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Judicial Diversity and Mandatory Retirement: Obstacle or Route to Diversity?

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A diverse judiciary is essential for a democratic society. While considerable attention has been paid to how judicial diversity can be promoted, most debate has been focused on judicial appointment processes, and the role of the Judicial Appointments Commission (JAC) in securing change. While judicial appointments are fundamental for achieving diversity, the focus on the appointments process assumes that there are judicial posts that need filling. Without substantially expanding the size of the judiciary, diversity can only be achieved through some degree of judicial turnover.

In recent decades, mandatory retirement ages have become been a key mechanism for securing predictable turnover in the UK judiciary. However, there has been limited discussion of the potential for mandatory retirement to secure diversity in the judiciary. Even the JAC has little to say about retirement ages, other than that ‘the age at which someone is appointed as a judicial officer must allow for a reasonable length of service before retirement’ at the statutory retirement age.¹ Despite repeated academic discussion of the role and importance of judicial pensions in securing diversity,² and the strong practical overlap between pensions and retirement rules, mandatory retirement has been comparatively neglected as an area of study in relation to the judiciary. As we increasingly move to a holistic understanding of judicial diversity – recognising the relationship between appointments, working conditions, appraisals, training, career development, travel and deployment in promoting (or hindering) diversity³ – it is equally important to acknowledge and consider the potential impact of retirement ages on this equation.

The lack of academic discussion on retirement ages for the judiciary⁴ stands in stark contrast to the weight of scholarship on retirement ages in relation to other professions and areas of work.⁵ Since the UK government removed the national default retirement

¹ See, for example, Judicial Appointments Commission, ‘Eligibility for Non-Legally-Qualified Candidates’ (*Judicial Appointments Commission*, no date) <<https://jac.judiciary.gov.uk/guide-eligibility-non-legally-qualified-candidates>> accessed 31 May 2016.

² See Graham Gee and others, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge University Press 2015) ch 4.

³ In Australia, see Kathy Mack and Sharyn Roach Anleu, ‘Entering the Australian Judiciary: Gender and Court Hierarchy’ (2012) 34 *Law & Policy* 313.

⁴ Though in Australia, see Alysia Blackham, ‘Judges and Retirement Ages’ (2016) 39 *Melbourne University Law Review* 738; in the UK, see Alysia Blackham, ‘Judicial Retirement Ages in the UK: Legitimate Aims and Proportionate Means?’ [2017] *Public Law* forthcoming; see generally Brian Opeskin, ‘Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges’ (2015) 35 *Oxford J Legal Studies* 627.

⁵ See, for example, Lucy Vickers and Simonetta Manfredi, ‘Age Equality and Retirement: Squaring the Circle’ (2013) 42 *Ind Law J* 61; Simonetta Manfredi and Lucy Vickers, ‘Retirement and Age Discrimination: Managing Retirement in Higher Education’ (2009) 38 *Ind Law J* 343; Simonetta

age of 65 for the general workforce in 2011,⁶ employers have increasingly had to move to a model of workplace relations without fixed retirement ages. Unless employers can show that an employer-justified retirement age is a proportionate means of achieving a legitimate aim, retirement ages can no longer be relied on. Anecdotal evidence suggests that the vast majority of UK employers – bar some outliers, such as the University of Oxford, University of Cambridge, and British Airways – are now operating without mandatory retirement. By retaining a mandatory retirement age, the judiciary is the exception to this general trend, and appears to be resisting the broader move towards greater age equality in employment. There is therefore even more need to scrutinise the practical impact of judicial retirement ages, including in relation to their impact on diversity.

The Judicial Pensions and Retirement Act 1993 (‘the 1993 Act’) imposes a general judicial retirement age of 70 for most judicial office holders, making compulsory retirement a key term of tenure for judicial appointments in the UK. However, as we shall see, the suggestion that requiring older office holders to retire may increase the frequency of judicial appointments, allowing for more diverse appointees⁷ is problematic on a number of fronts. Fixed retirement ages may make appointment to judicial office less attractive for individuals with disrupted or non-traditional career paths, particularly women. The concurrent use of retirement ages and fixed pension requirements may therefore actually impede the judicial appointments process, and hinder progress towards diversity, by rendering judicial office less attractive to certain applicants.

While other justifications may also support retirement ages for the judiciary – such as the need to protect judicial independence and ‘dignity’ by avoiding performance processes; encouraging ‘fresh blood’, new ideas and judicial renewal; and promoting intergenerational fairness more generally – these arguments are not the focus of this chapter, which focuses solely on the diversity implications of mandatory retirement. However, as I have argued elsewhere, even when taking these arguments collectively, there remain serious questions regarding whether judicial retirement ages can be justified.⁸ It is in this context that this chapter scrutinises the use of diversity arguments as one justification of mandatory retirement ages for judges.

Manfredi and Lucy Vickers, ‘Pensioning off the Mandatory Retirement Age: Implications for the Higher Education Sector’ (2013) 33 LS 289; Elaine Dewhurst, ‘Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations’ (2013) 50 Common Market Law Review 1333; Elaine Dewhurst, ‘The Development of EU Case-Law on Age Discrimination in Employment: “Will You Still Need Me? Will You Still Feed Me? When I’m Sixty-Four?”’ (2013) 19 European Law Journal 517; Elaine Dewhurst, ‘Are Older Workers Past Their Sell-by-Date? A View from UK Age Discrimination Law’ (2015) 78 The Modern Law Review 189; Catherine Barnard, ‘Retiring Gracefully’ (2011) 70 Cambridge Law Journal 304; Alysia Blackham, ‘Operating Without Mandatory Retirement: Comparative Organisational Strategies and Responses’ [2016] Industrial Law Journal advance; Alysia Blackham, *Extending Working Life for Older Workers: Age Discrimination Law, Policy and Practice* (Hart Publishing 2016); Malcolm Sargeant, ‘The Default Retirement Age: Legitimate Aims and Disproportionate Means’ (2010) 39 Ind Law J 244.

⁶ The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, SI 1069/2011.

⁷ House of Lords Constitution Committee, ‘Judicial Appointments’ (Report of Session 2012–13, 7 March 2012) para 193, referring to the evidence of the Association of Women Solicitors, Association of Women Barristers, and Law Society.

⁸ For discussion of these arguments, and the broader justifications of judicial retirement ages, see Blackham, ‘Judicial Retirement Ages in the UK: Legitimate Aims and Proportionate Means?’ (n 4).

To scrutinise the link between mandatory retirement and judicial diversity, this chapter draws on statistical evidence of the composition of the judiciary, and judicial appointments and retirements, via a survey of Appointments and Retirements announcements posted on the UK Courts and Tribunals Judiciary website spanning from 1 November 2013 to 16 August 2015. I argue that while some (albeit slow) progress on diversity is being made in judicial appointments, this progress would likely be made without compulsory retirement ages: the vast majority of judges leave their role before reaching the retirement age. Thus, natural attrition and judicial pensions are more effective at promoting judicial turnover than compulsory retirement. The use of judicial retirement ages is therefore not an appropriate or sufficient means of increasing judicial diversity.

Judicial retirement ages

Judicial retirement ages were first introduced by the Judicial Pensions Act 1959, which imposed a retirement age of 75 for those appointed to the High Court and above. Later, the 1993 Act introduced a general retirement age of 70 for most judicial office holders in the UK, with the aim of bringing consistency to retirement ages.⁹ Section 26 of that Act provides that, upon attaining the age of 70 (or a lower age specified in an Act or other instrument), a judicial office holder shall vacate their office. It follows, then, that most judges must now retire by age 70, though for judges appointed to the higher courts before the 1993 Act commenced, the mandatory retirement age is still 75.

The UK is not alone in imposing retirement ages on the judiciary: most jurisdictions (bar the US federal courts) adopt some age or term limits on judicial tenure.¹⁰ Indeed, the UK's retirement age of 70 is comparatively generous when compared with mandatory retirement ages for judges in other Commonwealth jurisdictions.¹¹ However, there is still a need to consider the practical impact that retirement ages might have, including on judicial diversity.

Retirement ages and diversity

Judicial retirement ages may allow for the appointment of new, more diverse judicial officers by increasing the frequency of judicial appointments.¹² Judicial tenure (and mandatory retirement) 'directly impacts the rate of judicial turnover':¹³ shorter tenure facilitates additional judicial appointments.¹⁴ Thus, judicial retirement ages may promote diversity in relation to gender, ethnicity, age and professional background, by making space for more diverse appointees. Arguments about diversity were raised in

⁹ HL Deb 16 June 1992, vol 538, cols 118–26 (The Lord Chancellor, Lord Mackay of Clashfern); HC Deb 3 December 1992, vol 215, col 429 (The Parliamentary Secretary, Lord Chancellor's Department, Mr. John M. Taylor).

¹⁰ Opeskin (n 4).

¹¹ Jan Van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (British Institute of International and Comparative Law 2015) 69.

¹² Constitution Committee (n 7) para 188. See also Christopher R McFadden, 'Judicial Independence, Age-Based BFOQs, and the Perils of Mandatory Retirement Policies for Appointed State Judges' (2000–01) 52 S C L Rev 81, 89.

¹³ Opeskin (n 4) 657.

¹⁴ But might, of course, come at the expense of a loss of experience, which is particularly problematic in a common law system of adjudication.

the parliamentary debates on the 1993 Act.¹⁵ Indeed, the whole process of reform under the Act was described by one MP as a ‘scheme to balance the judiciary’s gender or racial composition so as to make it more politically acceptable and more in touch with what is supposed to be popular opinion.’¹⁶

The desire to promote a more diverse workforce may help to justify a fixed retirement age for the judiciary. In the pivotal case of *Seldon v Clarkson Wright & Jakes (A partnership)*¹⁷ the UK Supreme Court (UKSC) considered whether the retirement age of 65 in a law firm’s partnership deed was objectively justified as a proportionate means of achieving a legitimate aim. In that case, the Court held that ‘intergenerational fairness’ (to be achieved through turnover) was a key legitimate aim that might justify a retirement age.¹⁸ This logically also extends to the situation of the judiciary.

To date, there have been a handful of cases relating to judicial retirement ages: intergenerational fairness and diversity feature prominently in most of these.¹⁹ For example, in 2013, in *Lindsay v Department for Employment and Learning*²⁰ the Employment Tribunal upheld a retirement age of 70 when challenged by a lay member of the employer panel for the Northern Ireland Industrial Tribunals.²¹ The Employment Tribunal held that the Department’s intergenerational fairness aims were legitimate, including for addressing the disparity in the panel’s age profile (72.48 per cent of panel members were aged over 55). The Employment Tribunal also held that the retirement age was a proportionate (and, indeed, the only) means of achieving these aims.²² If the Department had undertaken a recruitment exercise without a retirement age in place, the age disparity of panel members was likely to endure, and additional members would only reduce the amount of work available for all panel members.²³ Thus, intergenerational fairness was highly influential in *Lindsay*.

Similarly, in *White v Ministry of Justice*,²⁴ the Employment Tribunal in 2014 upheld the retirement of a circuit judge at age 70. The Tribunal identified five policy objectives underlying compulsory retirement ages for judges:

1. Promoting judicial independence by avoiding assessments about whether an individual remains capable of performing their judicial functions upon reaching a certain age;

¹⁵ HC Deb 3 December 1992, vol 215, col 431 (Mr Taylor).

¹⁶ *ibid* col 445 (Mr. Evans).

¹⁷ [2012] UKSC 16, [2012] 2 CMLR 50.

¹⁸ *Seldon v Clarkson Wright & Jakes (A partnership)* [2012] UKSC 16, [2012] 2 CMLR 50, [56]–[57]. The matter was referred back to the Employment Tribunal on the matter of proportionality. The retirement age was ultimately upheld as a proportionate means of achieving a legitimate aim.

¹⁹ Though compare *Engel v Transport and Environment Committee of London Councils* [2013] UKET 2200472/2012 (26 April 2013), where retirement age of 70 was upheld when challenged by a parking adjudicator. TECLC did not base their case on intergenerational fairness aims. Rather, they emphasised workforce planning and competence issues.

²⁰ [2013] NIET 356/12, [2014] EqLR 180.

²¹ The provision was challenged under regulation 3(1) of the Employment Equality (Age) Regulations (Northern Ireland) 2006 (NI) SI 2006/261, which is effectively the same as the provisions under the Equality Act 2010.

²² *ibid* 19, 22.

²³ *ibid* 17.

²⁴ ET 2201298/2013 (20 November 2014).

2. Preserving dignity by avoiding individual assessments;
3. Maintaining public confidence in judicial health and capacity;
4. Workforce planning; and
5. Sharing opportunities between generations and promoting diversity.²⁵

The Employment Tribunal heard evidence that increasing judicial retirement ages to 75 would '[introduce] a permanent and irrecoverable delay in improving diversity of 17 months',²⁶ as some judges would stay in their position for longer, preventing more diverse candidates from being appointed. Again, intergenerational fairness and diversity were key considerations in this case.

While the case law has largely accepted that judicial retirement ages will promote diversity, it is not so simple in practice. As noted by the House of Lords Constitution Select Committee, adopting higher retirement ages, or removing them entirely, may be 'particularly beneficial to those who started on the career ladder later in life, perhaps after taking a career break to have children.'²⁷ Thus, primary caregivers (particularly women) may benefit from higher retirement ages. Indeed, retirement ages may prohibit some individuals from '[reaching] the highest levels of the judiciary, however talented or experienced they might be, because their career paths have taken too long.'²⁸ Thus, retirement ages may disadvantage those with non-traditional career paths. As a result, they directly reinforce the male breadwinner model of work, where men are posited as primary wage earners.²⁹ As mandatory retirement ages are increasingly removed from other occupations, the presence of a retirement age for judicial appointments may deter those with disrupted or disjointed career paths from considering the judiciary as a career path, particularly women with caring responsibilities. Women may prefer to work beyond the traditional retirement age, either due to lost years in child-rearing, or due to a need for income.³⁰ Therefore, retirement ages may disproportionately disadvantage more diverse judicial candidates, and inhibit the JAC's work on diversity.

We must also recognise that judges might leave their position for a variety of reasons unrelated to retirement. Thus, imposing a retirement age may be unnecessary in many cases. In *Engel*, the Employment Tribunal heard evidence that most parking adjudicators left their role for reasons other than retirement,³¹ which meant that the retirement age was not a proportionate or effective means of achieving turnover. Similarly, in *Hampton v Lord Chancellor*,³² there was no evidence that recorders would

²⁵ *ibid* [19].

²⁶ *ibid* [32]. Note, however, that the decision in *White* may be criticized for its lack of supporting evidence: see *John v Ministry of Justice* ET 3300891/2012 and 1700191/2013 (16 December 2014).

²⁷ Constitution Committee (n 7) para 195. See also 'Pennsylvania House Votes to Set Judge Retirement Age to 75', *Washington Times* (10 February 2015) <<http://www.washingtontimes.com/news/2015/feb/10/pa-house-passes-bills-increasing-judge-retirement/>> accessed 30 March 2015.

²⁸ Constitution Committee (n 7) para 195.

²⁹ Diane Sainsbury, *Gender, Equality, and Welfare States* (Cambridge University Press 1996) 41; Angela O'Rand and John C Henretta, *Age and Inequality: Diverse Pathways through Later Life* (Westview Press 1999) 79; Martin Kohli, 'The Institutionalization of the Life Course: Looking back to Look Ahead' (2007) 4 *Research in Human Development* 253, 258.

³⁰ See Shirley Campbell, 'Delayed Mandatory Retirement and the Working Woman' (1979) 19 *The Gerontologist* 257.

³¹ *ibid* [53].

³² [2008] IRLR 258.

remain in their post until the age of 70,³³ again leading to a finding that the retirement age was not proportionate. This is perhaps unsurprising, given the strain that modern judging can take on individuals, as judicial roles become increasingly onerous.³⁴ In the 2014 Judicial Attitude Survey, 31 per cent of judges said they would consider early retirement in the next five years, and 22 per cent were undecided, citing limits on pay and benefits and increasing workloads.³⁵ It is debatable, then, whether judicial retirement ages are necessary to promote more diverse appointments to the judiciary, given many judges may leave their posts well before retirement age. Thus, we need to question the actual impact that retirement ages have on judicial diversity in practice.

The empirical link between retirement ages and diversity

These arguments may be evaluated via the use of statistical evidence about the composition of the judiciary. In 2015, only 25 per cent of court appointees in England and Wales were women, and 5.9 per cent were black and minority ethnic (BME).³⁶ This may be compared with the 2001 figures of 14.1 per cent women appointees and 1.9 per cent BME appointees.³⁷ This seems to imply that some (albeit slow) progress on gender and ethnic diversity is being made in judicial appointments. However, these general figures cloak the fact that progress on diversity is largely being made in the lower levels of the judiciary and in tribunals: women and BME appointees rarely occupy more senior judicial positions, as illustrated by Table 1.

Position	Total in post	% Female	% BME
UK judges			
Heads of Division	5	0%	0%
Lords Justices of Appeal	38	21%	0%
High Court Judges	106	20%	3%
Judge Advocates, Deputy Judge Advocates	12	17%	0%
Masters, Registrars, Costs Judges and District Judges (Principal Registry of the Family Division)	35	26%	0%
Deputy Masters, Deputy Registrars, Deputy Costs Judges and Deputy District Judges	55	40%	3%
Circuit Judges	640	23%	3%
Recorders	1,031	16%	7%
District Judges (County Courts)	441	31%	8%
Deputy District Judges (County Courts)	622	37%	6%
District Judges (Magistrates' Courts)	138	31%	4%

³³ *ibid* [51].

³⁴ See generally Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart Pub 2011).

³⁵ Cheryl A Thomas, '2014 UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals' (4 February 2015) 43, 46.

³⁶ 'Judicial Statistics 2015' (*Courts and Tribunals Judiciary*, 30 July 2015) <<https://www.judiciary.gov.uk/publications/judicial-statistics-2015/>> accessed 19 August 2015.

³⁷ 'Annual Diversity Statistics 2001' (*Courts and Tribunals Judiciary*, 23 March 2010) <<https://www.judiciary.gov.uk/publications/annual-ethnicity-statistics-2001/>> accessed 19 August 2015.

Deputy District Judges (Magistrates' Courts)	115	31%	11%
Total	3,238	25%	6%
UK tribunal judges			
First-tier Tribunal	3,969	45%	15%
Upper Tribunal	151	32%	10%
Employment Tribunal - England and Wales	1,200	48%	11%
Employment Tribunal - Scotland	200	48%	1%
Employment Appeal Tribunal	23	35%	17%
Total	5,543	45%	14%

Table 1: Gender and ethnic split by position, UK judges and tribunal judges 2015 (Source: Judicial Database)

A more compelling picture of the impact of retirement ages emerges when examining court appointees by age. As Table 2 illustrates, a substantially higher proportion of judges aged under 40 are women (53%), compared with those who are aged 60 and over (13%). However, the picture is less clear cut for BME appointees: while those under 60 are far more likely to be BME, this does not hold consistently across the age bands, with those aged 40–49 more likely to be BME than those under 40. A more consistent picture emerges for tribunal judges.

	Under 40	40-49	50-59	60 and over
UK judges				
Per cent of office holders who are female	53%	44%	30%	13%
Per cent of office holders who are BME	6%	11%	8%	2%
UK tribunal judges				
Per cent of office holders who are female	56%	56%	52%	29%
Per cent of office holders who are BME	15%	13%	11%	6%

Table 2: Gender and ethnic split by age band, UK judges and tribunal judges 2015 (Source: Judicial Statistics 2015)

While this implies that a more diverse pool of appointees is replacing older, retiring judges, it does not provide concrete evidence of this. To prove that retirement ages are having this impact, it is necessary to examine the actual appointments that are being made to the judiciary, and how this compares with the judges who are retiring. To

undertake this exercise, I conducted a statistical survey of Appointments and Retirements announcements posted on the Courts and Tribunals Judiciary website,³⁸ spanning from 1 November 2013 to 16 August 2015 (a total of 485 announcements). Over that period, announcements were made of 237 retirements, five resignations and 243 appointments. In this sample, the average age of appointment was 59.42; the average age of retirement was 66.63; and the average age of resignation was 63.33. Of those that retired, 191 were men (over 80 per cent), and four of those resigning were men. Of those who were appointed, 130 were men (around 53 per cent). Thus, while many retiring judges were replaced with male appointees, over this period 67 more women were appointed to the bench as a result of judicial retirements and resignations. This implies that progress is being made towards diversity at least partially as a result of judicial retirements.

However, it is important to note that few of these retirements occurred at the judicial retirement age. Of the 233 retirement announcements where an age was specified, only 31 retirements occurred at the age of 70 (13 per cent); and 12 occurred over the age of 70 (in 11 cases, where the judge was appointed prior to the new retirement age of 70 being introduced) (see further Figure 1). This raises serious questions as to whether the use of judicial retirement ages is a proportionate means of achieving the legitimate aims of increasing judicial diversity or intergenerational fairness. Rather, as was the case for parking adjudicators in *Engel*,³⁹ and recorders in *Hampton*,⁴⁰ it appears that the vast majority of judges (81.5 per cent) leave their role for reasons other than the retirement age.

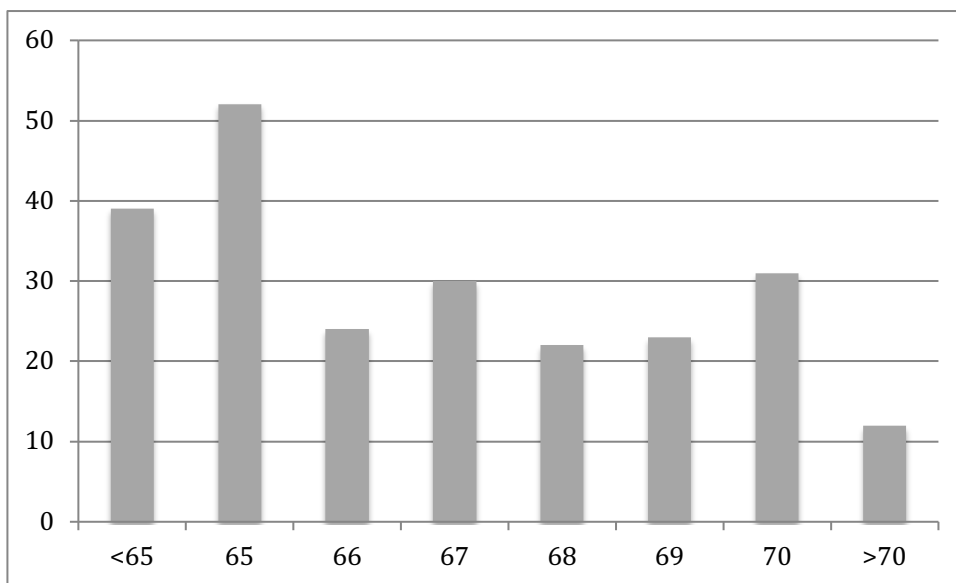


Figure 1: Number of judicial retirements by age, 2013–15

These findings are consistent with data from the Ministry of Justice. According to outflow data for the salaried judiciary in England and Wales, 145 office holders (or 7.5

³⁸ <https://www.judiciary.gov.uk/announcement-type/appointments-and-retirements/>

³⁹ *Engel* (n 19) [53].

⁴⁰ *Hampton* (n 32).

per cent) left their positions in 2014-15, at an average age of 66.08.⁴¹ These included seven vacancies due to death, two due to medical retirement, two due to removal, and 134 due to retirement.⁴² The Ministry of Justice also breaks down these figures according to judicial seniority (see Table 3). From Table 3 we can see that the age of departure is higher for more senior judiciary: thus, retirement ages will have more impact for those in the higher judiciary.⁴³ However, these data should be used with a degree of caution: the average age also includes deaths in office ('DIO'), medical retirements ('MR') and removals from office ('RFO'). Thus, many departures are not instances of voluntary retirement. Unlike the survey above, these figures also clump together all departures after age 70 – thus, it is difficult to determine when the individual was subject to the retirement age of 70 and when they were not, which may distort the average age of departure.

Office	Number of departures	50-54	55-59	60-64	65-69	70-75	Average age
Higher judiciary	12	0	0	2	3	7	68.58
Circuit bench	47 (2 DIO)	0	1 (1 DIO)	3 (1 DIO)	33	10	67.26
District judges (Magistrates' Court)	9	0	0	4	5	0	64.11
District judges	36 (2 DIO, 1 MR, 1 RFO)	3 (1 DIO, 1 RFO)	1	7 (1 DIO)	22 (1 MR)	3	64.39
Masters and Registrars	5	0	0	1	3	1	65.60
Tribunals	36 (3 DIO, 1 MR, 1 RFO)	1	0	10 (1 MR, 1 RFO)	21 (3 DIO)	4	65.94
Total	145 (7 DIO, 2 MR, 2 RFO)	4 (1 DIO, 1 RFO)	2 (1 DIO)	27 (2 DIO, 1 MR, 1 RFO)	87 (3 DIO, 1 MR)	25	66.08

Table 3: Departures of Salaried Judges, England and Wales, 2014-15 (Source: Ministry of Justice)

Pensions and diversity

When considering the link between judicial diversity and retirement ages, it is also important to take judicial pension arrangements into account, as pensions may strongly influence judicial retirement behaviour. Until 2015, judicial pensions were provided for by the Judicial Pension Scheme 1993 ('JUPRA'), which was established under the Judicial Pensions and Retirement Act 1993 and associated regulations. Under that scheme, judges were entitled to a contribution-based defined benefit pension, based on a final salary model. The pension scheme had a 20-year restriction on the number of

⁴¹ Ministry of Justice, 'Senior Salaries Review Body: Judiciary: Annual Written Evidence' (December 2015) 18.

⁴² *ibid.*

⁴³ That is, the High Court and above.

years of service that could be accrued; in other words, judges would achieve their full pension entitlement (an annual pension of half their pensionable pay) following 20 years of service.⁴⁴ The scheme had a normal pension age of 65, which would be of most benefit to those appointed at or before the age of 45. The New Judicial Pension Scheme 2015 lifts the 20-year restriction on years of service, imposes higher individual contributions on judges and reverts to a career-average defined benefit pension.⁴⁵ This has caused significant discontent among the judiciary, and has been challenged on the basis that it would disproportionately affect younger judges, who are more likely to be women and from ethnic minorities.⁴⁶

The combined effect of pension and retirement provisions may deter good candidates from accepting appointment to the bench. Under the 1993 JUPRA pension system, individuals who are appointed to the bench after the age of 50 are unlikely to earn full judicial pension entitlements. This may mean that the ‘best people will not accept appointment’,⁴⁷ as the (comparatively) low pay and lack of a full pension deter practitioners from taking up judicial office. This will be exacerbated by the New Judicial Pension Scheme 2015, which reduces pension entitlements even further. This may lead to a shortage of individuals willing to enter judicial office, with those who do ‘putting their duty before their own personal advantage.’⁴⁸ Alternatively, this may lead to more wealthy (and often white male) lawyers ‘consider[ing] the High Court as a hobby to pursue for a few years’, as they do not need the remuneration or pension provided by a judicial appointment.⁴⁹

The 2014 Judicial Attitude Survey provides a strong indication that pension changes will adversely affect judicial recruitment and retention. 68 per cent of respondents said that reductions in pension benefits would likely lead them to leave the judiciary early (that is, before retirement age),⁵⁰ and 76 per cent of respondents said they would discourage suitable applicants from applying for judicial appointment given the likelihood of further pension reductions.⁵¹ This may seriously impede the quality of judicial appointments, including by deterring more diverse candidates. Indeed, the Ministry of Justice has identified an ‘emerging problem with recruitment and retention’ at the High Court, partly exacerbated by an ‘unusual level of early retirements’ for senior judges.⁵² According to Joshua Rozenberg, a lack of applicants for certain positions has led to the:

much-criticised ‘tap-on-the shoulder’ method of recruitment — which the JAC was set up to replace — ... [being] discreetly reinstated. What’s different is that

⁴⁴ See further Ministry of Justice, ‘Judicial Pension Scheme 1993: Scheme Guide’ (November 2014).

⁴⁵ See Ministry of Justice, ‘New Judicial Pension Scheme 2015: Policy Papers’ (no date).

⁴⁶ Clive Coleman, ‘Why Are 200 Judges Suing the UK Government?’ (*BBC News*, 10 July 2015) <<http://www.bbc.co.uk/news/uk-33461759>> accessed 19 August 2015.

⁴⁷ HL Deb 30 June 1992, vol 538, col 691 (Lord Benson). See also HL Deb 30 June 1992, vol 538, col 696 (Viscount Bledisloe); HC Deb 3 December 1992, vol 215, col 465 (Sir Ivan Lawrence).

⁴⁸ HL Deb 30 June 1992, vol 538, col 696 (Viscount Bledisloe).

⁴⁹ Adrian Jack, ‘Empty Benches’ [2015] Counsel.

⁵⁰ Thomas (n 35) 46.

⁵¹ *ibid* 57.

⁵² Ministry of Justice, ‘Senior Salaries Review Body: Judiciary: Annual Written Evidence’ (n 41) 8.

it's senior judges who are doing the tapping rather than the lord chancellor — and it's now much more like a shove in the back.⁵³

The re-emergence of the 'tap on the shoulder' may significantly undermine efforts to increase judicial diversity in the UK. Conversely, the 'tap on the under-represented shoulder' could help to identify and support non-traditional candidates for judicial office, promoting diversity among the judiciary.⁵⁴ Thus, it is unclear how recruitment difficulties will play out in relation to diversity.

Beyond general recruitment difficulties, changes to judicial pensions may be a particular deterrent for women applicants, who are more likely to take career breaks to look after children, thereby reducing their overall income prior to being appointed as a judge,⁵⁵ and potentially slowing their career progression and ability to be appointed to the bench at an earlier age. Pension changes may disproportionately affect women with lower retirement income or limited pension provision.⁵⁶ This challenge was acknowledged in the parliamentary debates on the 1993 Act: 'In many respects, the pension arrangements will make it more difficult for women who have had a break in their career at the Bar to bring up a family to obtain the pension entitlements normally due to them.'⁵⁷

This will be even more important under the New Judicial Pension Scheme 2015, which places no upper limit on the number of years of pensionable service. Judges will also struggle to return to private practice upon leaving the bench, given the 'no return to practice' rule.⁵⁸ Judges with an inadequate pension (and women in particular) may struggle to earn using their legal skills in retirement, except as an arbitrator or mediator. This could pose very real challenges for some judges, and may deter judicial appointments from more diverse groups. In this context, removing or extending judicial retirement ages, and introducing more flexible pension arrangements, may make the judiciary a more attractive career path for non-traditional office holders, like women.⁵⁹

These concerns about the impact of retirement and pension arrangements on the appointments process were categorically rejected by the Government during the debate of the 1993 Act: 'There is little evidence that people accept, or are deterred from accepting, judicial appointment because of the pension arrangements.'⁶⁰ According to

⁵³ Joshua Rozenberg, 'Senior Judges Are Hanging up Their Wigs. Replacing Them Won't Be Cheap', *The Guardian* (London, 4 April 2016) <<http://www.theguardian.com/commentisfree/2016/apr/04/judiciary-recruitment-crisis-judicial-appointments-commission>> accessed 13 April 2016.

⁵⁴ Lizzie Barmes and Kate Malleon, 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity' (2011) 74 *The Modern Law Review* 245; Alan Paterson and Chris Paterson, 'Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary' (Centre Forum and CPLS 2012) 78. In Australia, see Mack and Roach Anleu (n 3) 330.

⁵⁵ HC Deb 3 December 1992, vol 215, col 432 (Sir Ivan Lawrence). See also col 464 (Sir Ivan Lawrence).

⁵⁶ Thomas R Klassen and CT Gillin, 'Legalized Age Discrimination' (2005) 20 *JL & Soc Pol'y* 35, 43.

⁵⁷ *ibid* col 449 (Mr. Byers).

⁵⁸ Fred Phillips, *The Modern Judiciary: Challenges, Stresses and Strains* (Wildy, Simmonds & Hill 2010) 259; Judiciary of England and Wales, 'Guide to Judicial Conduct 2013' (March 2013) 28.

⁵⁹ Hazel G Genn, 'The Attractiveness of Senior Judicial Appointment to Highly Qualified Practitioners: Report to the Judicial Executive Board' (2008) 29. See also Accent, 'Barriers to Application to Judicial Appointment' (July 2013) 14; Constitution Committee (n 7) paras 112–17.

⁶⁰ HC Deb 3 December 1992, vol 215, cols 432–33 (Mr Taylor).

the government, pension arrangements are only considered ‘collaterally to the main decision’ to accept appointment, and a more diverse judiciary will be appointed once ‘the reservoir of those available for appointment includes more women and more people of ethnic origins’,⁶¹ irrespective of pension entitlements. Judges may also retain their existing pension entitlements, acquired prior to taking up judicial office.⁶²

A great deal has changed, however, since the introduction of the 1993 Act: following the 2015 changes to judicial pensions, the arguments advanced by the Government in the early 1990s may no longer be sound. In the survey of judicial appointments and retirements, pensions appeared to have a strong influence on judicial retirement behaviour. Of the 233 retirement announcements where an age was specified, 52 retirements (or 22 per cent) occurred at age 65, the normal pension age under the JUPRA pension scheme. This far exceeded the 31 retirements that occurred at the retirement age of 70 (13 per cent). The vast majority of judges (81.5 per cent) left their role prior to the retirement age, with 151 departures (or 64.8 per cent) between the pension age (65) and age 69.

Overall, it appears that judicial pensions might have more impact on retirement behaviour than judicial retirement ages. While progress is being made on judicial diversity, judicial pensions are likely to be more effective at promoting judicial turnover than mandatory retirement. In this context, changes to judicial pension arrangements may have significant consequences for judicial diversity, and are of far more import than mandatory retirement in freeing up judicial posts. This calls into question the usefulness of retaining mandatory retirement ages for the judiciary; and flags the potential risks to diversity of reducing or altering judicial pensions.

That said, a recent study in Australia has found that women may actually be appointed to the judiciary *earlier* than men, and after less professional experience.⁶³ In a 2007 survey of the Australian judiciary, the average age of female judges was 54, compared with 61 for men; and 89 per cent of judges and magistrates aged 58 or more were men.⁶⁴ On average, women were first appointed as judges at age 45, and 19 years after first being admitted to practice; this was compared with age 50, and 25 years after admission to practice for men.⁶⁵

If these findings also hold in the UK context, concerns about women being disproportionately affected by retirement ages and pensions may be illusory. In the survey of judicial appointments conducted for this study, women were, on average, appointed at an earlier age than men. In the 236 appointment announcements that specified the age or birth date of the appointee, the average age of appointment was 51.19 years of age. For women, the average age of appointment was 49.34, and the median was 49. For men, the average was slightly higher, at 52.79 years of age, and the median age was 53.⁶⁶ Thus, like in Australia, women appear to be, on average,

⁶¹ *ibid.*

⁶² *ibid* col 427 (The Parliamentary Secretary, Lord Chancellor's Department, Mr. John M. Taylor).

⁶³ Mack and Roach Anleu (n 3) 326–27.

⁶⁴ *ibid* 321.

⁶⁵ *ibid* 326.

⁶⁶ Four announcements of women’s appointments did not include an age or date of birth, compared with three for men’s appointments.

appointed to the judiciary at a younger age than men, though the difference is less substantial than in Australia. Further, these statistics reflect appointments to both tribunals and courts: if women are more likely to be appointed to lower-level tribunals, it is unsurprising if they are (on average) appointed at an earlier age. That said, on average women also retired earlier than their male peers, at an average age of 65.24, compared with 66.95 for men. On average, then, retirement ages may actually have *less* impact on women.

Conclusion

In conclusion, it is difficult to argue that mandatory retirement ages are promoting a more diverse judiciary in the UK. While new judicial appointees appear to be more diverse than those who are departing, most judicial departures appear to be linked with the availability of a pension, rather than mandatory retirement ages. This seriously questions one of the key justifications for imposing mandatory retirement on UK judges, and prompts a reevaluation of the case law on this topic. Further, it flags the serious risks of changes to judicial pension arrangements. As well as creating significant discontent among the judiciary, reduced pension entitlements may seriously impede progress towards judicial diversity, both by deterring more diverse candidates from appointment, and by reducing the rate of judicial turnover. Thus, governments should approach judicial pension reform with a high degree of caution, and more properly consider the risks for diversity of lowering pension entitlements.

These findings also have consequences for how we regard judges more generally. Discussions of the judiciary often focus on the ‘public office’ aspect of the judicial role, rather than recognising that judges, too, are individuals with diverse career paths and professional needs. Re-emphasising the position of judges as ‘workers’ entails renewed attention on pay and benefits, judicial career paths, training and development, performance evaluation, flexible working, engagement and job satisfaction. Research on the judiciary is increasingly engaging with these aspects of the judicial role,⁶⁷ though there is far more work to be done in this area.

A renewed appreciation of judges as ‘workers’ also raises challenging questions regarding the retention of judicial retirement ages. If the UK government has deemed mandatory retirement to be inappropriate for the general workforce, is the judicial role sufficiently unique and special to justify the retention of fixed retirement ages? As judicial careers are increasingly professionalised, and there is a growing move towards performance development and management for judicial officers (at least at the lower levels of the judiciary), we must seriously question the distinctiveness of judicial employment when compared with the general workforce. Progress towards improving the opportunities within and structure of judicial careers may incidentally undermine any justification for mandatory retirement. Future research should engage and grapple with these challenging questions. As the arguments in support of mandatory retirement in the judiciary are called into question, and the nature of judicial careers shifts, the time may come where mandatory retirement for judges (like for the majority of the workforce) should be abandoned.

⁶⁷ See, for example, Barmes and Malleson (n 54).



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