

Trinity Term
[2011] UKSC 40
On appeal from: [2010] EWCA Civ 712

JUDGMENT

Jivraj (Respondent) *v* Hashwani (Appellant)

Jivraj (Appellant) *v* Hashwani (Respondent)

before

Lord Phillips, President
Lord Walker
Lord Mance
Lord Clarke
Lord Dyson

JUDGMENT GIVEN ON

27 July 2011

Heard on 6 and 7 April 2011

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Appellant
Michael Brindle QC
Brian Dye

(Instructed by Zaiwalla and Co)

Respondent
Rhodri Davies QC
Schona Jolly

(Instructed by Hill Dickinson LLP)

Appellant
Rhodri Davies QC
Schona Jolly

(Instructed by Hill Dickinson LLP)

Respondent
Michael Brindle QC
Brian Dye

(Instructed by Zaiwalla and Co)

Intervener (The London Court of International Arbitration)
Laurence Rabinowitz QC
Christopher Style QC
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(Instructed by Linklaters LLP)

Intervener (The International Chamber of Commerce)
Thomas Linden QC
Toby Landau QC
Paul Key
David Craig

(Instructed by Allen & Overy LLP)

Intervener (His Highness Prince Aga Khan Shia Imami Ismaili, International Conciliation and Arbitration Board)
Rabinder Singh QC
Aileen McColgan

(Instructed by Clifford Chance LLP)

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LORD CLARKE: (with whom Lord Phillips, Lord Walker and Lord Dyson agree)

Introduction

1. On 29 January 1981 Mr Jivraj and Mr Hashwani entered into a joint venture agreement ("the JVA"), containing an arbitration clause which provided that, in the event of a dispute between them which they were unable to resolve, that dispute should be resolved by arbitration before three arbitrators, each of whom should be a respected member of the Ismaili community, of which they were both members. The principal question in this appeal is whether that arbitration agreement became void with effect from 2 December 2003 under the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) ("the Regulations") on the ground that it constituted an unlawful arrangement to discriminate on grounds of religion when choosing between persons offering personal services.

The JVA

2. The JVA was established to make investments in real estate around the world. By article 9 it is expressly governed by English law. Article 8 provides, so far as material, as follows:

> "(1) If any dispute difference or question shall at any time hereafter arise between the investors with respect to the construction of this agreement or concerning anything herein contained or arising out of this agreement or as to the rights liabilities or duties of the investors or either of them or arising out of (without limitation) any of the businesses or activities of the joint venture herein agreed the same (subject to sub-clause 8(5) below) shall be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the President of the HH Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community.
>
> (2) The arbitration shall take place in London and the arbitrators' award shall be final and binding on both parties."

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The Ismaili community comprises Shia Imami Ismaili Muslims. It is led by the Aga Khan, whose title is the hereditary title of the Imam of the Ismaili community.

The disputes

3. During the 1980s the joint venture came to comprise substantial business interests, first in Canada and later in the United States, Pakistan and the United Kingdom, with investments in properties, hotels and the oil industry. By late 1988 Mr Jivraj and Mr Hashwani had agreed to part company. On 30 October 1988 they entered into an agreement under which they appointed a three man conciliation panel ("the panel") for the purpose of the division of the joint venture assets. Each member of the panel was a respected member of the Ismaili community. The panel operated between October 1988 and February 1990 and many of the assets were divided between the parties in accordance with its directions. It was however unable to resolve all the issues between the parties. The parties then agreed to submit the remaining issues to arbitration or conciliation by a single member of the Ismaili community, namely Mr Zaher Ahamed. He issued a determination in December 1993, whereafter he had further exchanges with the parties until 1995, when he declared himself defeated.

4. The principal matters which remained in dispute were, on the one hand, a claim by Mr Hashwani that there remained a balance due to him and, on the other hand, a claim by Mr Jivraj that Mr Hashwani had failed to declare certain tax liabilities which left Mr Jivraj with a potential for secondary liability. These matters remained in dispute for some years. Then, on 31 July 2008, Messrs Zaiwalla & Co, acting on behalf of Mr Hashwani, wrote to Mr Jivraj asserting a claim for US$1,412,494, together with interest, compounded quarterly from 1994, making a total of US$4,403,817. The letter gave notice that Mr Hashwani had appointed Sir Anthony Colman as an arbitrator under article 8 of the JVA and that, if Mr Jivraj failed to appoint an arbitrator within seven days, steps would be taken to appoint Sir Anthony as sole arbitrator. The letter added that Mr Hashwani did not regard himself as bound by the provision that the arbitrators should be members of the Ismaili community because such a requirement "would now amount to religious discrimination which would violate the Human Rights Act 1998 and therefore must be regarded as void". It is common ground, on the one hand, that Sir Anthony Colman is not a member of the Ismaili community and, on the other hand, that he is a retired judge of the Commercial Court with substantial experience of the resolution of commercial disputes, both as a judge and as an arbitrator.

5. Mr Jivraj's response to the letter was to start proceedings in the Commercial Court seeking a declaration that the appointment of Sir Anthony was invalid because he is not a member of the Ismaili community. Mr Hashwani subsequently issued an arbitration claim form seeking an order that Sir Anthony be appointed sole arbitrator

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pursuant to section 18(2) of the Arbitration Act 1996 ("the 1996 Act"). The application was made on the basis that the requirement that the arbitrators be members of the Ismaili community, although lawful when the agreement was made, had been rendered unlawful and was void because it contravened the Regulations.

The Regulations

6. The Regulations were made in the exercise of powers conferred by the European Communities Act 1972 following the making of the Council Framework Directive 2000/78/EC of 27 November 2000 (OJ 2000 L303, p 16) ("the Directive") which, by article 1, was itself made for the purpose of establishing:

> "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."

7. The Regulations (as amended by section 77(2) of the Equality Act 2006) provide, so far as material, as follows:

> "2 *Interpretation ...*
>
> (3) In these Regulations … references to 'employer', in their application to a person at any time seeking to employ another, include a person who has no employees at that time; 'employment' means employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions shall be construed accordingly …;
>
> 3 *Discrimination on grounds of religion or belief*
>
> (1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if –
>
> (a) on the grounds of the religion or belief of B or of any other person except A (whether or not it is also A's religion or belief), A treats B less favourably than he treats or would treat other persons;

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6 *Applicants and employees*

(1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person –

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;

(b) in the terms on which he offers that person employment; or

(c) by refusing to offer, or deliberately not offering, him employment.

7 *Exception for genuine occupational requirement*

(1) In relation to discrimination falling within regulation 3 (discrimination on grounds of religion or belief) –

(a) regulation 6(1)(a) or (c) does not apply to any employment … where paragraph (2) or (3) applies.

(2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out -

(a) being of a particular religion or belief is a genuine and determining occupational requirement;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either – (i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,

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and this paragraph applies whether or not the employer has an ethos based on religion or belief.

(3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -

(a) being of a particular religion or belief is a genuine occupational requirement for the job;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either – (i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

The Directive

8. It is common ground that the Regulations must, so far as possible, be construed to give effect to the objective of the Directive which they were designed to implement: see eg *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546. It is also common ground that, although the arbitration agreement was on any view lawful when it was made, it became subject to the provisions of the Regulations, insofar as they applied to it.

9. The Directive provides, so far as material, as follows:

"*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

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occupation, with a view to putting into effect in the member states the principle of equal treatment.

Article 2

Concept of discrimination

(1) For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in article 1.

…

Article 3

Scope

(1) Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to-

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

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(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations."

10. As Moore-Bick LJ, giving the judgment of the Court of Appeal, observed at para 8, the Directive is concerned with discrimination on the grounds of religion or belief, disability, age and sexual orientation. It is therefore much wider in its scope than the Regulations, which are concerned only with discrimination on the grounds of religion or belief. The explanation lies in the fact that the United Kingdom had already introduced legislation dealing with discrimination on most of the other grounds covered by the Directive in connection with employment and occupation. Discrimination on the grounds of sex was rendered unlawful by the Sex Discrimination Act 1975 ("the SDA 1975"), discrimination on the grounds of race by the Race Relations Acts 1968 and 1976, discrimination on the grounds of disability by the Disability Discrimination Act 1995. Legislation dealing with discrimination on the grounds of age, sexual orientation and religion or belief was still required to ensure compliance with the Directive. The Regulations deal with discrimination on the grounds of religion or belief. The Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) provided for discrimination on the grounds of sexual orientation, and discrimination on the grounds of age was subsequently covered by the Employment Equality (Age) Regulations 2006.

11. Again as observed by the Court of Appeal (at para 9), the form of the Regulations follows closely that of the earlier legislation, in particular in defining "employment" as including a contract personally to do work of any kind. Moreover, the language of regulation 6 is identical to, or differs in no significant respect from, that used in the other legislation dealing with discrimination. It follows that the Regulations must be understood as complementing all the other legislation prohibiting discrimination.

12. This uniformity of the law relating to the areas in which discrimination is forbidden has now been reinforced by the Equality Act 2010 ("the EA"), which applies to all of the cases protected by the earlier legislation. The EA is, among other things, an Act "to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination". The Regulations were amongst those enactments restated by the EA. They were revoked by section 211 and Schedule 27, Part 2. The revocation took effect on 1 October 2010. The current law is therefore as stated in the Act rather than the Regulations. It was not however suggested in the course of the argument that any of the issues in this appeal is affected by the revocation of the Regulations.

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First instance

13. Both parties' applications were determined by David Steel J ("the judge") on 26 June 2009: see [2009] EWHC 1364 (Comm), [2010] 1 All ER 302. In the meantime on 11 March 2009, which was before the applications were heard, the solicitors for Mr Jivraj wrote an open letter to the solicitors for Mr Hashwani offering him the option of pursuing his claim in the High Court on the basis that Mr Jivraj would not seek a stay on the basis of the arbitration clause. Mr Hashwani did not accept the offer.

14. It was submitted before the judge on behalf of Mr Hashwani that the term requiring arbitrators to be members of the Ismaili community was invalid by reason of one or more of the following: the Regulations, the Human Rights Act 1998 ("the HRA"), or public policy at common law. The judge held (i) that the term did not constitute unlawful discrimination on any of those bases and, specifically, that arbitrators were not "employed" within the meaning of the Regulations; (ii) that if, nonetheless, appointment of arbitrators fell within the scope of the Regulations, it was demonstrated that one of the more significant characteristics of the Ismaili sect was an enthusiasm for dispute resolution within the Ismaili community, that this was an "ethos based on religion" within the meaning of the Regulations and that the requirement for the arbitrators to be members of the Ismaili community constituted a genuine occupational requirement which it was proportionate to apply within regulation 7(3); and (iii) that, if that was also wrong, the requirement was not severable from the arbitration provision as a whole, so that the whole arbitration clause would be void. The judge ordered Mr Hashwani to pay Mr Jivraj's costs and refused Mr Hashwani's application for permission to appeal.

The Court of Appeal

15. On 7 October 2009 Sir Richard Buxton granted permission to appeal limited to the issues on the Regulations and on severance. Permission was refused on the HRA and public policy issues. The issues in the Court of Appeal were therefore these:

i) Are arbitrators persons who are under a contract to do work so as to fall within the Regulations and, if so, do parties who make an arbitration agreement specifying religious qualifications for eligible arbitrators thereby make an arrangement for the purpose of determining to whom they should offer employment or do they agree to offer, or deliberately not to offer, employment within the meaning of the Regulations?

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ii) If so, in the circumstances, did the requirement for all the arbitrators to be members of the Ismaili community constitute a genuine occupational requirement ("GOR") which it was proportionate to apply within regulation 7(3)?

iii) If not, did the whole arbitration agreement fail or was only the discriminatory provision void?

16. The unanimous judgment of the Court of Appeal, which comprised Moore-Bick and Aikens LJJ and Sir Richard Buxton, was handed down on 22 June 2010: see [2010] EWCA Civ 712, [2010] ICR 1435. The Court of Appeal reached a different conclusion from the judge on the principal points. It held that the appointment of an arbitrator involved a contract for the provision of services which constituted "a contract personally to do any work", and therefore satisfied the definition of "employment" in regulation 2(3). It followed that the appointor was an "employer" within the meaning of regulation 6(1) and that the restriction of eligibility for appointment as an arbitrator to members of the Ismaili community constituted unlawful discrimination on religious grounds, both in making "arrangements … for the purpose of determining to whom he should offer employment" contrary to regulation 6(1)(a), and by "refusing to offer, or deliberately not offering" employment contrary to regulation 6(1)(c). The Court of Appeal further held that being a member of the Ismaili community was not "a genuine occupational requirement for the job" within the meaning of the exception in regulation 7(3). It is submitted on behalf of Mr Jivraj that both those conclusions were wrong.

17. Finally the Court of Appeal held that, although there would be no difficulty in operating the agreement if the offending requirement was struck out, so doing would render the agreement substantially different from that originally intended, the term was void in its entirety under paragraph 1(1) of Schedule 4 to the Regulations and Mr Hashwani's nomination of an arbitrator was invalid. It is submitted on behalf of Mr Hashwani that both the judge and the Court of Appeal were wrong on this point, which I will call "the severance issue".

18. A further point arises out of the Court of Appeal's order on costs if its judgment is upheld on each of the above points.

Employment

19. The reasoning of the Court of Appeal was straightforward: see paras 15-17. In short the Court of Appeal drew attention to the wide terms of articles 1 and 3 of the Directive. In particular it noted at para 15 that the recitals to the Directive and the structure and language of article 3(1) as a whole indicate that it is concerned with

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discrimination affecting access to the means of economic activity, whether through employment, self-employment or some other basis of occupation, access to vocational guidance and training (which can be expected to provide a means of access to economic activity), conditions of employment (which affect those who have gained access to a means of economic activity) and membership of bodies whose purpose is to affect conditions of recruitment or employment or to regulate access to a particular form of economic activity, such as professional bodies that directly or indirectly control access to the profession or a significant means of obtaining work.

20. The Court of Appeal then said at para 16:

> "The paradigm case of appointing an arbitrator involves obtaining the services of a particular person to determine a dispute in accordance with the agreement between the parties and the rules of law, including those to be found in the legislation governing arbitration. In that respect it is no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, or consulting a doctor about a particular ailment or an accountant about a tax return. Since an arbitrator (or any professional person) contracts to do work personally, the provision of his services falls within the definition of 'employment', and it follows that his appointor must be an employer within the meaning of regulation 6(1)…"

21. In paras 16 and 17 it placed reliance on three cases. It relied upon *von Hoffmann v Finanzamt Trier* (Case C-145/96) [1997] All ER (EC) 852 as showing that arbitrators had been treated as providing services for VAT purposes. It also referred to domestic regulations relating to goods and services. It further derived support from *Kelly v Northern Ireland Housing Executive* [1999] 1 AC 428 and from *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28. It recognised that those cases were addressing slightly different points but concluded that they illustrate the width of the expression "a contract personally to do any work" in the various discrimination statutes. It concluded thus in para 17:

> "They confirm our view that the expression is apt to encompass the position of a person who provides services as an arbitrator, and why we think the judge was wrong to hold that the nature of the arbitrator's function takes his appointment outside the scope of the 2003 Regulations. Moreover, a contract of that kind, once made, is a contract of employment within the meaning of the 2003 Regulations. It follows, therefore, that for the purposes of the 2003 Regulations a person who has entered into a contract under which he

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> is to obtain such services is an employer and the person engaged to provide them is an employee."

22. The critical question under this head is whether the Court of Appeal was correct to form a different view from the judge on this point. In my opinion it was not. As the Court of Appeal correctly observed at para 15, the meaning of article 3 of the Directive has not been considered by the Court of Justice, and is to be interpreted in the light of the recitals and given its natural meaning consistent with the EC Treaty and the existing case law of the court.

23. It is common ground, at any rate in this class of case, that there is a contract between the parties and the arbitrator or arbitrators appointed under a contract and that his or their services are rendered pursuant to that contract. It is not suggested that such a contract provides for "employment under a contract of service or of apprenticeship". The question is whether it provides for "employment under … a contract personally to do any work". There is in my opinion some significance in the fact that the definition does not simply refer to a contract to do work but to "employment under" such a contract. I would answer the question in the negative on the ground that the role of an arbitrator is not naturally described as employment under a contract personally to do work. That is because his role is not naturally described as one of employment at all. I appreciate that there is an element of circularity in that approach but the definition is of "employment" and this approach is consistent with the decided cases.

24. Given the provenance of the Regulations, it is appropriate to consider first the decisions of the Court of Justice. The most important of these is perhaps *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328, where the Court of Justice followed the principles laid down in *Lawrie-Blum v Land Baden-Wurttemberg* (Case C-66/85) [1987] ICR 483 and in *Kurz v Land Baden-Wurttemberg* (Case C-188/00) [2002] ECR I-10691. In *Lawrie-Blum*, which was concerned with the free movement of "workers" under what was then article 48 of the Treaty, Advocate General Lenz said at para III 2(b) of his opinion that the term worker covers any employed person who is not self-employed. The court said at para 17:

> "That concept [ie of 'worker'] must be defined with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

25. In *Kurz* the court said at para 32 that it was settled case law that the concept of worker has a specific Community meaning and must not be interpreted narrowly. The

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court then repeated the essential feature of the relationship identified in the above passage from *Lawrie-Blum*.

26. In *Allonby* the court addressed an equal pay claim by a college lecturer who had been dismissed by the college and then re-engaged, ostensibly as a self-employed sub-contractor supplied by an agency. For the purposes of article 141(1) of the EC Treaty, the court drew a clear distinction between "workers" and "independent suppliers of services". It discussed the concept of worker within the meaning of article 141(1) between paras 62 and 72, which included the following:

> "62. The criterion on which article 141(1) EC is based is the comparability of the work done by workers of each sex: see, to that effect, *Defrenne v Sabena (No 2)* (Case 149/77) [1978] ECR 1365, 1377, para 22. Accordingly, for the purpose of the comparison provided for by article 141(1) EC, only women and men who are workers within the meaning of that article can be taken into consideration.
>
> 63. In that connection, it must be pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied: *Martinez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECRI-2691, 2719, para 31.
>
> 64. The term 'worker' within the meaning of article 141(1) EC is not expressly defined in the EC Treaty. It is therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty.
>
> 65. According to article 2 EC, the Community is to have as its task to promote, among other things, equality between men and women. Article 141(1) EC constitutes a specific expression of the principle of equality for men and women, which forms part of the fundamental principles protected by the Community legal order: see, to that effect, *Deutsche Post AG v Sievers* (Cases C-270 and 271/97) [2000] ECR I-929, 952, para 57. As the court held in *Defrenne v Sabena* (Case 43/75) [1976] ICR 547, 566, para 12, the principle of equal pay forms part of the foundations of the Community.
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> 66. Accordingly, the term 'worker' used in article 141(1) EC cannot be defined by reference to the legislation of the member

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states but has a Community meaning. Moreover, it cannot be interpreted restrictively.

67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration see, in relation to free movement of workers, in particular *Lawrie-Blum* … para 17, and *Martinez Sala*, para 32.

68. Pursuant to the first paragraph of article 141(2) EC, for the purpose of that article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. It is clear from that definition that the authors of the Treaty did not intend that the term 'worker', within the meaning of article 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, *Meeusen v Hoofddirectie van de Informatie Beheer Groep* (Case C-337/97) [1999] ECR I-3289, 3311, para 15).

69. The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.

70. Provided that a person is a worker within the meaning of article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article: …

71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article."

27. On the basis of those materials I would accept Mr Davies' submission that the Court of Justice draws a clear distinction between those who are, in substance, employed and those who are "independent providers of services who are not in a

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relationship of subordination with the person who receives the services". I see no reason why the same distinction should not be drawn for the purposes of the Regulations between those who are employed and those who are not notionally but genuinely self-employed. In the light of *Allonby*, there can be no doubt that that would be the correct approach to the near identical definition in section 1(6) of the Equal Pay Act 1970 and must remain the correct approach to the definition of employment in section 83(2) of the EA, which provides, so far as relevant:

> "'Employment' means – (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work; …"

That definition is almost identical to the definition in regulation 2(3) of the Regulations and, since it applies to equal pay issues by virtue of sections 83(4), 80(2) and 64 of the EA, it must equally apply to the Regulations.

28. In my opinion there is nothing in the domestic authorities which requires the court to come to any different conclusion. The problem with some of them is that they do not refer to the jurisprudence of the Court of Justice. However, the most recent decision of the House of Lords does. In *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28 the House of Lords considered a sex discrimination claim brought by a woman who was a minister of the Church of Scotland. The issue was whether she was employed within the meaning of section 82(1) of the SDA 1975. The House held that she was. Lord Hoffmann dissented on the basis that she was the holder of an office but had no doubt (at para 66) that, if the arrangement had been contractual, it would plainly have been a contract of service.

29. Lord Hoffmann said at para 73 that the term "workers" is a term of art in Community law which was defined by the Court of Justice in the passage from para 17 of *Lawrie-Blum* quoted at para 24 above. Lord Hope of Craighead said much the same at para 126, where he also noted that the same approach was taken in *Allonby*.

30. Baroness Hale of Richmond referred at para 141 to para A[4] of *Harvey on Industrial Relations and Employment Law*, which stated that:

> "the distinction is between those who work for themselves and those who work for others, regardless of the nature of the contract under which they are employed."

She then referred at para 143 to the decision of the Court of Appeal in Northern Ireland in *Perceval-Price v Department of Economic Development* [2000] IRLR 380,

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where it was held that three full-time judicial office holders, namely a full-time chairman of industrial tribunals, a full-time chairman of social security appeal tribunals and a social security commissioner were workers for the purposes of almost identical provisions.

31. In para 145, after quoting the definition of an employment relationship in *Lawrie-Blum*, Baroness Hale noted that, in giving the judgment of the court in *Perceval-Price*, Sir Robert Carswell LCJ said that the objective of the relevant EC legislation was to give protection against inequality and discrimination to those who might be vulnerable to exploitation. He also said that the concept of a worker should be construed purposively by reference to this objective. Baroness Hale then quoted this extract from the judgment of Sir Robert Carswell:

> "All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the president of the industrial tribunals or the court service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment …"

32. At para 146 Baroness Hale continued:

> "I have quoted those words at length because they illustrate how the essential distinction is, as *Harvey* says, between the employed and the self-employed. The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God's word, as interpreted in the doctrines of their faith, governs all that they practise, preach and teach. This does not mean that they cannot be 'workers' or in the 'employment' of those who decide how their ministry should be put to the service of the Church."

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33. Some consideration was recently given to the position of part-time judges by this court in *O'Brien v Ministry of Justice (Note)* [2010] UKSC 34, [2010] 4 All ER 62 where the court considered *Percy* in some detail in a judgment of the court given by Lord Walker. At para 25 it referred to the same passage in *Lawrie-Blum* as having laid down the relevant principle and at para 26 it referred to the speech of Baroness Hale and approved the passage quoted above from the judgment of Sir Robert Carswell in *Perceval-Price*.

34. As I read *Percy*, it sought to apply the principles identified by the Court of Justice, as indeed did this court in *O'Brien* [2010] 4 All ER 62. The essential questions in each case are therefore those identified in paras 67 and 68 of *Allonby* [2004] ICR 1328, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties. As I see it, that is what Baroness Hale meant when she said that the essential difference is between the employed and the self-employed. The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case. I would not accept the Court of Appeal's analysis (at para 21) of Baroness Hale's speech in this regard.

35. There have been a number of domestic cases which say that the question is whether the dominant purpose of the contract is the execution of personal work or labour: see eg *Quinnen v Hovells* [1984] ICR 525, *Mirror Group Newspapers Ltd v Gunning* [1986] 1 WLR 546, especially per Oliver LJ at 551H and Balcombe LJ at 556H; *Kelly v Northern Ireland Housing Executive* [1999] 1 AC 428 and *Percy* [2006] 2 AC 28 per Lord Hope at para 113, where he referred to two other cases in the Court of Appeal, namely *Patterson v Legal Services Commission* [2004] ICR 312 and *Mingeley v Pennock (trading as Amber Cars)* [2004] ICR 727. Mr Michael Brindle QC also referred on behalf of the respondent to two earlier cases which focus on the question whether a contract is one "personally to execute any work or labour": see *Tanna v Post Office* [1981] ICR 374 and *Hugh-Jones v St John's College, Cambridge* [1979] ICR 848. However, none of these cases considered the approach in the decisions of the Court of Justice referred to above.

36. In particular, the cases did not focus on the fact that the "employment" must be *employment under* a contract of employment, a contract of apprenticeship or a contract personally to do work. (My emphasis). Given the importance of the EC perspective in construing the legislation, including the Regulations, the cases must now be read in the light of those decisions. They show that it is not sufficient to ask simply whether the contract was a contract personally to do work. They also show that dominant purpose is not the test, or at any rate not the sole test.

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37. That is not to say that the question of purpose is irrelevant but the focus is on the contract and relationship between the parties rather than exclusively on purpose. Elias J, sitting as President of the Employment Appeal Tribunal, recognised some of the difficulties in *James v Redcats (Brands) Ltd* [2007] ICR 1006. He discussed the relevance of dominant purpose in this context by reference to the cases at paras 53 to 68. At para 59, after quoting from the judgment of Balcombe LJ in *Gunning* [1986] 1 WLR 546, he said that the dominant purpose test is really an attempt to identify the essential nature of the contract. In the context of the case he was considering he posed the question whether it was in essence to be located in the field of dependent work relationships or whether it was in essence a contract between two independent business undertakings.

38. At paras 67 and 68, after referring to a number of cases and observing at para 65 that the description of the test as one of identifying the dominant purpose was perhaps not an altogether happy one, he said this:

> "67. An alternative way of putting it may be to say that the courts are seeking to discover whether the obligation for personal service is the dominant feature of the contractual arrangement or not. If it is, then the contract lies in the employment field; if it is not - if, for example, the dominant feature of the contract is a particular outcome or objective - and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field.
>
> 68. This is not to suggest that a tribunal will be in error in failing specifically to apply the 'dominant purpose' or indeed any other test. The appropriate classification will in every case depend upon a careful analysis of all the elements of the relationship, as Mr Recorder Underhill QC pointed out in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667. It is a fact sensitive issue, and there is no shortcut to a considered assessment of all relevant factors. However, in some cases the application of the 'dominant purpose' test may help tribunals to decide which side of the boundary a particular case lies."

39. It is noteworthy that the European cases were not cited in many of the cases, including that before Elias J. In the light of the European cases, dominant purpose cannot be the sole test, although it may well be relevant in arriving at the correct conclusion on the facts of a particular case. After all, if the dominant purpose of the contract is the execution of personal work, it seems likely that the relationship will be, in the words of *Allonby* [2004] ICR 1328, para 67, a case in which the person concerned performs services for and under the direction of the other party to the contract in return for remuneration as opposed to an independent provider of services

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who is not in a relationship of subordination with him or it. This may not be so however because, although the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract. All will depend upon the applications of the principles in *Allonby* to the circumstances of the particular case.

40. If the approach in *Allonby* is applied to a contract between the parties to an arbitration and the arbitrator (or arbitrators), it is in my opinion plain that the arbitrators' role is not one of employment under a contract personally to do work. Although an arbitrator may be providing services for the purposes of VAT and he of course receives fees for his work, and although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties as contemplated in para 67 of *Allonby*. He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services, as described in para 68.

41. The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. As the International Chamber of Commerce ("the ICC") puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a "quasi-judicial adjudicator": *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1992] QB 863, 885.

42. In England his role is spelled out in the 1996 Act. By section 33, he has a duty to act fairly and impartially as between the parties and to adopt procedures suitable to the circumstances of the particular case so as to provide a fair means of determination of the issues between the parties. Section 34 provides that, subject to the right of the parties to agree any matter, it is for the arbitrator to decide all procedural matters. Examples of the width of those powers can be seen in the particular examples in section 34(2). Section 40 provides that the parties shall do all things necessary for the proper and expeditious conduct of the arbitration, which includes complying with any order of the arbitrator, whether procedural or otherwise. Once an arbitrator has been appointed, at any rate in the absence of agreement between them, the parties effectively have no control over him. Unless the parties agree, an arbitrator may only be removed in exceptional circumstances: see sections 23 and 24. The court was referred to many other statutory provisions in other parts of the world and indeed many other international codes, including the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration 1985, the ICC Rules and the London Court of International Arbitration ("the LCIA") Rules to similar effect.

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43. The Regulations themselves include provisions which would be wholly inappropriate as between the parties and the arbitrator or arbitrators. For example, regulation 22(1) provides:

> "Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."

It is evident that such a provision could not apply to an arbitrator.

44. In this regard an arbitrator is in a very different position from a judge. The precise status of a judge was left open by this court in *O'Brien* [2010] 4 All ER 62, in which the court referred particular questions to the Court of Justice: see para 41. However, as Sir Robert Carswell said in *Perceval-Price* [2000] IRLR 380 and Lord Walker said in *O'Brien* (at para 27), judges, including both recorders and all judges at every level are subject to terms of service of various kinds. As Sir Robert put it, although judges must enjoy independence of decision without direction from any source, they are in other respects not free agents to work as and when they choose, as are self-employed persons.

45. In both those cases the court was considering the relationship between the relevant department of state and the judges concerned. It was not considering the relationship between the judges and the litigants who appear before them. Here, by contrast, the court is considering the relationship between the parties to the arbitration on the one hand and the arbitrator or arbitrators on the other. As I see it, there is no basis upon which it could properly be held that the arbitrators agreed to work under the direction of the parties as contemplated in para 67 of *Allonby* [2004] ICR 1328. Further, in so far as dominant purpose is relevant, I would hold that the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.

46. In reaching this conclusion it is not necessary to speculate upon what the position might be in other factual contexts. It was submitted that the effect of the decision of the Court of Appeal is that a customer who engages a person on a one-off contract as, say, a plumber, would be subject to the whole gamut of discrimination legislation. It would indeed be surprising if that were the case, especially given the fact that the travaux préparatoires contained no such suggestion: see the impact assessment in the Commission's Proposal for the Directive 1999/0225 (CNS),

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Brussels 1999, which was concerned solely with the position of enterprises of various types. There was no consideration of the effect on individual choice by customers. See also a memorandum from the Commission's Director General for Employment and Social Affairs to the EU Committee of the House of Lords dated 9 February 2000 to much the same effect. This is not to say that the Regulations may not apply in the case of the plumber, solicitor, accountant or doctor referred to by the Court of Appeal in para 16. As already stated, all will depend upon the application of the principles in *Allonby* to the particular case. As I see it, the problem with the approach adopted by the Court of Appeal is that it focuses only on the question whether there is a contract to do work personally, whereas it is necessary to ask the more nuanced questions identified in *Allonby*.

47. In para 19 the Court of Appeal relied in support of its more general approach upon the opinion of Advocate General Maduro in *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* (Case C-54/07) [2008] ICR 1390. It said this in paras 19 and 20:

> "19. That the choice of a solicitor, plumber or arbitrator, whether on religious, racial or any other grounds, should fall foul of regulation 6(1) of the 2003 Regulations, even if made entirely privately, may strike some people as surprising. However, in [the *Firma Feryn* case] Advocate General Maduro expressed the opinion, at para 14, that the Directive must be understood in the framework of a wider policy to foster conditions for a socially inclusive labour market and to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin. That case arose out of a statement by a company that supplied and fitted up-and-over garage doors that it would not employ immigrants as fitters because its customers were unwilling to have them in their homes. One can well see why a public statement of that kind might be regarded as discriminatory: it was liable to deter potential applicants for employment and thereby militate against a socially inclusive labour market. The court itself did not expressly adopt the Advocate General's expression of opinion; rather it confined itself to holding, at para 25, that a general statement of the kind under consideration constituted direct discrimination because it was likely to deter some potential applicants and thus hinder their access to the labour market. None the less, the Advocate General's view of the broad policy objective of the Directive is in our opinion supported by the recitals. It is also one which is essentially incompatible with an acceptance of the right to discriminate between any providers of services on the basis of race, sex, religion or any of the other grounds covered by the Directive.

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> 20. Mr. Davies sought to meet that broad analysis by saying that the primary concern of the Directive is access to employment and economic activity, not private choices by consumers between those who have already gained access to the market. The language of article 3 could be construed in that more limited way, but the expression 'access to employment, to self-employment or to occupation' is capable of a broader interpretation consistent with the policy objectives we have described. In any event, we are concerned with the language of domestic legislation, which is not restricted by the scope of the Directive and which is underpinned by broadly the same policy considerations as those identified by Advocate General Maduro in the *Firma Feryn* case, whether it was introduced before or after the publication of the Directive."

48. I would not accept that analysis. The *Firma Feryn* case was not relied upon in the course of the oral argument in the Court of Appeal. It was referred to in answer to a letter from the Court of Appeal asking questions on the assumption that an engagement to provide services gave rise to an employment relationship under the Regulations. The case concerned conventional employment relationships and did not discuss at all the extension of discrimination law to one-off contracts for services. The Court of Justice held that a racially discriminatory statement by an employer as to its recruitment policy could constitute direct discrimination even if there was no actual "victim". There was no actual victim because there was no evidence that anyone who might have lost out as a result of the policy had actually applied, or would have applied, for a position with that employer. The Advocate General thus expressed his opinion in a case which was squarely concerned with employment and not with the boundary between employment and self-employment and in which no reference was made to *Lawrie-Blum* [1987] ICR 483, *Kurz* [2002] ECR I-10691 or *Allonby* [2004] ICR 1328.

49. Some reliance was placed upon the reference to the "conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions" in article 3(1)(a) of the Directive. In para 20 the Court of Appeal gave a wide construction to that provision, rejecting the submission made by Mr Davies that it related to barriers to entry to trades, professions and occupations. It did so on the same footing as before, namely that a wide meaning should be given to the terms of the Directive and, in any event, to the Regulations. However, I would accept Mr Davies' submission that the expression "access … to self-employment or to occupation" means what it says and is concerned with preventing discrimination from qualifying or setting up as a solicitor, plumber, greengrocer or arbitrator. It is not concerned with discrimination by a customer who prefers to contract with one of their competitors once they have set up in business. That would not be denying them "access … to self-employment or to occupation". I see no reason to give a different meaning to the Regulations from that given to the Directive.

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50. For these reasons I prefer the conclusion of the judge to that of the Court of Appeal. I agree with the judge that the Regulations are not applicable to the selection, engagement or appointment of arbitrators. It follows that I would hold that no part of clause 8 of the JVA is invalid by reason of the Regulations and would allow the appeal on this ground.

Genuine occupational requirement

51. If the above conclusion is correct, this point does not arise but it was fully argued and I will briefly consider it. The question considered by the judge was whether, if regulation 6(1)(a) or (c) would otherwise apply, it is prevented from applying by regulation 7(1) and (3). It will be recalled that, by regulation 7(1), regulations 6(1)(a) and (c) do not apply where regulation 7(3) applies and that regulation 7(3) provides:

> "This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out—
>
> (a) being of a particular religion or belief is a genuine occupational requirement for the job;
>
> (b) it is proportionate to apply that requirement in the particular case; and
>
> (c) either—
>
> (i) the person to whom that requirement is applied does not meet it, or
>
> (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

52. Those provisions were made in accordance with the exceptions in relation to occupational requirements made by article 4 of the Directive, which provides:

> "1. Notwithstanding article 2(1) and (2), member states may provide that a difference of treatment which is based on a

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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."

2. Member states may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of members states' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

…."

53. It is common ground that, as the judge said at para 40, a rigorous and strict approach must be adopted to the question whether the particular exception applies: *Stadt Halle v Arbeitgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna* (Case C-26/03) [2005] ECR I-1 and *Marleasing* [1990] ECR I-4135.

54. Although some reliance was placed in the course of argument on regulation 7(2), I shall focus first on paragraph (3). Since 1 October 2010 the provisions of regulation 7 have been replaced by those of Schedule 9 of the EA. Regulation 7(3) has been replaced by paragraph (3) of that Schedule, which provides:

"A person (A) with an ethos based on religion or belief does not contravene a provision mentioned in paragraph 1(2) by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and the nature or context of the work –

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(a) it is an occupational requirement,

(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and

the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it)."

It was not suggested that there is any significant difference between that paragraph and regulation 7(3).

55. There are four relevant requirements under regulation 7(3). The issue between the parties centres upon whether the second requirement is satisfied. The requirements are (1) that the employer should have an ethos based on religion or belief; (2) that, having regard to that ethos and to the nature of the employment or the context in which it is carried out, being of a particular religion or belief is a genuine requirement for the job; (3) that, having regard to that ethos and to the nature of the employment or the context in which it is carried out, it is proportionate to apply that requirement on the facts; and (4) that the person to whom the requirement is applied, who here must be Sir Anthony Colman, does not meet the requirement.

56. As to (1) it is not (and could not be) suggested here that Mr Jivraj and Mr Hashwani did not have such an ethos. As to (3), it is not in dispute that, if requirement (2) is satisfied, so that being an Ismaili is a genuine occupational requirement, it is or would be proportionate to apply it. As to (4), it is plain that Sir Anthony Colman does not meet the requirement in the JVA that the arbitrators should be members of the Ismaili community. The essential issue between the parties is whether requirement (2) is satisfied. The question is therefore whether, having regard to the Ismaili ethos and to the nature of the employment or the context in which it is carried out, being of the Ismaili religion or belief is a genuine requirement for the job. The judge held that this requirement was satisfied whereas the Court of Appeal held that it was not.

57. Our attention was drawn on behalf of Mr Jivraj to what is said to be an important difference between paragraphs (2) and (3) of regulation 7. Paragraph (2) is concerned with the case where the employer does not have a particular ethos based on religion or belief but wishes to recruit a worker who does have such an ethos. In that event, for the exception to apply, being of the particular ethos or belief must be a "genuine and determining occupational requirement". By contrast, where (as here) the employer has an ethos based on religion or belief, it is sufficient under paragraph (3) that being of a particular religion or belief is "a genuine occupational requirement for the job."

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58. Mr Davies submits that the difference between the two cases is this. In the first case the question is whether being of a particular religion or belief is a "genuine and determining occupational requirement". That is to say it must be an essential requirement for the job. Whether it is or not is an objective question which the court can readily decide. In the second case, on the other hand, the question for the court is subjective, namely whether it is a genuine requirement for the job in the eyes of the employer or employers. This, Mr Davies suggests, reflects the sensible principle that it is not for the court to sit in judgment over matters of religion or belief. By contrast, Mr Brindle disputes the idea that the test is entirely subjective. Regulation 7(3) requires that being of a particular religion or belief is not only genuine but also, as paragraph 2 of article 4 of the Directive shows, "legitimate and justified". It follows that it is not sufficient that the employer has a genuine belief that the particular religion or belief is required. The requirement must also be legitimate and justified. It would be remarkable, in his submission, if the justification could be found in the personal opinions of the prima facie discriminator.

59. I agree with Mr Davies that it is not for the court to sit in judgment on matters of religion or belief. However, I also agree with Mr Brindle that the test for justifying prima facie discrimination cannot be entirely subjective. This is because the Regulations must be construed consistently with the Directive. It seems to me to be reasonably clear that paragraph 1 of article 4 of the Directive is the source of paragraph (2) of regulation 7 because they both refer to a genuine and determining occupational requirement. In these circumstances paragraph 2 must be the source of paragraph (3) of the regulation, with the result that the expression "genuine occupational requirement" must (either alone or together with proportionality in requirement (3)) have been intended to reflect the expression "genuine, legitimate and justified occupational requirement" in paragraph 2 of article 4 of the Directive. If the legitimacy or justification of a requirement were assessed purely by reference to the subjective view of the employer, they would add nothing to the stipulation that a requirement be genuine. In my view, whether or not a particular religion or belief is a legitimate and justified requirement of an occupation is an objective question for the court. This is not however as strict a test as that applied under regulation 7(2), namely that a particular religion or belief is an essential requirement for the job. As I see it, the question is simply whether in all the circumstances of the case the requirement that the arbitrators should be respected members of the Ismaili community was, not only genuine, but legitimate and justified.

60. I do not agree with Mr Brindle that the requirement that arbitrators be Ismailis cannot be objectively justified. His submission that an English law dispute in London under English curial law does not require an Ismaili arbitrator takes a very narrow view of the function of arbitration proceedings. This characterisation reduces arbitration to no more than the application of a given national law to a dispute.

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61. One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute. This is reflected in section 1 of the 1996 Act which provides that: "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest". The stipulation that an arbitrator be of a particular religion or belief can be relevant to this aspect of arbitration. As the ICC puts in its written argument:

> "The raison d'être of arbitration is that it provides for final and binding dispute resolution by a tribunal with a procedure that is acceptable to all parties, in circumstances where other fora (in particular national courts) are deemed inappropriate (eg because neither party will submit to the courts or their counterpart; or because the available courts are considered insufficiently expert for the particular dispute, or insufficiently sensitive to the parties' positions, culture, or perspectives)."

62. Under section 34 of the 1996 Act (referred to above) the arbitrators have complete power over all procedural and evidential matters, including how far the proceedings should be oral or in writing, whether or not to apply the strict rules of evidence, whether the proceedings should be wholly or partly adversarial or whether and to what extent they should make their own inquiries. They are the sole judges of the evidence, including the assessment of the probabilities and resolving issues of credibility.

63. In paras 41 to 44 of his judgment [2010] 1 All ER 302 the judge made detailed findings which seem to me to be relevant to this question. I refer to only some of them. In para 41 he described the history and development of the Ismaili Community. He noted from the summary on the website of the Aga Khan Development Network that in the early part of the 20th century Aga Khan III introduced a range of "organisational forms that gave Ismaili communities the means to structure and regulate their own affairs". He added that those forms were established against the background of "the Muslim tradition of a communitarian ethic on the one hand, and responsible individual conscience with freedom to negotiate one's own moral commitment and destiny on the other".

64. At para 42 the judge quoted extensively from the same summary which included this:

> "Spiritual allegiance to the Imam and adherence to the Shia Imami Ismaili tariqah (persuasion) of Islam according to the guidance of

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the Imam of the time, have engendered in the Ismaili community an ethos of self-reliance, unity, and a common identity."

He noted that in 1986 the present Aga Khan:

> "promulgated a Constitution that, for the first time, brought the social governance of the world-wide Ismaili community into a single structure with built-in flexibility to account for diverse circumstances of different regions. Served by volunteers appointed by and accountable to the Imam, the Constitution functions as an enabler to harness the best in individual creativity in an ethos of group responsibility to promote the common well-being.
>
> Like its predecessors, the present constitution is founded on each Ismaili's spiritual allegiance to the Imam of the time, which is separate from the secular allegiance that all Ismailis owe as citizens to their national entities. The guidance of the present Imam and his predecessor emphasised the Ismaili's allegiance to his or her country as a fundamental obligation. These obligations discharged not by passive affirmation but through responsible engagement and active commitment to uphold national integrity and contribute to peaceful development."

65. In para 43 the judge quoted from a paper presented to the Council of Europe in March 2009 by the Director of International Training with the secretariat of the Aga Khan which included the following:

> "Under the Constitution, the Imam has also established … National and International Conciliation and Arbitration Boards to encourage amicable resolution of conflicts through impartial conciliation, mediation and arbitration, a service which is being increasingly used, in some countries, even by non-Ismailis. In fulfilling the mandate to sustain social, economic, cultural and civil society development, the Imamat collaborates with national governments, regional and international institutions as well as civil society organisations. This paper highlights the work of the Conciliation and Arbitration Boards established under the Ismaili Constitution and more particularly the training programmes that have been conducted for them over the last decade, indicating some of the best practices.
>
> Over the centuries, Ismaili communities in various parts of the world, have been conducting their own ADR processes based on the

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ethics of the faith as guided by the Imams of the Time. … [The Aga Khan] was concerned about the massive costs of litigation faced by members of the Ismaili community in various parts of the world. Not only were the legal costs very high, but the legal procedures, in many countries, were particularly lengthy and did not always result in outcomes that conformed with the principles of natural justice. The Aga Khan was concerned about compliance with the ethics of the faith which promote a non-adversarial approach to dispute resolution in keeping with the principles of negotiated settlement (sulh) enshrined in the Holy Qur'an.

The study indicated that a majority of the cases were in the field of family disputes and that the national courts in the countries, where the disputants were settled, were not always able to comprehend the inter-generational attitudinal issues involved, let alone being able to resolve them. This syndrome is very much in keeping with the notion of the "limited remedial imagination" that Menkel-Meadow attributes to the adversarial system which focuses on a zero-sum numbers game where the "winner takes all". It was therefore decided by the Imam, in consultation with the leaders of the various Ismaili communities worldwide, to build on the community's existing tradition of settling disputes amicably within the ethics of Islam and to establish Conciliation and Arbitration Boards at various levels of social governance in the Ismaili communities throughout the world. It was also felt that the system should be such that the first submission of an issue to an arbitrational or mediational body should ensure the highest degree of proficiency, probity and fairness so that the number of cases which go for appeal would be minimal and that the process would be seen as being equitable, fair and cost effective. The Aga Khan's advice was that such a system should endeavour to resolve disputes within the community without the disputants having to resort to unnecessary litigation which is time consuming, expensive and destructive. The Aga Khan saw the amicable resolution of disputes, without resorting to a court of law and within the ethics of the faith, as an important aspect of the improvement of the quality of life of the Ismailis globally. Consequently, the Ismaili Constitution of 1986 made provision for the establishment of the Conciliation and Arbitration Boards."

66. The judge then in para 44 set out part of article XIII of the Constitution which set up a National Conciliation and Arbitration Board for all types of dispute, which provided by article 13.5:

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> "Each National Conciliation and Arbitration Board shall upon the application of any Ismaili assist him to settle any differences or disputes with another party residing in the area of jurisdiction of the National Conciliation and Arbitration Board in relation to any of the matters mentioned in article 13.1(a)."

Article 13.1(a) provided that the Board was:

> "to assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, domestic and family matters, including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession;"

67. In these circumstances the judge held that the provision in the JVA which provided that the arbitrators should be respected members of the Ismaili community and holders of high office within the community was a GOR within regulation 7(3). He did so on the basis that the material set out above showed that, as he put it at para 45, one of the more significant and characteristic spirits of the Ismaili sect was an enthusiasm for dispute resolution contained within the Ismaili community. He said that he had no difficulty in determining this spirit to be an "ethos based on religion". He also relied upon the terms of the arbitration clause itself and the engagement by both sides of members of the Ismaili community to perform mediation and conciliation services from 1988 until 1994.

68. In my opinion the judge was justified in concluding that the requirement of an Ismaili arbitrator can be regarded as a genuine occupational requirement on the basis that it was not only genuine but both legitimate and justified, so that requirement (2) was satisfied. As to requirement (3), the judge said at para 46 that, had proportionality been a live issue, having regard to the parties' freedom in section 1 of the 1996 Act (quoted above) he would have held that article 8 of the JVA was proportionate.

69. The reasoning of the Court of Appeal [2010] ICR 1435 is set out in their para 29 as follows:

> "The judge's findings about the nature and ethos of the Ismaili community were not challenged, but in our view he failed to pay sufficient regard to the other requirements of regulation 7(3), in particular, to whether, having regard to the ethos of that community and the nature of the arbitrator's function, being an Ismaili was a genuine occupational requirement for its proper discharge. If the arbitration clause had empowered the tribunal to act ex aequo et

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> bono it might have been possible to show that only an Ismaili could be expected to apply the moral principles and understanding of justice and fairness that are generally recognised within that community as applicable between its members, but the arbitrators' function under clause 8 of the joint venture agreement is to determine the dispute between the parties in accordance with the principles of English law. That requires some knowledge of the law itself, including the provisions of the Arbitration Act 1996, and an ability to conduct the proceedings fairly in accordance with the rules of natural justice, but it does not call for any particular ethos. Membership of the Ismaili community is clearly not necessary for the discharge of the arbitrator's functions under an agreement of this kind and we are unable to accept, therefore, that the exception provided in regulation 7 of the 2003 Regulations can be invoked in this case."

70. I prefer the approach of the judge. For the reasons given earlier, I am not persuaded that the test is one of necessity. The question is whether, in all the circumstances the provision that all the arbitrators should be respected members of the Ismaili community was legitimate and justified. In my opinion it was. The approach of the Court of Appeal seems to me to be too legalistic and technical. The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence.

71. For these reasons I would, if necessary, have allowed the appeal on the basis that article 8 was a GOR within regulation 7(3). This conclusion makes it unnecessary to consider whether it also satisfied regulation 7(2).

Severance and costs

72. In these circumstances, neither the severance issue raised by Mr Hashwani nor the appeal on costs advanced by Mr Jivraj arises and I say nothing about them.

Reference to the Court of Justice

73. I would not refer any of the questions which arise in this appeal to the Court of Justice. On the first question, the only questions of EC law which arise relate to the true construction of the Directive. The Court of Justice has resolved those issues in a number of cases, notably *Allonby* [2004] ICR 1328. To my mind the principles are now acte clair. On the second question, the principal issue between the parties relates to the application of the relevant principles to the facts. As to the correct construction

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of regulation 7(3), I have accepted Mr Brindle's submission that it does not involve a wholly subjective question on the ground that the relevant provision must be not only genuine, but also legitimate and justifiable. In these circumstances, I see no basis for a reference in relation to GOR, which was in any event not determinative of the appeal.

Conclusion

74. I would allow the appeal.

LORD MANCE:

The first point

75. I have read and agree entirely with the judgment of Lord Clarke on the first point: that is, whether the arbitrators contemplated by article 8 of the Joint Venture Agreement are persons who would be engaged in "employment under … a contract personally to do work" within the meaning of regulation 2 of the Employment Equality (Religion or Belief) Regulations 2003, interpreted in the light of Council Directive 2000/78/EC to which the Regulations aim to give effect.

76. The conclusion that they would not be is, I think, unsurprising for all the reasons that Lord Clarke gives. I note that as long ago as 1904 (RGZ 59, 247), the German Reichsgericht identified the particular nature of an arbitral contract, in terms which I think have a relevance to arbitration generally, when it said (in translation), that:

> "It does not seem permissible to treat the arbitrator as equivalent to a representative or an employee or an entrepreneur. His office has …. an entirely special character, which distinguishes him from other persons handling the affairs of third parties. He has to decide a legal dispute in the same way as and instead of a judge, identifying the law by matching the relevant facts to the relevant legal provisions. The performance expected from him is the award, which constitutes the goal and outcome of his activity. It is true that the extent of his powers depends on the arbitration agreement, which can to a greater or lesser extent prescribe the way to that goal for him. But, apart from this restriction, his position is entirely free, freer than that of an ordinary judge".

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77. A more modern source, Gary B Born's authoritative work on *International Commercial Arbitration* (2009), convincingly discusses the general international legal understanding of the nature of an arbitrator's engagement in the following passage (Vol I, pp 1607-1609):

> "There is also debate about how to characterize the arbitrator's contract, particularly in civil law jurisdictions where the characterization of contracts is often essential to determining their effects. Some commentators consider the arbitrator's contract to be an agency agreement, where the arbitrator serves as the parties' agent. Other authorities have suggested treating the arbitrator's contract as an agreement for the provision of services. A third approach has been to regard the arbitrator's contract as a sui generis or hybrid form of agreement, not being categorizable in conventional terms and instead giving rise to a unique set of right and duties.
>
> The proper analysis is to treat the arbitrator's contract as a sui generis agreement. That is in part because this characterization accords with the specialized and distinct nature of the arbitrator's mandate: as noted above, that mandate differs in fundamental ways from the provision of many other services and consists in the performance of a relatively sui generis adjudicatory function. It is therefore appropriate, and in fact necessary, that the arbitrator's contract be regarded as sui generis.
>
> At the same time, there are no other satisfactory characterizations of an arbitrator's contract. It makes no sense to treat the arbitrator's contract as an agency agreement. Under most legal systems, that characterization would require the arbitrator to follow the parties' directions and to provide the parties with information and an accounting – all of which can only with difficulty, if at all, be assimilated to the adjudicative role of an arbitrator.
>
> Moreover, the role of an agent is inconsistent with the arbitrator's adjudicative function – which is precisely to be independent of the parties. This was underscored by a French appellate decision, which held that an agreement for the parties' 'representatives' to resolve their dispute could not be an arbitration agreement:
>
> > 'A stipulation of that kind is incompatible with the actual concept of arbitration, since the arbitrators,

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> though appointed by the parties, can under no circumstances become their representatives. That would imply, in particular, that they represent the parties and account for their functions. Such a role, and the obligations it entails, are alien to the functions of an arbitrator, which are judicial in nature.'
>
> Equally, regarding the arbitrator as a service provider, like an accountant, investment banker, lawyer, or other professional, ignores the essential adjudicative character of his or her mandate. Arbitrators do not merely provide the parties with a service, but also serve a public, adjudicatory function that cannot be entirely equated with the provision of service in a commercial relationship. The proper analysis is therefore to regard the arbitrator's contract as a sui generis agreement specifying the terms on which this adjudicative function is to be exercised vis-à-vis particular parties and on particular terms."

78. Both these citations catch and support the essence of Lord Clarke's distinction between persons under the direction of another and arbitrators who perform an independent role, free of such control.

The second point

79. As Lord Clarke notes at para 51, the second point does not in these circumstances arise, since the whole situation falls outside the scope of regulation 2. To ask how the exception permitted by regulation 7(3) and article 4(2) of the Directive might apply, when by definition it cannot, may risk giving a slightly false impression about the scope of the exception in situations to which it is potentially applicable.

80. The reasons which can, as Lord Clarke demonstrates, be given for concluding that the exception would not apply to a considerable extent duplicate those given for concluding that regulation 2 does not apply. They are in particular that the arbitrators would not be under the direction of the parties: see paras 61 et seq. Accordingly, it may be appropriate to say a few words about the application of the exception in a situation in which the regulation would apply.

81. If one takes a situation which is within regulation 2, say the engagement by the Ismaili community, or by any other organisation whose ethos is based on religion or belief, of an employed lawyer to undertake English law work, I would expect it to be

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much more difficult to maintain as valid a restriction to members of the Ismaili community or of the other religious or faith-based organisation.

82. Many English as well as other lawyers believe in, are trained in and are familiar with techniques for the amicable resolution of disputes, including conciliation, mediation and arbitration. The value of alternative dispute resolution, particularly mediation, is also recognised at the European legal level (see eg Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters and Council of Europe Recommendation No R(2002)10 on civil mediation). A religious or faith-based community's or organisation's power first to select and then to direct its own employed lawyers would be a secure means of ensuring that its employed lawyers valued, understood and prioritised the handling of English law work so far as possible on a non-confrontational basis, using alternative dispute resolution procedures wherever possible. A refusal to employ anyone other than a member of the particular religion or faith would in that context seem unlikely to be justified or proportionate.

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