Appeal No. UKEAT/0396/14/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
on 25 February 2015
Judgment handed down on 28 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

SITTING ALONE

MINISTRY OF DEFENCE — APPELLANT

MRS L HOLLOWAY AND OTHERS — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	MR BEN COLLINS (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS
For the Respondents	MS MELANIE TETHER (of Counsel) Instructed by: Thompsons Solicitors Churchill House 17 Wellington Street Leeds LS1 4DL

SUMMARY

JURISDICTIONAL POINTS

By a Treaty of 1960, the UK constituted the island of Cyprus an independent state, but retained two areas of the Island as military base areas (the Sovereign Base Areas – "SBAs"). Civilians who were dependents of service personnel or civil servants accompanying the Armed Forces in the SBAs engaged while in Cyprus as employees of the MOD complained to an ET in the UK that the terms of other civilians also engaged locally were better, and that this was discriminatory on the grounds of national origin or marital status. The ET had jurisdiction only if the territorial reach of the **Equality Act 2010** encompassed the Claimants. An EJ held it did, since the connection with the UK and UK law was sufficiently close for this to be the case. In doing so, she considered that English law applied to the contracts of employment the Claimants had agreed with the MOD. This was held in error, since the law of the SBAs was that which applied (although one effect of this was that it many respects it adopted principles of or familiar to English Law), and it invalidated her overall conclusion. In particular, she had not been shown the authorities which made it clear that the Crown in relation to a British Overseas Territory such as an SBA was the Crown acting in right of the BOT, and not in right of the UK. Had she been, she would not necessarily have concluded as she did as to the strength of the connection between the Claimants and UK law. The question of the territorial reach of the Equality Act was remitted for fresh determination by the same judge.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Employment Judge Grewal sitting at London Central Employment Tribunal had to consider whether the territorial reach of the **Equality Act 2010** was such as to confer jurisdiction upon the Tribunal to consider claims that the 19 Claimants made that they had been discriminated against on the grounds of race and marital status. It was common ground that she applied the appropriate test as it now stands following a decision of the House of Lords in **Lawson v Serco** [2006] ICR 250, and those of the Supreme Court in **Duncombe v Secretary of State for Children, Schools and Families** (2) [2011] ICR1312 and **Ravat v Halliburton Manufacturing and Services Ltd** [2012] ICR389, namely that there has to be a sufficiently strong connection with the UK and UK employment law to enable it to be said that Parliament would have regarded it as appropriate for the Tribunal to deal with the claim.

2. In **Powell v OMV Exploration and Production Ltd** [2014] ICR 63, the Appeal Tribunal observed that the starting point which must not be forgotten in applying the substantial connection test is that the statute will have no application to work outside the UK. Parliament would not have intended that, unless there were a sufficiently strong connection, and "Sufficiently has to be understood as sufficient to displace that which would otherwise be the position." In **Olsen v Gearbulk Services Ltd & Another** (UKEAT/0345/14, 28th April 2015, paragraph 36) it was accepted that whether there is a sufficiently close connection is a question of fact such that a decision by a Tribunal properly directing itself as to the applicable law, with regard to the appropriate cases, would disclose no error of law unless shown to be perverse.

3. Employment Judge Grewal decided that there was a sufficiently close connection in the present case. It is said on appeal that decision was flawed because in reaching it she took into

account a conclusion which was erroneous as to the system of law which applied to the Claimants' contracts of employment with the Appellant Ministry (MoD).

The Facts

4. Until 1960, the island of Cyprus was a British colony. By a treaty of that year ("the Treaty") the British government ceded all but two small areas of land on the island to what became the Republic of Cyprus. Those two areas - the Akrotiri and Dhekelia sovereign base areas ("the SBAs") - were retained for use as military bases.

5. The Claimants are employees of the MoD. They are spouses of serving members of HM Armed Forces or of UK based civil servants posted to the SBAs.

6. The Treaty accorded the United Kingdom rights which were set out in Annex B. At Section 7, it permitted the UK Authorities to employ freely in the SBAs labour from other parts of the island of Cyprus. It then provided as follows:-

> **"(2) The United Kingdom Authorities, authorised service organisations and their contractors shall, so far as is practicable, employ only Cypriot staff and labour in the Island of Cyprus, provided that such staff and labour are available and qualified to do the work… the above shall not prejudice the right of the United Kingdom Authorities, authorised service organisations and their contractors to employ when necessary staff and labour from the British Isles."**

British Forces Cyprus ("BFC") designated three types of posts for civilian staff. Category A posts were those of a professional specialist nature which could only be complemented with UK based civilians or civil servants specially recruited for overseas service. Categories B and C were both locally employed civilians: the distinction between them was that Category B posts were filled by the husband or wife of a serving member of the military or civil service component of the BFC who was in possession of a valid Status Stamp. Examples were posts

such as those of staff employed in secure areas, posts which required access to classified IT systems or locally sensitive material, and learning support assistants in schools when it was essential for English to be the first language or a CRB check was required.

7. The purpose of recruiting dependents of service personnel and of the civilian component accompanying the BFC was regarded as beneficial to the MoD as promoting good morale and harmony of family life amongst service personnel and the civilian component, assisting in their recruitment and retention, and ensuring a willingness that they would accept overseas posting.

8. The 19 Claimants were all recruited locally in the SBAs to fill category B posts. Their recruitment was managed by the Locally Employed Civilian HR Department. The appointment letters and statements and particulars of employment for Categories B and C were virtually identical, as were most of the terms and conditions – it was, however, the differences between these (which were said to favour recruits who were Cypriot nationals) which gave rise to the claims.

9. The contract of employment was between each Claimant individually and the MoD. Their contracts did not contain any choice of law clause, though they expressly referred to a right to take a case to a Sovereign Base Area Administration ("SBAA") Tribunal if such an employee thought she had been subject to unfair discrimination. Income Tax was paid in accordance with local arrangements: no UK income tax was deducted. The Claimants worked at the military bases in the SBAs. It might be thought that the Claimants, by virtue of their employer being the MoD, their relationship with a member of the Forces or civilian component and the fact that they were recruited with a particular view to the morale, recruitment and retention of those Forces and civilian component therefore had a much closer connection with England than they did with the Republic of Cyprus or the SBAs in which they worked.

However, the test is the connection not simply, and only, with the UK, but with "UK and UK employment law". It is important therefore, to set out carefully the facts from which the Tribunal reached its conclusion as to that aspect, and hence its overall decision.

10. At the same time as the Treaty was made, the Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960 came into operation. This established an administrator of the SBAs, who by Section 4 had the power to make laws for the government of the SBAs. Section 4(3)(a) provided that any law made by the administrator might be disallowed by "Her Majesty through a Secretary of State". By Section 5:-

> **"(1) The existing law shall, save in so far as it is in its application to the Sovereign Base Areas or any part thereof repealed or amended by, or by virtue of, any law enacted under this Order continue to have effect but shall be construed subject to such modifications and adaptations as may be necessary to bring it into conformity with the provision of this Order.**
>
> **(2) In this section "existing law" means any law enacted by any authority established for the Island of Cyprus, any Instrument made under such a law, and any rule of law, which is in force in the Sovereign Base Areas or any part thereof immediately before the date of commencement of this Order or which, in the case of such a law or Instrument, has been made, but has not yet come into force, before that date."**

The law of contract in force immediately before the Order in Council came into force was set out in a document entitled "Cyprus, Contract, Chapter 149 of the Laws" ("Cap 149"). At the times material to the present case, the general law of contract applicable in the SBAs was that set out by Cap 149.

11. Cap 149 does not contain any provision which relates in terms to a contract of employment as such: but a contract of employment is nonetheless a contract, and thereby Cap 149 is applicable to it.

12. By Section 32 of the Crown Proceedings Ordinance 1996, as amended in 2005, claims under employment contracts may be brought against the Crown by persons in service of the Crown, other than members of the Armed Forces or a member of the civilian component as defined in Annex C of the Treaty concerning the establishment of Cyprus.

13. Section 33 of the Courts (Constitution and Jurisdiction) Ordinance 2007 provides that the laws that apply in the SBAs are the Ordinances enacted by the Administrator, Acts of the UK Parliament and Orders in Council that apply to the SBAs, and the common law of England and the doctrines of equity except where contrary provisions have been provided by the SBAs. In addition, laws which were in force immediately before 16th August 1960 and had not been repealed remain in force.

14. Specific provision is made for claims in respect of some aspects of discrimination. The Employment (Equality) Ordinance 2013 makes it unlawful for employers to discriminate against employees because of race. However, whereas under the **Equality Act 2010** in the UK "race" includes national origin, Section 2 of this Ordinance defines race as including ethnic origin but not nationality.

15. The Industrial Disputes Tribunal has exclusive jurisdiction to determine any dispute of a civil nature arising from the 2013 Ordinance. This does not apply to the Crown in relation to service by a member of the Armed Forces or its employment of a member of the civilian component. It also has jurisdiction to consider a complaint under the Equal Treatment Ordinance 2004 (as amended in 2006) which makes it unlawful for employers to discriminate on the grounds of marital status. This also does not apply to the Crown in relation to its employment of a member of the Armed Forces or of the civilian component.

16. The SBAs are not part of the EU. There is no respect relevant for present purposes in which EU law applies to the SBAs.

17. In determining the effect of these constitutional provisions, it is necessary to distinguish between the Crown acting in right of the UK, and the Crown in the right of the SBAs. This distinction emerges most clearly in **R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs** [2006] 1AC 529, a case to which unfortunately the Judge was not referred. When Quark Fishing, which had been granted licences for each of the four previous seasons, was then refused a licence to fish for Patagonian toothfish in the waters of South Georgia by the Director of Fisheries for South Georgia, it applied for judicial review of the decision. The Chief Justice of South Georgia held that Courts of England and Wales, not those of South Georgia, had jurisdiction over any decision emanating from the Secretary of State to officials of the Government of South Georgia. The decision hinged upon whether the Secretary of State (who then issued an instruction to the Commissioner of South Georgia to issue fishing licences to two specified vessels, neither being that of the Claimant) was given on the Queen's behalf in Right of South Georgia and the South Sandwich Islands or in Right of the United Kingdom. As to that, the House held it was the former. Lord Bingham said in his speech at paragraph 9:

> **"The instruction in issue in this case was given to the Commissioner (who was required to direct the Director) by the Secretary of State. He was not, of course, acting on his own behalf but on behalf of the Crown from which his authority derived. But it is now clear, whatever may once have been thought, that the Crown is not one and indivisible: *R v Secretary of State for Foreign and Commonwealth Affairs Ex P Indian Association of Alberta* [1982] QB 892, 911, 916-917, 920-921, 928. The Queen is as much the Queen of New South Wales (in re *Bateman's Trust* (1873) LR 15 Eq355, 361) and Mauritius *(R v Secretary of State for the Home Department, EX p Bhurosah* [1968] 1 QB 266, 284) and other territories acknowledging her as Head of State as she is of England and Wales, Scotland, Northern Ireland or the United Kingdom. Thus the Secretary of State as a servant of the Crown exercises executive power on behalf of the Crown in whatever is, for purposes of that exercise of executive power, the relevant capacity of the Crown. The question which divides the parties is: by what test is the relevant capacity of the Crown to be ascertained?"**

The answer which the House gave to that question was that it was to be found by identifying the system of Government within which the particular exercise of power took place: in **Quark Fishing** it was the system established by a 1985 order which provided for the Constitution of South Georgia and the South Sandwich Islands.

18. The effect of the distinction of the Crown acting in the right of the SBAs, and the Crown acting in the right of the UK is important to the argument of the MoD. Mr Collins contended, without dispute from Ms Tether for the claimants, that the principles are correctly stated in Hendry and Dickson on *British Overseas Territory Law* [2011], at page 27, in the following terms:-

> **"…the correct legal position is indeed that each overseas territory has a Government distinct from the United Kingdom Government. That is the plain intention of the Orders in Council establishing a distinct constitution for each territory, most of which refer expressly to the "Government" of that territory and some to the Crown "in right of the Government" of the territory. Each territory has its own legislative and executive authorities separate from those of the United Kingdom. Each territory has its own courts, laws, public services and public funds, again separate from those of the United Kingdom. This situation is not altered by the fact that some territories are more susceptible to direction from London than others.**
>
> **The importance of this principle lies in the determination of the rights, powers, obligations and liabilities of the distinct governments of the Crown. This is crucial in settling legally which government – or put it another way, the Crown in right of which government – has particular rights, such as the title to Crown land and other property in a particular territory, which government has power to take particular action, *which government owes statutory or contractual obligations to particular persons*, and which government is liable to others for acts or omissions. The consequence of a failure to determine correctly the possessor of such rights, powers, obligations and liabilities hardly needs spelling out." [emphasis added]**

The Tribunal Decision

19. Although the question was the territorial scope of the **Equality Act**, no authority to which the parties could then refer her as to that had yet been determined. The guidance offered by the case law put before the Judge was that in respect of the unfair dismissal provisions in the **Employment Rights Act 1996**. She applied those principles, and having come to a conclusion

favourable to the Claimants, did not then need to consider whether the territorial ambit of the **Equality Act 2010** was wider (as the claimants had contended). She did, however, consider (paragraph 51) that there was no authority to support that proposition and no basis in law for accepting it. Since then, the matter has been considered in **Fuller v United Health Care Services inc. and Another** [2014] UKEAT/0464/13, 4th September 2014. Despite a developed argument before her, Lady Stacey concluded in that case at paragraph 44 that she had not been persuaded that the test should be different when considering the **Equality Act 2010**, commenting "there does not seem to be anything in the legislation or case law to indicate such a difference". **Smania v Standard Chartered Bank** [2015] ICR 436, though a case of unfair dismissal, is consistent with this approach in that at paragraph 44 the EAT saw no reason to think that the provisions of Section 103A of the **Employment Rights Act 1996** (automatically unfair dismissal on the grounds that an employee had made a protected disclosure) should have a territorial scope any different from that of section 94 of the **Employment Rights Act 1996**. A Section 103A point similarly arose in **Fuller**. It was, likewise, rejected on the same reasoning as Lady Stacey rejected the contention that the **Equality Act 2010** had a wider reach. Most recently, a Divisional Court of the Queen's Bench Division in **R (Mohammed Hottak and AL) v Secretary of State for Foreign and Commonwealth Affairs and The Secretary of State for Defence** [2015] EWHC 1953 (Admin) dismissed a claim for judicial review of a scheme of protection and benefits adopted for Afghan interpreters working for UK Forces which was said to be less generous than one adopted for Iraqi interpreters, and hence discriminatory on racial grounds. It did so on the basis that the territorial reach of section 29(6), alternatively section 39(2), of the **Equality Act 2010** was not such as to include the claimants' circumstances. In doing so, Burnett LJ with the agreement of Irwin J referred to both **Duncombe** and **Ravat**, and stated (at paragraph 45) that he did not accept "the submission that an intention can be imputed to Parliament that because discrimination on grounds of protected characteristics would be in issue, rather than unfair dismissal or other employment rights, it

intended the territorial scope of the provision to be wider." Ultimately, however, the matter was not fully determined by Employment Judge Grewal in the present case, and it remains arguable should the appeal succeed.

20. Though concluding overall in their favour, the Judge rejected the Claimants' argument that they were part of the "civilian component" as described at Annex C of the Treaty.

21. She then determined that English law governed the contracts of employment. The Respondent had argued that it was the law of the SBAs, in particular Cap 149, and not that of the UK. Cap 149 did not expressly apply to the Crown. It could only be if it were a necessary implication from its terms that it did so. No such implication could be drawn. Accordingly, at paragraph 48, the Judge said:

> **"If Cap 149 does not bind the Crown, then there is no Ordinance in the SBA that applies to contracts with the Crown. What SBA law provides is that in those circumstances, by virtue of Section 33 of the Courts (Constitution and Jurisdiction) Ordinance 2007, the common law of England must be applied. The effect of that is that it makes no difference whether the Claimants' contracts are governed by English law or SBA law, because in both cases the common law of England applies."**

22. The Judge continued:

> **"49. I then considered the connection between the Claimants' employment relationship and the SBAs and SBA law. They were recruited locally in the SBAs and their recruitment and employment issues were managed by the Locally Employed Civilian HR Department. They worked wholly in the SBAs. They (sic) vast majority of their terms and conditions applied to all Locally Engaged Civilians. Their written particulars of employment were provided in accordance with SBA law. SBA discrimination legislation applies to them and they have the right to bring discrimination and contract claims in the SBA courts and tribunals. They pay tax in accordance with the SBA tax income ordinance.**
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> **50. I considered whether the factors set out at paragraph 44 (above) were cumulatively sufficiently powerful to displace the connections set out at paragraph 49. Had the Claimants relied solely on the fact that they were employed by the British Government and worked on the British Government's military bases, I would not have been satisfied that that was sufficient to outweigh the connections of their employment with the SBAs. If the Cypriot nationals who also worked for the British Government on its**

> **military bases sought to argue that by virtue of that fact alone, they were entitled to bring claims for discrimination in the Employment Tribunals in England, it is unlikely they would succeed. However, the additional factors, set out at paragraph 44 are, in my view, significant. They demonstrate clearly that there is a strong link between the Claimant's employment in the SBAs and the British Government – they are present in the SBAs because their spouses had been posted there by the British Government, they are employed in their posts because the British Government has designated those posts for them and because it has a policy of employing them, their employment will come to an end when the British Government decides to post their spouse elsewhere. In regarding those factors as significant I took into account what Underhill J and Mummery LJ said in *Ministry of Defence v Wallis* and Baroness Hale in *Duncombe (2)*… those factors put them in a different position from the Cypriot nationals employed by the same employer in the same place of work on broadly similar terms. I am satisfied that their employment relationship has a stronger connection with Britain and British law than with SBA law."**

23. Mr Collins' essential point was that the Tribunal should have concluded that the Claimants' contracts were governed by the law of the SBAs. It was the law of the SBAs which provided that the principles of the common law of England should apply in the absence of express contrary provision. In both **Wallis** and **Duncombe** a significant factor arguing in favour of the conclusion which the courts reached was that the Claimants, though working overseas, had contracts of employment which were governed by English law. There was no such express agreement in the present case. Anyone else in the SBA, with the exception of members of the Forces and civilian component, would equally be subject to the principles of English common law save in so far as Ordinances made by the administrator of the SBAs, provided otherwise.

24. If Cap 149 binds the Crown, then the contract made between the Claimants and the Crown would be subject to SBA law, and not to English law insofar as it differed. Section 7 of the Interpretation Ordinance 2012 provided that an Ordinance would not bind the Crown unless it appeared by necessary implication that the Crown was bound. Mr Collins contends that it is necessary to make the implication. Cap 149 is set out in a text dated 1959. It does not expressly bind the Crown. The amendment to the Crown Proceedings Ordinance 1966, made in

2005, at Section 32(1) however authorises civil proceedings to be taken against the Crown in right of her Majesty's Government in the UK where the Ordinance to be relied on expressly applies to the Crown, or it is one to which "sub-section 2" refers. That sub-section provides that a claim for damages for breach of a contract of employment, or any other contract connected with employment which a Court or Tribunal in the SBAs would under the law for the time being have jurisdiction to hear and determine, could be brought by a person in the service of the Crown in the right of her Majesty's Government in the UK other than a member of the armed Forces or a member of the civilian component. This deals with jurisdiction, but does not, however, deal with the law to be applied in determining whether there was a contract, and whether it had been breached. The argument that Cap 149 must apply to the law by which claims in respect of breach of an employment contract are to be determined against the Crown assumes that even if it was not a necessary implication from Cap 149 prior to the 2005 amendment, which enabled claims of that sort to be brought against the Crown, it was a necessary implication thereafter. The difficulty with this approach is it suggests that there was nothing inherent in Cap 149 itself to that effect, and the necessary implication should be drawn not from Cap 149 but from an amendment to the Ordinance which said nothing to suggest whether the law to be applied was Cap 149 on the one hand or the common law of England on the other. As Ms Tether pointed out, an implication might more easily be thought necessary if the only contracts to which Cap 149 might in practice be expected to apply were those made with the Crown, for then without the implication it would lack any effect - but Cap 149 has wide applicability to cases other than those involving the Crown. Although the Crown might well be a party to many contracts made within the SBAs, there were many other contracts entered into between civilians within the SBAs to which the Crown was not a party.

25. Necessity is a strong word. I do not consider the circumstances were such that it was necessary to imply that the terms of Cap 149 applied to a contract made between the Crown and locally employed civilians. The Judge was in my view right so to hold.

26. For her part, Ms Tether argued that the Claimants formed part of the civilian component. As such, they were excluded from the right to bring a claim in the Industrial Disputes Tribunal of the SBAs. They would have rights, if at all, in English law: and in such circumstances it could not be supposed that Parliament would have wished to do other than extend the reach of the UK employment law to such a person.

27. The words "civilian component" appear in Annex C to the Treaty. In Section 1(1)(b) of that Annex it is defined as:

> **"…the civilian personnel accompanying a force as defined above who are employed in the service of a force or by an authorised service organisation accompanying a force, and who are not stateless persons or nationals of, nor ordinarily resident in the territory of the receiving state as here and after defined."**

28. The definition thus expressly relates back to the definition of "force". That definition is contained in Section 1(1)(a). It distinguishes between the Forces of the UK and those of the Republic of Cyprus, Greece or Turkey. As far as the former is concerned, it provides that "force" means:

> **"…the personnel belonging to the land, sea and air armed services of that country *when in the territory of the Republic of Cyprus*, provided that the person in question is posted or attached to, or is on an official visit to any unit stationed in the island of Cyprus, or is in the island in the course of transit on an official movement order." [emphasis added]**

29. There is a further distinction here which must be borne in mind: that between the Island of Cyprus, and the Republic of Cyprus. The Island of Cyprus comprises both the Republic and

the SBAs. A force is thus defined by reference to it being in the territory of the Republic; not by it being present within an SBA. "Civilian component" thus means those personnel accompanying a force when it is on the Island, but outside an SBA, and in the Republic.

30. Two further definitions are relevant: that of "Sending State" (By Annex C, Section 1 (1)(e)) this means the state to which the force in question belongs) and "Receiving State" (which by Annex C, Section 1(1)(f) means "(i) in relation to the [Sovereign Base Areas], the United Kingdom (ii) in relation to the territory of the Republic of Cyprus, the Republic of Cyprus." The territory of the Receiving State is defined accordingly at Section 1 (1)(g)(i) and (ii).

31. If this definition is applied literally, then a civilian working within the SBA, and accompanying the armed services of the UK within that SBA would not be a member of the civilian component. She would become so only if she were to accompany troops (say) across the boundary between the two. The phrase only has force in the context of an agreement which establishes the status of Forces of, on the one hand, the UK, and on the other the Republic of Cyprus when the one is in the territory of the other.

32. Section 32 of the Crown Proceedings Ordinance as amended in 2005 provides that the right to claim against the Crown and in the right of the UK does not apply in relation to "a member of a Civilian Component as defined in paragraph 1 (b) of Section (1) of Annex C of the Treaty of Establishment…". This exclusion from the right would thus not cover the Claimants in the present case.

33. At paragraph 45 of her judgment, the Judge had regard to Annex B of the Treaty and in particular Part II, Section 7, paragraph 2. That deals with the recruitment for employment within the SBAs and provides, in that respect, so far as material:

> **"The United Kingdom authorities, authorised service organisations and their contractors shall as far as possible have regard to the proportionate numbers of the Communities in Cyprus. The above shall not prejudice the right of the United Kingdom authorities, authorised service organisations and their contractors to employ when necessary staff and labour from the British Isles."**

It is plain from both paragraphs 2 and 3 of Section 7 that the Treaty envisaged that the UK government would employ civilians in both the SBAs and the Republic of Cyprus. The Judge considered that "civilian component" was intended to refer to civilians who were recruited from the UK. I suspect this conclusion was influenced by her view that "force" was defined as members of the British armed services posted or attached to any unit stationed in the island of Cyprus, as she put it. This is not the definition used in Annex C (which is set out above). I do not blame the Judge for this: little emphasis was placed below upon the meaning of civilian component, since there was little dispute about it, though it is now a ground of appeal for the Claimants. The Judge had earlier found that civilian staff could be employed not only locally in categories B and C, but could be employed in category A posts. These could "…only be complemented with UK based civilians (civil servants) or civil servants specially recruited for overseas service." She was entitled later to find at paragraph 45, on the evidence before her, that the posts to which the Claimants were recruited were not posts which required specialist or professional skills or qualifications not to be found within the Cypriot workforce, and hence, were designated as LEC posts. By describing them as such she was excluding them from being Category A posts. For present purposes it is only necessary for me to conclude that the Claimants were not part of the civilian component, within the meaning of the provisions applicable in the present case. Though it was only made in passing, I reject the attempt to argue

that the words "civilian component" had a particular meaning, favourable to the Claimants, by reference to the NATO status of Forces agreement, which may be familiar territory to the courts. The phrase in the current context has a meaning specific to that context which, so far as it is defined, is set out above.

34. On the other hand, I accept the submission made by Mr Collins that some assistance can be derived from the Explanatory Notes to each of the Employment Termination Ordinance 2010, (Section 45(2) of which expressly provides that the Ordinance does not bind the Crown for the purpose of employment of a member of the civilian component as defined in paragraph 1(b) of Section 1 of Annex C), the Employment (Equal Pay) Ordinance 2012 (where Section 26 is to the same effect) and the Employment (Equality) Ordinance 2013 (where Section 26 is likewise). In each, the Explanatory Note says in dealing with the exception in respect of the civilian component for which it provides that the Ordinance does not have effect where the employer is the Crown "…and the employee is a UK based civilian or service person." This description is inapt to describe a dependent of service personnel, or of civil servants. It supports the approach of the Judge.

35. Though only limited assistance may be had from an Explanatory Note, that is not to say that it may be of no help in indicating, at least, that which the maker of the instrument contemporaneously thought they were providing. Ms Tether does not argue that no regard should be had to it. Accordingly, I regard it as some support for Mr Collins' approach, subject to the inevitable limitation that it represents a view reached by a third party (albeit an informed one) of the effect of the legislation.

36. I accept too that there is a distinction drawn in Annex C, Section 9 paragraph 5 between members of a force and civilian component on the one hand and persons locally employed in

the service of a force on the other. Mr Collins draws from that that the distinction, between those locally employed on the one hand and those engaged from the UK on the other, is recognised in the Treaty. Further evidence of this, in his submission, is in Annex C, Section 3 paragraph 3, the opening words of which read:

> **"If a member of a force or civilian component leaves the employ of the sending state or an authorised service organisation and is not repatriated, the authorities of the sending state shall immediately inform the authorities of the receiving state giving such particulars as may be required…"**

The reference to "repatriation" indicates that the Treaty envisaged that a member of the civilian component would not be locally engaged. This expression is, he submits, consistent only that the person has become posted to Cyprus from the UK.

37. Ms Tether points to the fact that on a literal interpretation of the words used in the Treaty, there would be no person falling within the civilian component at a time when that person, wherever recruited, happened to be within the SBAs. The reference to "repatriated" is in this context to be seen as a reference to return to the place from which, abroad, the individual initially came, and makes no sense if "civilian component" is only to exist where civilians accompany troops who are physically within the borders of the Republic of Cyprus.

38. "Accompany" may have a different force in different contexts. In the present context, a person does not become a member of the civilian component, as defined, if that person happens to accompany troops just by being in the same minibus full of troops crossing the border between the SBA and the Republic. The word is plainly used in a different sense.

39. Ms Tether argues, too, that nothing in Annex B, upon which the Judge relied for her conclusions as to the meaning of "civilian component", provided that those recruited as such had to have skills and qualifications which were not apparent in the population of the Island of

Cyprus. The Judge had accepted that the posts in which the Claimants were employed were set aside to be filled by UK dependants. She was not justified to say that to be a member of a "civilian component" a person must be recruited in the UK, and must have professional skills and qualifications.

40. In resolving this dispute, I have to remember its significance to the overall question of construction. If an individual is a member of the civilian component, the Ordinances which I have mentioned and which provide rights in employment to civilians within the SBAs, would not apply to that person. Since this is by way of exception to a general rule, it would have to be shown that the individual concerned came within that exception: otherwise the Ordinances would be applicable. On a literal construction of "civilian component" the Claimants could not do so.

41. Though a literal construction leaves scope only for the exclusion of very few, since the number of those "accompanying" members of the Forces outside the SBAs but within the Island of Cyprus is always likely to be limited, and although it may have been the intention of the SBA authorities and the UK Government to ensure that civil servants recruited in the United Kingdom would be excluded from being able to rely upon the rights conferred by the Ordinances, this does not logically have the consequence that the Claimants could assert those rights.

42. I am inclined to accept Mr Collins' arguments, but to the extent that the interpretation of the words "civilian component" are obscure in providing for an exception to a general right, this also has the consequence that the Claimants are outside the scope of that exception. They cannot show they are within it.

43. I cannot hold, therefore, that the Judge was in error in her conclusions at paragraph 45, but in any event have been given no compelling reason why the consequence of any error would be that the Claimants were necessarily within the scope of "civilian component".

44. It follows from the above both that Cap 149 does not bind the Crown, and that the Claimants are not part of the civilian component. They were locally engaged civilians. The Judge drew this conclusion as a matter of fact. I cannot see that she made any error of law in doing so.

45. By contrast, in what she said at paragraph 48 it is common ground that the Judge did not appreciate the distinction between the Crown in right of the UK, and the Crown in right of the SBA. In the last sentence of paragraph 48 she was wrong to conclude that it made no difference whether the Claimants' contracts were governed by English law or by SBA law. It did. If SBA law governed such contracts, the employment rights of any locally employed civilian who was not a dependant of either a serving member of the force or a member of the civilian component fell to be decided by the application of SBA law. That might assert and incorporate principles of English common law. Mr Collins is, however, right to say that it would do so not because English law applied to the contract - plainly it would not - but because the law of the SBAs provided that the principles of English common law would do so. In just the same way, the common law of England could not be said to apply to the Claimants' contracts. Principles familiar to English law would do so - but, as Mr Collins points out, only because SBA law provided that they should. SBA law contained more than the common law principles applied in England. It also included the Ordinances. In order to determine the employment rights to which a locally employed civilian would be entitled, regard would have to be had to the entirety of SBA law.

46. I do not exclude the possibility that the history of the SBAs, and the incorporation in large part of many of the principles of English law, could factually be relevant to an assessment of whether the employment relationship between the Claimants and the MoD was such that the Claimants had a stronger relationship with the UK and UK law than it did with the SBAs and SBA law: but this conclusion would have to take account of the fact that it was SBA law which itself applied directly, and not English law. English principles would not apply primarily, but would constitute a secondary consequence of the application of SBA law.

47. In reaching this conclusion I have not found it necessary to deal with an argument addressed to me by reference to the Rome Regulation. The Judge spoke of the Rome Convention, but it has been succeeded by the Rome Regulation and it is this which is relevant, though its material provisions are the same as that of the Convention, even if the numbering is different. Article 8(2) of the Regulation provides that to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract should be governed by the law of the country in which "…the employee habitually carries out his work in performance of the contract." This is subject to Article 8(4):

> **"Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraph 2... the law of that other country shall apply. "**

The reference here is to a close connection between the *contract* and another country. This is not precisely the same as the test applicable to determine the territorial application of the **Equality Act**. It is, however, plainly relevant to the assessment of that latter question.

48. Article 22(1) provides that

> **"Where a state comprises of several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be**

> **considered as a country for the purposes of identifying the law applicable under this regulation.**
>
> **2) Member States where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.**

Before the Employment Tribunal, no argument was advanced in respect of Article 22. Before me, Mr Collins argued that EU law did not apply directly to the SBAs, which was not a part of the European Union. The provisions of the Rome Regulation did not therefore apply within the SBAs. Ms Tether rightly submitted that the Rome Regulation was nonetheless binding upon the Employment Tribunal in the UK when considering whether it had jurisdiction to consider a claim. The terms of the Regulation were just as applicable to jurisdictions outwith the EU as they were to those within it, for the purposes of considering the application by the Tribunal of the test within Regulation 8. The test depends upon the closeness of connection. Though not identical, it raises much the same issue as raised by application of the **Ravat** principle. There is no reason to think that this in any way invalidates the conclusion to which I have otherwise come.

Conclusion

49. The Judge decided as she did by taking into account all the circumstances of the case. One of those circumstances, of considerable importance, was the law which bound the parties consequent upon their contract. It is clear from **Quark Fishing**, applied most recently in the case of **Ponnusamy and others v Secretary of State for Foreign and Commonweath Affairs** [2015] EWHC160 (QB), that the contract was made with the Crown in right of the UK. The Crown in right of the SBA provided for the laws of the SBA. Though those laws might have been susceptible to Parliamentary interference, it was their provisions which applied to the contract, just as if the Claimants had been locally employed Cypriot civilians rather than dependents of the Forces.

50. Mr Collins urges me to say that if the contract is governed by the law of the SBAs, then Parliament would not have intended employment statutes applicable in the UK to apply to disputes arising in relation to it. The SBA Ordinances did. This is a powerful point, but in my view it is insufficient for me to say with any certainty that the Tribunal was bound to conclude that the **Equality Act** had no territorial reach in the Claimants' case. There are powerful arguments that it did: the Judge set out many of those in paragraph 47. As in any case of assessment, much depends upon the weight given to rival factors in reaching a conclusion which if reached on a proper self-direction of law is ultimately one of fact. Accordingly, the consequence of my conclusion that one of the considerations which materially influenced the assessment made by the Judge was reached in error by her, but that I cannot say either that her decision would necessarily be the same notwithstanding that conclusion, or that it would have been the converse, is that the appeal must be allowed. The question whether the reach of the Equality Act 2010 is such that Parliament must be taken to have intended it to apply to the Claimants must be remitted for further consideration in the light of this judgment, and any further submissions which the parties may wish to make to the Judge.

51. It is common ground that remission in this case should be to the same Judge: in particular, I would like to emphasise that the argument before me has been developed in a way in which it was not before her, and I pay tribute to her careful and thorough decision in all other respects.