Appeal No. UKEAT/0213/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 November 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

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(1) THE GENERAL MEDICAL COUNCIL (2) MR NIAL DICKSON (3) MR SIMON HAYWOOD	APPELLANTS
DR E MICHALAK	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MR JOHN BOWERS QC (One of Her Majesty's Counsel) and MR IVAN HARE (of Counsel) Instructed by: General Medical Council GMC Legal 2nd Floor, Regent's Place 350 Euston Road London NW1 3JN
For the Respondent	MR WILLIAM EDIS QC (One of Her Majesty's Counsel) Instructed by: Radcliffes LeBrasseur Solicitors Verity House 6 Canal Wharf Leeds LS11 5PS

SUMMARY

JURISDICTIONAL POINTS

PRACTICE AND PROCEDURE

The Claimant complained to an Employment Tribunal that she had been discriminated against by the GMC (a qualifications body). The GMC contended that section 120(7) **Equality Act** precluded jurisdiction, since judicial review afforded an appeal for the acts complained of, was provided for by statute and came within the meaning of "appeal" as explained by Hoffmann J in **Khan v GMC**.

At a Preliminary Hearing, the Employment Judge wrongly failed to recognise he was bound by the decision of the Employment Appeal Tribunal in a case which was directly in point (**Jooste**); and therefore permitted the proceedings to continue in part. Similarly, he permitted proceedings to continue against two named Respondents personally, when on the same principles as accepted in **Jooste** he should not have done. Thirdly, after the Notice of Appeal was served, he purported to be exercising the slip rule of his own motion when in fact he was setting out fresh relevant conclusions, as to which he should have heard submissions first.

On appeal, it was held that **Jooste** would be followed, though there were sufficient reasons to doubt that it was correct for permission to appeal to be given.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This case throws into stark focus a decision made at this Tribunal by HHJ McMullen QC on 4 July 2012 in the case of **Jooste v General Medical Council** [2012] EQLR 1048. In the present case, Employment Judge Keevash, at Leeds, did not appreciate that he was bound by the decision. It is agreed by both leading Counsel before me that he should have done. He misdirected himself. He wrongly considered that a subsequent case of **Uddin v General Medical Council** [2013] ICR 793, a decision of Slade J at this Tribunal, was in contradiction of the principles expressed in **Jooste**. He was in error in that. His decision therefore cannot stand unless I am satisfied that it is plainly and obviously right. In order to do so I would have to decline to follow the decision of HHJ McMullen QC. Unless I am satisfied that that decision is wrong and should not be followed, I should loyally follow it.

The Background Facts

2. Dr Michalak complained that had been discriminated against in the course of her employment as a doctor. She brought an action against her employer and succeeded. Pending the result of that action, she had been referred by her employer to the General Medical Council. That has the entitlement, indeed the duty, under the **Medical Act 1983** to confer registration on or in appropriate cases to remove or suspend the effect of registration from medical practitioners. It is, therefore, a "qualifications body" within the scope and meaning of section 53 of the **Equality Act 2010**.

3. She complained that, in its consideration of her case, the GMC had acted to cause her detriment. Section 53 of the **Equality Act 2010** provides, so far as relevant as follows:

> **"1. A qualifications body (A) must not discriminate against a person (B)—**
>
> > **(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;**
> >
> > **(b) as to the terms on which it is prepared to confer a relevant qualification on B;**
> >
> > **(c) by not conferring a relevant qualification on B.**
>
> **(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—**
>
> > **(a) by withdrawing the qualification from B;**
> >
> > **(b) by varying the terms on which B holds the qualification;**
> >
> > **(c) by subjecting B to any other detriment..."**

4. The provision at section 53(2)(c) widened the scope of the **Equality Act 2010** beyond that which in the spheres of sex and race discrimination had earlier been conferred by respectively the **Race Relations Act 1976** and the **Sex Discrimination Act 1975**, in which only the equivalents of 53(2)(a) and (b) were identified as situations in which there was a prohibition on discrimination.

5. She complained that in respect of eight matters set out at paragraphs 7.1 to 7.8 of Employment Judge Keevash's Judgment, as it was corrected and sent out on 19 June 2014, that the GMC and, in respect of two allegations, first the Second Respondent (the Chief Executive Officer of the GMC) and second the Third Respondent (an Investigating Officer) had discriminated against her within the terms of 53(2)(c).

6. A Preliminary Hearing was held in Leeds before the Employment Tribunal in order to decide whether or not the Tribunal had jurisdiction. It had to decide whether it had jurisdiction under the **Race Relations Act 1976** in respect of matters which all pre-dated 1 October 2010 when the **Equality Act 2010** came into force, those which post-dated 2010, and those which straddled the period before and after. I am concerned only with those matters to which the **Equality Act 2010** is relevant. The argument put before the Judge which he rejected was that

section 120(7) of the **Equality Act 2010** provided that the Tribunal had no jurisdiction to consider complaints of the nature which I have just outlined. That section provides materially so far as follows, under the heading "Jurisdiction", in a chapter itself headed "Employment Tribunals":

> **"(1) An Employment Tribunal has, subject to section 121, [a section immaterial for present purposes] jurisdiction to determine a complaint relating to—**
>
> > **(a) a contravention of Part 5 (work);**
> >
> > **(b) a contravention of section 108, 111 or 112 that relates to Part 5.**
>
> **…**
>
> **(7) Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal."**

7. The Judge expressed his conclusion at paragraph 28. He thought that section 120(7) did not prevent the Claimant from bringing the proceedings which she had set in train.

8. Before me Mr Bowers QC, appearing with Mr Hare, neither of whom appeared below, argued that a series of cases made it clear that the law was that section 120(7), properly construed, deprived the Tribunal of jurisdiction.

9. The history begins with **Khan v the GMC** [1996] ICR 1032. The central allegation was considered by the Court of Appeal in that case under the predecessor provision to 120(7), namely section 54(2) of the **Race Relations Act 1976**, which provided:

> **"Subsection (1) [of the relevant section dealing with the qualifications body] does not apply to a complaint … of an act in respect of which an appeal, or proceedings in the nature of an appeal, may be brought under any enactment …"**

10. What was in issue there was whether procedures internal to the GMC were an appeal within the meaning of that provision. The **Medical Act** provided for a two-stage procedure. Once a decision had been made, that decision was open to review by a review board. The

review board itself had no power to alter the decision, but it was to make a recommendation to the President of the General Medical Council. He, in the light of the Review Board's conclusions, could alter the decision. In Dr Khan's case the President decided adversely to Dr Khan. It was contended that Dr Khan had the entitlement to raise allegations that he had suffered discrimination on the grounds of race because he was not precluded from doing so since the two-stage procedure, for which the **Medical Act** provided, was not an appeal.

11. Neill LJ, giving the first Judgment of the court, considered at 1041C that that two-stage decision was "aptly covered" by the words of section 54(2), adding:

> **"… It was submitted that this procedure does not enable the medical practitioner to seek an effective judicial remedy. In my judgment, that argument does less than justice to the fact that the review procedure is provided for by statute. Parliament has enacted, for the purpose of adjudicating on these medical qualifications, that the machinery set out in Part III of the Act of 1983 is the proper machinery. It is the prescribed substitute in this particular area for the machinery which in other areas is covered by the work of an industrial tribunal."**

12. Hoffmann LJ, in the opening words of his Judgment which follows that of Neill LJ, said this:

> **"The main question in this appeal is whether proceedings under section 29 of the Medical Act 1983 are "in the nature of an appeal" within the meaning of section 54(2) of the Race Relations Act 1976.**
>
> **It is a short question of construction which, in my judgment, admits of an easy answer, namely, "Yes." Section 29 of the Act of 1983 allows the decision of the General Medical Council to be reversed by a differently constituted set of persons. For present purposes, I think that this is the essence of what is meant by "proceedings in the nature of an appeal." "**

13. Hoffmann LJ used the word "reversed". I have been satisfied by the submissions of Mr Bowers QC in argument that that did not mean that he was necessarily looking for a process by which the appeal body could substitute its own decision. Certainly that would count. But he made the point, which I think correct, that in the context of registration or non-registration to reverse a decision was effectively the same as to substitute a decision. To set aside a decision which adversely affects an existing registration will leave the existing registration as it is. Thus

it is immaterial whether the precise word is "reversed" or "set aside" or "quashed" or "substituted". Further, given the context within which **Khan** was decided, I do not think that Hoffmann LJ had in mind the subtle distinction that might be drawn between the word "reversed" and the word "substituted", nor do I consider that he was looking to see whether such as a quashing order made in the process of judicial review would or would not fall within his definition of what constituted an appeal.

14. The Court of Appeal had reason to consider **Khan** again in **Chaudhary v Specialist Training Authority Appeal Panel and Ors** [2005] ICR 1086 CA. The applicant was refused entry on the specialist register by the specialist training authority. He appealed against that refusal. His appeal was dismissed, as was an application for judicial review of the dismissal. He complained that the appeal panel itself had discriminated against him on the ground of race. He relied centrally upon the effect of the **European Convention for the Protection of Human Rights and Fundamental Freedoms**, which since the decision in **Khan** had become generally applicable in the law of the UK following the **Human Rights Act 1998**.

15. The court thought (per Pill LJ, paragraph 19), that whilst the machinery by which the application in the **Chaudhary** case was dealt with was different from that considered under the **Medical Act 1983** in the case of **Khan**:

> **"… it is very difficult to distinguish in a material way the circumstances in the present case from those in *Khan*, as considered in this court. Submissions in the *Khan* case were comprehensive."**

It went on to cite from the Judgments of Neill and Hoffman LJJ before coming to conclusions expressed at paragraph 29:

> **"…. the points raised do not justify in the present case a result different from that in *Khan* and *Chaudhary (No 1)*, applying the principles stated in this court in those cases. The words "review" and "reconsideration" are not materially different for the purpose of deciding whose "act" is in question. Both come within the expression "appeal, or proceedings in the nature of**

> **an appeal" in section 54(2) of the 1976 Act. Moreover, the emphasis upon complete reconsideration tends to confirm the effectiveness of the appeal procedure provided. Hoffmann LJ in *Khan* ([page] 1043F) also referred to the advantage, in terms of providing an effective remedy, of the specialisation in their field of tribunals, such as the review board in *Khan*, when dealing with professional qualifications."**

He went on to observe that an effective remedy had to be provided and indeed was required before the 1998 Act came into force:

> **"… The right of appeal to the appeal panel as constituted, with the possibility of a judicial review of its decisions, is in my judgment an effective remedy in the circumstances …"**

16. At paragraph 32 Pill LJ said this:

> **"The procedure is a lawful alternative in this context to a procedure by way of complaint to an employment tribunal under section 54(1). The remedies available by way of judicial review (*R (Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295) provide an appropriate safeguard for applicants in present circumstances. It will be open to the court, on judicial review, to consider whether the appeal panel had acted in a racial discriminatory manner."**

17. The next relevant case in time was the first relevant decision by HHJ McMullen QC at this Tribunal, that of **Tariquez-Zaman v GMC**, a decision of 20 December 2006, UKEAT 0292/06 and 0517/06. Judge McMullen expressly did not have to consider whether the possibility of an appeal by way of judicial review precluded the jurisdiction of the Employment Tribunal in respect of the qualifications body, the GMC. He did, however, express obiter views. He thought, paragraph 28, that the intention of Parliament in the predecessor provision of section 120(7) was to keep cases out of the Employment Tribunal, and in those specialist fora where challenges are made to qualifications bodies. Having said that, he then considered that judicial review was "aptly described as proceedings in the nature of an appeal." He thought that Judges in the Administrative Court were familiar with dealing with cases under the **Medical Act** in the form of "appeals proper" and thus constituted "the obvious destination intended by Parliament for disputes of this nature once a decision had been made at first instance".

18. He had reason to revisit those words, this time by way of ratio, in **Jooste**, which concerned claims under the **Equality Act** of race and disability discrimination. It was submitted to him by Mr Hare that judicial review or the possibility of proceedings by way of judicial review were proceedings in the nature of an appeal within the meaning of section 120(7). To do that he had to be satisfied first as to the act complained of and second, that that act might "by virtue of an enactment" be subject to an appeal or proceedings in the nature of an appeal. He rejected the view that the common law, not statute, provided for judicial review, noting that the **Senior Courts Act 1981** made provision for it.

19. Section 31 of that Act provides as follows, so far as relevant:

> **"(1) An application to the high Court for one or more of the following forms of relief, namely**
>
> > **(a) a mandatory, prohibiting or quashing order;**
> >
> > **(b) a declaration or injunction under subsection (2); or**
> >
> > **(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies**
>
> **shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.**
>
> **(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to –**
>
> > **(a) the nature of the matters in respect of which relief may be granted by mandatory prohibiting quashing orders**
> >
> > **(b) the nature of the persons and bodies against whom relief may be granted by such orders; and**
> >
> > **(c) all the circumstances of the case,**
>
> **it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be."**

20. The Act went on to provide that applications for judicial review could be made only with leave; that a sufficient interest was required by the applicant; that damages could be awarded (subsection (4)); that if the High Court quashed the decision it might remit to the court,

Tribunal or authority which made the decision with a direction to reconsider the matter, or substitute its own decision for the decision in question.

21. That power, initially enacted in 1981, has since been restricted by sections 5A and B, which were substituted, together with subsection (5), by the **Tribunal, Courts and Enforcement Act 2007**, section 141. Since it is material to what I shall later say, I shall set out section 5A.

> **"But the power** [i.e. of substitution] **conferred by subsection (5)(b) is exercisable only if –**
>
> **(a) the decision in question was made by a court or tribunal,**
>
> **(b) the decision is quashed on the ground that there has been an error of law, and**
>
> **(c) without the error, there would have been only one decision which the court or tribunal could have reached."**

22. At paragraph 42 of his Judgment Judge McMullen gave his conclusions:

> **"I will now turn to the one issue that was left open where he** [that being a reference to the President of the Employment Appeal Tribunal] **suggested there may be a possibility of an error. It is important to recognise what the purpose of this preliminary hearing was, which is to allow [the representative of the Claimant] to focus on how his case gets off the ground in showing discrimination in the light of what the Judge found in paragraph 37 of his Judgment. It is also important to understand the sequence of the Judge's reasoning. The first point, described as a "knockout" point by Mr Hare, is that this case is subject to section 120(7), in that the Claimant has rights by virtue of an enactment to proceedings in the nature of an appeal. It may come as no surprise that I still agree with what was put by Mr Hare and I held in *Tariquez-Zaman*, although I did not hear full argument upon it because it was not necessary for my Judgment. Judicial review arises under the SCA; that establishes the right of judicial review in its modern name and form, prescribes rules for running the proceedings and the remedies that are available. In my judgment, judicial review is aptly described as arising under an enactment, originally a common-law matter and originally subject to prerogative writs and prerogative orders but now controlled by the 1981 Act. As reinforcement, *Khan v General Medical Council* [1996] ICR 1032 CA points to the same conclusion; see, for example, the Judgments of Neill LJ at page 1040H and 1041C, and of Hoffmann LJ …"**

And he cited the passage cited above, adding that Hoffmann LJ had made it clear that there was a "effective remedy by way of judicial review." He concluded, finally, at paragraph 44 that the exclusion was thus:

> **"… by virtue of an enactment and it does provide for proceedings in the nature of an appeal. An appeal simply is the opportunity to have a decision considered again by a different body of people with power to overturn it."**

23. **Jooste** was heard while two cases heard together, **Depner v GMC** [2012] EWHC 1705 and **Uddin v GMC** [2012] EWHC 1763 (Admin), were awaiting Judgment. Separate Judgments in respect of each case were delivered on 14 February 2013 by Slade J. In **Depner** she considered that a Tribunal had not erred in holding that it had no jurisdiction to hear claims of discrimination and victimisation made under the **Race Relations Act 1976**. The acts complained of could be and were the subject of appeals under the **Medical Act 1983**, sections 40 and 38(8). No complaint of discrimination or victimisation in respect of them could therefore be presented to an Employment Tribunal by reason of section 54(2) of the **Race Relations Act**. She applied the decision in **Khan**. It was argued before her that Khan might be distinguished from **Depner**. As to that, she said this, page 14:

> **"In my judgment there is no basis upon which to distinguish *Khan* from the case under appeal. In *Khan* the Court of Appeal held that a review by a Review Board of a refusal of registration of an Overseas Qualified Practitioner fell within RRA section 54(2). On such a review under the now repealed section 29 of the MA, the Review Board could merely give its opinion to the President or members of the Council of the GMC whether a refusal of registration should stand. On appeal under the MA section 40 which applies to the decision of the FPP to suspend Dr Depner, the court has the power under section 40(7)(b) to quash the decision appealed from. On an appeal from an order for immediate suspension, the court has the power under section 38(8) to terminate such suspension. The powers of the court under the MA sections 38 and 40 are greater than that of the Review Board under the now repealed section 29. The distinction drawn by [the representative of the Claimant] that an internal right of appeal considered in *Khan* is an appeal or proceeding in the nature of an appeal within RRA section 54(2) but an appeal to a court cannot be accepted [sic]. The MA sections 38 and 40 give greater redress to an appellant than did section 29. If the internal review provided by section 29 was an appeal or proceeding in the nature of an appeal within RRA section 54(2) the greater rights on appeal provided by sections 38 and 40 must fall within that provision. Nor is there any basis to depart from *Khan* because of the passage of time. *Khan* remains good law and is binding on the EAT."**

She rejected the argument that the court's powers under those sections were limited to merely dealing with an irrational decision.

24. In **Uddin** the Claimant made claims of race discrimination and harassment in respect of the way he had been treated during a disciplinary process between July 2009 and October 2010, which led to his suspension by the Fitness to Practise Panel and his removal from the Register of Medical Practitioners. The conclusion which she reached was in respect of the proceedings

in respect of section 40 of the **Medical Act**. What was complained of was not an appealable decision within that Act and the Judge had been in error in thinking that it was. Section 40 of the Act provided that a decision of a Fitness to Practise Panel giving a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration was an appealable decision. The matters which were alleged, however, were matters which pre-dated the proceedings before the Fitness to Practise Panel. Such prior events were not caught by section 40. It was contended before Slade J that proceedings for judicial review would be proceedings in the nature of an appeal, which by virtue of section 120(7) would bar the jurisdiction of the Employment Tribunal. As to that she reached no decision as a matter of principle. She determined that, first, the acts alleged to constitute harassment and discrimination, as a subject of complaint, had sufficiently to be identified to see if they were decisions or acts of such a kind as would be amenable to judicial review. The Employment Judge could not herself have determined that because they had been insufficiently particularised for it to be clear whether they were. It follows that her decision made no final conclusion that a remedy by way of judicial review operated as proceedings in the nature of an appeal which by virtue of section 120(7) would deprive an Employment Tribunal of jurisdiction which it might otherwise have had. There is nothing, however, in her Judgment to suggest that she thought that if the acts complained of were amenable to judicial review that an application for it might not constitute proceedings in the nature of an appeal. And indeed, upon the remission of **Uddin** to the Employment Tribunal, Employment Judge Tayler decided, for reasons promulgated on 26 September 2013, that it did.

25. **Jooste** is thus the authority which, centrally, and alone in terms, establishes as a matter of principle and ratio that, where an application for judicial review may be brought in respect of the act complained of, the effect of section 120(7) is to deny an Employment Tribunal

jurisdiction. Mr Bowers QC and Mr Hare argue that the law is all one way. Judicial review proceedings are proceedings which fit the description given of an appeal by Hoffmann LJ in **Khan**. It was common ground between the advocates before me that the matters complained of by Dr Michalak were matters which could be considered in an application for judicial review. He argued that the right to proceed by way of judicial review arose by virtue of an enactment. The **Senior Courts Act 1981**, section 31, provides for it. Although it may once have been a common law right, it was now on a statutory footing. The statute was clear. The availability of judicial review fell within it. It was irrelevant to consider whether Parliament might or not have considered it more desirable in some cases to proceed before an Employment Tribunal than by way of judicial review. It was what Parliament had said.

26. He amplified these points by arguing that the expertise of those who sit in the High Court to determine applications for judicial review in discrimination and discrimination-related matters should not be underestimated. They were all equality-trained. The remedies that were available covered the full range. On an application for judicial review it was possible to substitute the decision of the court for that of the body from which they had been an application. The High Court was no stranger to applying the terms of the **Equality Act**: see the decision in **R(BAPIO Action Ltd) v Royal College of General Practitioners** [2014] EWHC 1416 Admin, [2014] EQLR 409, and indeed that in **R(E) v JFS Governing Body** [2009] UKSC 15, one of the leading cases on the law of discrimination, which arose initially from a decision on judicial review. Courts regularly had to consider and apply the public equality duty.

27. The gap between proceedings in a Tribunal and that by way of judicial review should not be exaggerated as, in his submission, the submissions of Mr Edis QC for the Claimant tended to

do: see the case of **Runa Begum v Tower Hamlets LBC** [2003] UKHL 5, [2003] 2 AC 430, at page 450, paragraph 47, per Lord Hoffmann who spoke of the gap being seldom very wide in practice. This was confirmed by the words of Lord Millett, in particular at paragraph 99 where he referred to the limitations of the court's jurisdiction but observed they were not very different from the limitations which practical considerations imposed on an appellate court with full jurisdiction to entertain appeals on fact or law but which dealt with them on the papers only, and without hearing oral evidence. To the same effect were the words of Keene LJ in the case of **R(Rayner) v Secretary of State for Justice** at paragraph 43, where he noted that since the **Human Rights Act 1988**:

> **"… the court has to be prepared to investigate more closely the merits of a decision challenged by way of judicial review, so as to ensure that the court as a public authority does not act incompatibly with the Convention rights of the applicant."**

28. For his part Mr Edis QC seeks to persuade me that the decision of the Judge was, despite the errors of law to which it was subject, nonetheless plainly and unarguably right. He argued that the starting point should be section 120(1) of the **Equality Act 2010**, which in the context of employment cases provides that the default position is that the Employment Tribunal has jurisdiction. At one stage in his argument this proposition was put more broadly and he might have been thought to argue that the Employment Tribunal should have jurisdiction on all matters relating to discrimination. I reject that point put in those terms. Mr Bowers QC has referred me to the provisions of sections 114 to 119 in the **Equality Act** which provide for the county court (or Sheriff's Court in Scotland) to have jurisdiction over a range of matters such as services and public functions, discrimination in respect of premises, discrimination in respect of education and in respect of associations; to the jurisdiction of the High Court and the Upper Tribunal in respect of judicial review which is expressly referred to in the **Equality Act** (sections 113 and 149 to 157); the Court of Session; the First-tier Tribunal in immigration matters (section 115(5)(b)) and in respect of the education of people with disabilities (section

116); the Special Immigration Appeals Commission (115(5)(a)); the Special Education Needs Tribunal of both Wales (116) and Scotland (116) and in both cases Schedule 17; and the Defence Council in respect of serving members of the armed forces (section 121 and 127(6) to (7)). Discrimination complaints are not the sole preserve of an Employment Tribunal.

29. However, insofar as "work" is concerned, which was the way Mr Edis put his submission primarily, it is certainly the usual case provided for by section 120 that an Employment Tribunal will have jurisdiction. He argues that the provision of 120(7) provides for an exception to what is therefore a general principle: that accordingly a restrictive approach, if anything, should be taken to 120(7).

30. I do not accept that in such absolute terms. It seems to me that section 120 has to be read as a whole. It provides that there is jurisdiction of an Employment Tribunal within certain limits. Implicitly it provides that those limits are established by the limits of the jurisdiction of other appeal processes which are relevant to the matter in play. That seems to me to establish no particular primacy as between one and the other save that, where there are such specific appeal processes, the latter should have primacy over those exercised by the Employment Tribunal. I do not therefore read this section as providing for a system setting out a general state of affairs from which there are exceptions which require to be restrictively interpreted.

31. A number of submissions which Mr Edis made have, however, given me considerable pause for thought. I have come to the conclusion that a powerful case can be made for the Claimant. But I am not so persuaded of it that I am satisfied that Judge McMullen was wrong. I consider that I should loyally follow his decision. But I do so with very considerable hesitation which might well, had there been no prior decision by him, have resulted in a

different conclusion of my own. I say that for these reasons. First, it seems to me that the purpose of the interrelationship between section 120(1) and (7) has to be understood. Mr Edis pointed to the words of Neill LJ in **Khan** at 1041F and following in which he sought to understand the way in which Parliament had required the machinery to be operated. He noted that at that time the GMC might, by one of its boards, reach a conclusion that an overseas applicant for registration did not have a sufficient command of the English language. Section 29(3) of the Act of 1983 then in force excluded resort to the review board in such a case. There would thus be no appeal which on the law as it stood under section 54(2) could exclude the jurisdiction of the Employment Tribunal. He observed:

> **"In such a case and in the other cases set out in section 29(3), the practitioner retains a right to bring a complaint to the industrial tribunal. The reason for that is simple. There are, in those cases, no proceedings in the nature of an appeal available against the initial decision. Mr Griffiths said that is an important provision because it shows how carefully this legislation is worded and how the statute itself draws a distinction between cases where there is a proceeding in the nature of an appeal, on the one hand, and cases where there is no such appellate machinery and where the practitioner can go to the industrial tribunal if he thinks it is right."**

32. For his part Hoffmann LJ said, 1043F:

> **"… Parliament appears to have thought that, although the industrial tribunal is often called a specialist tribunal and has undoubted expertise in matters of sex and racial discrimination, its advantages in providing an effective remedy were outweighed by the even greater specialisation in a particular field or trade or professional qualification or statutory tribunals such as the review board, since the review board undoubtedly has a duty to give effect to the provisions of section 12 of the Act of 1976: see *per* Taylor LJ in *Reg v Department of Health, Ex parte Gandhi* [1991] ICR 805, 814. This seems to me a perfectly legitimate view for Parliament to have taken. …"**

33. The emphasis there suggests that their Lordships saw the scheme provided for by the **Medical Act**, specific to medicine, as providing that those who had a particular expertise in the subject matter under consideration should be those who had the duty of considering any appeal in respect of a decision relating to it. Thus, in terms of the registration of doctors from overseas, it is not difficult to understand how the members of a panel established under the **Medical Act** would be better positioned and better qualified than Employment Judges to assess the applicability of qualifications gained outside the United Kingdom in determining whether

there should be registration within it. Similarly matters of medical practice and the application of appropriate standards, matters which are central often to decisions as to registration and deregistration, are matters which it is in general easier and more appropriate for professionals in the same field to exercise than it is those for those whose particular expertise relates to dealing with a range of cases involving allegations of unequal treatment. That logic provides a clear understanding of why it should be that Parliament would create an exception (if it is to be termed that) from the general run of cases before the Employment Tribunal where particular decisions have to be made. That logic does not, however, apply where the appeal process is a much more general process. The availability of judicial review does not depend upon the particular subject matter, nor any particular expertise in that subject area of the court concerned. It has been estimated that there are well over 100 different jurisdictions comprehended under the panoply of judicial review.

34. The scope of judicial review and its width is defined by Rule 54(1)(2)(a) of the CPR, which provides that a claim for judicial review means a claim to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. The notes to the White Book observe that that definition effectively encapsulates the scope of judicial review in English public law. This is far removed from the concentration on specialism which might otherwise have been thought to underpin the division of work between Employment Tribunals and specialist appeal bodies. Therefore in Mr Edis' argument the existence of judicial review across the board, if recognised as an appeal right within the scope of section 120(7), would preclude resort to Employment Tribunals whether or not a tailor-made statue conferred a right of appeal to a specific professional body.

35. Mr Edis made a submission which I understood to be to the effect that, where the words in section 120(7) "could by virtue of an enactment" appear, those words should be understood, in the light of the purpose of that subsection, as referring to an enactment which dealt with the particular subject matter likely to be under appeal. The enactment, as it seems to me, might be the enactment under which the act complained of took place but need not be. The words of the **Equality Act** do not confine "enactment" to one which is specific to the specialist area being considered. It may be thought to be the sense of it. If I were convinced of this, I would have rejected this appeal. Though it seems to me that there is force in reading that subsection in that way, I am not sufficiently convinced it is correct.

36. There is reinforcement for this general approach by noting a matter which gives me some concern. Despite the availability of judicial review, regulated by section 31 of the **Senior Courts Act 1981** since 1981, there does not seem to have been any suggestion in **Khan v the GMC** that judicial review was the answer to the particular case. This is despite the observations of Hoffmann LJ at 1043H to 1044A in which, having already referred to judicial review - not as creating an appeal which would be within section 54(2) but as reinforcing the effectiveness of the appeal route otherwise provided - he turned to deal with the alternative submission. As to this, it seems to me that if Hoffmann LJ had considered at the time that the availability of judicial review met the terms of the statute, so as to preclude an Employment Tribunal having jurisdiction, it would have been appropriate to mention it. This is all the more forceful a point given that he showed he had the availability of judicial review in mind. It is not therefore just the absence of any decision until the decision in **Jooste** which concerns me, but the fact that those appellate courts which have had the opportunity to consider the point have never had it raised before them by experienced Counsel there appearing, nor thought it

appropriate, whilst considering judicial review itself, that it would be a complete answer to jurisdiction.

37. It seems to me that the argument of Mr Edis emphasised the specialist nature of the Tribunal. An Employment Tribunal sitting in discrimination cases sits as a panel of three. He pointed to the statutory provisions which required the county court sitting in discrimination cases to sit with assessors. By contrast, although it is open to a Judge in the High Court considering judicial review to sit with assessors, he does not have to exercise that power. The design of the process is more clearly intended to deal with general matters of equality in the one case, whereas it is more likely to deal with general matters of public law in the second.

38. Though I entirely accept that there are differences in the culture of the courts when it comes to dealing with evidence and remedies, these seem to me to be a small point, insofar as they go they tend to weigh in favour of Mr Edis' arguments. However, it may well be, as Lord Millett said in **Begum v Tower Hamlets**, that there is in practice little difference theoretically in the remedies available and the effect of the processes.

39. I query too whether judicial review arises by virtue of an enactment. It seems to me there may be room for saying that section 31 regulates aspects of a procedure which is otherwise provided for by common law, and thus that the statute merely recognises that there is judicial review, rather than provides for it. Although the word "enactment" might well cover an enactment by way of secondary legislation as it does primary legislation, and thereby encompass the rules of civil procedure, it may be that judicial review is in its essence a creature of the common law, albeit with statutory powers now available (for convenience) to award remedies which, prior to 1981, would not have been available.

40. These points fall short of satisfying me that Judge McMullen was necessarily wrong. What he said was in line with a literal interpretation of section 120(7), assuming that the point I have raised in respect of the meaning of "by virtue of an enactment" is satisfactorily answered in favour of his decision. Nonetheless I remain concerned by the observations made by Judge Tayler himself between paragraphs 52 and 55 of his Decision upon the remission of the **Uddin** appeal, though I have to say that I think that much of his reasoning in paragraph 54 is circular and unconvincing.

41. It would be of value for a higher court to consider the question.

42. In conclusion, I have sufficient uncertainties as to the correctness of Mr Edis' otherwise attractive arguments, first, to recognise that I should, though the Judge did not, follow the decision in **Jooste**. The consequence therefore is that the appeal on ground 1 is allowed. The appeal on ground 2 follows, as is common ground between the parties.

43. A third ground was raised, which concerns a slightly different point. After the Notice of Appeal had been served, the Judge of his own motion decided to issue a corrected Judgment. He plainly did so because he recognised that he had been referring to **Jooste** as containing obiter (which it did not), when he should have been referring to **Zaman**. He substituted **Jooste** for **Zaman**. The two were different decisions in that, as I have noted, **Zaman** was a case in which the observations of Judge McMullen were expressly obiter. In **Jooste** they were ratio. The appeal under Ground 3 was that the Tribunal had done more than it was entitled to do under Rule 69 of the **2013 Rules**, which was simply to correct a clerical mistake or other accidental slip. What it now said amounted to an important change in the Tribunal's reasoning. This is uncontroversial between the parties before me.

44. If a Tribunal considers that it may not have referred to an authority which it should have referred to and wishes to make a point about that authority, it is only fair to both parties to give each an opportunity to advance submissions. In effect, it then reconsiders its Judgment as opposed to correcting a slip in it. In doing so, it will hear the parties. By contrast, where a slip is corrected this requires no input from either side. The process which was adopted here was thus one which wrongly shut out the parties from further submissions. The mistake about the nature of the change thus worked actual procedural and potential substantive injustice on the parties. Had it been necessary to do so, I would have decided the appeal favourably on ground 3 too.

45. Finally, can I thank both parties for the quality and comprehensive nature of their submissions.