Appeal No. UKEAT/0142/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 October 2013
Judgment handed down on 14 April 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MRS C BAELZ

MR DJ JENKINS OBE

MS Z KAPENOVA APPELLANT

DEPARTMENT OF HEALTH RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ROLF RUE (Representative)
For the Respondent	MS J WOODWARD (of Counsel) Instructed by: Treasury Solicitors DH Employment Team Room 1N18 Quarry House Quarry Hill Leeds LS2 7UA

SUMMARY

RACE DISCRIMINATION – Indirect

The Employment Tribunal did not err in holding to be justified an indirectly discriminatory criterion for entry to the two-year post graduate Foundation Programme for medical students. Applicants are not eligible if they have obtained or are expected to obtain full registration as doctors with the GMC by the start of the Programme, the PCP. Medical students at UK universities graduate after five years and are not entitled to full registration until completion of the first year of the Programme. The Claimant will be a graduate of a Czech university. Czech universities, as do those of some other European universities award medical degrees after six years' study. As an EEA national and a six-year graduate the Claimant will be entitled under the **Medical Act 1983** to full registration as a doctor and was not eligible for the Foundation Programme.

The Employment Tribunal did not err in concluding that the PCP was a reasonably necessary and proportionate way of achieving legitimate aims and so the indirect discrimination on grounds related to nationality was justified in both domestic and European law. Article 45 of the **Treaty on the Functioning of the European Union**, Directive 2005/36/EC (the Harmonisation Directive) and **Homer v Chief Constable of West Yorkshire** [2012] IRLR 601, **Bressol v Gouvernment de la Communaute Francaise** C-73/08 considered.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. At the conclusion of the hearing before us, Mr Rue, who represented Ms Kapenova ('the Claimant') stated that she wished to know the outcome of the appeal. We dismissed the appeal. These are our reasons for doing so.

2. The Claimant appealed from the judgment of an Employment Tribunal ('ET'), Mrs J Wade and members, sent to the parties on 12 November 2012 ('the judgment') that the United Kingdom Foundation Programme Office ('UKFPO') as agent of the UK Department of Health ('the Respondent') did not unlawfully indirectly discriminate against the Claimant on grounds related to nationality. Unless otherwise indicated references to paragraph numbers are to those in the judgment.

3. The Claimant is a Kazakhstan national studying medicine in the Czech Republic. On completion of her six-year course of study at the Charles University in Prague, pursuant to section 3(1)(b) of the **Medical Act 1983** she will be entitled to full registration by the General Medical Council ('GMC') and will be able to practice as a doctor in this country. The Claimant brought a claim before the ET of indirect discrimination related to her nationality because she was refused a place on the UK Foundation Programme ('FP') which she wished to join on graduation. The programme comprises two years, FP1 and FP2. An entry criterion for the two-year course provides that an applicant is not eligible if they have obtained or are expected to obtain full registration as a doctor from the GMC by the start of the programme. The Claimant contended that this provision, criterion or practice ('PCP') is unlawfully discriminatory.

4. The Claimant, who was ably represented before us as she was before the ET by Mr Rue, brought her claim under the **Equality Act 2010** ('EqA') and under European Law Provisions on

the Free Movement of Workers. The position of the Respondent, represented by Ms Woodward of counsel, before us and before the ET was that the relevant European provisions are given effect in domestic law by the EqA but that if that is not the case Article 45 of the **Treaty on the Functioning of the European Union** ('TFEU') had direct effect in the circumstance of this claim.

5. The issue on this appeal is whether the ET erred in holding that the PCP which they held to be indirectly discriminatory, was justified and therefore not unlawful.

6. The claim within the jurisdiction of the ET was brought under sections 55 and 109 of the EqA against the UKFPO as an employment service provider and an agent of the UK Departments of Health for the purposes of applying the eligibility criteria for admission to the FP.

Outline findings of fact

7. In the UK, the basic education and training of doctors has been by way of a five-year university degree followed by one year for graduates as a pre-registration house officer working in a hospital. At the end of the pre-registration year, if successful, they were entitled to full registration with the GMC. The system used to be that after registration a doctor applied for a senior house office role. They then applied for specialty training. Following a review of the system it was decided that from August 2005 a two-year Foundation Programme ('FP') should be put in place. The ET held at paragraph 16:

> **"The two year Programme is characterised by the following:**
> - **it has a centralised national recruitment system;**
> - **it is a two year programme, unless you fail at stage 1 you are guaranteed two years' paid employment and two years training;**
> - **it is an integrated planned two year programme of general training designed around a spiral curriculum;**

- **the first year (F1) is the replacement for the pre-registration house officer role and the second year (F2) for the senior house officer role;**
- **at the end of F1 a student can register with the GMC;**
- **at the end of F2 a successful student is given a 'FACD' [Foundation Achievement of Competencies] certificate which entitles them to apply for speciality training;**
- **it is common ground that the pre-registration house officer was, and an FP student is, 'employed' and does 'work', but there is also a significant training element."**

8. One criterion for admission to the FP is that an applicant is not eligible if they have obtained, or are expected to obtain, full registration by the start of the Programme. There is no provision which excludes applicants according to their country of origin. The ET held that the number of places in medical school is influenced by the need of the NHS for doctors. Medical students in some countries of the EEA graduate after five years, as in the UK, and are eligible for admission to the start of the FP. An eligible student graduating in the UK, of whatever nationality, can potentially be denied a place in favour of a five-year graduate from outside the UK. The ET held at paragraph 19 that in fact there has never been a year when a UK graduate has not been admitted to the FP but they were told that this would not be the case in the future. The ET held:

> **"20. If the Programme is undersubscribed then the number of Foundation year 1 roles are reduced. This means that the funders do not have to pay for roles that are not needed: there is not a set quota for Foundation Programme places which could be filled by 6-year applicants such as the Claimant if they are not needed by 5-year doctors."**

9. The ET held at paragraph 25 that there are at least three ways for a six-year graduate to obtain a FACD. These are:

> **"(ii) A 6-year student can undertake a one year freestanding F2 role. They will come out at the end of it at exactly the same point as a 5-year student who has been on the two year FP.**
>
> **(iii) The equivalence route means that a doctor can take 2 years or more to get to the FACD point working in a hospital in locum or staff roles.**
>
> **(iv) A hybrid route whereby a registered doctor (either a 5-year student who has completed year one of the FP or a 6-year student) could apply for an F1 locum role, and then from that role apply for a freestanding F2 role. They would therefore take 2 years to get to the FACD. Six-year students taking that route would take one year longer than was necessary and one year longer than 5-year students on the FP to get to FACD."**

10. The ET considered the route for direct entry to F2 for six-year students. They held that there is "headroom" enabling six-year students to apply for F2 places. They held that headroom exists at the moment. There is no guarantee that it would continue beyond the next two years.

11. The Claimant applied for the FP in August 2011 and was rejected because she would be eligible to apply for Registration at the start of the programme as she would be a six-year graduate. The Respondent suggested that she should instead apply for a "freestanding F2 role". The Claimant did not apply for a freestanding F2 role or pursue any of the alternative routes to obtaining the FACD.

The conclusions of the ET

12. At paragraph 33 the ET held that:

> **"The characteristic of 'not being a UK national' and/or a worker from outside the UK wishing to move freely into it puts the Claimant in a group protected by domestic and EU law."**

The ET held that the PCP had a differential and disadvantageous impact on the group of which the Claimant was a member and on the Claimant herself.

13. The ET held that the PCP put the Claimant at a disadvantage but the disadvantage was not sizeable. The ET listed the disadvantages of not being on the full two-year FP together with "the various balancing factors".

14. The ET held that the first category of disadvantage was "not being able to be on a full two-year FP". The ET considered that there were three disadvantages in this category. The FP is a very good course, however it is possible to qualify for the FACD by various other routes. The most sought after geographical locations for training are probably not available to students

who are not on the FP. The FP offers two years of guaranteed paid work. However if a doctor is registered, as the Claimant would be, staff and locum jobs would be available.

15. The second category of disadvantage relates to freestanding F2 jobs. The ET considered that there were four disadvantages in this category. The process of applying for F2 jobs can be time consuming and costly. However there are unfilled vacancies for F2 jobs. A Czech graduate starting in an F2 job "would struggle to acclimatise herself to the NHS and F2 is harder if you have not done the F1 already". However tutors are particularly attentive to the possible difficulties for a student entering an F2 course not having participated in an F1. The suggestion that perhaps a Czech graduate may need to study on an F1 before going on to an F2 in order to ensure she was practicing safely was not accepted. The ET did accept that it is harder to obtain an F2 job without NHS experience. However the ET held that if a registered doctor felt that she needed to have NHS experience before applying for an F2 she would be able to do so by applying for a locum F1 role. In this way her training to the FACD stage would be no longer than if she had entered the full two-year FP.

16. The third category of disadvantage relates to "equivalence" taking on locum or staff F1 roles. The equivalence route would take a year before specialist training but so too would undertaking the full FP course. The ET did not accept the Claimant's contention that freestanding F2 posts are oversubscribed. They found that whilst it is not well advertised, the F2 programme is not oversubscribed. It is open to but not required of a six-year student to take a one year post as a registered F1 locum and apply for an F2 post from that position.

17. The ET also noted that a UK doctor who is not registered because they have not studied year one of the FP is disadvantaged in comparison with a six-year graduate because a five-year student cannot undertake a locum F1 role. The disadvantage to such a student in being denied a

place on the FP in favour of a six-year student would be substantial. However focussing on the disadvantage of the PCP on six-year students, the ET expected that the effect on most six-year graduates of *not* having to undertake two years' training in the UK before specialising is advantageous.

18. Having found that the PCP put six-year students at a disadvantage, that six-year students were more likely to be non-UK nationals and that the Claimant shared that characteristic and was at that disadvantage, the ET considered whether the PCP was justified.

19. The ET directed themselves to apply the guidance given by the Supreme Court in **Homer v Chief Constable of West Yorkshire** [2012] IRLR 601. At paragraph 47 the ET found:

> **"…the aim of this contentious criterion is 'to provide an appropriate system of training for those who need it in a way that does not discriminate against any student outside the UK.' Another formulation would be 'to accommodate the expectations of UK graduates who seek full registration and to move on to the FACD without excluding other graduates at the same time of their education."**

In paragraph 48 the ET referred to the aims advanced by the Respondent as "slightly different but complementary". These were:

> **"(i) To maximise the opportunities for people of whatever nationality to study medicine in the UK to reach qualification.**
>
> **(ii) To prevent the waste of scarce NHS resources inherent in providing training to people who do not require it potentially at the expense of those who do."**

The ET rejected the contention of Mr Rue for the Claimant that the aim of the PCP was "to exclude non-UK nationals from training in the UK." The reasons for the rejection of this contention were that:

> **"(i) The criterion allows graduates from 14 other EEA countries, as well as from the UK to apply for the foundation programme.**
>
> **(ii) It allows graduates from outside the EEA to apply.**

(iii) It allows non-UK nationals in the UK to apply.

(iv) It allows UK nationals outside the UK on 5-year courses to apply."

Further the ET held that the number of places on the FP is not co-terminus with the number of UK graduates since there is "headroom" because there is an expectation that non-UK graduates will join the programme. Also historically only unregistered students were admitted to study in the pre-registration year, F1.

20. The ET held at paragraph 51 that the aim of the policy is "as defined in paragraphs 47 and 48". The aim as formulated by the ET in paragraph 47 and as formulated by the Respondent set out in paragraph 48, was "capable of being a legitimate aim". The ET held that the aim:

> **"…focuses on training for doctors who are going to work in the National Health Service and how graduates from all over the world can best be enabled to register with the GMC and thus practice as doctors [and that] … This is a social policy aim."**

The ET further held that:

> **"In fact it aims to open up training to graduates round the world who need it."**

21. The ET considered that the judgments of the CJEU in C-73/08 **Bressol v Gouvernement de la Communaute Francaise** and C-147/03 **European Commission v Austria** Case C-147/03 which Mr Rue relied upon to contend that the Respondent could not succeed in establishing that they had a legitimate aim were not relevant. The ET held that these European authorities related to a different justification defence, that of public health, and examined whether statistical evidence was needed to establish a public health justification. The ET considered that statistics would not have assisted in determining this case.

22. In deciding whether the PCP was a proportionate means of achieving what were found to be legitimate aims the ET concluded at paragraph 55 that it was "reasonably necessary". The ET gave seven reasons for reaching that conclusion. The ET held that the PCP:

> **"(i) …avoids the unnecessary repetition of a year for six-year students coming to the UK and recognises the equivalence of training across the EEA. It also avoids giving more options to six-year students than to UK and other five-year students.**
>
> **(ii) It ensures actual and perceived fairness in the application of the national and widely published UKFPO rules. Fairness is very important.**
>
> **(iii) It would be a waste of resources if students went on the full FP if they did not need it. …For us, waste of resources is a significant issue(s) and a political hot potato. It is of course true that the FP students do "work" in both year 1 and year 2, and hospitals benefit from their work whoever they are, but it is wrong to characterise what they do as only work. There is also training and there is a cost in recruiting into the FP both in terms of time and money, although that has not been quantified. So we think that waste, actual and perceived, is a significant factor.**
>
> **(iv) …Who the money is spent on, and whether it needs to be spent, is very relevant when it comes to the fair use of public resources, and since there is no set number of FP places there is less cost when less students apply. There would be no unfilled places that could be taken by the Claimant at no extra cost. We were not able, nor were the witnesses, to quantify the level of potential waste, or indeed of actual waste, but both waste in principle and internal cost are important factors. The cost element is only one and therefore this is what is known as a 'costs plus' justification.**
>
> **(v) If 6-year students were allowed on the FP this might be at the expense of a 5-year student, whether from the UK or outside it. Hitherto, there has not been a shortage of places, but we were told that there will be. The Respondent should be allowed to plan ahead … if 5-year students were excluded from the FP they would suffer a real disadvantage because of not being able to take up locum F1 posts.**
>
> **(vi) …[medical students] have a particular need to register in order to be able to practice and medical training is of little use before registration. It is in the public interest that we have registered doctors in the NHS to look after us and the successful completion of their training is relevant because it is paid for by us."**

23. The ET then considered the balance of disadvantage and held that the PCP did not have an impact on a large number of students as the majority of six-year students would not consider doing the full FP when they did not need to. The ET concluded in paragraph 56 that the numbers who benefit from the way the PCP is framed outweigh the numbers disadvantaged. Further the disadvantages to the Claimant and others in the six-year group were not either career threatening or career limiting. The ET held that:

> **"…when carrying out the balancing exercise we find that the disadvantage to the Claimant does not outweigh the importance of the legitimate aim."**

24. Reference had been made by Mr Rue to the policy adopted by Malta of admitting six-year students to the FP. The ET held that the fact that Malta may have a different and more flexible policy did not mean that the policy of the UK was unlawful.

25. The ET considered whether there were non-discriminatory alternatives by which the aims of the policy could be achieved. It had been contended on behalf of the Claimant that the FP would be opened to six-year students but not to those from outside the EEA. The ET considered that there was a real danger that this approach would amount to direct race discrimination and would be open to challenge.

26. The second alternative considered by the ET was to limit the right to apply for the FP to those who have only recently been registered as doctors. However they considered that there was a real danger that such a provision would be age discriminatory.

27. The ET also considered that FP students would think it unfair to have someone on the course who did not seem to need it and who was always ahead of them. Further there was a concern that if six-year students were allowed to enter the full FP this would upset the system for six-year students who wanted to apply for a freestanding F2 role. Fewer such places would be available. There would still be a need for such places as the Respondent could not compel all six-year students to take the FP as this would be failing to recognise the full registration to which they were entitled. Considering applications on a case by case basis was said to lead to the risk of discrimination.

28. The ET held in paragraph 62:

> **"In conclusion we find that the application of the criterion is justified on social policy grounds it is a proportionate means of achieving legitimate aim both for the purposes of**

the Equality Act and for the purposes of Article 5, [45] the Rules on the Free Movement of Workers."

The relevant statutory provisions

29. **Equality Act 2010**:

"19. Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation.

…

55. Employment service-providers

(1) A person (an "employment service-provider") concerned with the provision of an employment service must not discriminate against a person—

(a) in the arrangements the service-provider makes for selecting persons to whom to provide, or to whom to offer to provide, the service;
…"

30. **The Treaty on the Functioning of the European Union**:

"Article 45

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;
…

Article 46

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue

directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

…"

31. **Directive 2005/36/EC** on the recognition of professional qualifications ('the Harmonisation Directive'):

"Article 21. Principle of automatic recognition

1. Each Member State shall recognise evidence of formal qualifications as doctor giving access to the professional activities of doctor with basic training and specialised doctor, as nurse responsible for general care, as dental practitioner, as specialised dental practitioner, as veterinary surgeon, as pharmacist and as architect, listed in Annex V, points 5.1.1, 5.1.2, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.6.2 and 5.7.1 respectively, which satisfy the minimum training conditions referred to in Articles 24, 25, 31, 34, 35, 38, 44 and 46 respectively, and shall, for the purposes of access to and pursuit of the professional activities, give such evidence the same effect on its territory as the evidence of formal qualifications which it itself issues.

Such evidence of formal qualifications must be issued by the competent bodies in the Member States and accompanied, where appropriate, by the certificates listed in Annex V, points 5.1.1, 5.1.2, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.6.2 and 5.7.1 respectively.

The provisions of the first and second subparagraphs do not affect the acquired rights referred to in Articles 23, 27, 33, 37, 39 and 49.

…

6. Each Member State shall make access to and pursuit of the professional activities of doctors, nurses responsible for general care, dental practitioners, veterinary surgeons, midwives and pharmacists subject to possession of evidence of formal qualifications referred to in Annex V, points 5.1.1, 5.1.2, 5.1.4, 5.2.2, 5.3.2, 5.3.3, 5.4.2, 5.5.2 and 5.6.2 respectively, attesting that the person concerned has acquired, over the duration of his training, and where appropriate, the knowledge and skills referred to in Articles 24(3), 31(6), 34(3), 38(3), 40(3) and 44(3).

The knowledge and skills referred to in Articles 24(3), 31(6), 34(3), 38(3), 40(3) and 44(3) may be amended in accordance with the procedure referred to in Article 58(2) with a view to adapting them to scientific and technical progress.

Such updates shall not entail, for any Member State, an amendment of its existing legislative principles regarding the structure of professions as regards training and conditions of access by natural persons.

…

Article 24. Basic medical training

…

2. Basic medical training shall comprise a total of at least six years of study or 5 500 hours of theoretical and practical training provided by, or under the supervision of, a university. For persons who began their studies before 1 January 1972, the course of training

referred to in the first subparagraph may comprise six months of full-time practical training at university level under the supervision of the competent authorities.

…

Article 25. Specialist medical training

1. Admission to specialist medical training shall be contingent upon completion and validation of six years of study as part of a training programme referred to in Article 24 in the course of which the trainee has acquired the relevant knowledge of basic medicine."

32. **Medical Act 1983**:

"3. Registration by virtue of primary United Kingdom or primary European qualifications.

(1) Subject to the provisions of this Act any person who—

(a) holds one or more primary United Kingdom qualifications and has passed a qualifying examination and satisfies the requirements of this Part of this Act as to experience; or

(b) being a national of any EEA State, holds one or more primary European qualifications,

is entitled to be registered under this section as a fully registered medical practitioner.

…

4. Qualifying examinations and primary United Kingdom qualifications.

(3) In this Act "primary United Kingdom qualification" means any of the following qualifications, namely—

(a) the degree of bachelor of medicine or bachelor of surgery granted by any university in the United Kingdom;

…

…

15. Provisional registration.

…

(2) A person who, apart from any requirement as to experience, would by virtue of any qualification or qualifications held by him be entitled to be registered under section 3 above shall be entitled to be registered provisionally under this section.

(3) A person provisionally registered under this section shall be deemed to be registered under section 3 above as a fully registered medical practitioner so far as is necessary to enable him to be engaged in employment in a resident medical capacity in one or more approved hospitals, approved institutions or approved medical practices but not further.

…

47. Appointments not to be held except by fully registered medical practitioners who hold licences to practise.

(1) Subject to subsection (2) below, only a person who is fully registered and who holds a licence to practise may hold an appointment as physician, surgeon or other medical officer—

(a) in the naval, military or air service,

(b) in any hospital or other place for the reception of persons suffering from mental disorder, or in any other hospital, infirmary or dispensary not supported wholly by voluntary contributions,

(c) in any prison, or

(d) in any other public establishment, body or institution,

or to any friendly or other society for providing mutual relief in sickness, infirmity or old age.”

The Grounds of Appeal

33. The Notice of Appeal sets out six grounds which Mr Rue developed these orally in submissions that the ET erred in the way in which both European and domestic law were applied. The Grounds in the Notice of Appeal are:

- Ground 1

  The Tribunal erred in law by not determining whether the aim identified in paragraph 47 reflects imperative grounds of public policy that may be relied upon as justification for interference with freedom of movement rights in accordance with the limitations permitted by Article 45(3) TFEU, and by not making a finding as to the nature of the genuine and sufficiently serious threat that the PCP is intended to address.

- Ground 2

  The Tribunal erred in law by not making a finding of fact as to which doctors “need” the two years of employment and vocational training of the FP, or who are “at the same stage of their education”, and what “the expectations of UK graduates” actually are. Without such findings, the phrases are devoid of meaning as qualifications to the aim identified by the Tribunal in paragraph 47.

- Ground 3

  The Tribunal erred in law by not making findings, or otherwise taking into account, the full extent to which Directive 2005/36/EC on the recognition of professional qualifications applies to the facts of the case.

- Ground 4

  The Tribunal erred in law in assessing the usefulness of two cases to which it was referred: Case C-147/03 **Commission v Austria** and Case C-73/08 **Bressol**

v Gouvernment de la Communaute Francaise, and by not following their guidance.

- Ground 5

  The Tribunal erred in law by approaching the question of justification in an insufficiently organised fashion.

- Ground 6

  The Tribunal erred in law by not considering one of the alternatives discussed during the hearing, breaking the link between F1 and F2 by not considering other obvious alternatives and by giving inadequate reasons for rejecting the alternatives it did consider.

The contentions of the parties

34. Mr Rue developed his oral submission on the Grounds of Appeal first under English law and then under European law.

35. Mr Rue submitted that the ET erred in English law in their decision that the PCP was justified. He contended that the ET erred in holding that the aims of the PCP were legitimate for the purposes of establishing a defence to indirect discrimination. The aims relied upon by the ET were those set out in paragraphs 47 and 48 of the judgment. It was contended that the ET failed to take into account the fact that completion of F1 was not needed by UK graduates to enable them to obtain registration as doctors.

36. Completing the first year of the FP is the only route for a graduate of a UK university to obtain the experience and training necessary pursuant to section 10 of the **Medical Act 1983** to obtain full registration under section 3(1)(a). However if they satisfied the academic qualifying conditions for full registration they could obtain provisional registration under section 15.

Provisional registration would entitle them to be engaged in employment in a resident medical capacity in one or more approved hospitals, institutions and medical practices.

37. The Claimant's complaint is that she is not allowed to get on to F1 and F2. She requires the FACD certificate to undertake specialist medical training. Because UK graduates can obtain provisional registration on completion of their five-year degree course it was said that the ET erred in holding that the aim of the PCP was to enable them to achieve registration as doctors. They were entitled to provisional registration without undertaking the FP. Mr Rue submitted that doctors from six-year countries, like the Claimant, must work at F2 level for at least one year to obtain the FACD. Most jobs at that level are pre-allocated to doctors on the FP programme proceeding from year one to year two. Six-year graduates have no opportunity to compete for those jobs with the same priority as UK graduates.

38. Mr Rue contended that as the Respondent is not an employer they cannot rely on cost at all, even "cost plus", as a justification for a discriminatory PCP. He relied on the judgment of Burton J in **Cross v British Airways plc** [2005] IRLR 423 referred to in paragraph 59 of the judgment of the Court of Appeal in **Woodcock v Cumbria Primary Care Trust** [2012] IRLR 491. Burton J held at paragraph 72 of **Cross**:

> **"We conclude that the European Court has laid down a perfectly comprehensible structure. A national state cannot rely on budgetary considerations to justify a discriminatory social policy. An employer seeking to justify a discriminatory PCP cannot rely *solely* on consideration of cost. He can however, put cost into the balance, together with other justifications if there are any…"**

39. If "cost plus" can be relied upon as a justification for a discriminatory PCP, Mr Rue contended that the cost of the service provision of recruiting onto the FP was not quantified as the ET recognised in paragraph 55(iii). Since the participants in F1 work they provide value. The value of F1 exceeds the cost. Mr Rue contended that there was a policy to pay doctors on the foundation programme more than they were worth.

40. Even if the ET were entitled to conclude that there was a cost saving aim in the PCP, Mr Rue contended that the FP provides a social advantage. That social advantage must be provided on a non-discriminatory basis to migrant workers.

41. Mr Rue contended that the ET erred in failing to rule on alternative ways advanced before them of achieving the Respondent's aim. They did not properly consider ceasing the employment linkage between F1 and F2 as recommended in the Tooke Report. Further the ET did not consider whether the aims of the Respondent could be achieved by paying doctors on the FP no more than they are worth. The ET did not consider whether the Respondent should allocate applicants to posts at either F1 or F2 depending on their level of experience and qualification. Mr Rue contended that the ET failed to consider whether the aims of the Respondent could be achieved by changing Immigration Rule 2453X so that doctors from outside the EEA who have studied at a British medical school who otherwise would not have the right to work in the UK and who are now by virtue of that rule can join the FP should no longer have that right.

42. Mr Rue contended that the ET erred in directing themselves to consider whether the PCP was "*reasonably necessary*" as a proportionate means of achieving a legitimate aim. He contended that the correct test was to consider whether the PCP was "necessary". The qualification of "necessary" with "reasonably" was made in error of law.

43. Mr Rue advanced six arguments in European law in support of the contention that the ET erred in holding that the PCP was justified.

44. Mr Rue submitted that no defence of justification for this PCP was available in European law. He contended that Directive 2005/36/EC, the Harmonisation Directive, exhaustively harmonises the recognition of the professional qualification of medical doctors by minimum training conditions. Mr Rue submitted that the "ground occupied by 2005/36/EC – recognition of qualification for medical doctors giving access to professional activities – is exactly the substance of the PCP." Articles 25.1, 24 and 21.6 do this. Mr Rue relied on the judgment of the CJEU in **Matratzen Concorde AG v Hukla Germany UK** C/421/04 paragraph 20 in support of the contention that insofar as the PCP placed restrictions on the operation of the effect of the Harmonisation Directive the defence of justification could not be relied upon. Nor was it said, can the public policy derogation in Article 45(3) TFEU.

45. Secondly it was said that the object of the Harmonisation Directive must be recognised. The provision of TFEU Article 45(3) and the Harmonisation Directive were exhaustive of member states' competencies in the relevant area of free movement of labour and recognition of qualifications. This required enabling a Czech graduate to compete for places on the FP on equal terms with a UK graduate.

46. Third, if a defence of justification were available it would only be for a measure the aim of which was genuine and suitable to address a serious threat to a fundamental interest of society.

47. Fourth, it was said that evidence is required to support a defence of justification. Further, the PCP must be applied in a non-discriminatory manner. It was said that the ET erred in considering that the judgments of the CJEU in **Bressol** and **Austria** were not relevant. In **Bressol** the Advocate General referred to the principles to be applied in considering a defence of justification. She stated:

> **"83. It is settled case-law that indirectly discriminatory treatment on the basis of nationality may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued.**
>
> **84. The Court has likewise held that it is for the national authorities invoking a derogation from the fundamental principle of freedom of movement for persons to show, in each individual case that their rules are necessary and proportionate to attain the aim pursued. The reasons that may be invoked by a Member State by way of justification 'must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments.'"**

48. Fifth, Mr Rue contended that the Respondent had not established that the PCP was either suitable or necessary for the achievement of their aims.

49. Sixth, it was submitted that the ET had not applied the test of proportionality in its strict sense.

50. At the hearing Mr Rue asked us to refer the case back to the ET asking them to consider which European rights had been infringed and in what respect.

51. Ms Woodward pointed out that the Claimant's claim against the Respondent, UKFPO was brought under EqA section 55(1)(a). The Respondent provides the service of selecting candidates for entry to the FP as agent for the UK Departments of Health. The claim against the Respondent was for applying the PCP in issue in these proceedings. Counsel contended that any challenge to the structure of the FP would have to be by judicial review.

52. The position of the Respondent, as recorded by the ET was that European law is given effect by the EqA. In any event in the respects relevant to this case, domestic law is compliant with European law. Ms Woodward accepted that the ET did not expressly consider whether a case was made out under the directly applicable European law, Article 45. However they did so by necessary implication. In paragraph 6 the ET stated that they considered "both routes" and

in paragraph 62 that they considered the PCP justified under both EqA and "for the purposes of Article 45, the Rules on the Free Movement of Workers."

53. Ms Woodward contended that it was too late for a reference back to the ET to ask them to answer questions under the **Burns/Barke** procedure. Further, counsel contended that the Employment Appeal Tribunal was as well equipped as the ET to determine whether the Claimant had established a claim under European law.

54. Ms Woodward submitted that the third ground of appeal raises a point of law not argued before the ET. Counsel contended that it is in any event misconceived. The Harmonisation Directive does not provide that graduates of Czech and UK universities are at the same stage of their education. Graduates of UK medical schools do not complete their basic medical training until they have successfully completed F1 or its equivalent outside the UK. Article 24 of the Harmonisation Direction provides:

> **"2. Basic Medical Training shall comprise a total of at least six years of study or 5,000 hours of theoretical and practical training provided by, or under the supervision of a university."**

UK students graduate after five years of study. A six-year graduate, such as the Claimant, has completed basic medical training as specified in the Harmonisation Directive. A five-year graduate, those educated in UK universities have not. Accordingly the assertion in the Third Ground of the Notice of Appeal that:

> **"…in accordance with the Harmonisation Directive new graduates of both Czech and UK universities are at the same stage of their education."**

is contrary to the provisions in Article 24 of the Directive and must fail.

55. Ms Woodward submitted that the Second Ground of Appeal is contrary to Article 24 of the Harmonisation Directive. The Article makes it clear that basic medical training is only achieved on completion of at least six years' study or the requisite number of hours of supervised theoretical and practical training. The ET did not err in not making a finding as to which doctors need the FP. The answer is provided in Article 24 of the Harmonisation Directive. Five-year graduates will not have completed their basic medical training as provided by the Directive until they have completed F1 of the FP, whereas six-year graduates have completed basic medical training in accordance with the Directive.

56. Ms Woodward contended that Grounds One and Four of the Notice of Appeal, which challenge the finding of the ET that the Respondent had a legitimate aim, are misconceived. The Claimant's claim is of the application of the PCP for admission to F1. No such PCP applies for admission to F2. The Claimant has not applied for admission to F2. Whether or not the aim of the PCP was expressly stated, the ET made clear findings of fact as to what these aims were. The ET found the aims of the PCP to be those set out in paragraphs 47 and 48 of the judgment.

57. Ms Woodward contended that the ET did not err in holding the aim of reserving the first year of the FP for those who needed it for full registration was legitimate. It would be unnecessary and wasteful to admit to the F1 year those who were already entitled to full registration. It was said that this is not a cost justification rather it is avoiding waste. If it is a cost justification it is "cost plus". Ms Woodward referred to paragraph 20 of the judgment in which the ET held:

> **"If the Programme is undersubscribed then the number of Foundation year 1 roles are reduced. This means that the funders do not have to pay for roles that are not needed."**

The Court of Appeal in **Woodcock** held that an employer could not justify a discriminatory rule or practice solely on the basis of costs considerations but that rule or practice in which cost played a part could be objectively justified.

58. Ms Woodward contended that the aims of the PCP as found by the ET were legitimate in accordance with domestic law. They also found them to be a "social policy aim".

59. Ms Woodward pointed out that the fourth Ground of Appeal is related to the first. Contrary to the assertion made in the fourth Ground of Appeal guidance in **Austria** and **Bressol** does not require that to form a basis for a justification defence the aims of the Respondent must "constitute an imperative ground of public policy".

60. Ms Woodward contended that European law does not restrict justifiable legitimate aims of discriminatory domestic law provisions to "imperative grounds of public policy" as asserted on behalf of the Claimant. Although the CJEU in **Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano** Case C-55/94 referred to the requirement that national measures hindering or making less attractive the exercise of fundamental freedoms guaranteed by the Treaty be "imperative requirements in the general interest" to be capable of justification, the CJEU in **Kraus v Land Baden-Württemberg** Case C-13/92 set a lower bar in paragraph 32. A national measure may be justified "by pressing reasons of public interest. Ms Woodward contended that European law did not require a different approach to determining whether the aim of the PCP was legitimate and whether its application was justified than that adopted by the ET applying domestic law.

61. Ms Woodward submitted that in any event the PCP did not restrict the Claimant's rights under Article 45 of the TFEU. None of the Claimant's rights under Article 45 paragraph 3 were affected by the PCP.

62. Ms Woodward accepted that it is for the Respondent to establish the justification for an indirectly discriminatory PCP. The principle referred to in **Bressol** at paragraph 71 that it is for authorities who adopt a measure derogating from a principle of European law to show that the measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. In this case the PCP does not derogate from a principle of European law.

63. As for the fifth Ground of Appeal, the PCP which was found to be indirectly discriminatory had to be justified to be lawful. As in European law, the PCP has to be shown by the Respondent to be a proportionate means of achieving the legitimate aim. Lady Hale in the Supreme Court in **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601 gave the following guidance:

> **"22. …To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so…**
>
> **23. …A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate…**
>
> **24. …Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer…**
>
> **25. …To some extent the answer depends upon whether there were non-discriminatory alternatives available."**

64. Ms Woodward contended that the ET had properly considered these factors and had come to a permissible conclusion.

65. Ms Woodward challenged the suggestion in the sixth Ground of Appeal that a case had been advanced on behalf of the Claimant that as an alternative to the PCP the Respondent's aims could be achieved by splitting the FP into two separate years with separate application procedures for each. Ms Woodward pointed out that the Claimant's case before the ET was to challenge the eligibility criterion for admission to the two-year FP. Her case was not that its two-year structure was discriminatory. Further, this contention does not have a bearing on the claim against the Respondent. The case was brought against the Respondent as a service provider. They merely administer the application process for the two-year course.

66. Further, Ms Woodward contended that the Claimant did not suggest any alternatives to the PCP which would meet its aims. The alternative suggestions involved an unnecessary repetition of training which six-year graduates did not need. Repetition would involve wasting expenditure and would probably result in students requiring training being displaced.

67. Ms Woodward contended that the ET properly considered alternative means of achieving the Respondent's aims and came to a conclusion open to them on the evidence.

Discussion

68. The case advanced by Mr Rue was that domestic law does not properly implement the requirements of European law. It was said that justification defence was available to the Respondent at all as legitimate aims in this area are limited to "imperative grounds of public policy". No such aims had been established. Further, even if such aims had been established, the defence was only available if it were established by the Respondent that the PCP was a necessary and proportionate means of achieving that aim. There was no qualification of "necessary" by "reasonably" in European law. Further, the existence of an alternative non-discriminatory means of achieving the Respondent's aims would defeat the defence.

69. TFEU Article 45 provides that freedom of movement for workers shall be secured within the Union. By paragraph 2:

> **"Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment."**

By paragraph 3, freedom of movement entails the right, subject to limitations justified on grounds of public policy, public security or public health to accept offers of employment actually made. Regulation 492/2011 on freedom of movement for workers within the Union provides by Article 1:2 that a national of a member state shall have the right to take up available employment in the territory of another member state with the same priority as nationals of that state. Whilst the Framework Directive for equal treatment in employment and occupation, 2000/78, does not include differences of treatment based on nationality, reliance was placed by Mr Rue on the reference in Article 2 paragraph 2(b)(i) to justification of an indirectly discriminatory PCP being available if it has a legitimate aim and the means of achieving that aim are "appropriate and necessary".

70. The Harmonisation Directive itself leads to indirect discrimination between graduate medical students. Graduates of those EU universities who have six-year courses are regarded under the Directive having completed their basic medical training. Graduates of those EU universities, including all universities in the UK, which have five-year courses are not regarded as having completed their basic medical training. The six-year graduates are entitled to full registration as doctors. The five-year graduates who include all medical students educated at a UK university are not.

71. Paragraph 3 of Article 45 of the TFEU does not restrict the grounds for justifying the PCP at issue in this appeal. The PCP was applied by the Respondent as a criterion for selection for the FP. No offer of employment had actually been made to the Claimant (Article 45.3(a)) nor were any other of the circumstances present to which the restrictions on justification applied.

72. Nor does the judgment of the CJEU in **Matratzen Concorde** preclude justification of the PCP. We do not accept the contention of Mr Rue that, as in **Matratzen Concorde**, the relevant directive, here the Harmonising Directive, precludes justification of the PCP in reliance on any factors not stated to be such or referred to in the Directive. The seventh recital in the preamble to the Directive considered by the CJEU in **Matratzen Concorde**, 89/104/EEC, stated in regard to registration of trade marks:

> **"…the grounds for refusal or invalidity concerning the trade mark itself … are to be listed in an exhaustive manner."**

In **Matratzen Concorde** Article 3 of the Directive set out an exhaustive list of circumstances in which trade marks were not to be registered. The conditions for access to pre-registration post graduate medical training have not "been exhaustively harmonised at Community level" as have the conditions for refusal to register trade marks considered in **Matratzen Concorde** paragraph 20.

73. Six-year graduates are not denied access to specialist medical training contrary to Article 25.1 by application of the PCP. The ET found as a fact that the Claimant as a six-year graduate could apply for an F2 post and so obtain the FACD enabling her thereafter to undertake specialist medical training. This is not contrary to Article 25.1 of the Harmonising Directive. In any event the Claimant's claim was not of discrimination in being denied access

to specialist medical training for which she had not applied but in being denied access to the FP programme which starts with F1.

74. We do not accept that European jurisprudence restricts the justification defence in this case to "imperative grounds of public policy". The phrase "imperative requirements in the general interest" is taken from paragraph 37 of **Gebhard**. The CJEU in that paragraph cited **Kraus** as authority for the justification defence referred to. In paragraph 32 of **Kraus** the CJEU referred to a "pressing reasons for public interest". However the later case of **Bressol** shows that an indirectly discriminatory national measure may be justified.

75. In **Bressol** the CJEU considered a provision which restricted the number of students who were not regarded as residents in Belgium from enrolling in medical and paramedical programmes. The case was brought by students, the majority of whom are French, and by teaching and administrative staff of higher education establishments of the French community of Belgium. The CJEU set out in paragraph 48 the established approach to justification:

> **"…in order to be justified, the measure concerned must be appropriate for securing the attainment of the legitimate objective it pursues must not go beyond what is necessary to attain it."**

The "legitimate objectives" were not restricted to "imperative grounds of public policy" or "imperative requirements in the general interest" as contended by Mr Rue. The CJEU in **Bressol** considered three justifications advanced by the Belgian government for the discriminatory legislative provision.

76. The CJEU considered and rejected "the justification relating to excessive burdens on the financing of higher education". The Court rejected this justification not because the aim was not legitimate but because the Belgian government had not established that "were a difference

in treatment not to be made, the number of non-resident students enrolled in higher education institutions of the French Community would reach an excessively high level" and an excessive burden would be placed on financing higher education. The CJEU observed at paragraph 50 that according to the explanations of the French Community in the Order for Reference the overall allocation of finance does not vary depending on the total number of students. The CJEU held at paragraph 51 that:

> **"In those circumstances, the fear of an excessive burden on the financing of higher education cannot justify the unequal treatment of resident students and non-resident students."**

77. The second justification advanced by the Belgian government for the discriminatory measure was the protection of the homogeneity of the higher education system. The CJEU held at paragraph 53:

> **"Admittedly, it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and its homogeneity may justify a difference in treatment between some students (see, to that effect, *Commission v Austria*, paragraph 66)."**

Whilst that aim of protection of the homogeneity of the higher education systems could be a legitimate aim, since the justification advanced in that regard was the same as that linked to the safeguarding of public health, the CJEU considered it should be considered the context of that aim. The safeguarding of public health.

78. The Belgian government maintained that the large number of non-resident students causes a significant reduction in the quality of teaching in the medical and paramedical courses. Further they contended that the large numbers of non-resident students are likely ultimately to bring about a shortage of qualified medical personnel throughout the territory which would undermine the system of public health within the French Community in Belgium. This would be because after their studies the non-resident students return to their country or origin to

exercise their profession there, whereas the number of resident graduates remains too low in some specialities.

79. The CJEU held:

> **"62. It follows from the case-law that a difference in treatment based indirectly on nationality may be justified by the objective of maintaining a balanced high-quality medical service open to all, in so far as it contributes to achieving a high level of protection of health (see, to that effect, Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 47 and case-law cited).**
>
> **63. Thus, it must be determined whether the legislation at issue in the main proceedings is appropriate for securing the attainment of that legitimate objective and whether it goes beyond what is necessary to attain it.**
>
> **64. In that regard, it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such legislation satisfies those conditions (see, to that effect, Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 15, and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 82)."**

The Court emphasised at paragraph 71 the need for the national authorities which adopt a discriminatory measure to establish in each individual case:

> **"…that the measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it."**

The CJEU made similar observations in **Austria** paragraph 63. It is then for the domestic court to decide whether these elements have been satisfied.

80. In our judgment no European legal instrument placed before us precludes a justification defence of the PCP in this case. We do not accept that relevant decisions of the CJEU require a more restrictive approach than does domestic law to the defence of justification of the PCP in this case.

81. The Supreme Court in **Homer** considered the European and domestic law jurisprudence on justification. The PCP in issue in **Homer** was the requirement to have a law degree for admission to the third "threshold" above the starting grade in the Claimant's branch of the

police service. This would carry with it a higher rate of pay and therefore pension. Overturning the decisions in the Court of Appeal and the EAT, the Supreme Court held the PCP to be indirect age discrimination as people in the Claimant's age group did not have time to acquire a law degree before retirement. The Court also considered the justification defence having regard to both European and domestic law. Lady Hale, with whom Lord Brown and Lord Kerr agreed, held at paragraph 22:

> **"To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so."**

Lady Hale repeated the qualification of "reasonably" when she formulated the approach which the ET in that case should have taken. Lady Hale held at paragraph 24:

> **"So it has to be asked whether it was reasonably necessary in order to achieve the legitimate aims of the scheme to deny those benefits to people in his position?"**

82. The Supreme Court cannot have regarded the qualification of "necessary" with "reasonably" as being incompatible with European law. Accordingly the ET in the Claimant's case did not err in qualifying "necessary" with "reasonably" in considering whether the PCP was reasonably necessary in order to achieve the Respondent's aims. The ET followed the wording of the Supreme Court in **Homer** who in turn had considered the European as well as domestic jurisprudence in formulating the approach to the justification defence.

83. We reject the suggestion made by Mr Rue that in accordance with European law that a defence of justification cannot be made out if there is a less discriminatory means of achieving the Respondent's aim. It is clear from paragraph 78 of **Bressol** that this factor is to be taken into account in determining whether a discriminatory PCP is a proportionate means of achieving a legitimate aim. However the CJEU did not decide that the existence of an alternative was determinative against establishing that the PCP was justified. Lady Hale in

Homer held at paragraph 25 that the answer to the question of whether a discriminatory PCP is reasonably necessary to achieve legitimate aims:

> **"To some extent … depends upon whether there were non-discriminatory alternatives available."**

The existence of such an alternative is a factor to be taken into account in the overall assessment of whether the PCP is reasonably necessary and a proportionate way of achieving the legitimate aims pursued. In our judgment, neither domestic nor European jurisprudence regard the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy to be determinative against justifying a discriminatory PCP.

84. As in domestic law, the European jurisprudence requires a party seeking to justify an indirectly discriminatory PCP to establish the factual basis for doing so.

85. In our judgment the European law relevant to this appeal is given effect by the EqA and domestic jurisprudence.

86. Whilst the ET may not have expressly dealt with all the arguments on European law advanced to them by Mr Rue, their conclusion was clear. The application of the PCP was justified and was a proportionate means of achieving legitimate aims both for the purposes of the EqA and the relevant European law. A detailed consideration of the relevant European law would not have led to a different approach by the ET to the issues before them.

87. Mr Rue rightly commented that ETs must approach the question of justification in a suitably structured way and ask themselves all the right questions (**Homer** paragraph 26). In our judgment this ET did so. They concluded that the PCP that an applicant is not eligible for the FP if they have obtained or are expected to obtain, full registration by the GMC as a doctor

by the start of the programme was indirectly discriminatory by reason of nationality. The PCP put non-UK nationals of whom the Claimant is one, at a particular disadvantage when compared with UK nationals.

88. The ET made unchallenged findings of fact as to the aims of the policy in furtherance of which the PCP was applied. The ET set these out in paragraphs 47 and 48 of the judgment. We reject the contention by Mr Rue that because the Respondent is not an employer, applying dicta in paragraph 59 of **Woodcock**, they cannot rely on "cost plus" as a legitimate aim. The passage relied upon by Mr Rue is a citation from the judgment of Burton P in **Cross and others v British Airways plc** [2005] IRLR 423 paragraph 72 that "A national state cannot rely on budgetary considerations to justify a discriminatory social policy." However **Bressol** is an example of a "cost plus" justification advanced by a state being considered by the CJEU. In this case the ET found that the aims of the policy in issue included but were not limited to cost.

89. Whilst it is for a Respondent to establish the factual basis for a defence of justification the nature of such evidence depends on the circumstances of each case. No figures were placed before the ET showing the amount of money which would be wasted by providing F1 training to those who do not need it if six-year graduates were admitted to the FP. The ET observed at paragraph 52(ii) that statistics would not have helped in determining whether the Respondent's aims were legitimate. An ET is entitled to draw reasonable inferences from the material before them.

90. Although F1 medical students carry out some work, the FP is a training programme. The ET were entitled to infer that costs would be wasted by training those doctors who were or were entitled to full registration and who did not need to complete the F1 year to qualify. Further, in our judgment, the ET were entitled to hold that the aim of providing for UK

graduates who seek full registration may be put at risk if six-year graduates were admitted to F1. The current numbers of such applicants would be no real indication of numbers who may apply if the PCP were lifted. No doubt six-year graduates may not apply when they learn that they will not be admitted to year F1 of the FP. In our judgment the ET did not err in holding that the Respondent had established the aims of the policy and that they were legitimate.

91. The ET considered whether the PCP was a reasonably necessary and proportionate way of achieving the aims of the policy. In doing so they also considered possible non-discriminatory alternatives. They rightly considered alternative eligibility criteria for admission to the two year FP. We accept the contention of Ms Woodward that the alternatives advanced by Mr Rue in his skeleton argument of reform of the FP, including separation of F1 and F2, paying doctors on the FP no more than they are worth, allocating applicants to F1 or F2 as appropriate or revoking Immigration Rule 245X are not alternatives to the eligibility criterion applied by the UKFPO in its role as an employment service provider. The function of the UKFPO is to administer the process of application to the two year course. The UKFPO does not design the FP course. Other alternatives were listed in the Claimant's skeleton argument but were not included in the Grounds of Appeal.

92. We accept the contention of Ms Woodward that altering the PCP to admit doctors who have already obtained or are entitled to obtain full registration by the GMC would not further the unchallenged aims of the policy which is furthered by the PCP in issue. Admitting six-year graduates who have or are entitled to full registration would be contrary to the aim of the policy of providing training for those who need it to obtain full registration as doctors and of preventing the waste of resources on those who do not need to complete the F1 to gain such registration.

Concluding remarks

93. We wish to pay tribute to Mr Rue for the detailed research undertaken for this appeal. The way in which he presented the written materials was exemplary. Mr Rue advanced every argument which could be pursued for the Claimant with thoroughness and tenacity.