EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr V Patel	**v**	**Home Office**

Heard at: London Central
On: 5 – 9 March 2018
and chambers on 17 – 19 September 2018

Before: Employment Judge Hodgson
Mrs C Ihnatowicz
Mr D Carter

Representation

For the Claimant: in person
For the Respondents: Mr J Dixey, counsel

JUDGMENT

1. The claim of direct discrimination succeeds.
2. The claim of indirect discrimination succeeds.

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 26 April 2017, the claimant brought claims of direct discrimination and indirect discrimination. He relied on the protected characteristic of race.

The Issues

2.1 The issues in this case were not fully clarified until day two, and we will deal with the background of that below. However, it is appropriate that we should set out the issues, as finally identified, which will be determined by the tribunal.

2.2 There are claims of direct and indirect discrimination. The claimant relies on race and in particular, his national origin. The claimant is British. On his father's side he is second generation and on his mother's first generation. It follows his paternal grandparents and his mother came from India.

2.3 There is one matter about which the claimant complains: the decision on 30 January 2017 to withdraw the offer of a placement in New Delhi, India as an immigration liaison officer.

2.4 It is accepted that the claimant has security clearance at SC level. There is no question of his security being compromised or being withdrawn. It is accepted that the offer was removed, as it was considered that the number of relatives that he had in India led to a national security risk.

2.5 If the respondent's action is one of direct race discrimination, the respondent now relies on a justification defence provided by section 192 Equality Act 2010. On day two, the respondent confirmed that the approach to justification under section 192 is not materially different to the approach to justification under section 19 of the Equality Act 2010, and it involves a consideration of the aim, whether the aim is legitimate, whether it is a means of achieving the aim, and whether it is proportionate.

2.6 For the indirect discrimination claim, the claimant says the provision criterion or practice is as follows: that the Respondent would not post an individual to a country where that individual has extensive family connections.

2.7 The respondent says the provision criterion or practice is "concluding that an applicant for a posting abroad poses an increased security risk if they disclose within the 'security questionnaire supplements – overseas postings' extensive or close family contacts within the proposed country of posting."

2.8 The definition of the alleged particular disadvantage is common to both the claimant and the respondent (subject to the contention set out below). Employees of Indian ethnicity are more likely to have more family members living in India than employees of different, non-Indian ethnicities. Therefore, employees of Indian ethnicity are less likely to meet the PCP than employees of different, non-Indian, ethnicities. It is accepted that the claimant had the group disadvantage that is alleged.

2.9 It is the respondent's contention that there is no disadvantage for three reasons: no employee can choose a country to which he or she wishes to be posted (although applicants can indicate countries where they are not prepared to serve); there are the same career and personnel development opportunities for whichever post an employee is allocated; the application of the PCP removes disadvantage to an employee because it prevents the employee from being exposed to the security risks (including personal safety risks) which would otherwise arise.

2.10 The respondent identified the aim of the PCP. It has four elements as follows: first, to minimise the security risks to the respondent and the wider UK government interests; second, to limit the risk to the respondent's employees and their family members from external pressure; third, to avoid the respondent's employees being subject to conflicts of interest; and fourth, to discharge the respondent's duty of care towards employees by not exposing those employees and their family members to the first three aims.

2.11 There are four matters cited as the means by which the provision criterion or practice is achieved as follows: first, by requiring employees to apply for overseas posts to complete the "security questionnaire supplements – overseas postings," including identifying whether the employee or their partner has any relatives living abroad; second, the responses to the "security questionnaire supplements – overseas postings" are considered and may be considered with other information held about the employee; third, if a member of home office security considers that the employee and/or their partner has extensive or close family contacts in a third country which thereby poses an increased security risk, security clearance for the posting will be declined; and fourth, the employee may be offered an alternative posting where the security risks are lower or can be managed more appropriately."

2.12 It is said the aim is legitimate for two reasons: first, it is for the purposes of minimising harm to UK interests, including sensitive information and intelligence; and second, it is for the purposes of minimising harm to the respondent's employees and their family members.

2.13 As to proportionality five matters are cited: first, an immigration liaison officer would be privy to sensitive intelligence and information which would include secret and potentially top secret material; second, where security risks arise abroad it is difficult, and may be impossible, for the respondent to manage those risks both to the individual and from them; third, the respondent's employees do not have a right to be posted to particular countries; fourth, a decision to decline security approval does not disadvantage an employee (see the section on disadvantage); fifth, if security approval is declined the employee will ordinarily be offered an alternative posting.

Evidence

3.1 We heard from the claimant, C1.

3.2 For the respondent we heard from Mr Stephen Sowerby, R2; Mr Alistair Jackson, R3; and Ms Lesley Moss, R4.

3.3 We received a bundle, R1.

3.4 We received written submissions from both parties.

3.5 We viewed other documents as referred to in these reasons.

Concessions/Applications

4.1 On day one, we considered the issues as set out above. It was agreed that there were claims of direct and indirect discrimination. The respondent had not specifically pleaded section 192 of the Equality Act 2010. It was confirmed that the respondent did rely on that section. The claimant raised no objection and so no formal amendment was necessary.

4.2 The respondent's position in relation to indirect discrimination was unclear. It was not clear whether it alleged a provision criterion or practice or accepted the claimant's formulation. The question of disadvantage had not been adequately addressed. What was the aim of any PCP, why it was legitimate, and how it was proportionate had not been set out. The tribunal ordered clarification. Clarification was provided on day two in a document headed "submissions on behalf of the respondent: 6.3.18." It was specifically confirmed that this document was supplied in compliance with the tribunal's order. As it significantly modified the respondent's position, we noted it may be necessary to formally amend. However, the claimant took no issue with the document, and it was not necessary to consider a formal application to amend. However, it was accepted by all that the respondent was now bound by its own document. There was a slight amendment to the respondent's formulation of the PCP later on day two, by consent.

4.3 Later on day two, we noted paragraph 4 of the respondent's 6 March submissions. Mr Dixey confirmed his concern was not the tribunal's action, but whether the claimant had changed his position on what constituted the provision criterion or practice. That was explored. The claimant's formulation was clarified. The respondent confirmed it was not necessary to amend and that any concerns it had about prejudice had been dealt with and removed.

4.4 On day one, we agreed that there had been no application pursuant to rule 94 Employment Tribunal Rules of Procedure 2013. There had been three previous case management preliminary hearings, the most recent of which was 10 November 2017. At that hearing, Employment Judge Glennie made no national security order, but in his note of the discussion at paragraph 3 stated: "It is likely that part of the hearing will have to be held in private pursuant to rule 94 because of the nature of the evidence to be given. This can be addressed by the tribunal at the commencement of the hearing."

4.5 No written application was made by the respondent. Following discussion, it became clear that the respondent wished to rely on a document which was to be withheld from the public. Mr Dixey stated that the content of that document had been "suggested" in another document of 5 March. It was presented to the tribunal on 6 March 2018. It could be seen by the claimant, but it was not to be given to the public. The tribunal confirmed that a specific application must be made pursuant to rule 94 and directed that the application be set out in writing.

4.6 An application was made by letter dated 5 March 2018 presented to the tribunal on 6 March 2018. In summary, it sought the following orders: the summary/gist documents should not be made available to the public; the claimant's unredacted statement should be kept from the public; any questions regarding material in the summary/gist documents should be heard in private; there be two copies of the judgment promulgated, one being redacted for the public; and the original document should not be given to the claimant or the public.

4.7 We received submissions from the claimant and it was agreed that we should exercise our powers pursuant to rule 94(3) to consider in a closed hearing the respondent's submissions concerning the sensitive document.

4.8 During that closed hearing, we determined that the respondent's application for a rule 94 order should be granted, save it was unnecessary for there to be a specific order on the promulgation of the reasons, as this is provided for in the rules. Full oral reasons were given but written reasons were not requested. We gave specific consideration to whether it was necessary to have a special advocate appointed. For the reasons given in closed session, we do not consider it necessary for a special advocate to be appointed in this case.

4.9 In the open session, we explained the decision to the claimant. We confirmed a rule 94 order had been made, as the underlying document referred to by the respondent was sufficiently sensitive that it must be protected and not disclosed to the public it was therefore necessary to take steps to ensure there was no disclosure. We confirmed the order. We confirmed we had considered whether it was necessary to appoint a special advocate. However, we had concluded this was unnecessary, as the document was not sufficiently relevant to the matters we needed to consider. At issue was the action of individuals who held certain beliefs. Whilst those beliefs may have been based partly on the documentation considered, it was the fact of the belief that was relevant and not any underlying justification based on any documentation. The respondent wished to rely on one assertion only in relation to both liability and what may be called the justification defence. That point had been set out in the summary/gist document. We confirmed that should it become our view that the remainder of the document is relevant to our decision, it may be necessary to revisit our decision on the need for a special advocate. We confirmed that it is not part of the tribunal's role to assist in the drafting of "gist" documents. The process of gisting may occur in certain cases. It

particularly arises when a special advocate is involved and suggests that certain information can be given to a claimant by way of "gist." That may be a process which is appropriate for a special advocate; it is not appropriate for the tribunal to take that role. However, it is appropriate for the tribunal to consider the relevance of documents and there can be situations, as in this case, where a document referred to is so sensitive it must be protected by a national security order, but the document itself is not sufficiently relevant to the matters to be decided by the tribunal that it must be either disclosed to the claimant or considered by a special advocate. It is not always necessary to produce all prime source documents that may be said to justify a particular belief. As to the summary/gist document, we took the view that it amounted to one of two things: first, it was a redacted version of the primary document which had been produced by way of extract of the relevant point; second, it was a formal admission of a fact which required no further explanation or production of any underlying document, as it was clear enough in itself not to be misleading.[1]

4.10 Unfortunately, resolving the rule 94 issue took the majority of day two. We would note that whilst there may be sense in delaying a rule 94 application until the issues in the case have become clear, there may be danger in a respondent delaying an application until the hearing. It is necessary for a tribunal to scrutinise carefully any application which has the effect of excluding the public or limiting the claimant's access. Moreover, had we found that the primary document was sufficiently relevant to the issues in the case, it would have been necessary to appoint a special advocate and the final hearing would have been postponed and seriously delayed.

The Facts

5.1 The Home Office employed the claimant on 7 September 2009 in the Asylum casework directorate, based in Leeds. Subsequently, the claimant was promoted within the intelligence directorate of the United Kingdom Border Force and was based at Birmingham International Airport. Currently, the claimant works for an assistant director, Ms Donington. He has access to sensitive information which includes details of live operations and sensitive staffing issues. It is common ground that some of this information is sensitive for the purposes of national security. The claimant is subject to the Official Secrets Act and has SC clearance.

5.2 On 31 May 2016 he applied for a position as an Immigration Liaison Officer (ILO) based overseas. There were 23 possible positions and 21 locations. The recruitment was handled by RALON (Risk and Liason Overseas Network). RALON is the overseas arm of Immigration Intelligence, deploying staff worldwide.

5.3 Candidates were permitted to specify any locations in which they were not prepared to serve and were told that they would be matched to locations

[1] We deal further with the gist document and the source document in Appendix 1.

based “on their skill sets and personal needs.” Business needs took priority and the advert recorded, “If an offer is refused, the candidate will not be offered a further posting as part of this campaign.” The advert specified SC(E) vetting was needed. This is enhanced security clearance.

5.4 The claimant attended an interview on 3 August 2016; he confirmed he could speak French, Gujarati, and Hindi, to varying degrees of efficiency. It is the claimant’s unchallenged evidence that it was clear from the outset that he was of Indian heritage and had family connections in India. The claimant’s paternal grandparents came from India, and his father was born in Britain; his mother was born in India. The claimant was born in Britain.

5.5 The respondent informed the claimant on 11 October 2016 that he had been successful at interview.

5.6 An email of 10 November 2016 attached an offer letter and required certain forms to be returned. The role was identified as an Immigration Liaison Officer and he was to be assigned to New Delhi, India for a tour length of two years; security clearance at level SC(E) was needed. This is enhanced security clearance. The letter confirmed the offer was subject to “the completion of all necessary security and medical clearance and pre-posting checks and receipt of appropriate visas.” Under a section headed “security clearance” it was indicated any failure to fully disclose any/all required information within the timescales given could “cause delays.” There was a further section on SC(E) clearance instructions. It was necessary to complete the online BSVR renewal/upgrade form this would open a link to an online security questionnaire. He had 14 days to log on and 30 days to complete the form. In addition, there was a financial questionnaire. No specific guidance was given. The section concludes that “once your clearance is confirmed following your security interview, FCO will send you an XP35 clearance to travel via email.”

5.7 The claimant accepted the posting on 17 November 2016.

5.8 The documentation to be completed included a security questionnaire supplement which became “official sensitive” once completed. There were three specific questions concerning the following: posting location; whether the applicant or his partner had any relatives (close or extended) living abroad; and whether he or his partner had commercial or business interests. If there were such relatives living abroad, the details were to be completed. No guidance was given as to whether abroad would be limited to the country of posting or what was meant by “relatives (close or extended).”

5.9 The claimant did seek guidance before completing this form, first from Home Office security, and thereafter with the Foreign & Commonwealth Office and the Home Office’s international HR directorate. International HR suggested he only list individuals in the country of posting and those with whom he may have some contact.

5.10 The claimant had limited knowledge of his relatives living abroad. He sought his mother's assistance to contact various relatives and obtain full names of relevant relatives, including aunts, uncles, nephews, and nieces.

5.11 The claimant completed the form and submitted it on 29 November 2016. He identified 37 relatives including the following: two maternal uncles, one maternal aunt and her husband, cousins, nephews and nieces, and their various spouses. He supplied no information as to how well he knew the individuals, where they lived, or how frequently he had seen them in the past, or would see them in the future: that information was not requested.

5.12 On 30 January 2017 at 11:48, nearly 9 weeks after he submitted a security supplement, he received an email with the official posting letter to New Delhi.

5.13 On 30 January 2017 at 13:52, he received a further email advising that "this posting will not go ahead as planned due to family connections."

5.14 The claimant contacted international HR, RALON, and the Home Office security to seek an explanation.

5.15 International HR confirmed "RALON have overall responsibility for staff overseas postings. Also, I have [copied] HO security – ECO, they confirmed that this particular posting cannot be approved due to extensive family connections. We are not responsible for making this particular decision." The claimant was referred back to RALON and HO security.

5.16 The claimant was informed by RALON "unfortunately neither RALON nor International HR have any control over the security team vetting process. I found the details on horizon for you to appeal the decision."

5.17 The claimant was offered an alternative position in Doha, Qatar. He was considered for a position in Pakistan, but it was considered there would be difficulty obtaining diplomatic visas for someone of Indian heritage. He was considered for a position in Addis in Ethiopia, but he was deemed too inexperienced for that post.

5.18 On 2 February 2017 the claimant rejected the offer of a posting to Doha. The claimant noted he had a congenital heart condition and there was a lack of cardiology speciality in Doha. The claimant did not drive and noted the lack of public transport infrastructure. He was also concerned about pervasive racial discrimination. The claimant later undertook further research, and while still remaining concerned about cardiology specialists, he became less concerned about transport and the likelihood of exposure to racism. However, when he, subsequently, indicated he would accept the posting to Doha he was told the post was no longer available.

5.19 Mr Stephen Sowerby is a civil servant employed by the Home Office in the capacity of senior personnel security manager. He has been employed by the Home Office since 2002 in a variety of roles and has eight years relevant experience in his current role. Since 2010 he has been a senior

personnel security manager. His role is concerned with deciding who gets security clearance to work for the Home Office and whether existing staff are suitable to hold a higher level of clearance. He assesses applications for all levels of security clearance including counterterrorism checks, security checks, and developed vetting. All applications are subject to a range of national security vetting checks which may vary depending on the level of security sought. Adverse indicators may include criminal records; it is his responsibility to make an assessment on whether the indicator would make the applicant unsuitable for employment by the Home Office due to risks. His evidence is that a "small part" of his role requires approval of certain overseas postings for existing staff already holding security clearance. Those decisions do not relate to an individual's suitability to hold the level of security clearance. His statement records "it is essentially a separate risk assessment relating to the specific country [to which the] staff member is to be posted."

5.20 During his oral evidence, Mr Sowerby clarified that it is he who receives the security questionnaire supplement – overseas postings (the questionnaire). It is then open to him to make a summary decision, based only on the content of that document, about whether security clearance will be given, and whether the proposed posting of the individual who has completed a questionnaire may proceed. A refusal at that stage prevents the posting. There is no formal name given to this process; it appears a practice which has developed, but it is not reflected in any formal procedure or document. If the posting is not refused at this stage, the individual goes forward to the full process SC(E) clearance. The full process involves an interview stage which is undertaken by an agency. That report, and recommendation, is then returned to the office for security where it is considered by Mr Sowerby who then makes a decision.

5.21 It follows that whilst reviewing the questionnaire may be seen as a small part of his role, it is in fact simply one point when he can make a decision. The decision is his. He is not required to seek a second opinion, or show it to his line manager. In this case, he did show the claimant's questionnaire to his line manager and he did indicate he proposed to refuse the overseas posting at this questionnaire stage. Mr Jackson did look at it, briefly, and he did agree with Mr Sowerby's assessment.

5.22 Nevertheless, the decision remained Mr Sowerby's. It became clear during oral evidence, that the reasons of Mr Sowerby and Mr Jackson were not the same.

5.23 At no time was the claimant's integrity expressly questioned or doubted. Mr Sowerby's decision was underpinned by a general concern to preserve the integrity of the overseas process with which the claimant would be involved if posted. Mr Sowerby had in mind two potential security breaches which caused him concern and which were material to his decision. The first can broadly be described as the need to ensure the approval and issue of all visas would be done appropriately. The second was the potential for the claimant to disclose information, sensitive by reason of national security, to third parties.

5.24 In his oral evidence he clarified that the risk of the claimant being involved in any inappropriate issuing of visas was one that did not influence his decision at all. His sole concern was to prevent disclosure of information sensitive by reason of national security. In deciding that allowing the claimant to be posted to India was too great a risk, he took into account only the information contained on the questionnaire. In particular he formed the view that 37 relatives was "an unusually large number of relatives." His statement also refers to the "proximity of some of the familial relations." However, in his oral evidence he made it clear that it was the number, being 37, which was the most significant reason. He did not consider the geographical location, as he did not consider that relevant. He did not know the extent to which the claimant had any contact with any of the individuals, or would have any contact, he did not consider that relevant to his decision. He did not consider the extent to which the claimant would have contact to be information he needed to obtain. He relied on the number of relatives. He explained in his statement "that the volume of family connections represented a significant security risk to the classified/sensitive information, which Mr Patel's role would require him to access." He goes on to say, "In addition to the above I was concerned, admittedly to a lesser extent, that the claimant's family members may attempt to exploit their familial connections with the claimant to gain access to sensitive/classified information for their own ends. Clearly the larger the familial connection the larger the spread of risk to the individual." For those reasons he informed the operational team to inform the subjects HR sponsor that the posting could not be approved

5.25 Mr Jackson's position was different. When he briefly reviewed the matter, he assumed that the claimant would be responsible for, or engaged in, issuing visas. For him, at that time, it was the risk of inappropriate visa approval which informed his decision. However, his concern was based entirely on the number of relatives. His evidence is that he did not question the claimant's integrity.

5.26 On 31 January 2017, Mr Sowerby contacted the claimant. Mr Sowerby confirmed that it was his decision not to approve the posting and he offered an explanation: "You will surely appreciate should an employee have family members living in the country to which they are due to be posted – and I note you have listed over 30 family connections – it presents a risk that the employee may come under significant and unwelcome external pressure – in addition to the obvious conflict of interest risks." He continued, "You will also appreciate that staff operating abroad required to work in often challenging – if not hostile working environments – and the Home Office has a duty of care to its staff requiring us to reduce those risks when identified rather than increasing them." He did go on to add that it was not a question of not trusting overseas staff, but a matter of "reducing the potential risks both to the applicant and to the sensitive/classified information to which they have access."

5.27 It follows that the suitability for posting only related to India. He confirmed that there was no right of appeal and that the claimant retained SC clearance with nothing to prevent him from applying for SC(E) clearance. The claimant was allowed to require a second opinion from the deputy head of unit. That person was the Mr Soweby's manager, Mr Alistair Jackson.

5.28 On 7 February 2017, Mr Jackson wrote to the claimant. He too confirmed that in no sense had the claimant failed national security vetting. He stated, "A posting abroad represents a significantly increased risk both to the Home Office and to the member of staff in question." He explained that in the United Kingdom there are counterintelligence measures and the Home Office "can and do place sharp limits on the ability of foreign agents to operate and if these agents employ underhand tactics they can be quickly removed." It states that cannot happen abroad, and the Home Office is dependent on the goodwill of the nation in question. He stated, "Even in countries which are not considered hostile, like India, intelligence services from another more hostile country can operate more easily against us than they could in the UK, and of course every country has its criminals." He referred to reducing vulnerability and stated, "Experience has shown that pressure from or on family members in a country is one of our more common lines of hostile approach and it is therefore our policy to avoid posting people to areas where they have extensive in country family where that is possible." His oral evidence indicated to us that he knew of one occasion when there had been an approach through family to obtain national security information.

5.29 Mr Jackson's letter went on to say, "I have reviewed Mr Sowerby's decision and it is in line with that policy." The source of that policy remains unclear. He did acknowledge that the claimant's family were resident elsewhere in India, in fact all, or the majority, of his family members were over 900 miles away. Nevertheless, despite that geography he stated "the threat remains, however, of pressure from or, more worryingly, on them in order to gain compliance with some request. This would potentially place you in a very difficult position and your family members in a dangerous one. We wish to avoid this risk."

5.30 Thereafter, the claimant went on to raise a grievance. We do not need to consider the detail of that. There was initially some doubt as to whether it constituted a valid grievance under the respondent's grievance procedure. It was not initially perceived as a grievance concerning race discrimination. There was a decision to consider the grievance under the informal dispute resolution procedure. It was decided that there was a clear vulnerability in the claimant holding the position as a result of significant family connections in India. This had led to the security team's refusal to approve the posting. The claimant then submitted a revised grievance on 28 February 2017. It was rejected by letter of 6 March 2017. The person most closely associated with this decision was Ms Amy Carr. We have received no evidence from her. She was on maternity leave. We did hear from Ms Moss. The handling of this process is subject to significant criticism by the claimant, but it is not directly relevant to the matters we

need to decide. It was a process the claimant found distressing. We will make further finding on the grievance in due course, if we need to.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **…employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)**

6.3 Section 23 refers to comparators.

> Section 23 Equality Act 2010 - Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

6.4 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> Section 136 - Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

(a) an employment tribunal;
(b) …

6.5 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Appendix
(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.6 Section 192 Equality Act 2010 provides a defence to a claim of direct discrimination in the context of national security.

A person does not contravene this Act only by doing , for the purpose of safeguarding national security, anything it is proportionate to do for that purpose.

6.7 Indirect discrimination is defined by section 19 Equality Act 2010.

Section 19 - Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies 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.

The 'justification' test

6.8 The classic test was set out in **Bilka-Kaufhas GmbH v Weber Von Hartz** (Case 170/84) [1984] IRLR 317 in the context of indirect sex

discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see **Rainey v Greater Glasgow Health Board (HL)** [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.

6.9 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax** [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.

6.10 It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: **Hardys & Hansons plc v Lax** [2005] IRLR 726, CA.

Conclusions

7.1 We are concerned with the decision on 30 January 2017 to withdraw the offer of a placement in New Delhi, India as an immigration liaison officer. That decision to withdraw the offer was caused by the refusal to grant SC(E) clearance;[2] it is accepted by the respondent that the decision was made by Mr Sowerby. Mr Jackson approved it, and in that limited sense contributed, but his approval was not necessary, and the decision was that of Mr Sowerby. It is accepted that the decision had the consequence of preventing the claimant being posted to India. It was the only reason why the posting did not take place. Mr Sowerby knew that refusal of SC(E) clearance would have the direct effect of preventing the posting. We can refer to the refusal of SC(E) as the decision.[3]

7.2 The respondent's resistance to the claim is multilayered. First, it is alleged the decision was not detrimental treatment at all. Second, the decision was not direct discrimination. Third, if it was direct discrimination, there is a defence of proportionality pursuant to section 192 Equality Act 2010. Fourth, the provision criterion or practice adopted did not lead to a particular disadvantage. Fifth, if there was a PCP which led to particular disadvantage, it was a proportionate means of achieving a legitimate aim. We will need to consider each of these elements of the defence.

<u>Detrimental treatment</u>

[2] At the remedy hearing the parties agreed that this reference to refusal could cause confusion. We agreed that the "refusal" simply refers to the refusal to grant overseas clearance for India.

[3] The respondent has not suggested that there can be a distinction made between the removal of the posting-offer and the refusal of clearance such as may be envisaged in *CLFIS Ltd v Reynolds 2015 EWCA Civ 439.*

7.3 The respondent's submissions do not deal directly with this question, although it is clear that the tribunal is invited to find that there could not be less favourable treatment, because the treatment itself was not detrimental.

7.4 The respondent's submissions seek to justify the assertion that the respondent's actions were not detrimental.

> **10. It is for the Tribunal to judge what constitutes less favourable treatment. It is not enough for the Claimant to assert that he has been treated in a particular way which he considers to be disadvantageous (*Burrett v. West Birmingham Health Authority* [1994] IRLR 7). In Burrett the claimant (a female nurse) objected to having to wear a cap at work because she found it demeaning. The EAT held firstly, that the tribunal was entitled to find this was not less favourable treatment within the meaning of the Sex Discrimination Act 1975, s.1(1)(a), since male nurses also had to wear uniform, albeit not a cap; and secondly, the fact that she thought she was being less favourably treated did not mean that she was within the section.**
>
> **11. The Respondent submits that viewed objectively, the Claimant was not subjected to less favourable treatment:**
>
> **a. Firstly, no employee can chose a country to which they wish to be posted (applicants are asked to indicate the countries in which they are not prepared to serve). This is explained within the ILO job advert [Supplementary Bundle, 1-8] and was accepted by the Claimant (see §4 of the Claimant's Witness Statement). The Respondent would have been perfectly entitled to have offered the Claimant a posting to any location subject to the applicant specifying where they did not wish to serve (see the ILO job advert [Supplementary Bundle, 4]). Indeed, had the Respondent considered the Claimant's responses in the 'Security Questionnaire Supplement – Overseas Postings' before making the conditional offer of a posting to New Delhi, it is probable he would have been offered a different posting altogether.**
>
> **b. Secondly, as the Claimant accepted before the Tribunal, there are the same career and personal development opportunities in whichever post an employee is located. As the Claimant put it, the opportunities are what an individual makes of them. Save for the Claimant's concerns about Doha, there is no evidence before the Tribunal that the Claimant would have been advantaged by being posted to New Delhi as opposed to any of the other locations which were available.**
>
> **c. Thirdly, the Respondent's decision in fact removed disadvantage and unfavorable treatment because it prevented the Claimant from being exposed to the security risks (including personal safety risks) which would otherwise arise.**
>
> **12. As the EAT concluded in *Keane v. Investigo* and others (UKEAT/0389/09), a person who has no interest in a job which has been advertised discriminatorily cannot be said to have suffered a detriment. Underhill P held that an applicant who is not considered for a job in which he or she is not in any event interested cannot in any ordinary sense of the word be said to have been comparatively unfavourably treated (for a direct discrimination claim) or put at a disadvantage (for an indirect discrimination claim).**
>
> **13. The Respondent submits that on an objective basis, the Claimant has not in fact suffered less favourable treatment than any other person.**

7.5 This submission appears to proceed on the basis that the tribunal should consider the question of detriment objectively. Cited in support of this are **Burrett** and **Keane**. It is suggested that **Burrett** is authority for the proposition that it is not enough for a claimant to view the treatment as disadvantageous. That may be right. However, it is not authority for the proposition that the employee's view as to whether something is a disadvantage is irrelevant. The withdrawal of a foreign posting cannot be compared to wearing a hat as part of a uniform, **Burrett** is of not assistance.

7.6 **Keane** is of no relevance. It is fact dependent and casts no light on this case. This is not a case where it can be said that refusing the posting is not a detriment, as it was not a job in which he was not interested. He wanted to be posted to India.

7.7 The respondent fails to address the relevant case law. Lord Justice **Brightman in Ministry of defence v Jeremiah** 1980 ICR 13, CA, stated detriment "exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment." In **De Souza v the Automobile Association** 1986 ICR 514, CA, Lord Justice May confirmed the question is to be considered "from the point of view of the victim. If the victim's opinion that the treatment was to his detriment is a reasonable one to hold, that ought, in my opinion, to suffice." This was supported by the House of Lords in **Shamoon v the Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL. An unjustified sense of grievance will not be enough, but there is no need to show physical or economic consequence.

7.8 The claimant's subjective belief cannot be ignored. When the tribunal accepts that the subjective belief of the claimant is that he or she has suffered some detriment, it is necessary to consider, objectively, whether there was a detriment. It may be appropriate to have regard to whether a reasonable worker, in the same circumstances, would view the treatment as detrimental.

7.9 The claimant subjectively viewed the refusal of enhanced clearance and withdrawal of the offer as a detriment. His reason can be stated briefly. India was his first choice and his preferred posting. He would be able to use his language skills. He wished to experience the country and its culture. It was financially more advantageous, as the cost of living was lower, so he could have hired nannies, cooks and drivers. The refusal could lead to negative perceptions of him. Put simply, the posting to India was something that he desired, welcomed, and valued. Doha was not his preferred option and there were perceived problems. It was financially less advantageous, he believed that there was poorer access to medical care and he was particularly concerned because he had a heart condition: he was concerned the relevant expertise could not be accessed. There was a possibility of he and his family being exposed to racism. The transport infrastructure was problematic, and he did not drive.

7.10 The respondent alleges there was no detriment for a number of reasons: no person can chose a country; all postings carry the same personal development opportunities; the refusal of posting "removed" disadvantage, as he would not be exposed to "the security risks (including personal safety risks) which would otherwise arise." The respondent's assertion that the claimant should be content with its decision because he did not have a right to choose a country, they believe personal development opportunities will be equivalent, and that in some manner he will not be exposed to security or personal safety risks is no answer to the charge of detriment. The respondent has denied the claimant an opportunity that he desired, welcomed, and valued. It is a detriment viewed both subjectively and objectively.

The reason for the decision

7.11 Was the treatment because of race?

7.12 There are occasions when it may be helpful to construct a hypothetical comparator. It is not necessary in all cases. It is always necessary to focus on the reason. We must apply the reverse burden. Below, we will say more about the nature of the comparator in this case. However, the first question we must ask is whether there are facts from which we could decide, in the absence of any other explanation, that the employer contravened section 13.

7.13 It is claimant's case he was discriminated against because of race. He relies on his Indian national origin. As a result of that Indian national origin, it is part of his case that he is more likely to have relatives who live in India than someone of a different ethnicity or national origin.

7.14 It is implicit in his case that his reference to national origin is not construed narrowly. The claimant is British, but the historical link with India could not be ignored. When defining the claimant's race, his ethnic origin cannot be ignored. The respondent's submissions do refer to the claimant's ethnicity, and it is apparent that the respondent draws no distinction between his ethnic or his national origin. In the context of the case as presented, there is no difference alleged between ethnic or national origin, and we will adopt the terms ethnic origin and ethnicity.

7.15 The respondent concedes that the claimant is likely to have more relatives in India than someone who is of a different ethnic origin. This arises from the claimant's ethnic origin.

7.16 Mr Sowerby's decision was based on the number of relatives revealed by the claimant in his security questionnaire. He did not analyse the closeness of the relationships (albeit the relevant questionnaire identified the relatives as aunts, uncles, cousins etc.). He relied solely on the number. In his oral evidence, Mr Sowerby defined the closest relationships, excluding any partner or children, as being parents and siblings. The closest relationships the claimant had in India were uncles,

aunts, cousins, nephews and nieces, but Mr Sowerby did not have regard to this when making his decision.

7.17 During the hearing, the claimant made it clear that he was not suggesting that Mr Sowerby was consciously discriminating. It is the claimant's case that Mr Sowerby's concerns went beyond concerns about the number of the relatives and embraced, whether Mr Sowerby understood consciously or not, a negative attitude based on assumptions about how those of Indian nationality or Indian ethnic origin would, or do, behave.

7.18 The claimant does not have to prove the facts that could turn the burden. If there are facts from which it could be decided, in the absence of any other explanation, that the provision was contravened, the burden will shift. A finding of discrimination will frequently depend on what are the proper inferences that can be drawn from primary facts.

7.19 It is rare to find direct evidence of discrimination. The tribunal must be alert to the fact that employers may not recognise their own discriminatory behaviour, or they may be unwilling to accept or acknowledge it. However, where there are facts from which the discrimination could be found, and that includes where it could be proper to draw secondary inferences from primary facts, the burden shifts.

7.20 All relevant facts should be considered, including a person's stated reason for a decision. Such facts can include a failure of adequate explanation for unreasonable, or irrational, behaviour; the inference is not drawn not from the unreasonable behaviour, but from the failure of explanation.

7.21 In this case, we found that there are facts from which we could conclude there was discrimination, being both the evidence advanced by the respondent's witnesses, and also unreasonable or irrational behaviour, for which there is no adequate explanation.

7.22 During his oral evidence, Mr Sowerby asserted that in making his decision he was exercising his experience of eight years. He was asked to explain what he meant by his experience. Part of his experience related to the importance of the closeness of relationships. He stated that the general potential for influence was greater with the closest relatives. He was particularly concerned about parents.

7.23 Mr Sowerby stated his experience was that the potential for conflict of interest was an important factor. He was asked to expand on what he meant by a conflict of interest. He considered that having dual nationality could constitute a conflict of interest, as there remained some loyalty to another nation. That potential conflict of interest extended as far as naturalised British citizens. When asked about national origin, Mr Sowerby referred to the country of origin and did not seek to draw a distinction between country of origin or national origin. Having a country of origin other than the UK was also, in his view, a conflict of interest. For Mr Sowerby, the importance of the conflict of interest is that it increased the likelihood of security breaches. He did not define country of origin. He

questioned what was the difference between country of origin and national origin. For him, the question of conflict of interest was inextricably linked with the strength of a connection to another country. We have no doubt from his answers, and his email of 31 January 2017, that the potential conflict of interest extended as far as British citizens who he viewed as having a different "country of origin."

7.24 It is rare to find such clear, direct evidence of discrimination. We have no doubt that Mr Sowerby was expressly confirming that he treated differently those individuals who are either naturalised British citizens or who were British born citizens who have a significant national origin connected with another country. Moreover, it is also clear that this concern goes far beyond a simple recognition that an individual may have a number of relatives in another country. There is a suspicion of individuals who are either naturalised British citizen, or who are British, but have a national origin connected with another country, such as India. The reference to the potential conflict of interest makes it clear that those individuals are seen as a higher potential risk than people who do not share that racial characteristic. We are satisfied that the reference to a potential security risk is not simply a focus on the relatives within the country; it is clear that suspicion has fallen directly on the individual who has security clearance. The racial characteristic, in this case ethnic origin, caused him to form the view the claimant may succumb to a request for information because he had a conflict of interest. The assertion that the individual employee's integrity is not being questioned is fundamentally undermined by the conscious and subconscious thought processes based on the stereotyped assumption that someone who has a "country of origin," other than the UK is likely to have a conflict of interest and, it is implicit in the reasoning that the individual is more likely to succumb to pressure because of the potential divided loyalty.

7.25 There is no doubt that the burden shifts.

7.26 Even if there were not such clear, direct evidence of discrimination we would have found the burden shifts, as the procedure demonstrates unreasonableness and irrationality.

7.27 In this case, the only concern about the claimant, which was relevant to Mr Sowerby's decision, was the possibility that he would disclose information sensitive to national security. It was recognised that would be a breach of duty and contrary to the Official Secrets Act. It would potentially lead to prosecution and the loss of his job.

7.28 There were three sources of pressure identified: doing favours for relatives because of family loyalty; blackmail, for example over an affair; and simple bribery. As regards blackmail and bribery, it was conceded that having relatives in the host country presented no greater risk when being posted to that country. As regards family loyalty it is postulated, in some way, that because of some sort of family favour, classified information would be released. The justification for this appeared to be that the more relatives there were, the more likely it would be that a request would be made.

However, as to why that would make it more likely that the claimant would succumb to such a request is unexplained. It can only be understood in the context of a belief that someone of Indian ethnicity would be more likely to succumb to the "conflict of interest" thought to exist by Mr Sowerby. This, in itself, would suggest an unjustified stereotype.

7.29 The suggestion that if there were more relatives, there would be more scope for hostile third parties to use threats towards his relatives to secure compliance is unconvincing. The claimant stated, that such coercion is more likely to be effective by threats towards the close family members, particularly his spouse or children, but having a spouse and children does not preclude a person being posted to a country. If an individual were to succumb to threats directed at aunts, uncles, cousins, nephews or nieces it is difficult to see how the number of those could make any great difference. The respondent's arguments that there may be more individuals who could be approached is unconvincing.

7.30 Nevertheless, it is appropriate when considering issues of national security for the tribunal to have regard to the fact that these are serious concerns and the stakes may be high. It may be the tribunal has not been told all of the detail and it should give due weight to the concerns and opinions of those who are operatives.[4] With that in mind, we did enquire about the objective evidence to understand how many times, in the experience of Mr Jackson, there had been some approach, through a relative, in an attempt to secure national security information. We did not go into the detail of any specific event; it was not relevant. Mr Jackson knew of one occasion, and as we understood his evidence, that encompassed countries beyond India. There was no suggestion that leaks of national security information to an employee's relatives were thought to go undetected. The threat is so uncommon that there is a degree of irrationality in suggesting that there is a material increase given the number of relatives.

7.31 We do not accept that there was a rational explanation for why it should be thought that the possibility of relatives seeking information that is sensitive by reason of national security is a real risk, and any explanation advanced is undermined by the negative attitude shown towards individuals by reason of the "country of origin."

7.32 Mr Sowerby relied on the fact that the claimant had revealed 37 relatives. His evidence was that this was a large number of relatives remaining in the country from which the claimant can trace his ethnic origin. He pointed to evidence from his consideration of a number of questionnaires where such large numbers had not been revealed. However, he accepted that no guidance is given on those questionnaires as to who constitutes a sufficiently close relative. No checks are made initially, as to the veracity of the information given. Some further information is gained when

[4] The respondent cites *Beghal v Director of Public Prosecutions* [2015] UKSC 49 in support of the general proposition. We note para 76 of *Behal,* it may not always be necessary for the executive to produce positive evidence to show how the means used is no more than is required, but this is not authority for proposition that assertion will always be sufficient.

enhanced clearance interviews take place and it is apparent that many individuals then reveal more extensive relations. Moreover, he accepted that the number of relatives does not necessarily say anything about the contact with those relatives. Mr Jackson suggested that close contact for him would indicate an oral discussion, at least, over the Internet in recent years. However, that was not a definition suggested by Mr Sowerby. It was not a definition which was included anywhere. There is a degree of subjectivity.

7.33 Mr Sowerby accepted that if consideration was given to the relationship of those 37 individuals at interview, it may be decided that the contact was too insignificant and the relationship too remote for there to be concern. The interview may demonstrate that the number of relatives is no barrier to the posting.

7.34 It is not unusual for there to be a number of siblings in a family. When looking at an individual's parents, this may mean that there are a number of aunts and uncles. Each of those may have had children who would be first cousins. They in turn may have gone on to have children. We indicated that we would take judicial notice of the fact that even one or two aunts and uncles may lead to further generations and that it would not be unusual to trace dozens of such relatives. There was no suggestion that we should not take judicial notice of that fact.

7.35 Given that it is appropriate to consider close relatives of both the applicant and the applicant's partner and their children, who may in turn have children, 37 is not a large number. When this was discussed with Mr Sowerby, he sought to justify his view on the basis of his knowledge of the questionnaires, even though he had conceded that those questionnaires were frequently inadequate, were not consistently completed, were not buttressed by appropriate definitions of close relatives, and were found to be misleading on interview. His failure to acknowledge the likelihood of large families indicated a degree of irrationality.

7.36 We are also concerned about the use of statistics. It is dealt with at paragraph 37 of his submissions.

> **37. The Respondent submits that the decision was proportionate to the risk. As Mr Jackson explained in response to questions by the Tribunal: whilst there is a very low likelihood of a family member approaching an employee of the Respondent to obtain information the disclosure of which would be damaging to national security and the employee acting on that approach, such a disclosure would have a very high impact. The risk was heightened in the Claimant's case because of the number and in some instances closeness of the family connections. As Mr Jackson put it: if there is a chance that one person will do something, the probability of that 'something' occurring is increased 37 times if there are 37 people. Whilst the Tribunal may consider the risks to be lower from a niece or nephew, that is not a straightforward assessment particularly where the concerns include a concern that threats may be made to the health and safety of a family member who in turn seeks to persuade the employee to act.**

7.37 It is difficult to understand exactly what is meant. It appears to be the respondent's suggestion that a risk will increase 37 fold if there are 37 relatives as opposed to 1. Such a conclusion would demonstrate an unsophisticated approach to probability. If the probability of a particular person making an inappropriate approach is extremely small, it does not follow that the degree of risk increases proportionately with the number of people. Each family member has exactly the same probability of making the unreasonable approach. The result is that the probability remains extremely small. It cannot be assumed that there is a material increase in risk.

7.38 There is irrationality in believing the disclosure of 37 relatives by somebody of Indian national origin is a large number. There is irrationality in basing that on a questionnaire which is known to be flawed in the information it gathers. There is irrationality in proceeding on the basis of the number of relatives disclosed, when it is known that an interview may lead to any fears being allayed.

7.39 We find there is a failure of explanation for the unreasonableness, or the irrationality. To the extent that there is any explanation, it is built on the concept of conflict of interest, a concept which Mr Sowerby referred to directly in his email to the claimant of 31 January 2017. He said the following:

> **You will surely appreciate that should an employee have family members living in the country to which they are due to be posted - and I note that you listed over 30 family connections- it presents a risk that the employee may come under significant and unwelcome external pressure - in addition to the obvious conflict of interest risks.**

7.40 The email does not go on to identify what are the "obvious conflict of interest risks." It is now apparent from his oral evidence, that the conflict of interest revolves around potential loyalty to a foreign state. If it were not otherwise clear from Mr Sowerby's evidence, it is clear from this email that he takes the view the claimant may be subject to a "conflict of interest." That conflict of interest is shorthand for saying that his loyalty may be divided, and he may have a loyalty to the host country. That in itself has nothing to do with the number of relatives who remain in the country.

7.41 The notion of conflict of interest is underpinned by ingrained, unquestioned, and stereotypical views based on perceived loyalty of those with dual nationality, those who are naturalised British citizens, and those who have a different "country of origin."

7.42 It follows that there is a unreasonableness and irrationality in rejecting an application for clearance solely on the number of relatives in the host country. The failure of any rational explanation would lead to the burden shifting. When looking at the explanation, we cannot ignore the fact that there is clear evidence in Mr Sowerby's email that the reason for rejection includes the perception the claimant may be subject to a conflict of interest. That conflict of interest arises out of Mr Sowerby perception,

which is based on the claimant's country of origin, as he put it. That country of origin is India.

The comparator

7.43 We have noted the burden shifts. It is appropriate for us to give some consideration to the comparator. The respondent identifies the comparator as follows:

> **7. The Respondent submits that the proper comparator must be a person not sharing the Claimant's race but who discloses within the 'Security Questionnaire Supplement – Overseas Postings' extensive or close family contacts within the proposed country of posting. In the context of this case, that proposed country of posting was India. As Mr Jackson explained, the level of risk to the interests of the United Kingdom (including national security risks) is different in India than in other countries.**
> **8. The comparator should therefore be a person who discloses extensive or close family contacts within India. It is not necessary that those family members should themselves be of Indian national origin as this was not (as Mr Sowerby explained) a factor in his decision. It was the geographical location of the family connections which was relevant.**

7.44 The respondent has referred to the guidance given by the EAT (Elias J) in **London Borough of Islington v Ladele** 2009 ICR 387. The case contains a helpful review the relevant law. Mr Justice Elias, as he was, notes that finding the reason was discriminatory encompasses the treatment of the comparator. At paragraph 32 he states:

> **…Accordingly, although the Directive and the Regulations both identify the need for a tribunal to determine how a comparator was or would have been treated, that conclusion is necessarily encompassed in the finding that the claimant suffered the detriment on the prohibited ground….**

7.45 Further, Mr Justice Elias noted that reliance on a comparator can be misleading. At paragraph 39 he states:

> **39. Furthermore, there is a particular situation where a focus on how the comparator was or would have been treated can be positively misleading. This arises because it is now well established that there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for the act or decision. It follows that there will inevitably be circumstances where an employee has a claim for unlawful discrimination even though he would have been subject to precisely the same treatment even if there had been no discrimination, because the prohibited ground merely reinforces a decision that would have been taken for lawful reasons. In these circumstances the statutory comparator would have been treated in the same way as the claimant was treated. Therefore if a tribunal seeks to determine whether there is liability by asking whether the claimant was less favourably treated than the statutory comparator would have been, that will give the wrong answer.**

7.46 When considering comparison of cases, there must be no material difference between the circumstances relating to each case.[5] The respondent identifies a number of circumstances which it says are material circumstances relevant to the comparison. The comparator should "be a person not sharing the claimant's race but who discloses within the 'Security Questionnaire Supplement – Overseas Postings' extensive or close family contacts within the proposed country of posting. In the context of this case, that proposed country of posting was India." The respondent's argument is that such a person would also have been rejected. That may, or may not be right. However, it would not necessarily mean that that the claimant was not rejected because of race. The respondent could also be assume that that the comparator individual had a "conflict of interest" because of the number of relatives living in a foreign country, who would, for the purposes of the comparison identified by the respondent, be of Indian nationality or national origin. If we accept that the comparator would have been refused enhanced clearance, that does not demonstrate that the claimant was not rejected because of race. It may be that the comparator would be rejected because of the race of the relatives living in India, not his race. Race would still be a material part of the reason. The wording of section 13 is wide enough to include discrimination by association, as it does not have to be the claimant's race with is the material factor.

7.47 This is one of those cases where the construction of a hypothetical comparator is open to fundamental dispute and may mislead the tribunal. In this case, it is clear that it is the reason which must be considered. Resolution of that the reason answers the comparative question.

7.48 From all we have said it follows if the claim of direct race discrimination is to be defeated, the respondent must prove its explanation. It is clear that what must be proven is that the reason is in no sense whatsoever because of the prohibited characteristic.

<u>The explanation</u>

7.49 Is there is an explanation advanced by the respondent which in no sense whatsoever was because of race?

7.50 The respondent's submissions do not expressly identify an explanation. The closest the submissions come to an explanation is by stating a "reason" for the treatment, it is dealt with as follows:

> **18. The decision for declining security approval was not because of the Claimant's race nor those of his family members. The Respondent's evidence is clear: the reason for declining security approval was because of the family connections disclosed by the Claimant in his 'Security Questionnaire Supplement – Overseas Postings' [85-86] and the risks thereby posed to the interests of the United Kingdom Government (including the interests of national security) and the interests and safety of the Claimant and his family.**

[5] Section 36 Equality Act 2010

> **…**
> **19. As Mr Sowerby explained in oral evidence: he was concerned about the potential for pressure to be applied to the Claimant's family members who in turn might apply pressure to the Claimant. Mr Sowerby was particularly concerned about the Claimant becoming subject to "coercion, exploitation or duress". He was concerned that the Claimant's family members could be used as a tool for the coercion, exploitation or duress of the Claimant. This is not to call into question the loyalty, honesty or character of either the Claimant or his family: however it recognises that there is a risk which applies to all of the Respondent's employees. That risk is increased – as in this case – where an individual is posted abroad. Both Mr Sowerby and Mr Jackson expressly refer to cases of which they are aware where due to local family pressure employees of the Respondent have been the subject of disciplinary action for inappropriately accessing sensitive information systems (see, for example, §7 of Mr Sowerby's Witness Statement and §6 of Mr Jackson's Witness Statement).**
> **20. There is no basis for rejecting that evidence. Indeed, the Claimant's case on direct discrimination appears to be little more than an inference from a feeling that he was treated unfairly (see §28 of the Claimant's Witness Statement).**

7.51 It can be seen that the reason advanced is "the risks … posed to the interests of the United Kingdom Government (including the interests of national security) and the interests and safety of the Claimant and his family."

7.52 It is said that the decision was reached, and could be reached, from the disclosure in the questionnaire of 37 relatives. The reason set out in the submissions fails to acknowledge the assumptions made about the claimant and the obvious conflict of interest referred to by Mr Sowerby both in his oral evidence and in his email to the claimant 31 January 2017.

7.53 Mr Sowerby's perception of the claimant's county of origin, and hence his ethnicity led Mr Sowerby to believe the claimant had potential divided loyalties the number of relatives simply provided evidence which either established, or confirmed his perception. The number of relatives was the evidence that Mr Sowerby used to confirm and reinforce his true reason. The reason revolved around Mr Sowerby's belief that the claimant, because of his country of origin, posed a risk, as it was assumed he had divided loyalty. Therefore, it was the claimant who was seen as posing a risk. That risk was not based purely on the fact that he may be approached in one manner or another by relatives, but on the perception that, because of divided loyalty, he was more likely to succumb.

7.54 It has been the respondent's position that the claimant's integrity was never in question. That contention is contradicted by the evidence. The claimant integrity was the central issue. The respondent fails to establish its explanation. In this case the claimant's race was a material reason.

Justification

7.55 The respondent relies on section 192 Equality Act 2010. The respondent will be taken to have not discriminated, if the alleged discriminatory act

was for the purpose of safeguarding national security and it was proportionate to do the act for that purpose.

7.56 We have some reservations about the applicability of the defence in this case. Had Mr Sowerby's concern been solely about corruption in visa applications, we doubt that that would have engaged national security. The mere fact that an individual may have access to sensitive information does not mean that everything that individual does is covered by national security or should be covered by the section 192 exception. However, Mr Sowerby's specific concern was about the claimant disclosing classified information. There can be no doubt that the protection of classified information is a way of safeguarding national security. The claimant did not challenge Mr Sowerby's contention that there was a potential for disclosure that could breach national security. In those circumstances, we accept section 192 is engaged. However, in the context of direct discrimination, it is only the respondent's concerns, so far as they engaged national security, they can be taken into account.

7.57 The language of justification in section 192 is not precisely the same language of justification section 19 EQA. That said, we specifically enquired whether the respondent sought to argue that the approach should be different depending on the section considered. Mr Dixey conceded that there was no difference, and it was still necessary to consider the aim, to consider whether it was legitimate, to consider whether the means achieved that aim, and then to consider proportionality. If it were otherwise, it is difficult to see how proportionality would be approached. Proportionality involves balancing the discriminatory effect against the reasonable needs of the respondent. It is difficult to see how those reasonable needs could be ascertained without an understanding of the aim, the legitimacy, and effectiveness of the means.

7.58 It appears to the tribunal that the respondent's submissions may implicitly depart from that concession. The section on indirect discrimination reads as follows:

> **[4]e. If so, did it put persons of the same race (national origins) as the Claimant at a particular disadvantage when compared with persons of a different race (national origins) to the Claimant?**
> **f. If so, did it put the Claimant at that disadvantage?**
> **g. If so:**
> **i. Was the treatment done for the purpose of safeguarding national security?**
> **ii. Was the treatment proportionate to that purpose?**
> **Or: Can the Respondent show it to be a proportionate means of achieving a legitimate aim?**

7.59 This submission appears to elide the two provisions.

7.60 The 192 exception refers to doing anything for the purpose of safeguarding national security. Unlike section 19, section 192 does not expressly refer to aims, legitimacy or means. If the respondent seeks to draw a distinction between the approach taken in relation to justification for the purposes of section 192 and justification for the purposes of section

19, it does not make that distinction clear and it is contrary to its express concession.

7.61 Whilst it appears the general legal approach to the proportionality question is the same, as the same matters of principle must be considered, it does not follow that the relevant factual matters will be the same for the section 192 and section 19 defences.

7.62 In the context of section 192, when we consider the proportionality test, we can only have regard to those matters which are done for the purpose of safeguarding national security. If an act is done, other than for national security, there can be no defence to direct discrimination claim.

7.63 For a section 19 claim, when we consider the PCP and whether it is a proportionate means of achieving a legitimate aim, we are not limited by questions of national security.

7.64 We can give a simple illustration. Part of Mr Jackson's reason for supporting Mr Sowerby's decision related to his perception that there could be general abuse in the issuing of visas. This was not limited to issuing of visas which may compromise national security. Thus, his considerations went beyond national security. We have noted that Mr Sowerby did not have the same consideration.

7.65 It follows a justification for the purposes of section 19 is not curtailed by considerations of national security.

7.66 The respondent's submissions make no attempt to differentiate between the considerations relevant to section 192 and those relevant to section 19.

The PCP

7.67 The first question is whether there was a provision criterion or practice. This is addressed at paragraph 4C of the respondent's submissions.

> **[4]c. Whether the Respondent applied a provision, criterion or practice which was:**
> **i. [As formulated by the Claimant]: That the Respondent would not post an individual to a country where that individual has extensive family connections; or**
> **ii. [As formulated by the Respondent]: Concluding that an applicant for a posting abroad poses an increased security risk if they disclose within the 'Security Questionnaire Supplement – Overseas Postings' extensive or close family contacts within the proposed country of posting; or**
> **iii. Some other PCP as found by the Tribunal.**

7.68 The respondent's formulation refers to the concept of both extensive and close family contacts. However, the PCP applied to the claimant took no account of the closeness of the relatives. Closeness would only be taken into consideration at the interview stage, a stage the claimant's application did not reach. Therefore, the consideration is based only on the number.

It follows that the claimant's formulation more accurately identifies the specific PCP that applied to him.

7.69 There is no argument advanced that the PCP did not exist. We do have some reservations about the alleged PCP. The decision was, ultimately, based on the subjective view of one person. We have very limited evidence on which we could conclude that it was a more general policy that was applied. The evidence does not clearly demonstrate that it was applied equally to all. Given that we have found there was direct discrimination, it is at least arguable that it was not applied equally to all. However, we have noted that this is one of those cases where the identification of a comparator may be misleading. The comparator may have been subject to the same results, but not necessarily for the same reasons. We do not have to reach a final decision on whether this was a PCP which was, truly, applied equally to all. For the purpose of this analysis we will assume that the PCP existed.

Particular disadvantage

7.70 The next question is whether it resulted in particular disadvantage. The disadvantage is the exclusion from a posting to India. This point is conceded. It is accepted that those of the same ethnicity as the claimant would be much more likely to have a large number of relatives in India than individuals of a different race. It follows a group disadvantage is conceded. The claimant was refused a posting to India on the evidence of the number of relatives, and it follows he suffered the particular disadvantage.

The aim

7.71 What is the aim? The aim is set out at paragraph 49 as follows:

> **49. The aim of the PCP is to:**
> **a. Minimise the security risks to the Respondent and wider UK Government interests.**
> **b. Limit the risk to the Respondent's employees and their family members from external pressures.**
> **c. Limit the risk of the Respondent's employees being subject to conflicts of interest.**
> **d. Discharge the Respondent's duty of care towards its employees by not exposing those employees and their family members to the above.**

7.72 There is no attempt to suggest the aim is different for the purposes of section 192 and for section 19.

7.73 It is clear, even on a superficial reading of the aim, that it goes far beyond those matters which are directly relevant to national security. There is reference not only to security risks, which themselves may go beyond national security, but also the wider UK government interests. Those wider interests no doubt would include confidential information, and matters which are relevant to trade or immigration. The risk to

respondent's employees also goes far beyond those which are relevant purely to national security. The risk, for example, of bribery or coercion may relate to matters entirely unconnected with national security. The reference to the conflict of interest is puzzling. It appears to assume that individuals will have a conflict of interest, but what is meant is not explained. The reference to discharging a duty of care is not connected to national security at all.

7.74 The aims as set out in the claim and the submissions go beyond what was envisaged by Mr Sowerby when seeking to protect national security interests. His evidence was clear. His concern was the disclosure of national security sensitive information. He was not concerned with the wider UK government interests. As regards the remainder of the aims, such as discharging a duty of care, they may have been consequences, he may have welcomed them, but they were not considerations at the point when he made the decision.

7.75 There is little evidence in support of the more general aims as set out, they rely on general assertion, and are in conflict with Mr Sowerby's evidence.

Legitimacy

7.76 The next question is one of legitimacy.

7.77 The respondent sets out the reason why the "aim" is legitimate at paragraph 52 as follows:

> **52. The aim is legitimate because:**
> **a. It is for the purposes of minimising harm to UK interests, including sensitive information and intelligence, so of which, if disclosed, would injure the public interest.**
> **b. It is for the purposes of minimising harm to the Respondent's employees and their family members.**

7.78 To the extent that the aim was to preserve national security, that is legitimate. It is difficult to understand what is meant by wider UK government interests. Presuming that those interests themselves are legitimate, the aim must be legitimate, but it is impossible to determine what is being envisaged. We have no evidence on it.

7.79 The second limb is less easy to understand. Viewed broadly, preventing individuals being exposed to harm must be legitimate. This may encompass matters relevant to national security, but it is not limited by national security.

Means

7.80 The next question is whether the PCP is a means of achieving the aims. The alleged means, as set out at para 2.11 above are not expanded on in the submissions. There is no attempt in the submissions to demonstrate how the means achieved the aims.

7.81 There is a bare assertion that the means are proportionate at paragraph 54 of the submissions.

> **54. The means are proportionate because:**
> **a. An Immigration Liaison Officer would be privy to sensitive intelligence and information. This would include 'Secret' and potentially 'Top Secret' material.**
> **b. Where security risks arise abroad it is difficult (and may be impossible) for the Respondent to manage those risks both to the individual and from them.**
> **c. The Respondent's employees do not have a right to be posted to particular countries.**
> **d. A decision to decline security approval does not disadvantage an employee (for the reasons set out above).**
> **e. If security approval is declined the employee will ordinarily be offered an alternative posting.**

7.82 In the context of national security, it is apparent that information needs to be collected, collated, and used. As it is sensitive, it should be protected. The respondent does not address, specifically, the means employed to protect the information. Considering the evidence broadly, it is possible to say the following: employees are recruited: employees are trained and deployed; employees are vetted to relevant security level; information is provided at the relevant level; information is provided on a need-to-know basis, thus limiting its circulation; individuals are required to confirm, often through the Official Secrets Act, that they will not disclose information; and there is a degree of monitoring, the detail of which has not been given to us. It seems to us that those are the general steps taken to protect sensitive information and therefore constitute part of the means. What is being suggested is that those means are, in some manner, supplemented by preventing certain individuals from being posted abroad.

7.83 If the risk is disclosing national security information which is viewed by the employee only in the host country, then preventing an individual being in that host country will eliminate the risk of disclosure. It does not prevent that individual disclosing information obtained in the UK. Preventing the posting to a location prevents a person accessing information in that location. It follows that it is a means of preventing an individual having information, not a means of limiting the likelihood of the individual disclosing information received.

7.84 The general precautions taken, including vetting and limiting access, can be describes as ways of minimising the chance of harm through disclosure. Preventing an individual having access at all, it simply removes the possibility. It does, of course, do nothing to prevent disclosure of information legitimately viewed whilst working in the UK.

<u>Proportionality</u>

7.85 The final question considers proportionality. It is necessary to identify the discriminatory effect and then to have regard to the reasonable needs of the organisation. We must consider if there the measures adopted correspond to a real need, are appropriate with a view to achieving the

objectives pursued and are necessary to that end. Proportionality is established if the measures are necessary to secure the real need.

7.86 The respondent's submissions make no attempt to identify the effect of the discrimination. It is acknowledged that those of Indian ethnic origin are more likely than others to have a large number of relatives in India. The effect is all of those individuals are excluded from being posted to India. This may fall short of a blanket ban on those of Indian ethnic origin being posted to India, but the numbers are likely to be significant. We should note it is no answer to say that a number of people of Indian ethnic origin have been posted, we are dealing with the effect of the PCP, as explained to us. The fact that a number have been posted may undermine the argument that the PCP exists; it is not relevant to the question of the discriminatory effect caused by the PCP.

7.87 It can be seen that the discriminatory effect is extensive. It would apply to all of those who need SC(E) clearance who had a significant number of relatives in India.

7.88 We need to consider the discriminatory effect against the reasonable needs of the employer. In the context of national security, and therefore in the context of section 192, the respondent needs to collate, use, access, handle, and protect national security sensitive information.

7.89 In the context of a general section 19 defence, it can be seen that the needs of the organisation are wider. In the context of the claimant's work, much of this revolves around the issuing of visas. Issuing visas does not, necessarily, engage any national security issues. The respondent must ensure that the function is exercised and carried out without any improper interference.

7.90 The respondent does take precautions in relation to both national security interests, and wider interests. We have already identified the means employed. The respondent employs individuals who are trained and where necessary vetted. They are provided information at the appropriate level. They are supervised. They follow systems. They access information only on the basis of need to know. They use computers, and there is no doubt a degree of checking and monitoring. They are subject to the Official Secrets Act were appropriate.

7.91 The general means employed are designed to minimise the risk of abuse and improper disclosure. What is being suggested is that it is necessary, in some manner, to add to this arsenal of precaution the refusal to allow certain employees to be posted abroad.

7.92 In the context of national security, that revolves around the risk of an individual being approached by a relative and volunteering national security information. Such an approach has occurred once to Mr Jackson's knowledge. It follows it is a remote risk. That much is acknowledged by the respondent. As regards the wider interests, it would appear that the respondent is concerned mainly with visa abuse. We

received no evidence to suggest that that is a particular problem. Further, why an individual would be more susceptible when posted abroad, then when in the UK, is not explained adequately. Why the the other checks and balances employed are not sufficient to safeguard the wider interest is not explained.

7.93 We find that the discriminatory impact is significant, its effect is to exclude perhaps the majority of those with Indian ethnicity from being posted to India when SC(E) is needed. For the reasons we have given, refusing SC(E) clearance simply because the individual has a large number relatives in the country, will do little, if anything, to further protect national security information, or the wider government interests. Put more simply, there is no credible evidence that an individual can be said to pose a risk simply because that individual has a number of relatives in the country.

7.94 We should add it has never been suggested that the claimant's integrity has been questioned. There may be occasions when it is appropriate to remove security clearance or to modify it. In any individual case, there could be reasons which may impinge directly on national security concerns. However, there is no suggestion of that in this case.

7.95 We have not considered, specifically, how matters would vary, at all, with a consideration of the closeness of family contacts. Closeness of contact was not a material consideration in this case.

7.96 Refusing clearance on a summary consideration of a questionnaire that reveals the number of relatives in a country not reasonably necessary to secure the relevant needs of the organization.

7.97 It follows that the justification defence fails both in relation to section 192 in section 19. We therefore find is that the claimant was discriminated against directly because of race. The claimant was discriminated against indirectly in relation to the protected characteristic of race.

7.98 We will invite the parties to make representations as to remedy in this case.

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Employment Judge Hodgson

Dated: 07/03/2019

Sent to the parties on:

11/03/19

For the Tribunal Office

Appendix 1

1. The respondent disclosed a document that set out a list of countries and identified the perceived risk of threat from each country and the risk of hostile foreign powers operating in each country.

2. The essence of that document was gisted to the claimant.

3. The source document was known to the relevant respondent's witnesses.

4. The source document was not relied on, not the content of the document, when refusing the claimant enhanced clearance.

5. The source document and the information within it did not inform, modify, or influence the decision to refuse clearance to the claimant.

6. It was never suggested that the perceived risk posed by a country, either directly, or through hostile powers, made any individual more vulnerable to direct approaches from relatives or threats to those relatives.

7. The source document, and its content, formed no part of the Respondent's submissions. Those submissions were made in open.

8. The tribunal accepts that foreign powers may pose a threat to the interests of the UK, and the threat may vary depending on which country is being considered. The tribunal has had full regard to this when making the decision.