Appeal No. UKEAT/0271/19/VP (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 24 September 2020
Judgment Handed down on 6 November 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR SANWAR ALI — APPELLANT

OFFICE OF THE IMMIGRATION SERVICES COMMISSIONER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR B BEYZADE (Of Counsel)
For the Respondent	MS L ROBINSON (Of Counsel) Instructed by: Government Legal Department 102 Petty France Westminster London SW1H 9GL

SUMMARY

RACE DISCRIMINATION

It is unlawful for a person who is not a qualified person to provide immigration advice or services. One route to being a qualified person is to be registered by the Office of the Immigration Services Commissioner ("OISC"). The OISC also has powers to investigate and prosecute people suspected of providing such services unlawfully.

Two companies controlled by the Appellant had been registered with the OISC to provide immigration advice and services. But in 2014 both companies' applications for renewed registrations were refused. There is a statutory right of appeal to the First-Tier Tribunal, which the Appellant in fact exercised, though unsuccessfully. The Employment Tribunal rightly concluded that the FTT route of challenge amounted to an "appeal or proceedings in the nature of appeal" within the meaning of section 120(7) **Equality Act 2010**; and that its availability therefore meant that the Tribunal had no jurisdiction to entertain discrimination complaints about this conduct. **Michalak v General Medical Council** [2018] ICR 49 considered.

Some two and a half years later the OISC commenced an investigation into whether the Appellant was unlawfully providing immigration advice or services in circumstances where he was not a qualified person (he contended that the arrangements under which he was then operating meant that he was). This included inviting him to investigation interviews and obtaining a search warrant. The Tribunal held that it could not entertain proposed complaints that this was discriminatory conduct, as this conduct was not within the scope of section 53 of the **2010 Act** at all. The Tribunal was right to so conclude.

HIS HONOUR JUDGE AUERBACH

Introduction

1. The broad issue raised by this appeal is whether, or to what extent, the **Equality Act 2010** confers jurisdiction on the Employment Tribunal ("the Tribunal") to entertain a complaint alleging discrimination, victimisation or harassment on the part of the Immigration Services Commissioner ("the Commissioner").

2. The Commissioner was created by the **Asylum and Immigration Act 1999**, and is a corporation sole, who has various statutory duties and powers, and is supported by an administration. The **1999 Act**, as amended, prohibits the provision of immigration advice or immigration services by a person who is not a qualified person (as defined). A person who is a registered person (as defined) is a qualified person. The Commissioner has the responsibility of maintaining the register, including deciding applications for registration or re-registration, and deciding whether a person's registration should be varied, suspended or cancelled. A person is also a qualified person if they fall into one of a number of other specified categories. I need only mention one of these, which is that the person is acting on behalf, and under the supervision, of someone who is permitted to provide equivalent services in an EEA state.

3. The **1999 Act** makes it an offence for someone who is not a qualified person to provide immigration advice or services. Under the **1999 Act** and other legislation the Commissioner has various enforcement powers. These include the power to apply for an entry and search warrant if there are grounds to suspect such an offence, and the power to prosecute. For these purposes, the Commissioner may invite someone to an investigation interview conducted in a manner that is compliant with the **Police and Criminal Evidence Act 1984**.

4. On 27 June 2018 Mr Sanwar Ali presented a claim to the Tribunal to which the Respondent was the Commissioner. I will refer to the parties hereafter as Claimant and Respondent. In a reserved Decision arising from a Preliminary Hearing held on 1 November 2018, the Tribunal (Employment Judge Barrowclough) determined that it had no jurisdiction to entertain the Claimant's complaints; and that, in any event, the whole claim was out of time. The Claimant appealed against both parts of that Decision.

5. The Claimant was a litigant in person in the Tribunal and in the EAT. The Judge who considered on paper, the grounds attached to his Notice of Appeal, was of the opinion that there were no arguable grounds; but at a Rule 3(10) Hearing at which the Claimant was represented by Mr Beyzade of counsel, Choudhury P permitted certain grounds to proceed to this full appeal Hearing. The Claimant was again represented by Mr Beyzade, and the Respondent by Ms Robinson of counsel, who had appeared for it in the Tribunal. I had the benefit of written submissions from the Claimant and Ms Robinson, and oral submissions from both counsel.

6. In the Tribunal claim form the Claimant indicated that he was claiming race discrimination, victimisation and harassment. I will refer to these complaints compendiously as being of discrimination. He attached a narrative account covering a range of episodes and events and asserting that various conduct was discriminatory. The Respondent's solicitors entered a response resisting the claim. This Grounds of Resistance complained that the claim lacked clarity but responded to the complaints so far as the Respondent understood them.

7. The Claimant is the proprietor and operator of two limited companies which, for some years, were registered with the Respondent for the provision of immigration advice and services. These are ImmEmp Solutions Limited, trading as Workpermit.com, and Visa Joy Limited.

A However, by two decisions taken in 2014 the Respondent had refused both companies' applications for re-registration, and their registrations had been cancelled. (No point was taken on either side before the Tribunal by reference to the Claimant and his companies being separate legal persons; nor was any such point raised before the EAT.)

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8. The Respondent understood the Claimant to be asserting that those 2014 decisions contravened section 53 of the **2010 Act**. It asserted that the Tribunal did not have jurisdiction in respect of such complaints, on the basis that section 87 of the **1999 Act** conferred a right of appeal within scope of section 120(7) of the **2010 Act**. Section 120(7) precludes the Tribunal from jurisdiction in respect of a contravention of section 53, "in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal." Further, asserted the Respondent, the Claimant had in fact appealed both those decisions under section 87 to the First-Tier Tribunal ("FTT"), then to the Upper Tribunal ("UT") and then to the Court of Appeal (unsuccessfully throughout).

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9. The Respondent also asserted that the Claimant was therefore also precluded from relitigating matters that had been determined, and/or from seeking to raise in subsequent proceedings matters that could, and should, have been raised in earlier proceedings – relying upon the so-called rule in **Henderson v Henderson** (1843) 3 Hare 100. The Respondent also asserted that, in any event, the claims in respect of these matters were out of time, and, though the burden was on the Claimant to show otherwise, that they did not involve continuing acts, and it was not just and equitable to extend time.

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10. The Grounds of Resistance went on to assert that in January 2017 the Respondent became concerned that the Claimant was providing immigration advice and services on the basis that he

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A was allegedly being supervised by a Romanian solicitor, but in circumstances that did not meet the requirements of the **1999 Act**. It therefore embarked on an investigation including obtaining a search warrant. The Respondent understood the complaint in respect of this aspect also to be brought under section 53 of the **2010 Act**. But it asserted that the Tribunal did not have jurisdiction at all under that section in respect of it. Alternatively, it repeated the same time points.

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11. Finally, while complaining again of lack of particulars, the Respondent denied that there had been discriminatory conduct on its part, of any sort, at all. It also submitted that the claims should be struck out and/or made the subject of a deposit order.

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12. There was a Case Management Preliminary Hearing (PH) on 14 September 2018, before EJ Brook. The Claimant tabled proposed revised details of claim. The minute of the Hearing referred to the 2014 decisions, and the subsequent litigation in the FTT, UT and Court of Appeal. It continued that the Claimant "brings his current complaints to the Employment Tribunal on the basis that [the Respondent] was systematically racially biased against him and his companies up to and beyond the deregistration and have now, he says, pursued him further by threatening prosecution for allegedly providing immigration advice without proper supervision." He also asserted that his complaints of bias were "ignored" by the FTT.

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G 13. The Tribunal then summarised the Respondent's case that, in respect of the deregistration decisions, section 120(7) applied to exclude jurisdiction, and that thereafter the Tribunal was "not acting in a regulatory capacity but in an enforcement capacity". The Tribunal also referred to evidence produced by Ms Robinson, that the FTT had specifically invited the Claimant to particularise his allegations of race discrimination, and to the Claimant, at this PH, having

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"candidly confirmed that, in consultation with his counsel, he decided not to pursue assertions of race discrimination despite that invitation, apparently in the belief that he would not get a fair hearing and was anyway 'bound to lose'".

14. The Tribunal recorded that it was agreed that there should be a PH on the issues of jurisdiction and the time points. It ordered that the PH would determine "[w]hether the Employment Tribunal had jurisdiction to hear the Claimant's complaints" and, if so, "whether the complaints are out of time and if so whether time should be extended." The Tribunal gave directions, including for disclosure and exchange of witness statements. It also permitted the Claimant to include his details of claim document in the PH bundle "with the proviso that the Respondent reserves the right to challenge the same at any stage of the proceedings, in particular if jurisdiction is granted."

15. I come to the Decision arising from that further PH, which is the subject of this appeal. The Claimant was in person. The Respondent was represented by Ms Robinson of counsel.

16. In the first paragraph, the Tribunal referred to the Claimant having presented claims of direct and indirect race discrimination, racial harassment and victimisation. It referred to all of them being resisted, and the Respondent raising jurisdictional, abuse of process and time points. It recorded that it heard evidence from the Claimant and from Mr Seymour, the Respondent's Director of Operations.

17. The Tribunal summarised the Respondent's powers and relevant provisions of the **1999 Act**. It then made findings of fact about the decisions taken by the Respondent in 2014. It referred to the appeals to the FTT, including noting that, at a case management hearing in one of them,

the Claimant had been "specifically advised that he was at liberty to pursue allegations of race discrimination". It referred to what he had told EJ Brook about that. The Tribunal then described the unsuccessful appeals to the UT and the Court of Appeal.

18. I need to set out the next few paragraphs in full.

> **"6. In Mr. Perera's letters to the Claimant concerning Workpermit (31 March 2014) and Visa Joy (18 August 2014), the Claimant had been informed that, under ss.91 & 92B of the 1999 Act, he would be committing a criminal offence, punishable by a fine or imprisonment, if Workpermit and/or Visa Joy continued thereafter to provide immigration advice or services, or advertised the provision of such services. Mr. Seymour says that, as a result of his office being notified in January 2017 by the Home Office of various remarks concerning the Respondent on the Workpermit website, it became apparent that that company was possibly providing immigration advice unlawfully, since its registration had been cancelled, and an investigation was commenced. That revealed that Workpermit was claiming supervision of the immigration advice and services being provided by a lawyer based in Romania as satisfying s.84 of the 1999 Act. The same or a similar arrangement, Mr. Seymour says, has occurred in a number of other cases, and a trial or hearing at which the legality of one such arrangement will be determined is to take place in the New Year.**
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> **7. On 21 February 2017, the Claimant was invited to provide details of how Workpermit were satisfying the requirements of s.84 at an interview conducted under the Police and Criminal Evidence Act 1984. No such interview then took place, and on 19 May thereafter investigators from the Respondent attended the offices of Workpermit, where they executed a search warrant granted by Westminster Magistrates Court under s.92A of the 1999 Act, seizing a number of emails and invoices relating to the provision of immigration services. The Claimant was invited once again to participate in an interview under caution on 6 June 2017, but stated that he was seeking further advice. A number of further appointments for such an interview have been suggested, but to date no such interview has in fact taken place.**
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> **8. Mr. Seymour states that the Respondent has an internal complaints procedure, initially to the head of HR and thereafter to the Commissioner, if an individual considers that the Respondent has failed to provide a satisfactory standard of service, details of which procedure are on the Respondent's website. If a complainant remains dissatisfied at the end of that process, it is open to them to pursue the complaint or alleged injustice through their MP to the Parliamentary Ombudsman. Information and details concerning the complaints procedure are included on the Respondent's website. Mr. Seymour identified the Respondent's applicable policy in relation to criminal prosecutions at pages 165 to 169, and said that there were currently about twenty criminal investigations in progress. Most concerned situations where advice and services were being provided in the complete absence of any registration or registered adviser, although two organisations had claimed a UK based supervisor, and one an overseas supervisor. Under the Respondent's regulatory scheme, there were currently about 3,500 registered individual advisers, operating through about 1,600 organisations, none of which had claimed a non-UK based supervisor.**
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> **9. In his witness statement, the Claimant asserts that the Respondent's decisions to refuse Workpermit and Visa Joy's continued registration as being qualified to provide immigration advice and services under s.84 and to cancel their registration was motivated or infected by race discrimination; that his earlier complaints concerning some members of the Respondent's staff have resulted in**

him and his companies being victimised; and that the Respondent's threats of criminal prosecution and their obtaining and executing a search warrant are discriminatory and amount to harassment. The Claimant includes at paragraph 31 of his statement an 'overview' of the discrimination he alleges. Whilst it is correct that the Claimant's companies did in fact exercise their rights of appeal against the registration refusal and cancellation decisions, the Claimant says that the First-Tier Tribunal *'and other Courts that we have already gone to are not suitable venues for the hearing of racial discrimination claims. If you dare to criticise the Respondent, you will weaken your case and are more likely to lose'.* The Claimant sets out in his statement what he says happened at the First-Tier Tribunal hearing on 10 June 2014 that he attended, and says that there was a marked disinclination on the part of the Tribunal to deal with his allegations of discrimination; and that the professional advice from counsel he then received was, in effect, not to pursue the matter in that forum.

10. The Claimant also deals at some length with complaints he has raised about members of the Respondent's staff and his dealings with them, in particular a Mr. Dean Morgan, which stretch back for more than 10 years, and about which nothing has been done. He contends that there is no appeal possible where, as here, the Respondent has failed to deal with his complaints against Mr. Morgan and others; that the Respondent's approach has been racially discriminatory and that it encourages fraud and corruption. Whilst the Claimant acknowledges that it would be possible perhaps to apply for Judicial Review, he says that would not be a suitable remedy.

11. In conclusion, the Claimant suggests that the Respondent has been operating a system for about 10 years where there were no effective appeal rights against their complaint determinations, short of Judicial Review. Secondly, he contends that it is not possible to separate the actions which the Respondent takes as a regulator from its enforcement function, which he suggests has been racially motivated in his case. Thirdly, that raising the issue of discrimination at the First-Tier Tribunal was counterproductive and only harmed his case, and that it and the Upper Tribunal are not suitable venues within which to raise discrimination issues. Finally, that it is only recently that the law has changed to make it easier to bring claims against regulators in the Employment Tribunal."

19. The Tribunal then referred to the submissions. This included Ms Robinson suggesting that there were two periods of time, the first in which the Respondent cancelled the two registrations, which the Claimant then attempted to overturn. The later period was from January 2017, in which the Respondent investigated and commenced enforcement action for unlawful conduct. The Claimant submitted that this distinction was artificial and wrong.

20. The Tribunal then came to its conclusions, which I will set out in full.

"18. I agree with Ms. Robinson that it is sensible and appropriate, at least for the purposes of considering the applicable legal principles, to consider the complaints raised by the Claimant as falling into two separate periods, the first being those relating to the Respondent's refusal of the Claimant's companies' application for continued registration and the cancellation of their registrations, and the steps then taken to overturn those decisions; and the second and later

period covering the complaints arising from the Respondent's enforcement activities since January 2017.

19. In relation to the complaints arising in the first period, I have no hesitation in accepting Ms. Robinson's submissions, which are plainly correct. There is no doubt that the Respondent was then acting in the capacity of a qualifications body, that s.53 Equality Act 2010 prohibits such a body from acts and omissions of the type which the Claimant alleges in his claim, and that s.120 of the same Act confers jurisdiction on the Tribunal to determine such complaints, unless the act(s) complained of may be subject to appeal under another enactment. The Claimant (or rather his companies, and I should make clear that no submissions or evidence were put forward by either side as to any distinction between the two, so I do not address that potential issue in this judgment) did in fact bring and pursue appeal proceedings against the Respondent in respect of its decisions to refuse his applications for continued registration and the cancellation of existing registrations, pursuant to the Immigration and Asylum Act 1999. There is no doubt that the Claimant was able to include the allegations he now puts forward of race discrimination, racial harassment and victimisation relating to those decisions by the Respondent in those appeals, that he was reminded of that option at a time when he could have pursued it, and that, apparently with the benefit of legal advice, he chose not to do so. Whether or not the Claimant had good reasons for acting as he did, as to which I make no finding, is immaterial: the simple fact is that he had a right to and could have raised those allegations in those appeals. It follows in my judgment that the provisions of s.120(7) Equality Act 2010 apply to the Claimant's complaints which arise in the period before January 2017 and when the Respondent was acting in the capacity of a qualifications body, that the Tribunal has no jurisdiction to hear them, and that they must be struck out. For the avoidance of doubt, and in case I was wrong in coming to that conclusion, I make plain that I would have struck out those complaints as amounting to an abuse of process, for the reasons outlined by Ms. Robinson.

20. It seems to me that the position in relation to the later period, from January 2017 onwards, when the Respondent was investigating possible offences by the Claimant and his companies and commencing enforcement action by means of interviews under caution, is not quite so clear cut. Accordingly, bearing in mind that the Claimant was representing himself, that there seems to be no appeal against the Respondent's actions in the later period short of Judicial Review, and that s.54 Equality Act does not provide any definition of a 'qualification body,' in terms of its having different or varying functions which is helpful in the circumstances of this case, I put the Claimant's case to Ms. Robinson. That is in essence that the Respondent's capacity in its dealings with the Claimant has been unchanging, that enforcement action is simply one aspect of the Respondent's overall regulatory role, and that it is arbitrary and artificial to separate the functions which the Respondent may Case Number 3201321/2018 8 undertake from time to time and to apply different rules to each, as well as being confusing for the layman.

21. As noted at paragraph 2 of these Reasons, under the 1999 Act which established the Respondent, it has a number of statutory functions, some of which have been set out above. Ms. Robinson submits that those functions should be read and understood disjunctively, rather than conjunctively; and that in exercising its enforcement function the Respondent is not acting as a qualifications body, as defined in s.53. I agree. I accept that the fact that the Claimant's companies' registrations were cancelled and their applications for continued registration refused by the Respondent, acting as a qualification body, is ultimately irrelevant to the enforcement action subsequently undertaken. That proposition can be tested and proved by the fact that, as Mr. Seymour stated, most of the criminal investigations and prosecutions undertaken by the Respondent were against organisations which were never registered nor had qualified advisers under the regulatory scheme, so that the fact that the

> **Respondent in other circumstances undertakes regulatory functions as a qualifications body would be immaterial. Secondly, to allow any such unregistered organisation to have recourse to the Employment Tribunal simply because it objected to the enforcement action being taken against it would be to open the proverbial floodgates, and in my view is outside the scope of the statutory provisions, which were designed to provide redress against discriminatory acts related to or arising out of the authorisation, qualification or recognition (et seq) needed for, or which facilitates, engagement in a particular trade or profession. Finally, I accept Ms. Robinson's analogy and comparison of the Respondent with the police. They too have a number of functions as a qualifications body, for example in relation to examinations for entry and promotion, and at the same time an obvious enforcement function, with significantly greater powers than the Respondent: yet there is no option for those aggrieved with their discharge of that function to complain to the Tribunal. For these reasons, I find that the provisions of s.53 Equality Act 2010 do not apply to the Respondent's investigation and enforcement actions from January 2017 onwards concerning the Claimant and/or his two companies; that the Tribunal has no jurisdiction to hear the Claimant's complaints in relation to that period and those actions; and that they too must be struck out.**
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> **22. If I was wrong in coming to that conclusion, I would have been minded to have struck out the complaints as being out of time, since the last date for interview under caution proposed by the Respondent of which I am aware was 6 June 2017, over a year before the Claimant's claim was presented, although I appreciate that subsequent interviews were suggested. In any event, in my judgment and for the reasons I have given, the whole of the Claimant's claim against the Respondent must be struck out."**

21. The original Grounds of Appeal ran to twelve long paragraphs. Choudhury P considered that seven paragraphs were arguable. A redrafted version was then approved by him. The full text appears as an Appendix to this Decision. Though a little shorter than the original draft, these Amended Grounds remain, in my view, somewhat discursive, and there are elements of overlap. I have therefore identified what appear to me, in substance, to be the principal points of challenge. I summarise them as follows:

(1) The Tribunal erred in concluding that section 120(7) precluded it from having jurisdiction in respect of the complaints that the 2014 decisions, not to re-register the Claimant's two companies, were acts of discrimination. That is said to be because it erred in concluded that section 87 of the **1999 Act** enabled those acts to be subject to an appeal or proceedings in the nature of appeal in the sense meant by section 120(7).

(2) The Tribunal erred in concluding that the Claimant was estopped from presenting discrimination complaints to it in respect of those 2014 decisions, as it wrongly held that he could, and should, have pursued those allegations as part of the FTT appeals.

(3) The Tribunal erred in concluding that there was no power at all to entertain the complaints in respect of the Respondent's conduct from January 2017 onwards, on the footing that they were not within scope of section 53 of the **2010 Act**. It erred because the Respondent remained, at all times a "qualifications body" as defined in section 54; and/or what the Respondent did in 2014 and what he did from January 2017 formed part of his same overall role, and of a course of treatment;

(4) The Tribunal erred in concluding that the complaints were in any event out of time. The Claimant was complaining of conduct which he said was continuing up to the time when he presented his Employment Tribunal claim form.

22. There are other points raised by the Amended Grounds of Appeal, but in my judgment the outcome of the above four core points of challenge will resolve them all. I will therefore consider those four points, each in turn. Finally, I will address some other points that arose during the course of the Hearing of this Appeal itself.

(1) <u>Does Section 120(7) Preclude Jurisdiction in Respect of the 2014 Decisions?</u>

Overview of the Issue

23. The starting point is that the Tribunal may only consider a complaint if legislation confers jurisdiction upon the Tribunal to hear it. The Claimant's case was that the Respondent is a qualifications body, as defined in section 54 of the **2010 Act**, all of his complaints fell within scope of section 53, and jurisdiction to entertain them was conferred on the Tribunal by section 120(1)(a), as section 53 falls within Part 5, relating to "work".

24. Sections 53 and 54 provide (excluding irrelevant parts) as follows:

> **53 Qualifications bodies**
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> **(1) A qualifications body (A) must not discriminate against a person (B)—**
>
> **(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;**
>
> **(b) as to the terms on which it is prepared to confer a relevant qualification on B;**
>
> **(c) by not conferring a relevant qualification on B.**
>
> **(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—**
>
> **(a) by withdrawing the qualification from B;**
>
> **(b) by varying the terms on which B holds the qualification;**
>
> **(c) by subjecting B to any other detriment.**
>
> **(3) A qualifications body must not, in relation to conferment by it of a relevant qualification, harass—**
>
> **(a) a person who holds the qualification, or**
>
> **(b) a person who applies for it.**
>
> **(4) A qualifications body (A) must not victimise a person (B)—**
>
> **(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;**
>
> **(b) as to the terms on which it is prepared to confer a relevant qualification on B;**
>
> **(c) by not conferring a relevant qualification on B.**
>
> **(5) A qualifications body (A) must not victimise a person (B) upon whom A has conferred a relevant qualification—**
>
> **(a) by withdrawing the qualification from B;**
>
> **(b) by varying the terms on which B holds the qualification;**
>
> **(c) by subjecting B to any other detriment.**
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> **54 Interpretation**
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> **(1) This section applies for the purposes of section 53.**
>
> **(2) A qualifications body is an authority or body which can confer a relevant qualification.**
>
> **(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.**
>
> **(5) A reference to conferring a relevant qualification includes a reference to renewing or extending the conferment of a relevant qualification.**

> **(6) A competence standard is an academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability.**

25. It has never been in dispute that being registered with the Respondent to provide immigration advice and services pursuant to the **1999 Act** amounts to a "relevant qualification" within scope of section 54(3), and hence that the Respondent is a qualifications body as defined in section 54(2). It has also never been in dispute that, in deciding not to re-register the Claimant's two companies in 2014, and, consequently, removing their names from the register, the Respondent was doing something potentially within the scope of sections 53(2), (3) and/or (5) if it amounted to an act of discrimination, harassment and/or victimisation. Nor is it disputed that section 120(1)(a) potentially conferred jurisdiction on the Tribunal.

26. The sole dispute, in respect of the 2014 decisions, was as to whether section 120(7) was engaged, and so disapplied section 120(1)(a) and precluded jurisdiction. There was, and could be, no dispute that the **1999 Act** is an enactment. The issue was whether the proceedings which section 87 enables an aggrieved party to pursue, have the particular characteristics which must necessarily be possessed by a right of "appeal or proceedings in the nature of an appeal" in the sense meant by section 120(7).

27. Mr Beyzade argued that they do not, for the following essential reasons. First, section 87(2) permits a person aggrieved by a relevant decision of the Respondent to appeal to the FTT "against the decision". It does not permit them to present a complaint to the FTT, in terms, that the decision was an act of discrimination, as such. Secondly, the FTT is not able, when considering an appeal pursuant to section 87(2), substantively to consider and adjudicate such allegations. Thirdly, the FTT is not a suitable specialist forum to consider such allegations. Finally, the FTT could not provide the remedies which the Employment Tribunal could provide,

A and would therefore not be able to provide the Claimant with the effective remedy for discrimination to which he is entitled.

B 28. Ms Robinson's answer to the first two lines of argument was, in essence, that, as part of an appeal to the FTT against a relevant decision, an individual *can* advance the contention that the decision was an act of discrimination, and the FTT *can* give that allegation substantive consideration. As to the third point, Parliament has decided that where there is a right of appeal C within scope of section 120(7) to another body, jurisdiction lies exclusively with that body, and not with the Tribunal. As to remedy, it is not an essential requirement of an appeal or proceedings in the nature of an appeal within scope of section 120(7), that the body which adjudicates the D proceedings should have the power to confer the same remedies as would the Employment Tribunal.

Discussion and Conclusions

E 29. In **Michalak v General Medical Council** [2018] ICR 49 the Supreme Court considered whether the availability of judicial review in respect, in that case, of certain decisions or actions of the General Medical Council, excluded the jurisdiction of the Tribunal by virtue of section F 120(7). There were issues both as to whether judicial review was available "by virtue of an enactment" and as to whether judicial review proceedings are "proceedings in the nature of an appeal". The Supreme Court answered both questions in the negative.

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30. On the latter question the key passage in the Judgment of Lord Kerr (all the other Justices concurring) is the following:

H **"20. In its conventional connotation, an "appeal" (if it is not qualified by any words of restriction) is a procedure which entails a review of an original decision in all its aspects. Thus, an appeal body or court may examine the basis on which the original decision was made, assess the merits of the conclusions of the body or court from which the appeal was taken and, if it disagrees with those conclusions, substitute**

its own. Judicial review, by contrast, is, par excellence, a proceeding in which the legality of or the procedure by which a decision was reached is challenged. It is, of course, true that in the human rights field, the proportionality of a decision may call for examination in a judicial review proceeding. And there have been suggestions that proportionality should join the pantheon of grounds for challenge in the domestic, non-human rights field - see, for instance, *Kennedy v Charity Commission (Secretary of State for Justice intervening)* [2014] UKSC 20; [2015] AC 455, paras 51 and 54; and *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19; [2015] 1 WLR 1591, paras 96, 113 and 115; and *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355, paras 133, 143 and 274-276. But an inquiry into the proportionality of a decision should not be confused with a full merits review. As was said in *Keyu* at para 272:

"… a review based on proportionality is not one in which the reviewer substitutes his or her opinion for that of the decision-maker. At its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision-maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense."

21. Judicial review, even on the basis of proportionality, cannot partake of the nature of an appeal, in my view. A complaint of discrimination illustrates the point well. The task of any tribunal, charged with examining whether discrimination took place, must be to conduct an open-ended inquiry into that issue. Whether discrimination is in fact found to have occurred must depend on the judgment of the body conducting that inquiry. It cannot be answered by studying the reasons the alleged discriminator acted in the way that she or he did and deciding whether that lay within the range of reasonable responses which a person or body in the position of the alleged discriminator might have had. The latter approach is the classic judicial review investigation.

22. On a successful judicial review, the High Court merely either declares the decision to be unlawful or quashes it. It does not substitute its own decision for that of the decision-maker. In that sense, a claim for judicial review does not allow the decision of the GMC to be reversed. It would be anomalous for an appeal or proceedings in the nature of an appeal to operate under those constraints. *An appeal in a discrimination case must confront directly the question whether discrimination has taken place, not whether the GMC had taken a decision which was legally open to it."*

31. Lord Kerr went on to hold that certain decisions of the EAT holding that, where there was a right to seek a judicial review, section 120(7) was engaged, were therefore wrong. Importantly, in this part of his speech he discussed the decision of the Court of Appeal in **Khan v General Medical Council** [1996] ICR 1032, the import of which he said had previously been misunderstood by the EAT. I shall return to what **Michalak** has to say about **Khan**.

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32. Section 87(2) of the **1999 Act** enables a person aggrieved by a relevant decision of the Respondent "to appeal to the First-Tier Tribunal against the decision". The definition of "relevant decision" in section 87(3) includes decisions to refuse an application for registration, to refuse an application for continued registration and to cancel a registration. There can therefore be no doubt that the Claimant had the right, under section 87, to appeal the 2014 decisions in respect of his companies; and, as we have seen, he exercised it.

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33. Section 88(2) provides that, if the FTT allows a section 87 appeal, it may, among other things, if it considers it appropriate, direct the Respondent to "register the applicant or continue the applicant's registration".

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34. With regard to the first two strands of Mr Beyzade's submissions, it is true, as such, that section 87 does not expressly provide a right to present a complaint to the FTT, in terms, that the Respondent has done something that amounts to an act of discrimination. However, there is no such requirement in section 120(7), only a requirement that "the act complained of" be the subject of an appeal. The "act complained of" means the *substantive conduct* complained of – here the refusal to re-register the companies and the removal of them from the register. Nor is there anything in **Michalak** (or any other authority) to suggest that a right of appeal must have this feature, in order to fall within scope of section 120(7).

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35. Mr Beyzade however submitted that the FTT did not have the power to "conduct an open-ended enquiry" into the discrimination issue (referencing **Michalak** at [21]), nor to "confront directly the question whether discrimination has taken place" (referencing **Michalak** at [22]). I do not agree. My reasons follow.

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36. First, section 87 places no particular restriction on the grounds of appeal which may be advanced to the FTT, or as to the basis on which the appellant may assert that they are "aggrieved" by the decision against which they are appealing. It plainly was open to the Claimant, to advance, in this case, as part of his appeal to the FTT, his particular allegations that the 2014 decisions amounted to acts of discrimination, harassment and/or victimisation in the sense that those terms are defined in the **2010 Act**. If he initially had any doubt about whether it would be open to him to do that, it was addressed, in terms, by the FTT telling him that at an interlocutory hearing.

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37. Secondly, I agree with Ms Robinson that the FTT does have the power, when hearing and determining an appeal under section 87, to scrutinise and confront allegations of discrimination and to come to a substantive view about them. I agree with her that the Tribunal correctly regarded the decision in the case of **Kenny Kehinde Tuki**, IMS/2011/7/RCR as a practical illustration of that happening. In that case, as part of its evaluation of an application for continued or renewed registration, and following a complaint, the Respondent had subjected the appellant to an audit. As part of the appeal, allegations of race and sex discrimination were made against the caseworker who conducted the audit. The FTT heard evidence. In the course of its decision it came to the conclusion that those specific allegations of discrimination against the caseworker were unfounded.

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38. In the present matter the FTT heard the appeal of ImmEmp Solutions Limited over two days in August 2014. I had in my bundle a copy of its reserved Decision dated 6 October 2014. At [21] it accepted, by reference to an authority of the UT, **KMI v Immigration Services Commissioner** [2013] UKUT 0520, a submission, in terms, that this was "a full appeal by way of rehearing." It heard evidence and its Decision makes findings of fact. The UT, in its Decision in the present matter (in relation to both the ImmEmp Solutions appeal and the Visa Joy appeal),

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A at [15], also cited **KMI** and noted that the FTT was required to determine for itself whether the Decision appealed from was right, and to redetermine issues of fact previously determined by the Respondent, as necessary in order to resolve the particular grounds of appeal. Further, it held, at [85], that where the cancellation of a registration is based (as it was here) on the outcome of a complaint or complaints, the FTT can, and will need to, examine not merely the fact of a complaint, but its substance, in order to determine the appeal.

39. Mr Beyzade referred me to some passages from the decision in **Uddin v General Medical Council**, UKEAT/0078/12, but I cannot see how it assists him. **Uddin**, by contrast with some other pre-**Michalak** decisions of the EAT, held that availability of judicial review is not within scope of section 120(7), so that, where complaints related to treatment for which judicial review was the only available route of challenge, the Tribunal would still have power to consider them under section 53. But, in this case, Ms Robinson correctly submitted that the FTT could have considered and determined *any* allegation of discrimination said to be relevant to the decisions to de-register, including in relation to the complaints against the Claimant's companies that were said to have contributed to those decisions.

40. The allegations in question here were that the conduct of the Respondent (through one or more employees or agents) itself was an act of discrimination. But I cannot see any basis for concluding that this would be off limits for consideration by the FTT. Such allegations were considered in **Kenny Kehindi Tuki**, and in the present case the Claimant was expressly told that he could advance them. Further, I note that, in a passage in **Khan** (above), cited in **Michalak** at [27], Hoffman LJ said that the GMC's Review Board for Overseas Qualified Practitioners had a *duty* to give effect to, and have proper regard to, the provisions of the **Race Relations Act 1976**

(the relevant discrimination statute at the time), citing a dictum of Taylor LJ in **R v Department of Health, ex p Gandhi** [1991] ICR 805 at 814.

41. I conclude that, had the Claimant elected to pursue his allegations of discrimination as part of either or both of his FTT appeals, the FTT *would* have been bound to "confront" them, consider the evidence, and make findings determining whether they were well founded or not, as part of its consideration and overall determination of those appeals.

42. I turn to Mr Beyzade's submissions based on the proposition that the FTT is not a suitable specialist forum. He referred to the recognition, in particular at [19] of **Michalak**, of the specialist expertise that Employment Tribunals have in adjudicating discrimination claims. Mr Beyzade was critical of what he suggested (in so many words) was the superficial and inadequate treatment of the discrimination allegations in the **Kenny Kehindi Tuki** decision. The Claimant's own position plainly was, and is, more boldly, that he does not consider that his allegations of discrimination would have received fair consideration before the FTT; and he told EJ Brook "candidly" that that was why he decided not to pursue them in that forum, where he was, he considered, "bound to lose".

43. My conclusions on this aspect are these. First, Employment Tribunals do indeed have particular expertise and experience in hearing and determining claims of discrimination. But I note that Parliament has not given them exclusive jurisdiction over all claims and issues arising under the **2010 Act**. The County Court expressly has exclusive jurisdiction in relation to complaints arising in a number of spheres, as do specialist Tribunals in the education field. **Equality Act** issues can also arise in certain guises in the High Court.

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44. Secondly, there can be no doubt that, where it applies, section 120(7) does rob the Tribunal of the jurisdiction that it might otherwise have had under section 53. Parliament has, in this respect, deliberately decided to take a different approach, in relation to challenges to the decisions of qualifying bodies, which are often subject to bespoke statutory oversight, than it has to, say, challenges to the decisions of employers (under section 39). If Parliament had thought it undesirable so to provide, on the basis that other appellate bodies did not, or might not, have the same level of expertise in determining discrimination issues as the Employment Tribunal, it would not have enacted section 120(7). Neither the Claimant's lack of faith in the FTT, nor Mr Beyzade criticisms of the **Kenny Kehindi Tuki** decision (about which I express no view) provide any basis for construing section 120(7) any differently.

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45. Further, in this area, there is no concurrent jurisdiction. As Lord Kerr observed in **Michalak** at [18], where section 120(7) does apply, it makes sense for jurisdiction to be confined to the alternative statutory route. But in any event, the words of section 120(7) are unambiguous. Where it applies, sub-section 120(1)(a) "does not apply".

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46. I turn to the matter of remedies. The Claimant, and Mr Beyzade, highlight that, where a complaint of discrimination is upheld by an Employment Tribunal, it can make a declaration, and grant remedies including a recommendation and, importantly they say, an award of compensation covering a number of heads of damages. The FTT cannot grant those remedies.

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47. Mr Beyzade particularly relied upon what Lord Kerr said in **Michalak** at [16]

> **"16. Not only was the Employment Tribunal designed to be a specialised forum for the resolution of disputes between employee and employer, it was given a comprehensive range of remedies which could be deployed to meet the variety of difficulties that might be encountered in the employment setting. Thus, for instance, the tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters that arise in the proceedings before it (section 124(2)(a)); it may order a respondent employer to pay compensation to a complainant employee (section 124(2)(b)); and it may make a**

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> **recommendation (section 124(2)(c)). If a recommendation is not followed, the tribunal has power (under section 124(7)) to increase the award of compensation, or, if an award has not been already made, to make one."**

48. These were among considerations which, said Lord Kerr at [17], "provide the backdrop to the proper interpretation of section 120(7)." Mr Beyzade also referred to the fact that, at [18], while indicating that, where there is an alternative route of redress by way of an appeal or appeal-like procedure, it makes sense for the challenge to be confined to that route, Lord Kerr added: "That rationale can only hold, however, where the alternative route of appeal or review is capable of providing an equivalent means of redress."

49. These passages put some wind in Mr Beyzade's sails. They gave me some pause. But ultimately this strand of the argument also fails. My reasons are as follows.

50. First, section 120(7) provides that is sufficient to exclude the Tribunal's jurisdiction if the act complained of may be subject to an appeal or proceedings in the nature of an appeal. It does not, itself, require the body that would be seized of those proceedings to have the power to grant the same remedies as the Tribunal would have, or even equivalent remedies.

51. Secondly, I do not think that Lord Kerr's observation, that the alternative route of appeal must be "capable of providing an equivalent means of redress" carries the import that the body concerned must be able to award the same suite of remedies as the Tribunal. The passages by which Mr Beyzade set particular store form part of the opening discussion of the **2010 Act** and the wider purpose and context of its provisions. While noting, at the start of [17] that these "provide the backdrop" to the proper interpretation of section 120(7) Lord Kerr continues:

> **"Part of the context, of course, is that appeals from decisions by qualification bodies other than to the Employment Tribunal are frequently available. It would obviously be undesirable that a parallel procedure in the Employment Tribunal should exist alongside such an appeal route or for there to be a proliferation of satellite litigation incurring unnecessary cost and delay. Where a statutory**

> **appeal is available, employment tribunals should be robust in striking out proceedings before them which are launched instead of those for which specific provision has been made. Employment tribunals should also be prepared to examine critically, at an early stage, whether statutory appeals are available."**

52. The section of Lord Kerr's Judgment under the specific heading of "Proceedings in the nature of an appeal" appears at [20] – [30]. I have already cited parts of it. He states that the conventional connotation of an appeal is a procedure that conveys a "review of an original decision in all its aspects" and the ability to substitute its own decision if it disagrees [20]; where the allegation is of discrimination, the appeal body must "conduct an open-ended enquiry into that issue" [21] and "confront directly the question whether discrimination has taken place" [22]. At [25] he highlights the dictum of Hoffman LJ in **Khan**, that a procedure which allows the decision under challenge to be "reversed by a differently constituted set of persons" is "of the essence of what is meant by 'proceedings in the nature of an appeal'"; and he observes, at [26], that it was the fact that, in that case, the Review Board of the GMC could reach an open-ended and unconstrained decision, uninhibited by the circumstances that the GMC had reached a particular decision, which meant that the review they conducted was in the nature of appeal.

53. In summary, the hallmarks of an appellate body are that is has the unconstrained ability to look at the matter again, come to a different decision, and reverse the decision under appeal. Lord Kerr is therefore telling us that if, but only if, a body has these hallmarks (and judicial review does not), then it is truly an appellate body in the requisite sense and is capable of providing the complainant with what he has earlier called "an equivalent means of redress."

54. Further, at [27] and [28], in a passage to which I have referred already, Lord Kerr said:

> **"27. Hoffmann LJ did refer to judicial review later in his judgment. At p 1043, dealing with an argument that claimants such as Dr Khan were not able to pursue claims for race or sex discrimination if they were not permitted to make complaints to an industrial tribunal, he said this:**

> **"For my part, I do not see why [an application for review under section 29] should not be regarded as an effective remedy against sex or race discrimination in the kind of case with which section 12(1) of the Race Relations Act 1976 deals. That concerns qualifications for professions and trades. Parliament appears to have thought that, although the industrial tribunal is often called a specialist tribunal and has undoubted expertise in matters of sex and racial discrimination, its advantages in providing an effective remedy were outweighed by the even greater specialisation in a particular field or trade or professional qualification of statutory tribunals such as the review board, since the review board undoubtedly has a duty to give effect to the provisions of section 12 of the Act of 1976: see per Taylor LJ in *R v Department of Health, Ex p Gandhi* [1991] ICR 805, 814. This seems to me a perfectly legitimate view for Parliament to have taken. Furthermore, section 54(2) makes it clear that decisions of the review board would themselves be open to judicial review on the ground that the board failed to have proper regard to the provisions of the Race Relations Act 1976. In my view, it cannot be said that the Medical Act 1983 does not provide the effective remedy required by Community law."**
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> **28. It is important to understand that Hoffmann LJ was not referring here to judicial review as a possible candidate for inclusion in the category of a proceeding in the nature of an appeal. His remarks in this passage were made in the context of an argument that, in order to have an effective remedy, a claimant had to be allowed to present a complaint to the industrial tribunal. He was merely pointing out that the availability of the review procedure, especially when considered with the opportunity to apply for judicial review of that review provided an adequate remedy.**

55. Here Hoffman LJ, and Lord Kerr in turn, further expound on what is meant in this context by an "effective remedy". Although the GMC Review Board appeal, in **Khan**, provided a *different* particular remedy from the Employment Tribunal, it could not be said that it did not provide an *effective* or *adequate* remedy, or, in Lord Kerr's language, "equivalent means of redress."

56. Mr Beyzade also argued that a further deficiency of the FTT forum is that statutory shifting of the burden of proof under section 136 of the **2010 Act** would not inform its consideration of allegations of discrimination. However, there is nothing in either section 120(7) or in **Michalak** to indicate that this is an essential requirement of an appeal or proceedings in the nature thereof, falling within its scope.

57. Applying the **Michalak** guidance, I conclude that the section 87 route of appeal to the FTT had all the essential hallmarks of an appeal. The Claimant could have advanced his

allegations of discrimination there. The FTT would have had the unconstrained ability to hear evidence, find facts, and adjudicate their particular merits. It also would have had the power to reverse the decisions of the Respondent by directing that the Claimant's companies be put back on the register – a power that the Tribunal in fact would not have had, as it could only make a recommendation. It did have the power to afford him an equivalent means of redress.

58. The Tribunal was therefore right to hold that it did not have jurisdiction to consider the Claimant's complaints about the Respondent's 2014 decisions not to renew his companies' registrations and to remove them from the register, because the right of appeal conferred by section 87 of the **1999 Act** in that respect is "an appeal or proceedings in the nature of an appeal" for the purposes of section 120(7) of the **2010 Act**. Ground (c) therefore fails. The Tribunal also properly concluded that, whatever the Claimant's personal misgivings about the FTT process, they did not affect the proper analysis; and Ground (d) also fails.

(2) Abuse of Process

59. I can deal with this shortly. The Tribunal held that, had it accepted that section 120(7) did not rob it of jurisdiction, it would have struck out the complaints relating to the 2014 decisions as an abuse of process, relying on the principle in **Henderson v Henderson**. As I have concluded that the Tribunal was right to find that section 120(7) did rob it of jurisdiction, it did not, in fact, need to rely on this alternative ground for striking out those complaints. That part of this appeal therefore falls away; and Ground (e) fails.

(3) The Actions of the Respondent from January 2017 Onwards

60. The decisions which the Claimant sought to impugn as discriminatory were the decision to commence an investigation of whether he was breaking the law, by providing immigration

advice and services at a time when he was not a qualified person, including inviting him to an interview for the purposes of that investigation, and obtaining a search warrant.

61. The Claimant's and Mr Beyzade's arguments focussed, before the EAT, as they did before the Tribunal, on the definition of "qualifications body" in section 54. The Claimant argued that the Respondent had not ceased to be a qualifications body at some point before 2017. It still was one. Further, its enforcement role was part and parcel of its regulatory role, and could not be severed from it. Further, the 2014 actions and the 2017 actions were, in his case, all part of a longstanding vendetta against him. That was a further reason why it was wrong to divide the complaints into two distinct phases. The Tribunal's additional lines of reasoning in support of rejecting the Claimant's analysis – the "floodgates" argument and the supposed analogy with different police functions – were both also faulty.

62. My conclusions in relation to this aspect of the Appeal are as follows.

63. First, it is a necessary condition, for a complaint of discrimination to be within scope of section 53, that the party against whom the complaint is advanced be a qualifications body. That is because every sub-section of that section applies, only, to a qualifications body. The Claimant is right that the Respondent was, throughout, a qualifications body, within section 54. He is therefore right that *this* section 53 condition was met in respect of the complaints relating to the Respondent's conduct from 2017 onwards that he wanted the Tribunal to consider.

64. But, while this is a necessary condition for a cause of action to be established under section 53, it is not sufficient. That is because the section *does not* prohibit *any* conduct by a qualifications body which amounts to discrimination or victimisation, but *only* such conduct as

amounts to doing one or more of the things referred to in each of the sub-paragraphs of sub-sections (1) to (5) (or, in relation to disabled persons, falling within sub-sections (6) or (7)).

65. In order to determine whether it could consider the allegations of discrimination relating to the conduct from 2017 onwards, the Tribunal therefore had to decide whether the nature of the *conduct* in this period, of which the Claimant wished to complain, fell within scope of section 53. For this reason, I reject the contention, in Ground (a), that the Tribunal was wrong to distinguish between the complaint relating to the conduct in 2014 and that relating to the conduct from 2017 onwards, relying on the broad definition of a qualifications body in section 54. The Tribunal did need to consider the nature of the particular conduct complained of in respect of 2017 onwards, and whether *it* fell within scope of section 53.

66. I turn then, to what the Tribunal said in its decision about this aspect. At [15] it summarised Ms Robinson's case – which focussed indeed on section 53. Her argument was not that the Respondent was not, at that time, a qualifications body at all, but, rather, that it was not acting *in that capacity*. This could, perhaps, have been spelled out more fully, but the nub of the argument (as can also be seen from her submission to the Tribunal), was that the complaints about what it did in this period, did not relate to conduct on which section 53 may bite.

67. The Tribunal's conclusion in the final lines of [21] was, clearly, that the provisions of section 53 did *not* apply to the conduct complained of in the period from 2017 onwards, being the various investigation and enforcement actions. The Tribunal did, therefore, answer the right question. Was its answer wrong? In oral submissions Mr Beyzade identified a number of sub-provisions of section 53 that he contended the Tribunal should have found applied to the investigation and enforcement actions. I will work through them.

68. First, he cited sections 53(1)(a) and (b). He argued that, in looking into the activities of the Claimant (or his companies) in this period, and, in particular, into whether he was operating under the supervision of an EEA national, the Respondent was deciding whether to confer a relevant qualification upon him. Mr Beyzade highlighted the wide-ranging definition of "relevant qualification" in section 54(3). He noted that this includes "authorisation" and "recognition". He submitted that, in this period, the Respondent was deciding whether to authorise the Claimant and or whether to recognise what the Claimant said was his arrangement with an EEA national, as a relevant qualification.

69. As to that, certainly the Respondent could be said to have been engaged in the process of investigating and deciding whether the Claimant *was* a qualified person or not at the time, and hence whether he was acting lawfully. But it was *not* deciding whether to *confer* a qualification upon him. The concept of recognition might apply where an organisation, for example, has the power to decide that some particular status or achievement is good enough to meet its own requirements for membership, or bestowal of some other status by it. But the Respondent did not have the power to decide what arrangements should be recognised as relevant qualifications. That was addressed by Parliament. The only qualification that the Respondent can itself confer is registration in accordance with the **1999 Act** regime which it administers. It was not, in 2017 or thereafter, deciding an application for registration. For the same reasons 53(1)(b) did not apply.

70. Next, Mr Beyzade cited section 53(2)(c). He contended that the Respondent's conduct in this period amounted to detrimental treatment, and that the Claimant was someone who fell within the preamble to section 53(2). The argument, more specifically, is that the Claimant was a person "upon whom A has conferred a relevant qualification" because he (or his companies) had held one in the past – until it was removed in 2014.

71. However, in my judgment that is not the correct construction of the preamble. Rather, subsections (1) to (5) as a whole bite on different types of discriminatory conduct in relation to, first, people who are applying to the Respondent for a qualification (that is, registration), and, secondly, people who *currently* hold a qualification that has been conferred by the Respondent. In relation to discrimination and victimisation, the drafter has covered the ground in two sub-sections, one for each aspect, because, in relation to each aspect, there are a number of discrete sub-permutations. In relation to harassment, where there is no need to descend into sub-permutations, these two aspects are covered within the two sub-letters of a single sub-section.

72. Consistently with that being the overall regime, the reference in the preamble to section 53(2) to someone "upon whom A has conferred a relevant qualification" is a reference to a *current* holder of such a qualification conferred by A, not to someone upon whom A once in the past conferred such a qualification. but who now no longer holds it. That is clearly what it means in relation to sub-paragraphs (a) and (b), and there is no warrant to give it a more expansive and different meaning in relation to sub-paragraph (c). The inclusion of "any other detriment" is simply there to cater for the possibility that there could be other treatment of a *current* holder, apart from varying the terms on which they hold the qualification, or withdrawing it, that would be detrimental to them, and should be prohibited if it amounts to discrimination, victimisation or harassment. This approach, I might add, mirrors the approach of section 39, in relation to employment, which covers both aspirants and current employees, and includes a prohibition on detrimental treatment of the latter.

73. Mr Beyzade argued that section 53(3)(a) applied because the Claimant held a relevant qualification, as he was working under the supervision of an EEA national. But that, of course was disputed, and was the very subject of the investigation. But even if he in fact was, section

53 only gives a cause of action in relation to conferment *by the qualifications body that is it the subject of the complaint* of a relevant qualification, or a person currently holding a relevant qualification that has been conferred *by that body*. In relation to sub-section (3) this is expressed by the words in the preamble: "in relation to conferment by it". Again, that is consistent with the overall policy being to regulate the formation (or not) of a relationship by the conferring of a qualification, and a relationship that currently exists between the person who conferred it and the holder. It does not apply to conduct by a qualifications body towards someone who holds a relevant qualification that has been conferred by someone else. It could, therefore, only apply to conduct by the Respondent in respect of an applicant for registration or re-registration with it, or the current holder of such a registration, *and* connected with it.

74. In light of the foregoing, Ground (b) of the Amended Grounds fails. A qualifications body cannot "escape from liability merely by deregistering or refusing to renew" a registration. A complaint that such conduct amounted to discrimination could be considered as part of an appeal to the FTT, and, if upheld, could result in the deregistration or refusal to renew being overturned. Nor would such an act deprive an individual of any right to complain about other conduct that would otherwise exist. The underlying premise of Ground (b) – that the **2010 Act** gives the Employment Tribunal power to consider a complaint of discrimination in relation to the Respondent's enforcement activities is, for reasons I have explained, wrong. The strand of Ground (f) that raises a similar line of argument also fails.

75. Ground (f) also criticises the Tribunal's "floodgates" argument, advanced in the middle of [21]. Such policy considerations would, said Mr Beyzade, be a matter for Parliament. In any case there was no reason to suppose that allowing complaints about enforcement actions to be considered by the Tribunal would create a flood of claims. That Ground also criticises the police

force analogy deployed by the Tribunal in [21] as inapposite and factually inaccurate. But even if these aspects of its reasoning were, indeed, faulty, that does not avail the Claimant on this aspect of the appeal, if the Tribunal's conclusion was still legally correct. For reasons I have already given, it was, and none of the other points raised in Ground (f) lands home.

76. For all these reasons the Tribunal was right to conclude that it had no power to consider the complaints relating to the conduct of the Respondent from 2017 onwards, because the nature of that alleged conduct was not such as to fall within scope of any part of section 53.

(4) Time Points

77. Ground (g) argues that the Tribunal erred at [22] in concluding that the complaint relating to the conduct from 2017 onwards was out of time, on the basis that the last date for interview under caution proposed by the Respondent was 6 June 2017. Mr Beyzade relied on the fact that the Tribunal itself acknowledged, in the same paragraph, that subsequent interviews were suggested. This was also mentioned at [7] where it was also noted that an interview had yet to take place. The Claimant's case was that there was ongoing discriminatory treatment even at the time when the claim was presented. There was further correspondence from the Respondent during the first half of 2018. The Tribunal had erred by failing to take account of this. Alternatively, this part of its decision was not **Meek**-compliant.

78. Ms Robinson, in reply, told me that, in evidence to the Tribunal, the Claimant had said that the most recent aspect of matters he was complaining about was the invitation to interview in June 2017. He had not advanced any specific case for just and equitable extension of time.

79. Had the outcome turned on it, I would not have regarded the Tribunal's handling of the time point in [22] as satisfactory. Had the complaints relating to events from 2017 onwards been within scope of section 53, it would have needed to consider what was the Claimant's *case* as to which conduct in that period amounted to, or was part of, discriminatory conduct, what, in light of the evidence, to find, about whether, subject to time points, any part of that did amount to discriminatory conduct, and then to consider the position in relation to time. Not all stages of the exercise were necessarily suitable for a PH. But in the event this Ground of appeal goes nowhere, because, for reasons I have explained, the Tribunal was right to conclude that the complaints about what happened in the period from 2017 onwards were, as a whole, not within the scope of section 53. It was therefore right to dismiss them for that reason alone.

Other Matters

80. I need to address two further aspects that came up during oral argument.

81. First, in the Claimant's original particulars of claim, and the document that he tabled to the September 2018 case management PH, there are references to a complaint the Claimant made to the Respondent about the alleged activities of a Mr Dean Morgan. In oral argument Mr Beyzade suggested that the Tribunal had erred by failing to consider whether it had jurisdiction to entertain a claim of discrimination made to the Tribunal, relating to what the Claimant said was the Respondent's failure to take action on his complaint to it about Mr Morgan.

82. In reply, Ms Robinson said that the Claimant's substantive complaints of discrimination to the Tribunal related only to the de-registration of his companies in 2014 and the actions taken by the Respondent from 2017 onwards. His assertions relating to Mr Morgan were relied upon as background, and by way of what, according to the Claimant, was the contrast between the Respondent's inaction in the case of Mr Morgan (who, he described as white British) and the

A treatment of himself. Nor, said Ms Robinson, was there a distinct Ground of Appeal to the effect that the Tribunal had erred by not considering whether it had jurisdiction in relation to such a purported claim to it. In any event, she submitted, the handling of a complaint made by the Claimant to the Respondent about *someone else*'s alleged conduct, would not have been within scope of section 53; and the Claimant would also have faced insuperable time problems, had he raised such a claim, as the complaint about Mr Morgan was made in 2010.

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83. My conclusions on this aspect are as follows.

84. First, it is clear from his original particulars of claim and his September 2018 document, that it was the Claimant's general case that the Respondent had been consistently discriminating against him over many years, and in various ways. These also refer to what he says was its contrasting treatment of Mr Morgan, and to what he says was its inadequate response to his complaint about Mr Morgan, as an example (on his case) of racist treatment of him. However, the overall tenor and thrust of these documents is that the specific conduct of which he is actually seeking to make complaint to the Tribunal is the deregistration decisions in 2014, and the treatment of him from 2017 onwards. This is how his claim form was understood by the Respondent, and how his case was understood by EJ Brook at the PH before him.

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85. Consistently with this, the Decision which is the subject of this Appeal records the Claimant's evidence in his witness statement as ranging over all of these matters, but the submissions as relating to the 2014 and 2017-onwards complaints; and the Decision at [19] identifies them as such, and identifies (correctly) that any allegations of discriminatory treatment which he maintained were relevant to the 2014 decisions could have been advanced as part of his

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appeals to the FTT (just, I observe, as allegations about earlier treatment or background events may be relied upon as background in pursuing a claim in the Tribunal).

86. I have considered, nevertheless, whether, bearing in mind that the Claimant was a litigant in person, the Tribunal at the November 2018 Hearing should, in light of the references the Claimant made to it, have sought proactively to clarify whether he was seeking to complain about this aspect in its own right. But, bearing in mind that there had been a case management PH, that, on any view, the de-registrations in 2014, and the actions from 2017, were in a different category in terms of their implications for the Claimant, and that it was clearly his case that his complaints about both of those things were justiciable before the Tribunal, I do not think that it was, or should have been, clear, that he was seeking to advance an additional claim relating to the Dean Morgan matter in its own right.

87. Were this a live issue on appeal, I would therefore not have been persuaded that the Tribunal erred in law in this regard. In addition, even had the Claimant expressly advanced such a distinct complaint, and leaving aside Ms Robinson's section 53 point in relation to it, I am bound to say that it is difficult to see how he could have overcome the time obstacle in relation to it, given its vintage, and that the Tribunal correctly concluded that there was no jurisdiction in relation to the 2014 decisions, nothing was said to have been done by the Respondent after that until 2017, and the Tribunal correctly concluded that there was no jurisdiction in relation to the complaints relating to events from 2017 onwards either.

88. Further, I do not think that, on a fair reading, a complaint that the Tribunal had failed to address the jurisdictional question in relation to such a putative claim was, in fact, covered by the Amended Grounds of Appeal. The opening words of Ground (c) refer to the first period as

relating to the refusal of the applications for continued registration, and specifically assert that the error of law lies in the Tribunal's view that the Claimant was able to include his allegations of discrimination relating to those decisions "in those appeals" – that is, the appeals to the FTT. This Ground goes on to develop his arguments to the effect that the section 87 route of challenge did not amount to an appeal within section 120(7). It is also noteworthy that neither in Ground (c), nor anywhere else in the Amended Grounds, is there any specific reference to the matter of the Dean Morgan complaint.

89. I conclude that there was no discrete Ground of Appeal relating to a putative discrete complaint to the Tribunal about the handling of the Dean Morgan complaint; and, had there been one, it would not have succeeded.

90. The second aspect is that, for the sake of clarity, I asked counsel whether section 108 of the **2010 Act** (relationships that have ended) had been raised or argued at any point, with respect to the complaint relating to the conduct from 2017 onwards. Both counsel told me that it had not been raised at all, or considered by either of them. Ms Robinson submitted that, in any event, this section could not have assisted the Claimant. There was no conduct by the Respondent between the de-registrations in 2014 and the initiation of an investigation in 2017. The latter had nothing to do with the fact that the Claimant's companies had previously been registered. It was triggered by information being passed to the Respondent by the Home Office, as the Tribunal was told in evidence at [6] and [7] and itself accepted at [21].

91. Mr Beyzade said, in reply, that this finding could not be properly relied upon, as this was not a Full Merits Hearing. The gap of 2 ½ years would also not have precluded a finding that the instigation of the investigation in 2017 was connected to the former relationship.

92. As I have noted, this aspect was not argued before the Tribunal or raised in the Notice of Appeal. Nevertheless, Ms Robinson was content that I consider it. For the Tribunal to have power to consider a complaint under section 108 the alleged discrimination must be something that "arises out of and is closely connected to" the former relationship, *and* the allegation must be of conduct that would have been a contravention of the **2010 Act** had it occurred during the relationship. It seems to me that the Claimant could not have succeeded in such a claim. While it was his case that he had been active in the period between 2014 and 2017, it was never suggested that the Respondent had taken any action in relation to him in that period. Having heard evidence from Mr Seymour about what prompted the start of the 2017 investigation, the Tribunal was entitled to accept it as fact. I cannot see how the Tribunal could have (properly) concluded that the alleged treatment from 2017 arose out of the former relationship, was also connected to it, and, more than that, was closely connected to it. Had it been argued, section 108 could therefore not have provided a route to jurisdiction in that regard.

Outcome

93. For all the foregoing reasons, this appeal is dismissed.

A

Appendix – The Amended Grounds of Appeal

The grounds upon which this appeal is brought are that the Employment Tribunal("ET") erred in law in that:

a) The decision to split the periods during which the Respondent was carrying out its various functions in relation to the Claimant and his businesses was not in accordance with section 54(2) of the **Equality Act 2010** ("EA 2010") which defines *"a qualifications body"* fairly broadly. Section 54 did not provide that the ET should carry out a piecemeal or disjunctive analysis of the Respondent's functions (paragraph 21 of ET's Judgement). If a Respondent's functions broadly fell within the definitions set out in section 54 of **EA 2010**, the Appellant was entitled to bring a claim pursuant to section 53 of the **EA 2010**.

B

C

b) In any event considering the matter from a disjunctive perspective in paragraph 21 of the Judgment was erroneous as the Appellant had stated in his ET1 Form that the complaints were in relation to continuing discriminatory acts. It would render the protections within section 53 of the **EA 2010** nugatory if it were permissible for a qualifications body to escape from liability merely by de-registering (or refusing to renew) the Appellant's registration and seeking to undertake enforcement proceedings. Such an interpretation would be inconsistent within the statutory regime.

D

c) In paragraph 19 of the ET's Judgment, referring to 'the first period' in 2014 relating to the Respondent's refusal of the Claimant's companies' application for continued registration, the ET proceeds to err in law by concluding *"there is no doubt that the Claimant was able to include the allegations he now puts forward of race discrimination, racial harassment and victimisation relating to those decisions by the Respondent in those appeals …"* because it did not give proper consideration to the issue of whether a statutory appeal was in fact available in relation to the matters complained of by the Appellant. The mere availability of a statutory right of appeal does not preclude the Appellant from bringing a claim under section 53 of the **EA 2010** (see ***Uddin v General Medical Council and Others*** *UKEAT/0078/12/BA* paragraph 30). An appeal pursuant to section 87 of the **Immigration and Asylum Act 1999** ("1999 Act") was not appropriate because there are no provisions therein for an Appellant to commence proceedings in the First Tier Tribunal ("FTT") for breach of the **EA 2010**, or to request consideration of the discriminatory acts before the ET (e.g. by the fact and manner in which it carried out its investigations) or to ask for a remedy available within the ET such as compensation for injury to feelings and/or a declaration.

E

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d) The ET's decision in paragraph 19 was also erroneous because even if there were alternative proceedings available (which is not accepted), there was no consideration given as to whether the purported avenue of appeal in this discrimination case confronted directly the question whether discrimination has taken place, and not merely whether the Respondent had taken a decision which was legally open to it (see ***Michalak v General Medical Council and Others*** *[2017] UKSC 71* relating to judicial review). The ET failed to give the same detailed consideration to the issue of whether an appeal under the **1999 Act** was sufficient so as to enable the discrimination

H

complaint to be confronted directly to ensure that persons in the position of the Appellant were not left with inadequate remedies. Judicial review proceedings in this analogous case would not fall within the nature of an appeal in the context of section 120(7) of the **EA 2010**. The ET also failed to pay regard or give reasons relating to the Claimant's difficulties in terms of bringing an appeal in the FTT.

e) Paragraph 19 of ET's Judgment was not compliant with the requirements set down in ***Meek v City of Birmingham*** *[1987] IRLR 250, 251.* From the ET's conclusions as to the relevant law and facts leading to their conclusion the parties are entitled to know why they have won or lost and paragraph 19 does not adequately set out the reasons for the ET's conclusions in relation to abuse of process. The ET's decision was perverse because the Appellant's claim was not made (and a number of claims could not be made) at the FTT.

f) The ET also erred in concluding that after the Appellant's registration came to an end, the question of the subsequent actions of the Respondent was *"ultimately irrelevant to the enforcement action subsequently undertaken"* (paragraph 21 of the ET's Judgment). The ET also failed to reach any conclusion in its findings in relation to the investigation the Respondent was carrying out in relation to the Claimant's two companies set out in paragraphs 2, 6 and 7 of its judgment and whether the Respondent's said functions were part of its role as 'a qualifications body'. The Respondent's conduct should have been considered as a continuous act. The first purported justification of the ET in paragraph 21 that the Respondent's main enforcement activities involved organisations without registrations or qualified advisers was not a relevant consideration in the context of the Appellant's case, as this clearly did not apply to the Appellant who was working with a qualified adviser based abroad. The second justification of the ET in relation to allowing unregistered individuals to bring a claim misconstrued the nature of the definition in section 54 of 'a qualifications body' in section 54 (which did not differentiate between registered and unregistered persons) and it was clearly envisaged that the section 53 of the **EA 2010** would apply to unregistered applicants (for example in the context of a first registration). The ET's concern that giving unregistered applicants the right to bring a claim would *"open the proverbial floodgates"* was not a relevant consideration within sections 53 or 54 of the **EA 2010** and in addition allowing the Claimant to bring a claim was not likely to have this effect as the determination would be fact sensitive. Thirdly, the comparison between the police and the Respondent's positions was not a fair or appropriate comparison to make, not least because the police have far wider powers than the Respondent, the police does not supervise or routinely make decisions in relation to unregistered police officers holding themselves out as such (this would be a matter for the Crown Prosecution Service), and the vast majority of the police's role is assisting with enforcement by investigating crimes. It is not the function of the police authority to remove professional registration.

g) Paragraph 22 of the ET's Judgment should be set aside because it is wholly inconsistent with paragraphs 7 of the ET's Judgment (in which the ET states that the Appellant was invited to interviews in June 2017 and has been invited since) and paragraph 23 of the ET3 in which it is accepted by the Respondent that its

investigations were ongoing. The Appellant has provided the ET with email correspondences between him and the Respondent dated 6 June 2017, 14 March 2018, 23 April 2018, and 3 January 2019. Furthermore, paragraph 22 of the ET's Judgment is not meek-compliant as it does not set out in sufficient detail why the ET believes that the Appellant's claim is time barred, whether there were a 'continuing act' or if it were 'just and equitable' to extend time.