Appeal No. UKEAT/0330/19/VP

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 October 2020
Judgment handed down on 15 January 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

CREW EMPLOYMENT SERVICES CAMELOT APPELLANT

MR W GOULD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	Mr Adam Ohringer (of Counsel) Instructed by: Addleshaw Goddard LLP Exchange Tower 19 Canning St Edinburgh EH3 8EH
For the Respondent	Mr Grahame Anderson (of Counsel) Instructed by: Draper Lang LLP Enterprise House 12a Hart Street Henley on Thames Oxfordshire RG9 2AU

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SUMMARY

PRACTICE AND PROCEDURE

The Claimant was the Captain of a superyacht registered in the Cayman Islands, but whose sailings were directed by a wealthy individual, Mr Borodin, resident in the UK. The Claimant resided in the USA and the Respondent was based in Guernsey with no office in the UK. The yacht spent about 50% of its time in UK waters. All decisions in respect of the Claimant's employment were made by Mr Borodin, albeit he was not the employer. The yacht had never been to Guernsey. The Claimant was dismissed and he lodged a complaint of unfair dismissal in London Central Employment Tribunal. The Respondent claimed that the Tribunal had no jurisdiction to hear the claim. The Tribunal concluded that it did have jurisdiction. The Respondent appealed.

Held, dismissing the appeal, that the Tribunal had applied the correct test, both in determining that it had jurisdiction to hear the claim and that it fell within the legislative grasp of the **Employment Rights Act 1996**. The Tribunal did not err in concluding that the place where or from which the Claimant habitually carried out his work, within the meaning of Article 21 of **Brussels Recast**, was the UK. In reaching that conclusion, the Tribunal was entitled to take into account the fact that the Claimant's instructions emanated from a person resident in the UK even if that person was not the employer. As to territorial scope, there was ample evidence to support the conclusion as to the sufficiency of connection with British employment law. It was not irrelevant to consider, in this context, the absence of particularly close links with other jurisdictions.

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THE HONOURABLE MR JUSTICE CHOUDHURY

1. This appeal is concerned with jurisdictional issues relating to a claim of unfair dismissal brought by the captain of a Cayman Islands registered superyacht, in which the link to the UK is based, in part, on the amount of time spent sailing or docked in UK[1] waters. The London Central Employment Tribunal ("the Tribunal"), Employment Judge Russell ("the Judge") presiding, held that there was jurisdiction to deal with the claim. The employer appeals against that decision. I shall refer to the employer and the employee as "the Respondent" and "the Claimant", as they were below.

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Factual Background

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2. The background facts were largely agreed between the parties. The Tribunal set these out at [2] of the Judgment:

> **"2.1 The Claimant's employment with the Respondent commenced on 13 July 8 [sic] 2015, initially as Relief Captain/Chief Officer of the yacht Amaryllis.**
> **2.2 The Claimant held the post of Captain with effect from 4 May 2017, on which date Amaryllis was in Antigua.**
> **2.3 The Respondent is a cell [found by the Tribunal to be akin to a subsidiary] of Crew Employment Services PCC Limited, a company registered in Guernsey, with its only premises situated in Guernsey.**
> **2.4 The Claimant's normal place of work was the yacht Amaryllis.**
> **2.5 During the employment the Claimant was required to work in such locations as Amaryllis happened to be in from time to time.**
> **2.6 In the period from 4 May 2017 to the termination date Amaryllis was variously located in Antigua, Falmouth, Portsmouth, Greenock, West Palm Beach Miami, the Turks and Caicos, St Martin and St Kitts.**
> **2.7 The periods spent by Amaryllis in various locations throughout the Claimant's tenure as Captain of Amaryllis are:**
> **• 5 May 2017-16 May 2017 - crossing from Antigua to United Kingdom**
> **• 17 May -25 October 2017 – UK (mainly Falmouth)**
> **• 16 October 2017 – 6 November – crossing from the UK to Florida**
> **• 7 November 2017-23 March 2019 – Florida**
> **• 26 March2018-14 April 2018 Bahamas and Turks and Caicos**
> **• 15 April 2018-27 April 2018 – Florida**
> **• 30 April 2018-11May 2018 – St Martin and St Kitts**
> **• 12 May 2018-23 May 2018 – Crossing to the UK**
> **• 23 May 2018-7 October 2018 – UK (although the Claimant's**

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[1] For present purposes, 'Great Britain', 'Britain' and 'UK' are used interchangeably.

employment terminated on 28 June 2018)
2.8 The first voyage captained by the Claimant was from Antigua to Falmouth, UK.
2.9 Upon arrival in Falmouth on 17 April 2017, the Claimant signed a contract of employment in relation to the role of Capitan.
2.10 The Claimant's salary was paid in Euros.
2.11 On all but one occasion it was paid into a personal bank account located in the USA.
2.12 As the Claimant's request, on 6 June 2017 a single payment of €21,569.46 was made in the Claimant's bank account in the UK.
2.13 The Claimant was responsible for payment of his own tax and social security or similar.
2.14 The Claimant was paid tax in the USA.
2.15 At the time of the Claimant's dismissal on 28 June 2018, Amaryllis was located in the United Kingdom.
2.16 The Claimant's contract of employment was expressly stated to be governed by the laws of Guernsey and the parties agreed to submit to the jurisdiction of the Courts of Guernsey in all matters arising out of the agreement.
2.17 The Cayman Islands statutory provisions as set out in the Merchant Shipping Law 2008 Section 101 were stated in the Claimant's contract of employment to be applicable to the Claimant's employment.
<u>Facts relating to the Claimant</u>
2.18 The Claimant is a British citizen.
2.19 Throughout the employment the Claimant was resident in the United States of America.
<u>Background facts</u>
2.20 Amaryllis is owned by Amaryllis Solution Limited, a company registered in the Cayman Islands.
2.21 Throughout the employment Amaryllis was registered in the Cayman Islands.
2.22 Amaryllis's managers were Hill Robinson Yacht Management Consultants SARL, a company registered in France with offices in Monte Carlo, Antibes, Fort Lauderdale, Limassol, Isle of Man, West Palm Beach and London."

3. Other matters, including as to control of and decision-making in relation to the crew of the Amaryllis, were disputed. The Tribunal found that the effective (although not legal) owner of the Amaryllis was Mr Borodin, a wealthy individual residing in Henley on Thames. Mr Borodin had interviewed the Claimant, made the decisions to recruit him in July 2015 and to promote him to the captaincy in 2017, and gave regular instructions to the Claimant in respect of operational matters relating to the yacht. The Managing Agents, Hill Robinson, were found to do "very little other than act as a post box for the contracts of employees of Amaryllis' employees…": [7]. The Claimant's involvement with the Respondent was held to be "very limited": [8]

4. The Claimant's home and place of work was the Amaryllis, other than on the brief occasions that he visited his home in Florida when Mr Borodin allowed it. Mr Borodin's needs

in respect of the yacht meant that it was often in UK waters. Specifically, the Tribunal found that the Amaryllis was in the UK for five and a half months between May and October 2017 and that it was likely that it would have spent a similar amount of time in the UK in 2018. It was accepted by the Respondent that for around 50% of the time, the Claimant was in the UK.

5. The Claimant was suspended and removed from the Amaryllis on 18 June 2019. He was subsequently dismissed for alleged gross misconduct. The Claimant contends that he was dismissed without any meaningful investigatory or disciplinary processes and that his dismissal was unfair. Proceedings were lodged on 25 September 2018. The Respondent contested jurisdiction and the matter was set down for a Preliminary Hearing to determine that issue.

The Tribunal's Conclusions as to Jurisdiction.

6. The Tribunal first considered whether there was international jurisdiction to hear the claim. It concluded as follows:

> **"<u>International Jurisdiction</u>**
> **15. The Respondent's Counsel deals first with this issue which is taken as a second issue by the Claimant's Counsel but both refer me to Articles 20(2) and 21 of s.5 of the Brussels I regulations. Article 20(2) states "where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State".**
> **16. In this case the Respondent employer is based in Guernsey and does not have a settled branch agency, agency or other establishment in England nor does or can the dispute arise out of any operations of such branch, agency or other establishment. Whilst I found that Mr Borodin exercised control over Amaryllis yacht which went beyond that of (for instance) an absentee or less interested owner, he was not the employer and nor was the Managing Agent Hill Robinson (which did have a branch in London albeit no one from the branch was active in the arrangements between the Claimant and the Respondent involving Amaryllis) and so Article 20(2) does not provide the Claimant a "gateway" as the Respondent's Counsel put it (into our jurisdiction).**
> **17. Turning to Article 21 this states:**
> **1. An employer domiciled in a Member State may be sued**
> **(a) in the Courts of the Member State in which he is domiciled or**
> **(b) in another Member State**
> **(1) in the courts for the place where or from the employee habitually carries out its work or in the courts for the last place where he did; or**
> **(2) if the employee does not or did not habitually carry out his work in any on country, in the courts of the place where the**

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business which engaged the employee is or was situated
2. An employer not domiciled in a Member State maybe be sued in a court of a Member State in accordance with point (b) of paragraph 1.
Clearly the Claimant's employer is not domiciled in a Member State and therefore to the extent that Article 21 assists the Claimant it must be by virtue of Article 21(2) applying Article 21(1)(b). In the Webber v Universal Ogden Services (2002) case the ECJ considered how the place of "habitual work" was to be determined when (as here) the Claimant employee spent time in different jurisdictions. The Court stated, inter alia, that "failing other criteria that will be the place where the employee has worked the longest" and "it will only be otherwise if, in the light of the facts that the case, the subject matter of the dispute is more closely connected with a different place of work". Neither the Claimant or Respondent referred to the dictionary definition of habitual but I find it helpful to do so and note that this adjective is defined as "doing something constantly or regularly" and having found that the yacht on which the Claimant worked was regularly in British waters it is, as a separate legal finding, legitimate to also determine that the Claimant could have habitually "carried out his work in Great Britian" [sic – this spelling of "Britain", presumably the result of a spell-checking error, is repeated throughout the judgment]. I also take into account, the decisions of the Supreme Court in Duncombe the Secretary of State for Children's Cause and Families (2011) and Rovat v Halliburton Manufacturing Services Limited (2012) making it clear that the correct approach was not to treat employees as being in a fixed category but to compare it and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other. In the Claimant's case his work was wherever Amaryllis was and clearly his "home base" was not in Great Britain. However, in Nogueria v Crewlink Ireland Limited (2018) the suggestion that habitual work was akin to "home base" was rejected in favour of a (preferred) reference to "the place where, or from which, the employee in fact performs essential part of his duties vis a vis his employer". Whilst the Claimant's employer was based in Jersey [sic] it had no day to day involvement with the Respondent and Amaryllis had never visited Jersey [sic]. The place the Claimant habitually carried out his work was the UK and indeed this was only EU Member State in which Amaryllis had visited whilst he was Captain. It was also the place he was working when the Respondent determined to dismiss him. Much of his instruction came from the UK because the effective owner lived there and the fact that his home was in Florida is far less relevant than the fact that Mr Borodin's home was in Henley as reflected by the fact that for around 50% of his time as Captain with the Amaryllis the yacht had been in the UK. And certainly, he was in the UK longer than he was in any other jurisdiction."

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7. The Tribunal then set out its conclusions as to the territorial scope of the **Employment Rights Act 1996 ("ERA")**:

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"Territorial Scope
18. Determining this question is of course made more difficult by the fact that the Employment Rights Act 1996 is silent about territorial scope. The scope must therefore be implied. This in part reflects the number of case authorities that have dealt with this issue. The Respondent's Counsel states that the definitive test was set up by Lord Hope in the case of Rovat v Halliburton Manufacturing and Services Limited (2012). He emphasised the importance of the Claimant's (and I recognise that it is the Claimant's responsibility to establish jurisdiction in this case) "connection" between Great Britian and the employment relationship and to show that this is sufficiently strong that s.94(1) of the ERA 1996 should apply to them. The Respondent in paragraph 28 of his submission sets out nine factors to be taken into account arising out of the authorities and it is clear from my findings that the Claimant does not "tick the

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boxes" in respect of many of these. He is employed by a Guernsey registered company, the choice of law under that contract is Guernsey, he is resident (even though he is British) is in Florida when he was not on Amaryllis he pays tax in the USA, he is paid in Euros (albeit he was occasionally paid in the UK) and the managing agents were not based in the UK. However, against that, I have found that he spent more time working in England than any other jurisdiction (indeed that he "habitually" worked in the UK) and there was a strong connection to the effective owner Mr Borodin even if he was not the employer. The Claimant is not a "peripatetic" employee in the same way that a teacher who travels from place to place working at one school or college and then another, because his work was always (in one sense) in one place – on board the Amaryllis. Its simply that the yacht sailed from place to place but again all this for short periods because for around half of his Captaincy the yacht was in the UK. Another analogy might be to workers who move from place to place ("international mobile employees") but this is not a particularly helpful comparison in the case of Captain of a yacht. But I have found that control was effectively determined by Mr Borodin who was in the UK and that what the Claimant's Counsel refers to as "an array of entities apparently involved in the running of the Amaryllis" did not play any significant part in the Claimant's employment relationship. By which I mean having material input into his day to day work.

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19. These cases (including the guidance of Kurrj [sic]) in Rovisy v Simmons and Simmons LLP (2018) and Elias LJ v Bates Van Winkelhov Clyde & Co (2013) determined that I must satisfy myself that the connection between the Claimant and Great Britian is sufficiently strong to enable it to be said that the Employment Tribunal should appropriately deal with the Claimant's claim. I am so satisfied (and this reflects my findings of fact) that there is such a sufficiently strong connection with Great Britain and British Law. I do not accept (using use the Claimant's Counsel's summary) that this is a type A case (referring to the summary of the then Employment Judge Auerbach in Rovisy v Simmonds and Simmonds LLP (2018)) but I do believe it is a type C case, i.e. one in which the Claimant lived and work at least for part of the time in Great Britain. And, further, that there was a strong enough connection with Great Britian that the Employment Rights Act should apply to this employment. In this respect I also take into account the very limited connection to other jurisdictions. The connection with Florida was greater than anywhere else (other than Great Britian) but it is accepted that the Amaryllis spent limited time there and that although the Claimant lived in Fort Lauderdale that he was only there briefly whilst working on Amaryllis. In addition, although he paid tax in the USA he was paid in Euros by the Respondent company placed in Guernsey and through a managing agent registered in France and with limited day to day involvement with the Claimant or the operation of the yacht. Certainly, the link with Guernsey was very slight. Neither the yacht nor the Claimant went to Jersey [sic] during his employment and the payroll administration in Guernsey was very much a paper exercise. I do take into account the fact that his contract of employment in Guernsey contains a choice of law clause in favour of Guernsey and obviously the choice of law remains relevant but it is not definitive. A standard form contract is being used reflecting no doubt the corporate/tax advantages of the company being registered in Guernsey and the question before me is the wider one of jurisdiction and determining the jurisdiction as to whether or not the Claimant can or cannot make a claim in the UK and determining the territorial extent of his UK employment rights. Section 204 Employment Rights Act 1996 states that the governing law of the contract is not relevant and having found as a matter of fact that the Claimant's connections with Great Britain are stronger than with anywhere else in the world I accept the Claimant's proposition that the territorial question should be answered in the Claimant's favour.

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20. In British Counsel v Jeffrey 2016 the EAT and later the Court of Appeal in that case reminded the Employment Tribunal that it should focus on where

the Claimant was working immediately prior to his dismissal and of course in the Claimant's case this was in Great Britian. This is where he had been ordinary working when the Respondent (indirectly) turned up to suspend and subsequently dismiss the Claimant. The fact that the Claimant was in the UK at this time gives support to the "connection" argumental though I also accept the Respondent's submission that where the Claimant – Amaryllis happened to be at one particular time (including when the Claimant was dismissed) should not be determinative of the question of jurisdiction. Indeed, although it was stated in Lawson v Serco that the application of s.94(1) Employment Rights Act 1996 should depend on whether the employee was working in Great Britian at the time of his dismissal it was also stated that the prior history of the working and contractual relationship might be relevant to whether the employee is really working in Great Britain. The Respondent's Counsel states that his last visit to Great Britain was of a "casual" nature, and he was there by coincidence (because that is where Mr Borodin wanted him to be and/or the yacht needed maintenance work which was best done in Great Britain). Whilst accepting that was perhaps the reason for the yacht and the Claimant being in Great Britian in the late Spring of 2018 my earlier findings highlight that this was not merely a "casual" visit given the connection with, in particular, the effective owner, Mr Borodin. And it is in finding that the Claimant habitually carried out his work in Great Britian (and not simply that this is where he was based immediately before his dismissal), that has led me to find, applying the appropriate legal test, that the Employment Tribunal has jurisdiction to hear his unfair dismissal complaint. The fact that the dismissal was also instigated whilst he was in Great Britian merely adds an extra layer to that legal determination.

21. In my judgment the Claimant does fall within the peripatetic exception in Lawson v Serco and there is a sufficiently strong connection between the Claimant's employment and UK law so that the Employment Tribunal has jurisdiction to hear the Claimant's unfair dismissal claim."

8. Accordingly, the Tribunal found that it did have jurisdiction to hear the Claimant's claim of unfair dismissal.

Legal Framework

International Jurisdiction

9. Section 5 of the **Brussels I Regulations (Recast)** (EU 1215/2012) ("**Brussels Recast**") identifies the courts of the Member State in which complaints arising from individual contracts of employment may be brought. Articles 20(2) and 21 of **Brussels Recast** apply to employment by employers who are not domiciled in a Member State. Article 20(2) provides that a claim may be brought against an employer that has a relevant branch, agency or other establishment in the Member State. The Respondent in this case did not have any such branch, agency or other establishment in the UK, and so, as the Tribunal found, this provision does not apply.

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10. Article 21 of **Brussels Recast** provides:

> **"(1) An employer domiciled in the Member State may be sued:**
> **a. in the courts of the Member state in which he is domiciled; or**
> **b. in another Member State:**
> **i. in the courts for the place where from where the employee habitually carries out his work or in the courts for the last place where he did so; or**
> **ii. if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engage the employee is or was situated.**
> **(2) An employer not domiciled in a Member State may be sued in accordance with point (b) of paragraph 1."**

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11. The Respondent was not domiciled in a Member State. The question therefore was whether the claimant habitually carried out his work in or from a Member State so as to bring him within the scope of Article 21(1)(b)(i). It is clear from the terms of Article 21(1)(b)(ii) that the answer to that question may be, "in more than one country" or "nowhere". In **Koelzsch v Grand Duchy of Luxembourg** [2012] ICR 112, the CJEU confirmed, in respect of identical provisions in the Rome Convention, that subsection (b)(ii) was to be invoked and "ought to apply in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out": see **Koelzsch** at [43].

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12. In **Weber v Universal Ogden Services** [2002] ICR 979, the ECJ considered the situation of a German national who was employed by a Scottish company to work on board ships or drilling rigs on the Netherland's continental shelf and later in Danish territorial waters. It held as follows:

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> **"58. In light of all the foregoing considerations, article 5 (1) of the Brussels Convention must be interpreted as meaning that where an employee performs the obligations arising under his contract of employment in several contracting states, the place where he habitually works, within the meaning of that provision taking account of all the circumstances of the case, is the place where he in fact performs the essential part of his duties vis-à-vis his employer. In the case of a contract of employment under which an employee performs for his employer the same activities in more than one contracting state, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of article 5 (1). <u>Failing other criteria, that will be the place where the employee has worked the longest. It will only be otherwise if, in light of the facts of the case, the subject matter of the dispute is more closely connected with a different place of work, which would, in that case, be the relevant place for the purposes of applying article 5 1.</u> In the event that the criteria laid down by the court of justice do not enable the national court to identify the habitual place of work, as referred to in article 5 (1), the employee will have the choice of suing his employer either in the courts for the place where the business which engaged him is situated, or**

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in the courts of the contracting state in whose territory the employer is domiciled." (Emphasis added)

13. It appears that the special provision for employment cases in **Brussels Recast** is so that the employee has the minimum difficulty in enforcing or defending his rights: see Recital 18 of **Brussels Recast**. The CJEU took this point into account in analysing the relevant provisions in **Nogueira and ors v Crewlink Ltd and other cases** [2018] ICR 344, a decision concerning the rights of airline cabin crew members and whether the "place where the employee habitually carries out his work" could be equated with that of the "home base" for such crew members. The CJEU noted (at [57]) that "the court has repeatedly held that the criterion of the member state where the employee habitually carries out his work must be interpreted broadly…". The CJEU went on in that case to reject the suggestion that the place where or from which the employees habitually carried out their work should be equated to the "home base" of the employees (although that remained a relevant matter to be taken into account), stating as follows:

> **"58. As regards an employment contract performed in the territory of several contracting states and where there is no effective centre of professional activities from which an employee performs the essential part of his duties vis-à-vis his employer, the court has held that article 5(1) of the Brussels Convention must— in view of the need to establish the place with which the dispute has the most significant link, so that it is possible to identify the courts best placed to decide the case in order to afford proper protection to the employee as the weaker party to the contract and to avoid multiplication of the courts having jurisdiction—be interpreted as referring to the place where, or from which, the employee actually performs the essential part of his duties vis-à-vis his employer. That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend such proceedings and where the courts best suited to resolving disputes relating to the contract of employment are situated: see Weber v Universal Ogden Services Ltd (Case C-37/00) [2002] ICR 979; [2002] QB 1189 , para 49 and the case law cited.**
>
> **59. Thus, in such circumstances, the concept of "place where the employee habitually carries out his work" enshrined in article 19(2)(a) of Regulation No 44/2001 must be interpreted as referring to the place where, or from which, the employee in fact performs the essential part of his duties vis-à-vis his employer.**
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> **60. In the present case, the disputes in the main proceedings concern employees employed as members of the air crew of an airline or assigned to the latter. Thus, the court of a member state seised of such disputes, when it is not able to determine with certainty the "place where the employee habitually carries out his work", must, in order to assess whether it has jurisdiction, identify "the place from which" that employee principally discharged his obligations towards his employer.**
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> **61. As the Advocate General pointed out in point 95 of his opinion, it is also apparent from the case law of the court that, to determine specifically that place, the national court must refer to a set of indicia.**

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62. That circumstantial method makes it possible not only to reflect the true nature of legal relationships, in that it must take account of all the factors which characterise the activity of the employee (see, by analogy, Koelzsch [2012] ICR 112 , para 48), but also to prevent a concept such as that of "place where, or from which, the employee habitually performs his work" from being exploited or contributing to the achievement of circumvention strategies: see, by analogy, D'Oultremont v Région Wallonne (Case C-290/15) EU:C:2016:816 , para 48 and the case law cited.

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63. As observed by the Advocate General in point 85 of his opinion, as regards work relationships in the transport sector, <u>the court, in Koelzsch , para 49 and Voogsgeerd [2011] ECR I-13275 , paras 38–41, mentioned several indicia that might be taken into consideration by the national courts. Those courts must, in particular, determine in which member state is situated (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found.</u>

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64. In that regard, in circumstances such as those at issue in the main proceedings, and as pointed out by the Advocate General in point 102 of his opinion, the place where the aircraft aboard which the work is habitually performed are stationed must also be taken into account.

65. Consequently, the concept of "place where, or from which, the employee habitually performs his work" cannot be equated with any concept referred to in another act of EU law.

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66. As regards the air crew, assigned to or employed by an airline, that concept cannot be equated with the concept of "home base", within the meaning of Annex III to Regulation No 3922/91 . Indeed, Regulation No 44/2001 does not refer to Regulation No 3922/91 , nor does it have the same objectives, the latter Regulation aiming to harmonise technical requirements and administrative procedures in the field of civil aviation safety.

67. The fact that the concept of "place where the employee habitually carries out his work", within the meaning of article 19(2)(a) of Regulation No 44/2001 , cannot be equated with that of "home base" in Annex III to Regulation No 3922/91 , does not however mean, as stated by the Advocate General in point 115 of his opinion, that that latter concept is irrelevant in order to determine, in circumstances such as those at issue in the cases in the main proceedings, the place from which an employee habitually carries out his work." (Emphasis added).

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14. The test for determining the place where the employee habitually carries out his work is thus to determine the place where or from which the employee performs the essential duties of his service vis-à-vis his employer. Failing other criteria, that will be the place where the employee works the longest and it will only be otherwise where the subject matter of the dispute is more closely connected with a different place of work. That test is to be interpreted broadly. In considering this issue, the court or tribunal might consider various factors and must (for cases in the transport sector) consider (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found. Whilst the Claimant works on a mode of transportation, it is probably not correct to describe a private yacht

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as being in the "transport sector" within the meaning of CJEU's judgment in **Noreuiga**. It is not mandatory, therefore, to consider the factors identified at [63] of that judgment, although they may well provide a useful guide in all cases of internationally mobile employees.

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Territorial Scope of ERA

15. The relevant principles to be taken into account in determining the territorial scope of **ERA** were conveniently summarised by Underhill LJ in **British Council v Jeffrey** [2019] ICR 929, a case concerning an employee of the British Council who lived and worked in Bangladesh:

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> **"2. The question of the territorial reach of British employment legislation has notoriously given rise to problems in recent years and has produced a plethora of reported cases, including one decision of the House of Lords and two of the Supreme Court— Lawson v Serco Ltd [2006] ICR 250 ; Duncombe v Secretary of State for Children, Schools and Families (No 2) [2011] ICR 1312 ; and Ravat v Halliburton Manufacturing and Services Ltd [2012] ICR 389 . The effect of those decisions has been fairly recently reviewed in this court in Bates van Winkelhof v Clyde & Co llp [2013] ICR 883 and Dhunna v CreditSights Ltd [2015] ICR 105 . It will not be necessary in these appeals, and would indeed be likely to be positively unhelpful, to attempt a further comprehensive survey of that well-travelled ground. The position as now established by the case law can be sufficiently summarised for the purpose of the cases before us as follows.**
>
> **(1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999 . Since then the 1996 Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94(1) of the Act); nor is there any such provision in the Equality Act 2010 .**
>
> **(2) The House of Lords held in Lawson v Serco Ltd that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the 1996 Act in cases where an employee works overseas.**
>
> **(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker—that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer—will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case law as "the territorial pull of the place of work". (This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended the 1996 Act to apply if they are based in Great Britain.)**
>
> **(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".**
>
> **(5) In Lawson Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from**

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that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a "British enclave" abroad. But the decisions of the Supreme Court in Duncombe and Ravat made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.

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(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what Ravat was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/European Union-funded international schools considered in Duncombe .

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(7) The same principles have been held by this court to apply to the territorial reach of the 2010 Act: see R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] ICR 975 .

I emphasise that this is not intended as a comprehensive summary of the effect of the decided cases. I am simply setting the background for the issues that arise in these appeals. …" (Emphasis added)

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16. The essential question to be determined, therefore, is the sufficiency of connection between the employee's employment and Great Britain and British employment law. Underhill LJ's analysis in **Jeffreys** focused (understandably, given the facts of that case) on the situation of the employee who was "truly expatriate" in the sense of both living and working abroad. The present case concerns an employee working for at least part of the time in the UK. That type of employee falls within one of the categories of cases set out in the judgment of Kerr J in **Ravisy v Simmons and Simmons LLP**, UKEAT/0085/18/OO, 30 November 2018 (Unreported), and which derived from the analysis of EJ Auerbach (as he then was):

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"22. After that review of the case law, the judge went on to state as follows at paragraphs 79- 80 of his reasons:

"79. Pausing there, I conclude that, in principle (though, of course, application of this typology to the given facts may be tricky) cases can potentially, and to start with, be divided into three types:

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(a) those in which (at the relevant time or during the relevant period), the claimant worked in Great Britain;

(b) those in which the claimant worked outside Great Britain; and

(c) those in which the claimant lived and worked for at least part of the time in Great Britain.

80. In cases of type (a) there will be territorial jurisdiction. In cases of type (b) the presumption is against jurisdiction unless there is something which puts the case in an exceptional category, such that the employment has much stronger connections both with Great Britain and British employment law than with any other system of law. That is a question of fact and degree. A

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> **non-exhaustive range of factors could be relevant. In cases of type (c) the case does not have to be "truly exceptional" for territorial jurisdiction to be established; and the comparative exercise called for in a type (b) case is not required. There merely needs to be a sufficiently strong connection with Great Britain and British law."**

17. At [50] of **Ravisy**, Kerr J considered EJ Auerbach's analysis to provide a helpful guide. I agree, with one caveat: whereas category (c) is said to refer to those who lived *and* worked for at least part of the time in the UK, it would, in my judgment be more correct, given the provenance of category (c), which appears to be paragraph 29 of Lord Hope's judgment in **Ravat v Haliburton Manufacturing Services Ltd** [2012] ICR 389, to define category (c) as those who lived *and/or* worked for at least part of the time in the UK. As explained by Elias LJ in **Bates van Winkelhof v Clyde and Co.** [2013] ICR 883 (CA) (in part of the judgment in that case that was not appealed to the Supreme Court):

> **"98. … The comparative exercise will be appropriate where the applicant is employed wholly abroad. There is then a strong connection with that other jurisdiction and Parliament can be assumed to have intended that in the usual case that jurisdiction, rather than Great Britain, should provide the appropriate system of law. In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force. However, as para 29 of Lord Hope DPSC's judgment makes plain, that is not necessary where the applicant lives and/or works for at least part of the time in Great Britain, as is the case here. The territorial attraction is then far from being all one way and the circumstances need not be truly exceptional before the connection with the system of law in Great Britain can be identified. All that is required is that the tribunal should satisfy itself that the connection is, to use Lord Hope DPSC's words: "sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim." (Emphasis added)**

18. The Tribunal in the present matter considered that the Claimant's case fell into category (c). Thus, the case does not have to be "truly exceptional" for territorial jurisdiction to be established; there merely needs to be a sufficiently strong connection with Great Britain and British law. I agree with that categorisation. All that needs to be established, therefore, is a sufficiently strong connection between the Claimant's employment and Great Britain and British employment law.

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Claimant's additional ground in support of the Tribunal's decision

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19. It is convenient to address, at this stage, the Claimant's argument that the Tribunal's conclusions should be upheld on the additional basis that this was in fact a category (a) case (i.e. that at the relevant time the Claimant worked in Great Britain) and that the Tribunal ought to have so found. Mr Anderson submits that the Claimant's position was directly analogous to that

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of the claimant in **Pervez v Macquarie Bank Ltd (London Branch)** [2011] IRLR 284. There, the claimant had moved from Hong Kong to London on secondment, and had been dismissed whilst on secondment. In considering whether his situation fell within the legislative grasp of the

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unfair dismissal provisions, Underhill J (as he then was) said as follows at [12]:

> **"12…(3) [Counsel for the employer] contended that the claimant's case was different from that of the claimants in Crofts v Veta Ltd because he was only on secondment and his base remained Hong Kong. In view of what the judge says about how the case was put before her I am not sure that it is open to Ms Wilkinson to take this point; but in any event I think the judge was right to say that the evidence showed that the claimant was working in Great Britain at the**

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> **material time, and specifically at the date of his dismissal. Whatever the precise expectations as to the length of his secondment, it is clear from the terms of the assignment letter, and from what happened in practice, that the claimant was working in London on a settled (and indefinite) basis, as part of MBL's operation, reporting to its managers and paid by it. If that is right, I am not sure that it adds anything to say that he was "based" in London: that concept only becomes important where the employee is peripatetic, which the claimant was**

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> **not. But if it is relevant I would also say that it was clear that his base was in London for the duration of the secondment.**
> **I should emphasise that my view is based on the circumstances of this particular case. "Secondments" come in all shapes and sizes, and a different conclusion might be appropriate if the secondment were for a shorter time or the employee was less integrated into the business of the company to which he was seconded.**
> **13. I therefore agree with the judge that the claimant comes within the legislative grasp of the statutes and regulations on which his claims are based."**

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20. Mr Anderson submits that the fact that the Claimant in the present case was in Britain at the time of his dismissal on something other than a casual or coincidental basis should have led the Tribunal to find that the Claimant was working in Britain at the relevant time, and so within

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the legislative grasp of **ERA** on which his claim was based.

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21. I do not accept that submission. **Pervez** was concerned with a secondment situation during which the claimant was working in London on "a settled (and indefinite) basis, as part of MBL's operation, reporting to its managers and paid by it". Whilst the Claimant in the present case was working in British waters for extended periods, his situation cannot be described as being akin to an assignment to work in Britain on a settled and indefinite basis, and the Tribunal did not so find. Instead, the location of the yacht at any time was "dependent on the request of the effective owner Mr Borodin": Judgment at [10]. The decision in **Pervez** is clearly distinguishable. The Claimant worked part of the time in Britain and part of the time elsewhere; his case falls to be analysed on that basis.

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Standard of review on appeal

22. An issue arises as to the standard of review to be applied by the EAT in considering an appeal against judgment of the Tribunal as to the sufficiency of connection. It arises out of the apparent inconsistency between Lord Hoffman's conclusions in **Lawson v Serco** and those of Lord Hope in **Ravat v Halliburton**. In **Lawson**, Lord Hoffman said as follows:

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> **"34 [Counsel for the employees] said that the tribunal's conclusion was a finding of fact which the Employment Appeal Tribunal (and your Lordship's House on appeal) had no jurisdiction to disturb. Like many such decisions, it does not involve any finding of primary facts (none of which appear to have been in dispute) but an evaluation of those facts to decide a question posed by the interpretation which I have suggested should be given to section 94(1) , namely that it applies to peripatetic employees who are based in Great Britain. Whether one characterises this as a question of fact depends, as I pointed out in Moyna v Secretary of State for Work and Pensions [2003] 1 WLR 1929 , upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review. I would be reluctant, at least at this stage in the development of a post- section 196 jurisprudence, altogether to exclude a right of appeal. <u>In my opinion, therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect.</u> In the present case I think not only that the tribunal was entitled to reach the conclusion which it did but also that it was right. I would therefore dismiss Veta's appeal." (Emphasis added)**

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23. In **Ravat**, at [29], Lord Hope said as follows:

> **"29. But it does not follow that the connection that must be shown in the case of those who are not truly expatriate, because they were not both working and living**

overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree. The fact that the commuter has his home in Great Britain, with all the consequences that flow from this for the terms and conditions of his employment, makes the burden in his case of showing that there was a sufficient connection less onerous. Mr Cavanagh said that a rigorous standard should be applied, but I would not express the test in those terms. The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain." (Emphasis added)

24. Underhill LJ in **Jeffreys** sought to reconcile this apparent divergence as to whether the issue was one of law or fact:

> **"41. In my view the correct starting point must be Lord Hope DPSC's judgment in Ravat v Halliburton Manufacturing and Services Ltd [2012] ICR 389 , and in particular para 29, quoted at para 33 above, since it contains an explicit and authoritative statement of the correct characterisation of the relevant issues. Lord Hope DPSC distinguishes between "whether section 94(1) applies to [the] particular employment", which is a question of law, and whether the sufficient connection requirement is satisfied, which is a question of fact. In the typical case, however, the answer to the former question will depend entirely on the answer to the latter, with the result that in practice the dispositive issue is one of fact, except in a case where the decision made, to use Lord Hoffmann's phrase in Moyna [2003] 1 WLR 1929 , para 29, "falls outside the bounds of reasonable judgment", in which case the issue becomes one of law and an appeal will lie. I say something more at para 44 below about how that line is to be drawn in cases of the kind we are concerned with here.**
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> **42. It seems to me that we are bound as a matter of authority to follow that approach. In any event I believe that it is correct. I agree with Mr Laddie that it makes sense in policy terms and is consistent with how analogous questions involving multifactorial evaluations in other contexts are characterised. As appears from Olsen v Gearbulk Services Ltd [2015] IRLR 818 , it is also clearly the preferred approach of the specialist appeal tribunal. I do not accept Mr Kemp's submission that Lord Hope DPSC's characterisation was limited to the "residual category". He is referring to the sufficient connection question generally, and he had previously identified that question as embodying the general principle underlying the application of the Act in cases where employees work abroad: see paras 14–16 and 26 of his judgment.**
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> **43. I accept that, as Mr Laddie acknowledged, it is a nice question how that conclusion is to be reconciled with what Lord Hoffmann says in Lawson v Serco Ltd [2006] ICR 250 . One possible route is that taken by Langstaff J in Olsen , but Lord Hope DPSC does not appear to have been intending to avail himself of the "maturing case law" option floated in Lawson . As I read it, he saw no real distinction between his characterisation and Lord Hoffmann's. Although a purist might say that to treat the sufficient connection test as a question of fact, so that an appeal only lies if the decision falls outside the bounds of reasonable judgment, is not the same as Lord Hoffmann's statement (see at para 34 of his opinion) that the application of the correct principles in a particular case "is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect", they might be thought to amount to much the same thing in practice (see (2) below). However, I do not think it is useful to spill further ink on the question. If there is any significant difference between the two approaches, which I doubt, I believe we should follow Lord Hope DPSC's, as being the more recent and the more explicit.**

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44. However, I wish to make one further point. It is now well accepted that the intensity of a "rationality" review may vary according to the kind of question being considered. I would not for my part wish to set the bar for legitimate review by the Employment Appeal Tribunal too high. The question of the territorial scope of the 1996 and 2010 Acts is a particularly important one, going as it does to the jurisdiction of the tribunal, and it is very desirable—particularly in the absence of a statutory test—to ensure a level of consistency and predictability in the decisions taken by employment tribunals. Promoting such consistency is an appropriate role for the appeal tribunal, itself of course a specialist tribunal, and it should not be unduly inhibited. I respectfully agree with the observations in the final paragraph of Lord Carnwath's article which he quotes in his judgment in R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] 2 AC 48 (see para 37 above). Precise calibration is impossible, but the labels used can help convey the correct level of intensity of review. That being so, I am uneasy about Langstaff J's reference in Olsen to a need for an appellant to show (in the absence of an explicit misdirection) that the employment tribunal's decision was "perverse". I would rather say that the appeal tribunal should not interfere unless it is satisfied that the employment tribunal's assessment of the relevant factors was wrong. That means more than that it would have made a different assessment itself, and I was initially attracted to the phrase "plainly wrong", in order to emphasise that point. But the use of that phrase has been deprecated by the Supreme Court: see In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911 , especially per Lord Wilson JSC at para 44, albeit not so much on the basis that it was positively wrong (these being, as Lord Wilson JSC recognised, "matters of little more than nuance") as that "plainly" was redundant, and I would not go to the stake over an adverb.

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45. Since drafting the foregoing I have seen the judgments of Longmore and Peter Jackson LJJ, who conclude that the issue should be treated as one of law. As will have appeared, I see the attraction of that approach and might have adopted it myself but for Lord Hope DPSC's analysis in the decision in Ravat [2012] ICR 389 . Fortunately, we are all three agreed that the difference in the theoretical justification makes no practical difference in the present case or, I think, more generally."

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25. The majority in **Jeffreys**, as noted by Underhill LJ, concluded that the question was one of law. Longmore LJ held as follows:

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"135. For my part, I do not find it altogether easy to reconcile the statement by Lord Hoffmann in para 30 of Lawson v Serco Ltd [2006] ICR 250 that the question, whether on given facts a case falls within the territorial scope of section 94(1) of the 1996 Act, should be treated as a question of law with the statement by Lord Hope DPSC in Ravat v Halliburton Manufacturing and Services Ltd [2012] ICR 389 , 400C–E that the question, whether the connection between the circumstances of an employee's employment and Great Britain is sufficiently strong to enable it to be said that it is appropriate for the employee to have a claim for unfair dismissal, is a question of fact. It is most unlikely that Lord Hope DPSC intended to disagree with Lord Hoffmann on the matter.

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136. <u>The differing approaches can, in my view, be reconciled on the basis that the decision on the question whether the connection is sufficiently strong is an evaluative judgment to be made on the basis of the underlying facts (as to which there will often be no dispute). That is, strictly speaking, a question of law but it is well settled that an appellate tribunal will not interfere with a first instance evaluative judgment of this kind unless that tribunal took into account matters it should not have taken into account or failed to take into account matters it should have taken into account or made some error or was otherwise wrong:</u> see Aldi Stores Ltd v WSP Group plc [2008] 1 WLR 748 , para 16, as followed in Stuart v Goldberg Linde [2008] 1 WLR 823 , para 81 per Sir Anthony Clarke MR, as now corrected by Lord Wilson JSC in In re B (A Child) (Care

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Proceedings: Threshold Criteria) [2013] 1 WLR 1911 , para 44…" (Emphasis added)

And Peter Jackson LJ said as follows:

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> **"138. I also agree with Underhill LJ's disposition of both appeals and, subject to what appears below, with his reasoning.**
> **139. Concerning the distinction between matters of law and fact, I share the difficulty articulated by Underhill and Longmore LJJ as to how the dicta in the decisions in Lawson v Serco Ltd [2006] ICR 250 and Ravat v Halliburton Manufacturing and Services Ltd [2012] ICR 389 *975 are to be reconciled. In agreement with Longmore LJ, I would rest on the conclusion that a decision whether a case falls within the territorial scope of section 94(1) of the 1999 Act is, as stated by Lord Hoffman in Lawson , an evaluation of facts, but that the evaluation itself should be treated as a matter of law. The formulation by Lord Hope DPSC in Ravat does not in my view chart a clear departure from this approach.**
> **140. <u>The correctness or otherwise of this conclusion has no effect on the outcome of these appeals nor, I believe, on the law generally.</u> Whether an appeal tribunal is undertaking a relatively generous rationality review (favoured by Underhill LJ) or a relatively restrained substantive review (preferred by Longmore LJ and myself), <u>the practical outcome is the same, namely that an appeal tribunal should be slow to interfere with an evaluative judgment of a first instance tribunal in a matter of this kind and should not do so unless it is satisfied that the judgment is wrong</u>." (Emphasis added)**

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26. This Appeal Tribunal is, of course, bound to follow the majority view in the Court of Appeal, although it does not appear, from the above extracts, that the distinction between that view and that of Underhill LJ makes a substantive difference so as to affect the likely outcome in a given case. Thus, the sufficiency of connection question is one of law. However, as is made clear in the judgments above, that question will involve an evaluative judgment with which this Appeal Tribunal will be slow to interfere. On an appeal against such an evaluative judgment, the question is whether the EAT is satisfied that the Tribunal's judgment is wrong or whether it reached its decision having taken into account irrelevant factors or failed to take account of relevant ones. That is the approach I shall apply.

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Grounds of Appeal

27. There are ten grounds of appeal: the first three grounds relate to the Tribunal's conclusion that it had jurisdiction under **Brussels Recast** to hear the claim; Grounds 4 to 9 challenge the

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Tribunal's conclusions as to territorial scope of the ERA; and Ground 10 contends that a finding as to Hill Robinson's role was unsupported by the evidence.

International Jurisdiction

28. Grounds 1 to 3 are as follows:

a. Ground 1 – Did the Tribunal err in concluding that the Claimant habitually carried out his work in Great Britain?

b. Ground 2 – Further or in the alternative, did the Tribunal reach the wrong conclusion in law and should it have decided that this was a case where the Claimant was not habitually working anywhere?

c. Ground 3 –If the issue is one of fact, was the Tribunal's conclusion perverse?

Submissions

29. Mr Ohringer, who appears for the Respondent (as he did below), took Grounds 1 to 3 together. He submits that the Tribunal applied the wrong test in determining the place where or from which the Claimant habitually worked, and that it wrongly relied upon the dictionary definition of "habitually" instead of applying the test sanctioned by the CJEU, namely to identify the place where or from which, taking account of all the circumstances of the case, the employee performs the essential part of his duties vis-à-vis his employer. Mr Ohringer further submits that the Tribunal took into account an irrelevant factor in that it attached weight to the fact that the Claimant's instructions came from the vessel's owner, who was merely the Respondent's client and who happened to live in the UK. The Tribunal ought to have concluded that, on the facts of this case, the Claimant did not habitually work anywhere.

30. Mr Anderson, who appears on behalf of the Claimant (as he did below), submits that there was no error. The Tribunal considered all the relevant factors, including those highlighted by the

A CJEU in **Noreuiga**, and correctly concluded that the Claimant habitually worked in the UK. The fact that the Claimant had spent most time in UK waters was a significant factor in such cases, as identified by the CJEU itself in **Weber**.

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Discussion

31. Whilst the Tribunal did have regard to the dictionary definition of "habitual", there is nothing in [17] of the Judgment to indicate that by doing so, the Tribunal had failed to apply the C correct test. The Tribunal expressly cites the correct test, namely the "place where or from which the employee in fact performs the essential part of his duties vis-à-vis his employer". The Tribunal also concluded that the Claimant's work was wherever the Amaryllis was located. It then D considered the location of the Amaryllis over the duration of the employment and calculated that for "around 50% of his time as Captain with the Amaryllis the yacht had been in the UK…[and] certainly, he was in the UK longer than he was in any other jurisdiction." The reference to being E in the UK the longest, is a directly relevant consideration, as confirmed by the CJEU in **Weber** at [58]. The Tribunal's findings did not indicate any closer connection to any other place of work. Indeed, it noted that, although the employer was based in Guernsey, there was "no day-to-day involvement" with that jurisdiction and the Amaryllis had never been there.

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32. To the extent that the Tribunal took account of the regularity or consistency of work at a particular location (as a result of applying the dictionary definition of "habitual"), that is not necessarily inconsistent with identifying the place where or from which he performs the essential G part of his duties and/or where the Claimant worked the longest. The Tribunal can be assumed, by reason of its reference to the "50%" figure, to have had in mind its earlier findings at [10] and [11] of the Judgment as to the number of days and continuous periods of time spent in UK waters. H Those findings are entirely supportive of the conclusion that the Claimant worked the *longest* in the UK. It cannot be said, and Mr Ohringer did not submit, that by considering regularity, the

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Tribunal was merely considering the regularity or periodicity of short visits to the UK at the expense of considering where the Claimant spent the longest amount of time. Had the dictionary definition of "habitual" been applied only in the sense of regular visits of short duration that did not in total give rise to a longer period of work in the UK than elsewhere, the Tribunal might have fallen into error. However, it is clear, in my judgment, that that is not what the Tribunal did in this case.

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33. I do not accept Mr Ohringer's submission that the Tribunal took account of an irrelevant factor, namely the location of the person instructing him. In principle, it may be relevant, in the case of an internationally mobile employee, to consider where instructions are received: see **Noreuiga** at [63] (cited above at paragraph 13). The fact that the instructions came from Mr Borodin, rather than from the employer in law, does not render those instructions irrelevant. One can envisage many situations where, for organisational or other reasons, instructions to an employee emanate from a client of the employer or a third party. It would be contrary to the need to interpret these provisions in **Brussels Recast** broadly if that were sufficient reason in and of itself to disregard the instructions in a particular case in determining the place where or from which the employee was performing the essential part of his services.

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34. I also do not accept that this was a case where the Tribunal ought to have found that there was no habitual place of work. Whilst such a conclusion is open to a national court: see **Koelzsch** at [43], it was clearly open to the Tribunal, on the facts of this case, to find otherwise.

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35. The issue, being one of jurisdiction (albeit based on findings of fact), is an issue of law and the perversity challenge under Ground 3 does not really arise. Even if it did, the perversity challenge would be without merit, and Mr Ohringer did not pursue the matter with any vigour in oral or written submissions. In my judgment, there was a proper evidential basis for the factual conclusions underpinning the Tribunal's conclusions on jurisdiction, and the perversity challenge does not get off the ground.

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36. For these reasons, Grounds 1 to 3 of the Appeal fail and are dismissed.

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Grounds 4 to 9 - Territorial Scope of ERA.

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37. Mr Ohringer's overarching submission is that the Tribunal erred in its assessment of the sufficiency of connection to the UK and that the evidence points to stronger connections with each of the Cayman Islands, Guernsey and the US. The Tribunal appears to have been persuaded that there was a close connection with Britain because of Mr Borodin's residency. However, that,

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submits Mr Ohringer, is to confuse the location of the employer (which is highly relevant) with the location of the employer's client (which is of little, if any, relevance).

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Ground 4 – Did the Tribunal apply the wrong test in determining territorial scope?

Submissions

38. Mr Ohringer submits that the Tribunal considered whether "the connection between the Claimant and Great Britain is sufficiently strong…" whereas it should have considered whether

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the connection between the circumstances of his employment and Great Britain and British Employment Law is sufficiently strong. In other words, the Tribunal incorrectly focused on the Claimant's personal circumstances rather than his employment and gave little or no consideration

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to the connection with British employment law.

39. Mr Anderson submits that the Tribunal did state the test correctly at other points in the judgment, and that at worst, the phraseology used on the occasion highlighted by Mr Ohringer amounted to nothing more than slightly inaccurate shorthand. An analysis of the Tribunal's actual

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approach to the question demonstrates that it had the correct test in mind; that is most clearly

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demonstrated by its conclusion that "there is a sufficiently strong connection between the Claimant's employment and UK law". It is also apparent from the Tribunal's conclusions that, far from focusing on the Claimant's personal circumstances, the Tribunal in fact attached very little weight to such matters.

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Discussion

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40. In my judgment, Mr Anderson's submissions are to be preferred. The impugned formulation of the test appears at [19] of the Judgment. However, at other points in the judgment, the Tribunal clearly refers to the correct test. For example, at [19] itself, the Tribunal also refers to the need to be "satisfied … that there such a sufficiently strong connection with Great Britain and British Law" and that "there was strong enough connection with Great Britain that the Employment Rights Act should apply"; and at [21], it concludes that "there is a sufficiently strong connection between the Claimant's employment and the UK law so that the Employment Tribunal has jurisdiction…". In my judgment, the single example of infelicitous wording relied upon by the Respondent does not indicate that the Tribunal had the wrong test in mind. Furthermore, when one considers the factors taken into account by the Tribunal it is apparent that the focus was on the circumstances of the Claimant's employment and its connection to Great Britain and British Employment Law, rather than on what might be said to be merely personal circumstances. As Mr Anderson submits, there is precious little reliance on matters such as citizenship (which would be a personal circumstance) to establish the connection and far more on matters relating to employment, such as the location of the work and fact that very little connection was established with other jurisdictions.

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41. Ground 4 fails and is dismissed.

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Ground 5 – Did the Tribunal fail to consider the factors for and against there being a sufficient connection in a "systemic (sic) manner"?

42. Mr Ohringer's challenge here is that the Tribunal took into account irrelevant factors or failed to take account of relevant ones and failed to attach proper weight to them. Four matters are relied upon:

43. First, it is said that the Judge erred in treating the absence of particularly close links with other jurisdictions as a factor in favour of a sufficiently close connection with the UK when that was an irrelevant consideration. I do not agree that this is irrelevant. It seems to me that it is almost inevitable that in assessing whether there is a sufficiently strong connection with the claimed jurisdiction, the Tribunal will consider the strength of connection with other jurisdictions to see if the territorial pull is in fact exerted in the opposite direction.

44. Second, it is said that the Judge failed to accord proper weight to the fact that the Respondent was not UK-based and that the contract was governed by foreign law. In my judgment, this does not give rise to any error of law. In the absence of any authority as to the importance to be attached to any particular factor in a multifactorial evaluative exercise, weighting is a matter for the Tribunal. Particular criticism is made of the Tribunal's conclusion that the connection with Guernsey was "slight". That, says Mr Ohringer, was incorrect given the choice of law provisions in the contract. However, the Tribunal expressly stated (at [19]) that the choice of law clause in favour of Guernsey was taken into account, and noted that it "remains relevant but is not definitive". That was a correct statement of the law. The Tribunal clearly attached *some* weight to the choice of law clause (as it was entitled to do) but that did not, in the circumstances, outweigh the other matters establishing a sufficiently strong connection to Great Britain and British Employment Law. The Tribunal's findings on other matters, such as the fact that the Amaryllis had never been to Guernsey, provide ample support for the conclusion that the connection to Guernsey was "slight". That conclusion was not wrong.

45. Third, it is submitted that the Tribunal elevated the test of habitual working in substitution for the correct one of sufficient connection. Mr Ohringer highlights the following passage in [20]

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as demonstrating that the Tribunal treated the habitual work finding as effectively determinative of the sufficiency of connection question:

> **"And it is in finding that the Claimant habitually carried out his work in Great Britain (and not simply that this is where he was based immediately before his dismissal) that has led me to find, applying the appropriate legal test, that the Employment Tribunal has jurisdiction to hear his unfair dismissal complaint."**

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46. I consider the Respondent's submission to be based on a misreading of that passage. This sentence must be read in light of all that has gone before. Far from treating habitual working as determinative, the Tribunal is stating that habitual working is a further matter to be taken into account in "applying the appropriate legal test" (which can only be a reference to the sufficiency of connection test) and which supports the conclusion as to jurisdiction.

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47. Fourth, it is said that the Tribunal erred in conflating the discretion exercised by Mr Borodin (who was no more than a client of the Respondent) with the Respondent's control over the employment relationship, and in doing so, the Tribunal incorrectly attached weight to Mr Borodin's location rather than that of the Respondent. I do not consider that any error is disclosed here. The Tribunal did not lose sight of the fact that Mr Borodin was not the employer: it referred to the Claimant being employed by a "Guernsey registered company" and was careful to refer to Mr Borodin as the "effective owner even if he was not the employer".

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48. The findings made by the Tribunal as to the real nature of the relationship between the various parties involved were part and parcel of "the intense consideration of the factual reality of the employment in question" that is required in "[a]n assessment of the strength of the connection with Great Britain and British employment law": per Gross LJ in **Foreign and Commonwealth Office and ors v Bamieh** [2019] IRLR 736 at [65]. If the factual reality of the employment relationship is such that real control emanates from a source that is potentially indicative of a stronger connection with a particular jurisdiction, then that is clearly a relevant factor to be taken into account. Far from disclosing any error of law, it seems to me that the Tribunal's approach was plainly correct.

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49. Ground 5 fails and is dismissed.

Ground 6 – Did the Tribunal err in failing to consider the Respondent's argument as to the significance of the Maritime Labour Convention 2006 ("the MLC")?

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Submissions

50. Mr Ohringer submits that it was argued below that the MLC, which provides that a code for the employment rights of seafarers is to be enforced by the Flag State of the vessel (here the Cayman Islands), should be taken into account. In failing to do so, the Tribunal failed to take account of an important factor in determining the territorial scope of domestic legislation as it applies to seafarers. I was referred to s.199, **ERA**, which deals with the applicability of the **ERA** to mariners. So far as relevant, it provides:

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> **"199 Mariners**
> **…**
> **(7) The provisions mentioned in subsection (8) apply to employment on board a ship registered in the register maintained under section 8 of the Merchant Shipping Act 1995 if and only if—**
> **(a) the ship's entry in the register specifies a port in Great Britain as the port to which the vessel is to be treated as belonging,**
> **(b) under his contract of employment the person employed does not work wholly outside Great Britain, and**
> **(c) the person employed is ordinarily resident in Great Britain.**
> **(8) The provisions are—**
> **…**
> **(f) Part X."**

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51. The effect of this provision is that mariners on board British registered ships can only bring a claim of unfair dismissal under Part X of **ERA** if the conditions in subsections (7)(a) to (c) of s.199 are met, and that includes (at (c)) being ordinarily resident in Great Britain. Mr Ohringer submits that the Tribunal's conclusion on jurisdiction gives rise to an anomaly in that a person employed to work on a foreign registered vessel is in a better position to bring a claim in Britain than a person working on a British registered vessel. That is because the former would not need to be ordinarily resident in Britain.

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52. Mr Anderson submits that the MLC was only mentioned in the Respondent's skeleton argument below in support of the contention that the connection was stronger with the Cayman

Islands (it being the Flag State) than with Britain. In any event, the MLC is of little significance because it does no more than create a floor of rights which does not oust the territorial scope of **ERA**. As to the alleged anomaly created by the Tribunal's conclusion on jurisdiction in light of s.199(7), ERA, Mr Anderson submits that the short answer is that that is what Parliament has currently legislated. The fact that the rights under MLC appear, thus far, not to have been implemented in domestic legislation does not mean that the territorial scope of such legislation must give way to the MLC.

Discussion

53. In my judgment, Mr Anderson's submissions are to be preferred. Whilst the MLC does provide for certain minimum employment rights, I was not taken to any provision or authority suggesting that its ratification precluded the territorial scope of ERA, the provisions of which would otherwise apply. As for the suggested anomaly, Mr Anderson is right to say that the position in respect of mariners on British-registered ships as set out in s.199(7), **ERA** is what is currently provided for by Parliament. There is nothing in either **ERA** or the MLC to suggest that the MLC should supplant the normal rules on determining territorial scope in respect of those employed on foreign-registered vessels.

54. The argument based on the MLC does not, therefore, disclose any error of law on the part of the Tribunal.

Ground 7 – Did the Tribunal provide sufficient reasons for its decision?

55. The Respondent takes a **Meek** point (**Meek v Birmingham District Council** [1987] IRLR 250) and suggests that the Tribunal simply listed various factors with its reasoning being too compressed to enable the Respondent to understand how factors were weighted and why the assessment fell in the Claimant's favour.

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56. I do not accept that the reasons are inadequate. The Tribunal made a clear finding that the Claimant spent almost half of his time working in UK waters, and its other findings did not support any strong territorial pull in the other direction. The Tribunal also found that the Claimant had been in Britain for around a month at the time of dismissal, consistent with Amaryllis's pattern of spending around 6 months a year here. Other aspects of his employment, such as his recruitment, his instructions from Mr Borodin, decisions as to his employment, the absence of any day-to-day involvement in his employment on the part of other overseas-based entities and the lack of time spent in places like Guernsey, all suggested that the connection between his employment and Britain and British employment law was stronger than with other jurisdictions. The Tribunal did consider the factors relied upon by the Respondent. It acknowledged that the Claimant "does not "tick the box" in respect of many of these" and refers to some of these expressly explaining why they lack weight (at [18] and [19]). However, the Tribunal goes on to explain the factors going the other way and set outs why there is jurisdiction. The decision is adequately explained.

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Ground 8 – Was the Tribunal's decision wrong?

57. For the reasons set out above in relation to the other grounds, it will be apparent that I do not consider the Tribunal's decision to be wrong. This ground does not add anything further.

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Ground 9 – Was the Tribunal's decision perverse?

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58. This perversity challenge is brought in the alternative if the issue is one of fact. Given that the sufficiency of connection issue is a question of law, and that the standard of review to be applied is whether the Tribunal got the decision wrong, this ground of appeal does not get off the ground. In any event, a challenge that fails to establish that the decision is wrong is not going to clear the higher hurdle of perversity.

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Ground 10 – Was the finding that Hill Robinson did very little other than act as a post box for the contracts of employment unsupported by the evidence?

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Submissions

59. Mr Ohringer reminded me that the agreed facts included that the yacht's managers were Hill Robinson and that the Claimant's own statement below acknowledged that safety and administrative issues were managed by HR. The Claimant also stated that any complaints about

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employment were to be referred to HR and that HR was involved "from a budgetary perspective as they were in charge of the financial side of Amaryllis's operation". The Respondent's evidence below also set out the extensive involvement of HR in the yacht's operation. In the light of such

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evidence, it was, submits Mr Ohringer, wrong and perverse to describe HR as merely a postbox.

60. Mr Anderson submits that this is nothing more than a challenge to a finding of fact that the Tribunal was entitled to make and does not get close to the high hurdle to be crossed to make

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out a perversity challenge. The Claimant gave unchallenged evidence that the vast majority of his day-to-day instructions came from Mr Borodin or his entourage. The Tribunal was entitled, in light of such evidence, to conclude that, "In practice Hill Robinson did very little other than act as a postbox for the contract of employment… together with payroll expenses particularly

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given the work undertaken by Voyonic"

Discussion

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61. The Tribunal's finding was not that Hill Robinson did nothing other than act as a post box, but that it did "very little" beyond that. It also referred to the fact that Hill Robinson had some involvement in payroll and expenses. Furthermore, the Tribunal (at [6]) acknowledged the

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fact that Amaryllis was managed by Hill Robinson and that it provided Human Resources administration services. However, the Tribunal accepted the Claimant's evidence that Hill

Robinson only had a "behind the scenes" role as to the running of the yacht and that his involvement with Hill Robinson (and the Respondent) was "very limited". In my judgment, based on this evidence, the conclusion that Hill Robinson did very little other than act as a post box for contracts of employment was one that was perfectly open to this Tribunal to reach. None of the other evidence as to what Hill Robinson did contradicts the Tribunal's conclusions. Accordingly, I reject the submission that this conclusion about the extent or nature of Hill Robinson's activities was wrong or unsupported by the evidence. Even if, contrary to my view, the Tribunal had erred in its conclusion about Hill Robinson, it is unclear how this would assist the Respondent or otherwise undermine the Tribunal's judgment as to the sufficiency of connection.

62. Ground 10 is not upheld.

Conclusion

63. For the reasons set out above, and notwithstanding Mr Ohringer's careful submissions, the grounds of appeal are not upheld. This appeal is therefore dismissed.