Neutral Citation Number: [2024] EWCA Civ 1460

Case No: CA-2023-001183

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ James Tayler
EA-2019-000652-DA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2024

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

MR ROOPESH DAVDA	**Appellant**
- and -	
THE INSTITUTE AND FACULTY OF ACTUARIES	**Respondent**

- -
- -

Jeffrey Jupp KC (instructed by **Nexa Law Limited**) for the **Appellant**
David Reade KC and Joanne Connolly (instructed by **Clyde & Co (Scotland) LLP**) for the **Respondent**

Hearing date : 23 October 2024
- -

Approved Judgment

This judgment was handed down remotely at 11.00 am on 2 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant in this court is Mr Davda. He is a British national. Mr Davda wishes to qualify as an actuary. The Respondent ('the IFA') is, in the terms of section 53 of the Equality Act 2010 ('the 2010 Act') a 'qualifications body', as the IFA accepted in the ET and accepted in this court. Mr Davda considered that the IFA had discriminated against him, contrary to section 53.

2. Mr Davda brought a claim in the Employment Tribunal ('the ET'). The ET upheld his claim of direct discrimination. It held that the IFA had directly discriminated against Mr Davda, as a British national, because of his race, 'in respect of the number of opportunities it gave him to pass examinations to qualify as a Fellow [of the IFA], compared to the number of opportunities it gave to Indian nationals'.

3. The IFA appealed to the Employment Appeal Tribunal ('the EAT'). The EAT allowed the IFA's appeal. The EAT held that the ET had erred in law in upholding Mr Davda's claim for direct discrimination. It dismissed Mr Davda's cross-appeal against the dismissal of his fourth claim 'claim 4' (see paragraph 6.4, below). Mr Davda does not appeal against that part of the EAT's order. The EAT set aside the ET's judgment in respect of Mr Davda's claims of indirect discrimination and his claims under sections 111 and 112 of the 2010 Act. The EAT remitted the section 112 claim and the indirect discrimination claim to a different ET for re-hearing.

4. Mr Davda now appeals on four grounds, with the permission of Bean LJ, against the EAT's decision to dismiss his claim of direct discrimination. He also appeals against the EAT's decision to 'set aside the finding of the ET that there was an agreement between [the IFA] and the IAI that UK nationals would not be permitted to join the IAI'. Mr Jupp KC represented Mr Davda. The IFA was represented by Mr Reade KC and Ms Connolly. Mr Jupp and Ms Connolly both also appeared in the EAT. I thank counsel for their written and oral submissions. Both counsel accepted, I think, that the central question on this appeal is whether the ET erred in law in its approach, although there are some separate arguments about the EAT's approach which I will mention where necessary.

5. For the reasons given in this judgment, I would dismiss grounds 1-4. In short, the ET erred in law in holding that giving opportunities to pass exams was 'treatment' by the IFA, and that that treatment was on the grounds of Mr Davda's nationality. The EAT was therefore right to set aside paragraph 1 of the judgment and to substitute for it a finding that the IFA had not discriminated directly against Mr Davda.

The Appellant's claims in the ET

6. The Appellant brought four claims of race discrimination against the IFA. Two were claims of direct discrimination and two of indirect discrimination. The protected characteristic he relied on was his British nationality. His case was that the IFA discriminated against him in the arrangements it made for deciding on whom to confer relevant qualifications.

    1. Claim 1 was a direct discrimination claim. UK students were said to be disadvantaged because Indian students had four

opportunities a year to pass exams. They had had five such opportunities in 2018. British students only had two such opportunities.

2. Claim 2 was based on the same allegation, but framed as a claim of indirect discrimination.
3. Claim 3 was that Swiss Actuaries could qualify as fellows by mutual recognition when their qualification requirements were far less onerous.
4. Claim 4 was framed as a direct discrimination claim. The IFA was said directly or indirectly to have caused, induced and/or aided the IAI not to allow British students to join the IAI, while allowing Indian nationals to be members of the IFA.

The ET's judgment

7. In paragraph 1 of its judgment, the ET allowed Mr Davda's direct discrimination claim (see paragraph 2, above). It also held, in the alternative, the IFA subjected the Appellant to indirect discrimination on the grounds of race by offering only two sittings of examinations a year, while granting exemptions to equivalent examinations set by the IAI and 'in the circumstances that [the IFA's] introduction of Curriculum 2019 gave the Appellant only 2 years in which to pass the relevant outstanding exams' (paragraph 2). The ET nevertheless held that the IFA did not subject the Respondent to indirect race discrimination by requiring that 'in order to be regarded as a fully qualified actuary' he had to be appointed a fellow of the IFA (paragraph 3). The ET did hold, however, that the IFA directly discriminated against the Appellant by directly or indirectly instructing, causing or inducing the IAI not to admit British nationals as students (paragraph 4).

The issues raised by the claims

8. The ET said that the parties had agreed 'an extremely lengthy list of issues'. The ET set out the agreed issues in paragraph 2 of its reasons, between pages 2 and 7. It is not necessary to repeat much of that material here, but I will describe the issues about claim 1.

9. The key question was whether, because of his British nationality, Mr Davda been treated less favourably by the IFA than it treated or would treat an Indian national in the number of opportunities it gave him to pass qualifying exams. The Appellant contended that the correct comparator was a hypothetical Indian student member of the IFA, because that person was in materially the same circumstances as the Appellant. The IFA argued that the correct comparator was a hypothetical non-British student who is not a student member of the IAI.

10. The Appellant contended that he was treated less favourably than the Indian member because the Indian member had the opportunity to join the IAI and sit exams which were recognised by the IFA, and the IFA gave exemptions for those exams. The IFA denied that it had treated the Appellant in that way, or that any treatment caused the Appellant any disadvantage. The IFA said that any complaint about this less favourable treatment should be made against the IAI, not against the IFA. The IFA denied that, by reason of the Appellant's nationality, it had stopped the Appellant from

being a member of the IFA and of the IAI. The IFA's case was that the IAI admitted British nationals as student members.

11. The ET noted that the parties agreed that the IFA offered two sittings of exams a year and that it was possible for an Indian student member of the IFA who is also a member of the IAI to sit the IAI's exams and the IFA's exams equivalent exams in the same year. The parties disagreed about whether the IAI had a provision criterion or practice ('PCP') of denying student membership to British nationals. They also disagreed about whether the IFA had a discretion to grant exemptions for equivalent Indian exams, or whether it had a fixed policy of doing that.

12. Claim 2 was an alternative to claim 1. The first question in claim 2 concerned the relevant PCP. The Appellant relied on two. The first was a rule or policy of offering two sittings a year. The second was a PCP of requiring student members to pass exams by the end of a transition period (31 December 2018) or to face losing the benefit of passes already obtained and also having to take more exams under curriculum 2019. The IFA accepted that it applied the first PCP, but not the second. The Appellant's case was that the PCP or PCPs applied to all British nationals and to all non-British nationals. The IFA's case was that they would apply to all student members of the IFA.

13. The ET recorded, in paragraph 3, that during closing submissions, Mr Davda had applied to amend claim 2 so as to rely on a third PCP. That was said to be the IFA's policy of exempting exams set by the IAI. The IFA did not resist that application, and the ET allowed the amendment (paragraph 4).

Applications to adduce further evidence

14. In paragraphs 7-33, the ET described various applications by the parties to adduce evidence after the end of the hearing. First, the IFA applied on 13 February 2019 to adduce two email exchanges between Mr Davda, another student, and the IAI. The ET listed a further hearing. At that hearing, both sides applied to rely on yet further evidence. The IFA wanted to rely on exchanges between it and the IAI after the end of the hearing. The ET refused that application on the grounds that it was far too late for the IFA to ask to rely on evidence of that kind, which it could, with reasonable efforts, have got before the hearing. It did not allow Mr Davda to rely on some evidence about discussions and meetings of the Actuarial Association of Europe. The ET also decided to allow the IFA to rely on the email exchanges which had been the subject of February 2019 application to rely on new evidence. Finally, the ET allowed Mr Davda to rely on some material from the internet; a public document from the IAI about the IAI's ACET examination.

The facts found by the ET

15. Mr Davda graduated in 2000 from King's College London with a BSC in Mathematics. He was 40 at the date of the ET hearing and a student actuary of the IFA, having joined in 2001. By that date, Mr Davda had been sitting the IFA's exams for 15 years (paragraph 112). Mr Jupp told us at the hearing of this appeal that Mr Davda has since resigned his membership of the IFA.

16. The IFA was established by Royal Charter. It is the qualifications body for actuaries in the United Kingdom. It sets exams for qualification as a Fellow of the IFA. Other

countries have their own qualifications set by their own qualifications bodies. The IFA has a number of Mutual Recognition Agreements ('MRAs') with overseas qualifications bodies. Under the MRAs, the IFA confers exemptions from the requirement to take its exams when it considers that a particular exam set by another qualifications body is equivalent to the corresponding exam set by the IFA (paragraph 40). It was agreed (paragraph 41) that the IAI follows a syllabus which is identical to the IFA's, uses the same educational materials and sets exams which are directly equivalent to the IFA's exams, and have the same structure. While each exam is unique, a person who had followed the IFA's syllabus and used its materials would be able to sit an equivalent exam set by the IAI.

17. The IFA has an MRA with the IAI. It recognises passes of the IAI's exams as the direct equivalent of passes of its corresponding exams. A person who has passed an exam set by the IAI is automatically exempt from passing the equivalent exam set by the IFA. The ET gave more details in paragraphs 43 and 44. The IFA's exemptions for corresponding exams set by the IAI cover every exam which a student needs to pass to become a Fellow, with one exception. The ET considered the agreements which the IFA had with overseas bodies in paragraph 45. The exemptions available for the qualifications awarded by those overseas bodies were less extensive than those available for the IAI's exams. The ET considered the mutual recognition of EU qualifications, and further points about MRAs in paragraphs 88-111. The ET recorded the evidence of Mr Davda and his witnesses that there is hierarchy in international qualifications. The five most respected qualifications are those awarded by two US organisations, by the Australian Actuarial Institute ('the IAA'), by the IAI, and by the IFA. The IFA grants partial exemptions for exams set by two one of the US organisations and by the IAA, but not for exams set by any European organisations (paragraph 105).

18. Until changes to its curriculum in 2018, it was necessary for a student to pass 15 exams to qualify as a Fellow. The IFA introduced Curriculum 2019 on 31 December 2018. To be exempt from sitting exams under Curriculum 2019, a student must have passed equivalent exams under the old curriculum. However, in the case of two of the new exams, it is necessary to have passed two old exams, not one. Mr Davda had passed only one of each of the two necessary exams under the old curriculum. A further exam, which he had not passed under the old curriculum, has now been divided into two. It was agreed that the IFA's exams 'are very exacting' (paragraph 46). The ET made more findings about changes to the curriculum in paragraphs 82-87. Mr Davda was told in 2016 that there would be changes to the curriculum. He was told about the effect of the changes on him in a letter dated 12 January 2017.

19. The IFA sets exams twice a year. So does the IAI, but not on the same days. The IAI's exams are about a month later. The IFA does not have any nationality criterion for membership. 'This means that Indian nationals, who are members of …[the IAI] can also be members of [the IFA]. They can sit 2 examinations per year under the IAI exam timetable and 2 exams per year, if they wish to, under [the IFA's] exam timetable'. So an Indian national could sit 4 different exams a year. If he passed them all, they would all count (directly or via an exemption) towards a qualification as Fellow or Associate of the IFA. Or such an Indian national could have four chances to pass the same exam in one year (paragraph 47).

20. It was Mr Davda's case that a British national cannot be a member of the IAI. The ET considered the evidence about this in paragraphs 49-81.

21. The ET referred to an email exchange in 2010 between Mr Khan (the then President of the IAI) and a student, Mr Hirani. Mr Khan told Mr Hirani that the IAI exams (with one exception) were based on the syllabus and study materials of the IFA. The IAI had access to those materials at low cost and 'this arrangement made it necessary for the IAI to ensure that it did not compete with [the IFA] and, in specific terms, not to conduct examinations in the UK for UK residents and subjects' (paragraph 50). The IAI has one exam centre in the United Kingdom (paragraph 51). Mr Khan's email was copied to Mr Watkins of the IFA. Mr Watkins emailed Mr Khan, asking him about the 'agreement' between the IAI and the IFA that they would not compete for students to which Mr Hirani had referred in his email. Mr Khan replied, 'There was no agreement, it was more of an understanding with Liz Goodwin. I am not sure that I mentioned in my email to him about any agreement.' Mr Watkins did not ask for clarification from Mr Khan, but forwarded his email to Mr Kemp, the IFA's General Counsel, and to others. Mr Watkins said, 'As I thought, there is no agreement (Liz was my predecessor)'. In paragraph 65, the ET recorded the evidence of Mr Watkins that the quid pro quo for the provision of cheap study materials to the IAI by ACTED (a company associated with the IFA) was that those materials should not be provided to the United Kingdom students. The IFA knew that the IAI was saying that it had an understanding with the IFA that it would not admit students who were 'UK residents and citizens and would not allow UK residents and/or citizens to sit examinations through the IAI in the UK' (paragraph 72).

22. Dr Watkins said that the IFA did not know about, and was not complicit in, the IAI's not accepting British students, while accepting that he had not said to Mr Khan that 'the understanding' should be stopped (paragraph 66). The IFA, once it had been told that Mr Davda had been refused entry by the IAI because of his nationality, had not told the IAI to change its policy, and had not changed its MRA with the IAI (paragraph 67).

23. The ET's conclusion was that the IAI did have a 'policy' of not allowing British nationals to join it, and that the IAI applied that policy to Mr Davda when it rejected his application in 2017 (paragraph 80).

The ET's reasons for upholding claim 1

24. In paragraph 130, the ET asked whether Mr Davda, a British national, had been treated less favourably by the IFA than an Indian national because of his nationality 'in respect of the number of opportunities to pass examinations to qualify as a Fellow of' the IFA. He relied on a hypothetical Indian student member of the IFA. That student was in materially the same circumstances as he was in. The ET recorded the IFA's argument that the correct comparator was a hypothetical non-British student of the IFA; and that being in 'materially the same circumstances' entailed that non-British student was not a member of the IAI (paragraph 131). The ET did not grapple with that argument. It accepted two assertions made by Mr Davda, without explaining why. They were that he was 'entitled to choose his comparator', and that he was in 'materially the same circumstances' as his chosen comparator (paragraph 132).

25. The ET recorded Mr Davda's argument that he was treated less favourably than the Indian member because 'the Indian member had the opportunity to join the [IAI] and sit exams which were recognised by [the IFA] through exemptions, whereas a UK national could not' (paragraph 133). In paragraph 134, it found that the IFA automatically treated the IAI exams as directly equivalent to its exams by granting exemptions from its exams to those who had passed the IAI's exams. That meant that anyone who sat both sets of exams had four opportunities to pass a relevant qualifying exam in one year. The ET said that for a '*James v Eastleigh BC*' - type claim to succeed, 'the reason for the treatment and protected characteristic must exactly correspond', or if the relevant criterion is 'the protected characteristic itself, or a proxy for the protected characteristic, then the reason for the treatment is the protected characteristic and the discrimination is direct discrimination rather than indirect discrimination' (paragraph 135). That is a reference to the decision of the Appellate Committee of the House of Lords in *James v Eastleigh Borough Council* [1990] 2 AC 751.

26. By recognising the IAI's exams, 'which are sat on 2 extra occasions each year *the Respondent* provides additional opportunities to pass exams to members of [the IAI] . British nationals cannot be members of the IAI. British nationals could never sit those exams. 'There is an exact correspondence between the protected characteristic (*non-UK nationality)* and the reason for the treatment (*student membership of [the IAI]*)' (paragraph 136) (my emphases).

27. The IFA argued that Mr Davda's claim should have been brought against the IAI, because the IFA did not treat Mr Davda less favourably. The ET's response was that it had found that the IFA automatically gave exemptions for IAI exams, which it treated as directly equivalent to its own exams. Passing an IAI exam effectively meant passing the IFA's exam. The IFA 'thus' provides 2 opportunities to pass its own examinations to IAI members. Whether or not the IFA intended to discriminate it recognised the IAI exams, from which Mr Davda 'is excluded because of his nationality'.

28. The IFA also argued that section 53 of the 2010 Act only applied to the 'ultimate qualification' and not to individual exams. The ET held that the 'arrangements' included the way in which the exams were administered. Section 53 would be 'of little effect' if it only applied to a final qualification and 'not to the individual requirements which the employee [sic] had to fulfil in order to obtain that final qualification'. Each exam was part of the arrangements made for deciding on whom to confer the qualification (paragraph 140).

29. The ET's conclusion, in paragraph 141, was that the IFA had treated Mr Davda 'less favourably than Indian nationals when it gave exemptions to exams set by the IAI because [Mr Davda], who was a UK national, was barred from joining the IAI because of his nationality, was unable to sit all those exams and gain those exemptions. He only had two opportunities to sit relevant exams in one year, when Indian nationals potentially had 4 opportunities'.

30. The ET considered claim 4, which I will refer to as the 'instructing etc' claim, in paragraphs 164-170. Mr Davda's case was that the IFA instructed etc the IAI not to admit British nationals as students. The IFA argued that the ET did not have

jurisdiction to consider the claim, as it 'was not capable' of being within the scope of section 53(1)(a)-(c) of the 2010 Act. The ET had found that there was 'an understanding' between the IAI and Liz Goodwin, Dr Watkin's predecessor at the IFA, that the IAI would not admit British nationals. The ET held that having an understanding did come within the meaning of 'instructed, caused induced and/or aided' another to do something which contravened Part 5 of the 2010 Act (paragraph 166). The complaint was also within section 53 because 'it related to the arrangements which [the IFA] made for deciding on whom to confer the relevant qualification'. Those arrangements included 'the recognition and/or exemption of Indian exams for the purposes of gaining [the IFA's] qualifications' (paragraph 167).

31. Paragraph 168 says:

> 'Under s. 111& 112 [of the 2010 Act] the Tribunal concluded that [the IFA] did instruct, or cause, or induce, or aid [the IAI] to discriminate against [Mr Davda] in the arrangements [the IFA] made for deciding upon whom to confer a relevant qualification.'

32. The relevant 'instruction or inducement or help of the third party was a continuing act because, albeit that Liz Goodwin had originally issued the *instruction*, Dr Watkins knew about it at the time, and in 2013. At no time did [the IFA] do anything to stop that instruction or understanding continuing. The act continues until the present day' (my emphasis) (paragraph 169).

The appeal to the EAT

The IFA's grounds of appeal

33. The IFA appealed to the EAT, originally on 17 grounds, some of which raised overlapping points. Eight related to claim 1, and three to claim 4. There were also four general grounds. The IFA then revised its grounds of appeal.

34. There were four revised grounds of appeal in relation to claim 1.
    1. The ET misapplied section 13 of the 2010 Act and failed to identify treatment of Mr Davda by the IFA.
    2. The ET misapplied *James v Eastleigh Borough Council*.
    3. The ET misapplied section 23 of the 2010 Act by failing to identify a comparator whose circumstances were not materially different from those of Mr Davda.
    4. The ET misapplied section 53(1)(a) of the 2010 Act by failing to identify treatment by the IFA in the arrangements it made for conferring a qualification on Mr Davda.

35. There were two grounds of appeal (8 and 9) which related to claim 4.
    1. The ET misunderstood or misapplied section 53(1) of the 2010 Act by considering whether the IFA acted in breach of section 53, instead of considering whether the IAI breached section 53. That would have required the ET to consider the issue of territorial jurisdiction. It had not done so.
    2. The ET misapplied section 111 and/or section 112, and/or reached a perverse, or inadequately reasoned conclusion. It

> conflated an understanding that exams would not be held in the UK for UK residents and nationals with an understanding that they would not be admitted as members of the IAI. There was no evidence that Dr Goodwin knew that the IAI excluded British nationals (still less that she instructed etc the IAI to do so). If she did not know what the IAI was doing, she could not have instructed the IAI to do it. The ET's conclusions were insufficiently explained.

36. There is also a general ground which is relevant to this appeal. The conclusion that Mr Davda suffered less favourable treatment is said to have been perverse. This ground was explained further in five sub-grounds. Those sub-grounds in essence attacked the ET's conclusion that a British citizen could not be a member of the IAI, and suggested that if Mr Davda had sat the IAI's exam (the ACET) in India, he could have become a member of the IAI.

The EAT's judgment

37. After describing the facts, the EAT said, in paragraph 9, that the resolution of a factual dispute about Mr Davda's assertion that British nationals were not allowed to be members of the IAI 'as a result of an agreement made with' the IFA 'was of considerable significance in all of the claims'. The EAT described the applications to adduce further evidence. As a result of the ET's approach to those, there was 'limited evidence about whether UK nationals are permitted to be members of the IAI and the precise nature of any agreement or understanding between [the IFA] and the IAI at the relevant time'. The EAT described the evidence considered by the ET in paragraphs 11-15. It quoted paragraphs 76-81 of the ET's reasons. It summarised the ET's view in paragraph 17: '…the IAI does not permit UK nationals to join'.

38. The EAT decided to consider claim 4 first. It described as 'ground 9a', the ground I have summarised at paragraph 35.1, above, and, as 'ground 9b', the ground I have summarised at paragraph 35.2, above. It summarised ground 9b as an argument that 'the finding that there was an agreement [sc between the IFA and the IAI] under which there was an absolute prohibition on British Nationals joining the IAI was perverse' (see paragraph 27 of the EAT's judgment). It set out sections 53 and 54. The effect of sections 111 and 112 is 'to make a person liable for discrimination carried out by another in specific circumstances'. The EAT quoted paragraph 4 of the judgment, and paragraphs 166-169 of the ET's reasons. It referred to grounds 8 and 9 of the revised notice of appeal.

39. The EAT held that the ET had conflated sections 111 and 112, which are significantly different provisions.

40. The EAT recorded that Mr Jupp, representing Mr Davda, had accepted that section 111 could not apply to Mr Davda and that, accordingly, that part of the judgment could not be sustained. The EAT explained why in paragraph 30. For the purposes of section 111, 'A' is the IFA, and 'B' is the IAI. The 'basic contravention' is discrimination by a qualifications body within section 53. First, section 111(7) limits section 111 to circumstances in which the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B. In other words, the

IFA must be able to commit a basic contravention in relation to the IAI, for example, by not conferring a relevant qualification on it. Mr Davda now accepted that section 111 could not apply. Second, the premise of the judgment and reasons of the ET was that there had been a basic contravention by the IFA, 'whereas it would have to have been committed by the IAI'.

41. 'A' and 'B', for the purposes of section 112, are also the IFA and the IAI, respectively. The EAT held that the ET had made the same mistake about section 112 as its second error in relation to section 111. Again, the 'basic contravention' had to be committed, not by the IFA, as the ET had held, but by the IAI. Mr Jupp had accepted that, too, but had argued that the ET had found that the IAI had committed the basic contravention by finding as a fact that the IAI had committed a basic contravention by excluding British nationals from its membership. He argued that the EAT should find that the IAI had breached section 53 ('presumably in the arrangements it makes for deciding upon whom to confer a relevant qualification, by refusing membership to British nationals, and the IFA knowingly helped it to do so').

42. The EAT thought that there were 'considerable problems' with that approach. It involved making a finding that a professional body in India had broken the law of the United Kingdom 'in circumstances where it is not a party to the proceedings and has had a very limited opportunity to submit evidence'. There were considerable difficulties about procedural fairness in considering complaints under section 111 or section 112 if 'A' is not a respondent to the claim. It might be necessary to consider whether 'A' should be allowed to take part in the proceedings as having a 'legitimate interest' for the purposes of rule 35 of the Employment Tribunal Rules 2013.

43. Not enough thought had been given to the position of the IAI in the ET, 'largely because' the parties did not seem to have thought about it (paragraph 35). It was not clear, either, precisely what the IFA was said to have done knowingly to help the IAI to discriminate. Moreover, the judgment referred to the IFA's acting 'directly or indirectly' when section 112 does not refer to 'indirect helping'.

44. The EAT decided that revised grounds 8 and 9a succeeded. The EAT considered it likely that the claim under section 112 would have to be remitted to the ET. The IFA had raised the 'fairly obvious issue of territorial jurisdiction'. Mr Jupp had accepted in a supplementary skeleton argument that that issue had not been raised in the ET and that it was too late to do so now. The EAT considered that it was an issue which it was likely to be appropriate for the ET to consider on remittal, as would be the question whether the IAI should be permitted to take part in the proceedings.

45. The EAT then considered 'The finding that [the IFA] and the IAI had an agreement under which there was an absolute prohibition on British Nationals joining the IAI – ground 9b.' It had already explained its concerns about the safety of the determination that there was an agreement between the IFA and the IAI that meant that there is an 'absolute prohibition' on a British national becoming a member of the IAI 'because of the limited evidential basis for this finding, in particular, the limited scope for the IAI to provide any evidence' when the IAI had not been a respondent, and Mr Davda asserted that it had acted unlawfully. That decision was also very significant for the claims of direct and indirect discrimination. The EAT said that it would return to the safety of that decision later (paragraph 40).

46. The EAT then considered claim 1. It set out paragraph 1 of the judgment and paragraphs 131-137, and 141 of the ET's reasons, the relevant statutory provisions, and the four revised grounds of challenge (see paragraph 34, above).

47. The EAT did not accept that where the IAI (or any other organisation with similar agreements with the IFA) allowed students to take exams, that was treatment by the IFA. The IFA gives all students, whatever their nationality, two opportunities a year to take exams. The IAI also gave its students two such opportunities: but that was treatment by the IAI, and not by the IFA (paragraph 46).

48. Any difference of treatment had to be because of race or nationality. Even if the four opportunities to take exams was treatment by the IFA, there was 'no exact correspondence' between membership and non-membership of the IAI and Indian nationality. Not all Indian student members of the IFA will be members of the IAI. There was nothing to suggest that membership of the IAI was limited to Indian nationals, even if British nationals were excluded (paragraph 48).

49. The EAT added that the ET had analysed the 'treatment' differently in paragraph 141, when it described the treatment as the IFA giving 'exemptions for exams set by the IAI'. That was not the treatment referred to in the judgment. In any event, not all Indian student members of the IFA would be student members of the IAI, and some who are student members of the IAI will not have taken any of the exams for which they could get an exemption. There would also be British nationals who had got exemptions from bodies other than the IAI. Again, there was no exact correspondence between nationality and getting exemptions (paragraph 49). Mr Davda had not joined any other such body or taken the opportunity to get any such exemptions himself (paragraph 50).

50. The EAT upheld grounds 1-3 of the revised grounds because the ET misidentified the treatment given to Mr Davda by the IFA, erred in deciding that there was '*James* type exact equivalence' and erred in its identification of the comparator. Ground 4 fell away for the time being as the question whether the treatment fell within section 53 could only be answered once that treatment had been properly identified (paragraph 51). In paragraph 52 the EAT said that the parties would be asked for submissions on disposal. If disposal involved remittal, and the analysis on remittal relied on a total bar on British nationals joining the IAI, that raised the question of the safety of the ET's determination that British nationals cannot join the IAI.

51. Paragraph 64 of the EAT's judgment is headed 'The finding that [the IFA] had an agreement under which there was an absolute prohibition on British Nationals joining the IAI'. The EAT repeated that, subject to argument, the case might have to be remitted to the ET. That brought 'into focus' the EAT's concerns about the safety of the factual finding that the IAI had an agreement under which there was an absolute prohibition on British Nationals joining the IAI. The EAT's provisional view, if remittal was appropriate, was that revised grounds 9b and 11 should also be remitted. It would be for the ET to manage that, including considering whether the IAI should be allowed to intervene if it wished.

52. Paragraphs 66-72 dealt with disposal. Having considered the parties' submissions, the EAT held, applying *Jafri v Lincoln College* [2014] EWCA Civ 449; [2014] ICR 920, that there was only one realistic answer to claim 1. It should fail. The EAT substituted its decision on claim for that of the ET. The EAT did not consider that there was only one answer to the indirect discrimination claim. It remitted claim 2. It recorded that the claim under section 111 was no longer pursued. The parties agreed that the claim under section 112 should be remitted. The question whether there was a relevant agreement between the IFA and the IAI would also be remitted. The EAT accepted the IFA's submission that that finding was challenged in the appeal. The EAT considered that that finding was unsafe. If, contrary to its flawed approach, the ET had realised that it was necessary to find a basic contravention by the IAI, it would have had to consider how that issue could be decided in a way which was fair both to the IAI and to the IFA. It would be for the ET to consider any application by the IAI for it to be joined, and whether the issue of territorial jurisdiction should be raised.

The EAT's order

53. The EAT set aside paragraph 1 of the ET's judgment and substituted a decision that the IFA had not directly discriminated against Mr Davda. It also set aside paragraphs 2 and 4 of the ET's judgment. It remitted those claims to a different ET. It dismissed the cross-appeal.

The grounds of appeal to this court

54. There are five grounds of appeal.

1. The EAT erred in law in holding that the IFA did not subject Mr Davda to less favourable treatment.
2. The EAT erred in law in not holding that membership of the IAI and the protected characteristic of nationality corresponded, so that membership of the IAI was a proxy for nationality (*James v Eastleigh Borough Council*).
3. The EAT erred in law in criticising the ET's choice of comparator.
4. The EAT erred in law in setting aside the ET's finding that there was an agreement between the IFA and the IAI that British nationals would not be admitted to the IAI.
5. For those reasons the EAT erred in law in holding that Mr Davda had not been subjected to direct discrimination on grounds of race.

The arguments

55. On ground 1, Mr Jupp argued that the act of recognising the IAI and giving the exemption is the IFA's act, not the act of the IAI. It is part of an arrangement within section 53. It was a positive act and only Indian members could benefit from it. He also pointed out that the IFA could insist, as a condition of its provision of materials to the IAI, or of its recognition of the IAI's exams, that the IAI admitted British nationals as student members. There was no evidence that other membership bodies restricted membership on grounds of nationality. The EAT was right, up to a point, that the IFA did not do various things; but it did not matter, because the issue was who gave the exemption, and that was the IFA. That was the less favourable treatment.

56. Ground 2 was the heart of the appeal. It was important to distinguish between pools of comparators for the purposes of an indirect discrimination claim and groups of advantaged or disadvantaged people for the purposes of a direct discrimination claim. He gracefully acknowledged that the ET had erred in relation to the indirect discrimination claim, and that that was his fault. There was no appeal against that aspect of the EAT's decision. The description of the advantaged and disadvantaged groups flowed logically from the choice of comparator. In most cases, such as *James v Eastleigh*, the choice of comparator was binary. It was different if the protected characteristic was not binary, as in a race claim. British students were disadvantaged in comparison with Indian students.

57. It was suggested to Mr Jupp during the hearing that the IFA's recognition of exams was based on their equivalence with the IFA's exams, and had nothing to do with nationality. His answer was that it was not right to look at the whole system of exemptions, but that it was necessary to look at each exemption scheme individually. It was only in cases where there is a bar based on nationality that there would be less favourable treatment. The reason for not getting an exemption in such a case would be the nationality bar. It was no different from access to the swimming pool in the *James* case. There was an exact correspondence between the advantaged and disadvantaged groups and the protected characteristics. There were no Indian student members in the latter group, and no British student members in the former. It was suggested to him that the premise of that assertion was that all Indian members of the IFA were also members of the IAI. Mr Jupp's response was that the case was all about opportunity; and only Indian nationals had the relevant opportunity. The fallacy in the EAT's reasoning was to equate the claims for direct and for indirect discrimination. The proxy rule required the EAT to look at the advantaged group and the disadvantaged group. There was the necessary correspondence with the protected characteristic. The IFA had the power of negotiation over the IAI.

58. He added, if I understood his argument correctly, that the EAT was wrong in paragraph 51 to suggest that the correct comparator was an Indian student member of the IFA. Mr Davda was a British national who was a student member of the IFA. His correct comparator, submitted Mr Jupp, was an Indian student member of the IFA who was also a member of the IAI. That must be the correct comparison, because if it was not, there would be a material difference between the situations of Mr Davda and of his comparator; and that would go against the statute. The very issue which was relevant to the protected characteristic could not be included in the comparison, he argued.

59. Mr Jupp was asked how ground 4 related to the direct discrimination claim. He said that the existence of the agreement was said by the EAT to be relevant to all the claims, and the existence of the agreement was evidence which supported claim 1. He referred to paragraph 9 of the EAT's judgment (see paragraph 37, above). He contended that the EAT had not set aside the ET's finding in paragraph 80 that the IAI had a policy of not admitting British nationals (see paragraph 23, above). It had set aside the ET's finding that there was 'an agreement/understanding' between the IFA and the IAI. He also argued that the IFA had not, in its appeal to the EAT, challenged the finding in paragraph 80. The EAT referred to limited evidence in paragraph 10 of its judgment. In paragraph 27 (see paragraph 38, above) the EAT had misstated the

scope of the ground of appeal, as it was not based on a perversity allegation. The EAT's point about the limited evidential basis of the finding was misplaced. The IFA had had every opportunity to get evidence from the IAI or to join it and had not done so.

60. If his submissions were not accepted, Mr Jupp asked for permission to amend his notice of appeal to ask for permission to appeal against the EAT's setting aside of the finding of fact by the ET in paragraph 80 of its reasons. No prejudice would be caused by that.

61. Mr Reade submitted that the thrust of the appeal was an attempt to shoehorn a claim for indirect discrimination into a claim for direct discrimination, and to re-cast the way in which the case had originally been argued. It was necessary to take a step back and to consider the jurisdiction of the ET conferred by section 53. He accepted that the IFA is a qualifications body. The difficulty was identifying what the relevant 'arrangements' were. Mr Davda had claimed in his ET1 that the direct discrimination was the number of opportunities which British nationals and Indian nationals had to take exams (two sittings compared with four). The complaint was that the relevant arrangements consisted of the IFA allowing Indian students to take four sets of exams. That was reflected in the ET's judgment. That was unsustainable. The relevant treatment was by the IAI: it was that the IAI choses different dates for its exams from the dates chosen by the IFA. If the IAI aligned its dates with the IFA's dates, the whole discrimination claim would disappear.

62. An analysis based on the recognition of the exams set by other bodies (1) was not Mr Davda's case below, and (2) was not the basis of the ET's judgment. In any event, the IFA based its recognition of exams set by other bodies on their equivalence to its exams, not on any other criterion, such as nationality. He drew our attention to the amendment to the indirect discrimination claim which had been allowed by the ET at the hearing (see paragraph 13, above).

63. Mr Jupp's argument about the treatment ran together two things: the IAI's policy not to admit British nationals and its policy of holding exams at different times from the IFA. Both were outside the control of the IFA, as the EAT had correctly pointed out. Lewis LJ had also been right to observe to Mr Jupp in argument that the only way of correcting this discrimination (if that was what it was) would be for the IFA to stop recognising exams set by the IAI. These difficulties could not be cured by re-formulating the claim in this court. The EAT was right that the complaint was not about 'treatment' by the IFA, and that the only conclusion was that the direct discrimination claim failed. If there was a claim at all (and the IFA did not accept that) it could only be a claim for indirect discrimination. Mr Reade agreed with Lewis LJ that his argument was that there was no treatment by the IFA, and that, if there was a separate issue about the recognition of exams, that had not been pleaded, but if it had been, Mr Davda would have had to prove that the position was the same with all the other relevant bodies. Mr Davda had had the chance to plead a case based on mutual recognition and had pleaded it as a claim for indirect discrimination.

64. If this court did not agree with that point, it came back to the decision in *James*. The decision to recognise the IAI's exams was not directly aligned with the relevant protected characteristic. Mr Reade relied on *Boohene v Royal Parks Limited* [2024]

EWCA Civ 1036; [2024] ICR 1036, an authority to which this court drew the parties' attention before the hearing. That was an indirect discrimination claim. In that case there was an issue which was broadly similar to one of the issues here. The issue was whether the correct pool of those to be compared with the respondent's directly employed workforce was all the respondent's indirectly employed workforce, or just those employed by one sub-contractor ('the Vinci-only pool'). The claimants had pleaded reliance on the former pool, but had only led evidence about the Vinci-only pool. The EAT held that the ET's decision was flawed by its reliance on the Vinci-only pool. The EAT also refused to remit the claim to the ET because the claimants had had a chance to prove their pleaded case and had simply failed to do so. On the claimants' appeal, this court agreed with both aspects of the EAT's decision. Here, Mr Reade argued, that if Mr Davda's case was that the recognition of other bodies' exams was aligned with the protected characteristic of nationality 'across the piece', it was for Mr Davda to prove that. He had not done so, and this court should not remit the matter in order to give him a further opportunity to do so.

65. Mr Reade dealt briefly with ground 3. His submission was that Mr Jupp had been right to do likewise, as ground 3 did not help Mr Davda. An Indian student member of the IFA had exactly the same opportunity to sit the IFA's exams as Mr Davda. It was true that an Indian student member of the IFA also had the opportunity to join the IAI, and would have the opportunity to sit the exams more frequently if the IAI kept its current policy about the dates of its exams. That simply underlined that Mr Davda's comparator was not in materially the same circumstances as he was.

66. On ground 4, the finding of fact on which Mr Davda relied was not directly relevant to the claim for direct discrimination or to the appeal to this court. As Mr Reade agreed in answer to a question from Moylan LJ, Mr Davda had not appealed against the decision of the EAT to overturn the ET's judgment on the section 112 claim and to remit that claim to the ET. The finding about the 'agreement/policy' was relevant to all the grounds of appeal, and those included ground 4. The EAT was entitled to decide, in the circumstances, that the finding was unsafe, and to remit that claim to the ET with no preserved findings of fact. The EAT had grappled with the parties' written submissions about the terms of the remittal, which had included Mr Davda's argument that the ET's findings of fact should not be set aside on any remittal, because they had not been challenged on the appeal to the EAT. The EAT had rejected that argument, accepting that the IFA had made a perversity challenge to the relevant findings of the ET. The short point was that ground 4 related to a part of the EAT's judgment which Mr Davda had not challenged in this court.

67. In his reply Mr Jupp accepted that the findings of fact were relevant to the IFA's ground 4 in the EAT. The finding of fact about the agreement was not centrally relevant to Mr Davda's direct discrimination claim, but the finding of fact about the policy was essential. Mr Davda was being criticised for not appealing the EAT's decision on claim 4. But the IFA had not cross-appealed to ask for remittal to the ET on the question whether or not there was a policy. The remittal was on the question whether there was an agreement, not whether there was a policy. Mr Davda's appeal could only succeed if that finding of fact was preserved.

68. Ground 2 turned on whether Mr Davda was right to argue that the court should focus on the IAI in isolation, and was not required to consider the wider picture. It was

necessary to look at each MRA in turn. He agreed with Moylan LJ that each 'arrangement' for the purposes of section 53 was different and should be considered individually. There had been no need to amend the claim in the ET as it was clearly articulated in submissions and in the list of issues, and was plain to see in paragraph 141 of the ET's reasons (see paragraph 29, above).

The legal framework

69. The relevant Parts of the 2010 Act are Part 2 ('Equality: Key Concepts') and Part 5 ('Work'). The relevant Chapters of Part 2 are Chapter 1, 'Protected characteristics', Chapter 2, 'Prohibited Conduct' and Chapter 5, 'Work'. Section 4 lists the protected characteristics. They include 'race'. Section 9(1)(b) further explains that 'race' includes 'nationality'.

70. Direct discrimination is one type of prohibited conduct. It is defined in section 13(1), which is the only part of section 13 which is relevant to this appeal. I will substitute in my summary the word 'race' for the phrase 'protected characteristic'. A discriminates against B if, because of race, he treats B less favourably than he treats or would treat others. Section 19 is indirectly relevant. It defines 'indirect discrimination'. 'Race discrimination' is either 'discrimination within section 13 because of race' or 'discrimination within section 19 where the relevant protected characteristic is race' (section 25(6)).

71. Section 23(1) is also relevant. Section 23 is headed 'Comparison by reference to circumstances'. It provides 'On a comparison for the purposes of section 13…there must be no material difference between the circumstances relating to each case'.

72. The relevant Chapter of Part 5 is Chapter 1, 'Employment, etc', which is divided into ten groups of sections. Sections 53 and 54 are headed 'Qualifications'. Section 53 is headed 'Qualifications bodies'. So far as is relevant in this appeal, section 53(1) provides that a qualifications body (A) must not discriminate against a person (B) in '(a) the arrangements A makes for deciding upon whom to confer a relevant qualification'. Section 54 is headed 'Interpretation'. It applies for the purposes of section 54 (section 54(1)). Subject to irrelevant exceptions in section 54(4), a qualifications body is a body which can confer a 'relevant qualification' (section 54(2)). 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'.

James v Eastleigh Borough Council

73. *James* was decided under the provisions of the Sex Discrimination Act 1975 ('the SDA'), one of the 2010 Act's predecessor statutes. Section 1(1) of the SDA differed from section 13(1) of the 2010 Act in two respects. The phrase 'on the ground of her sex' was used, and the comparison directed by the provision was with 'a man' rather than with 'others'. Section 2(1) made it clear that the provisions of the SDA were to be read as applying, mutatis mutandis, to men. Section 5(3) was similar, but not identical, to section 23(1) of the 2010 Act. It provided that 'A comparison of the cases of persons of different sex…under section 1(1)…must be such that the relevant circumstances in the one case are the same, or not materially different, in the other'. Section 29 made it unlawful, in short, for a person who provided services to the public

or to a section of the public to discriminate in the terms on which those services were offered.

74. The plaintiff and his wife ('W') were both 61. They went to their local swimming pool. W was let in for nothing because she was over what was then pension age for women (60). The plaintiff, on the other hand, had not reached pension age for men, (65). He had to pay 75p to get in. He brought a claim in the county court which failed on the ground that the relevant 'section of the public' was people who had reached pensionable age. This court overturned that decision. But it dismissed the plaintiff's appeal on a new and different ground. It held that the council's less favourable treatment of the plaintiff was not 'on the grounds of his sex' because the council applied the criterion for free entry (being of pensionable age) to both sexes equally. On that analysis the claim could only succeed as an indirect discrimination claim. That had not been pleaded, so this court declined to remit the case to the county court for it to consider an indirect discrimination claim.

75. The majority of the Appellate Committee held that this court had been wrong to hold that it was relevant only to ask why the defendant was treating the plaintiff less favourably, rather than simply whether there was a causal link between the plaintiff's sex and the treatment he was given. The subjective reason for the treatment was irrelevant in this case. Section 5(3) did not help the council, because pensionable age was itself a discriminatory criterion. That meant whether or not the person had reached pensionable age could not be treated as 'relevant circumstance' for the purposes of section 5(3). In the words of Lord Ackner (at p 572B) 'Such a formula was inherently discriminatory'.

Discussion

76. I should deal, first, with Mr Jupp's submission that that the less favourable treatment by the IFA was its arrangements for giving exemptions from its exams. I accept Mr Reade's submission that this was not the way in which Mr Davda had pleaded, proved or argued his direct discrimination claim in the ET. That is shown most clearly by the amendment to his claim, on the last day of the ET hearing, to rely on this point, but only as a PCP in the indirect discrimination claim (see paragraph 13 above). I also accept Mr Reade's submission that it is far too late for Mr Davda to advance this argument now. There are several reasons for this. I have already referred to the pleading. Second, this was not the way in which the ET approached the direct discrimination claim in its judgment. Third, an arrangement for exempting exams set by different international bodies is not based on, and is not a 'proxy' for, the race of the candidates. Fourth, even if such a claim were viable, it could not be considered without evidence about the MRAs which the IFA has with other international bodies.

77. I turn to the pleaded claim. The ET erred in law in holding that the opportunity to take exams four times a year rather than twice a year was treatment by the IFA. The IFA had no say or control over when, or how often, the IAI held its exams. The treatment given by the IFA to Mr Davda was, simply, allowing him two opportunities to sit its exams in each year. The IFA gave that same opportunity to all its student members, regardless of their nationality. I also agree, and this point overlaps with the point I have just made, that the ET also erred in failing to identify different treatment in arrangements which fell within section 53(1). The arrangements by the IAI for

holding exams were not arrangements made by the IFA within section 53(1). That it is enough to dispose of the appeal.

78. For what it is worth, I also agree that the ET wrongly applied *James v Eastleigh*. In that case the criterion for free entry to the swimming pool was having reached retirement age. It was, as the majority of the House of Lords held (and, indeed, as the council's counsel accepted), inherently discriminatory on the grounds of sex. It was therefore, in the modern jargon, a 'true proxy' for the plaintiff's sex. If it is assumed (contrary to my view) that the treatment here is by the IFA and it is the opportunity to take the exams four times a year, that treatment is not an exact proxy for nationality. It cannot be assumed that all Indian nationals (or indeed, all Indian nationals who are student members of the IFA) are student members of the IAI, any more than it can be assumed that all student members of the IAI are Indian nationals. I also agree with the EAT's alterative analysis of the different complaint addressed by the ET in paragraph 141of its reasons based on exemptions (see paragraph 49, above).

79. Although it is not necessary to decide this appeal, I further accept Mr Reade's submissions about the correct comparator (see paragraph 65, above). The ET was clearly wrong to hold, in effect, that it was up to Mr Davda to choose his comparator. Section 23(1) expressly limits the choice of comparator by providing that there must be 'no material difference between the circumstances relating to each case'. There clearly is a material difference between an Indian national who is a member of the IAI and Mr Davda, for obvious reasons. A comparison between their cases cannot clarify whether their different treatment is because of their race, or not.

80. That reasoning makes it unnecessary for me to decide whether ground 4 is well founded or not. Mr Jupp explained in his submissions that ground 4 only mattered to Mr Davda in so far as the ET's finding that there was an agreement was essential to his claim of direct discrimination. The EAT considered two rounds of detailed written submissions on remittal and was entitled to decide, having set aside the ET's judgment on the section 112 claim, that that part of the case should be remitted, without any preserved findings of fact, for the ET to consider it afresh. My view, therefore, is that ground 4 is not well founded.

81. The EAT was therefore right to allow the appeal in relation to claim 1 for the reasons which it gave.

Conclusion

82. For those reasons, I would dismiss this appeal.

Lord Justice Lewis

83. I agree.

Lord Justice Moylan

84. I also agree.