Neutral Citation Number: [2015] EWCA Civ 609

Case No: A2/2014/1802

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE LANGSTAFF
UKEAT/0480/13/SM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2015

Before :

THE CHANCELLOR OF THE HIGH COURT, SIR TERENCE ETHERTON
LORD JUSTICE LEWISON
and
SIR COLIN RIMER

- -

Between :

HOME OFFICE (UK BORDER AGENCY)	**Appellant**
- and -	
SHAFIC ESSOP AND OTHERS	**Respondents**

- -
- -

Ms Naomi Ellenbogen QC and **Mr John-Paul Waite** (instructed by **The Treasury Solicitor's Department**) for the **Appellant, Home Office (UK Border Agency)**
Ms Karon Monaghan QC and **Ms Nicola Braganza** (instructed by **Thompsons Solicitors**) for the **Respondents**

Hearing date: 21 April 2015

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Approved Judgment

Sir Colin Rimer :

Introduction

1. This appeal is against an order dated 16 May 2014 made by Langstaff J (the President) in the Employment Appeal Tribunal ('the EAT') allowing an appeal against a judgment of Employment Judge Baron in the London South Employment Tribunal ('the ET') sent with written reasons to the parties on 25 June 2013. The ET's judgment followed a pre-hearing review in an unidentified number of test claims that had been selected out of a total of 52 claims brought against the Home Office (UK Border Agency) by its employees. The claims are for indirect race and/or age discrimination.

2. The pre-hearing review was triggered by the emergence at a case management discussion of a difference between the claimants and the Home Office as to the interpretation and application of section 19 of the Equality Act 2010. The parties assessed that a resolution of that difference in advance of the final hearing of the claims would be likely to assist in achieving their more economical disposal.

3. So it was that the preliminary issue came to be determined by Judge Baron. He decided it in favour of the Home Office. On the employees' appeal to the EAT, Langstaff J took a different view and decided it in favour of the claimants. With the permission of Sir Stephen Sedley, the Home Office appeals to this court and asks it to restore Judge Baron's judgment. We have had the benefit of able arguments from Ms Ellenbogen QC and Mr Waite for the Home Office and Ms Monaghan QC and Ms Braganza for the claimants.

The factual background

4. The claimants are employed by the Home Office. Mr Essop, the lead claimant, started his employment in 1995 and his current role is that of an Immigration Officer. The Home Office has a practice of applying to all staff a requirement to sit and pass a Core Skills Assessment ('CSA') in order to become eligible for promotion. The CSA is a generic test for all jobs at the same level, regardless of a job's particular role. The levels are HEO original, HEO interim and Grade 7. The CSA bears no correlation to the post for which the candidate intends to apply. If the candidate passes the CSA, he must then sit and pass a Specific Skills Assessment, which (unlike the CSA) is adapted to the post applied for.

5. The claimants all failed the CSA and so were ineligible to be considered for promotion. Their claims against the Home Office are for indirect discrimination, for which they rely upon their protected characteristics of race as black and minority ethnic ('BME') and/or of age; those whose case is based on age rely on the fact they were 35 or older at the time. Each claimant's case is that the Home Office requirement for all employees to pass the CSA in order to demonstrate eligibility for promotion is a 'provision, criterion or practice' ('PCP') for the purposes of section 19 of the Equality Act 2010 that disadvantaged them and resulted in indirect discrimination. Their comparators are white and/or younger Home Office employees who had also been required to pass the CSA in their bid for promotion.

6. The claims are evidentially based on a statistical report of February 2010 that was commissioned by the Home Office in 2009 to assess the equality impact of the CSA. It was the work of external diversity specialist consultants, Pearn Kandola, a firm of occupational psychologists. Its conclusion was that BME and older candidates had a proportionately lower CSA pass rate than white and younger candidates. It noted that whilst a more detailed breakdown of candidate ethnicity was available, all non-white candidates had been pooled into the BME grouping in order to maximise the sample size of the group and thus the reliability of the analysis. As regards age, it noted that:

> '… for simplicity, most of our analyses on age band were based on two categories – those candidates who were 34 or younger and those candidates who were 35 or older. These two groupings were chosen because they provided the most even split (698 and 628 candidates respectively).'

7. The claimants also rely on a report of 26 May 2011 by Tyzack Associates, which confirmed that the differential impact identified by Pearn Kandola was statistically significant. They reported that:

> 'The BME selection rate was 40.3% of the White selection rate and there was a 0.1% chance that this could happen by chance. For older candidates the rate was 37.4% with again 0.1% risk that this could happen by chance.'

8. It is agreed (i) that no reason was identified in either report to explain the differential impact and (ii) that many BME and/or older candidates passed the CSA. Langstaff J recorded, at [2] of his judgment, that for the purposes of the pre-hearing review in the ET it was assumed:

> '(a) There was a statistically significant difference between the success of BME/older candidates and younger non BME candidates sitting the CSA test.
>
> (b) There was no particular personal factor specific to any individual Claimant that might explain this.
>
> (c) However, not all older BME candidates failed.'

I understand it also to be agreed that many white candidates also failed the CSA, including white candidates who were 34 or younger.

9. Before explaining the nature of the issue that, on these assumptions, the ET had to decide, I shall first refer to the applicable legislation.

The Equality Act 2010

10. Section 13 of the Equality Act 2010 ('Direct discrimination') provides:

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

11. Section 19 of the Act ('Indirect discrimination') provides:

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

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

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

age;

…

race;

….'

12. Section 23 of the Act ('Comparison by reference to circumstances') provides:

'(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case. …'

13. Section 39 of the Act (in Part 5, 'Work', Chapter 1, 'Employment, etc') provides:

'(2) An employer (A) must not discriminate against an employee of A's (B) –

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service ….'

14. Section 124 ('Remedies: general') provides:

'(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may –

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation. …

(4) Subsection (5) applies if the tribunal –

(a) finds that a contravention is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c) …'.

15. Section 136 ('Burden of proof') provides:

'(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule. …

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

(a) an employment tribunal; …'

The issue before the ET at the pre-hearing review

16. I take this from Judge Baron's summary of the arguments as set out at [19] to [27] of his reasons for his judgment.

17. It is agreed that the Home Office requirement for all candidates for promotion to pass the CSA is a PCP for the purposes of section 19. The claimants' case was that they were the victims of indirect discrimination within the meaning of that section. The BME claimants asserted that the PCP put those sharing their protected characteristic of race at a 'particular disadvantage' for the purposes of section 19(2)(b) when compared with white employees who do not share that characteristic. That is because the statistical evidence in the Pearn Kandola report showed that those sharing the race characteristic had a proportionately lower CSA pass rate than the white comparators who did not: the claimants were, therefore, more likely to fail the test than pass it and so be ineligible for promotion. Their case was that all that they needed to show in order to make good their claims was: (a) that the CSA is a PCP which created an adverse disparate impact on them as sharing the protected characteristic of race; and (b) that they had failed the CSA. They said it followed that they suffered a detriment in being deprived of the opportunities for promotion.

18. In particular, they said it was not necessary to show *why* they had failed the CSA. The ET will not therefore need at the substantive hearing to examine a candidate's individual answers and scores or consider whether the test is discriminatory in the sense that the reason for his failure was connected to his/her protected characteristic. They said that such an inquiry would only be appropriate if the claim were one of direct discrimination. If the BME claimants were right, they said it would then be for the Home Office to seek, if it could, to *justify* the disparate treatment: section 19(2)(d). Like arguments were also advanced on behalf of those claimants relying additionally or separately on indirect age discrimination. I understand it to be the position of all claimants that, in order to make good their case (but subject always to justification), they need do no more than produce the Pearn Kandola report.

19. The Home Office's case was, by contrast, that it is not enough for a BME claimant merely to seek to prove his case by reference to the statistical reports. In a case in which it is said that a PCP works to the disadvantage of a particular protected group under section 19(2)(b), the claimant must prove the nature of the 'particular disadvantage' to the protected group to which that subsection refers. In this case, that requires the claimant to prove the *reason* for the lower pass rate by that group. Only then, is the claimant in a position to prove, if he can, that he was also put to *that* disadvantage (see section 19(2)(c)) and that the PCP was therefore discriminatory towards him. Thus (in the BME cases) each candidate must first show *why* the BME candidates were more likely to fail the CSA; and each must then also show that he was subject to the same impediment or obstacle with the consequence that it would be more likely that he too would fail it. A like defensive argument was advanced in relation to those claims relying on age as their protected characteristic.

The decision of the ET

20. Judge Baron said, at [9], it was clear to him that the particular disadvantage suffered by the claimants for the purposes of section 19(2)(b) was 'the increased likelihood of failure of the CSA, and not the fact of failure itself.' This was because many BME and older candidates did pass the CSA. (Judge Baron had also recorded at [3] that the parties had earlier agreed that the relevant disadvantage was that 'those in the same racial group as the Claimant were less likely to pass the test'). In approaching the interpretation of section 19, Judge Baron derived particular assistance from the judgment of the EAT (delivered by Elias J, then the President) in *McClintock v. Department of Constitutional Affairs* [2008] IRLR 29. Elias J said, at [34]:

> 'For the purposes of this appeal, it is helpful to identify three elements in the concept of indirect discrimination claim. The first is that there must be a provision, criterion or practice which disadvantages persons who hold beliefs falling within the scope of the legislation; the second is that the appellant must personally be disadvantaged for that reason; the third is that the employer must be unable to justify any such criterion, policy or practice.'

21. Judge Baron concluded his reasoning for preferring the arguments of the Home Office as follows:

> '36. I do not accept the proposition put forward by Miss Braganza on behalf of the Claimants that all that is necessary is for the Tribunal to find that there has been a group disadvantage in that there was an increased likelihood of a candidate

failing the CSA test, and then that the relevant Claimant did in fact fail that test. In paragraph 25 of her written submissions Miss Braganza refers to the Claimants failing the test and not being promoted, and that being a detriment and disadvantage. I do not take issue with the proposition that a candidate who fails the test is thereby at a disadvantage as s/he cannot then be promoted. However, as explained earlier, that is not the 'particular disadvantage' for the purposes of section 19(2)(b), because not all BME and older candidates failed the CSA test. It appears that 'disadvantage' is being used in different contexts.

37. In my judgment it is simply necessary to follow what I consider to be the clear wording of the statutory provisions, which is in accordance with the passages quoted above from *Harvey*, the Code of Practice, and paragraph 34 of the judgment of Elias P in *McClintock.* Firstly, it is for the parties to agree, or for the Tribunal to ascertain, what was the particular disadvantage caused by the provision, criterion or practice to the group who do not share the characteristic in question. [I believe the words "do not" were there included in error]. That may well also involve a determination of what the relevant group is in each case.

38. I prefer the arguments of Mr Waite on the second element of section 19(2) [a reference to section 19(2)(c)]. Once the particular disadvantage caused by the PCP has been found then it will be necessary for the Tribunal to determine that the relevant Claimant was actually put at <u>that</u> disadvantage. The mere fact of failure of the CSA in any particular case is not determinative of whether that Claimant has been put at that disadvantage. If the Tribunal finds that the Claimant was him/herself put at the group disadvantage applicable for section 19(2)(b), then the definition of indirect discrimination is satisfied, subject to the defence of justification.

39. It is then necessary for the Tribunal to go further and consider whether the indirect discrimination was unlawful under section 39(2). Did the discrimination as found under section 19 result in the relevant Claimant being denied access to promotion? It is quite possible that absent any discrimination the relevant Claimant would not have passed the CSA test. It is my conclusion that in such circumstances the discrimination would not be unlawful under section 39.

40. Therefore on the issue before me as agreed between counsel my conclusion is that it will be necessary for each of the Claimants to prove the reason for his/her failing of the CSA test. …'

22. The outcome was that (subject always to justification) Judge Baron made a declaratory judgment that 'in order to succeed in the claims of indirect discrimination under sections 19 and 39 … based upon the protected characteristics of race and/or age the Tribunal must find:

1. That the Respondent has applied a [PCP] to the relevant Claimant and also to persons who do not share the protected characteristic(s) in question;

2. That such [PCP] puts such persons at a particular disadvantage when compared with persons who do not share the characteristic(s) in question;

3. The nature of that particular disadvantage;

4. That such [PCP] also put the relevant Claimant at that particular disadvantage;

5. That that particular disadvantage had the effect of denying the relevant Claimant the possibility of access to promotion.'

The decision of the EAT

23. Langstaff J described the issue as one of the proper interpretation and application of the Equality Act 2010. After noting that section 19(2)(b) looks at the disadvantage suffered by those sharing a protected characteristic when compared to those who do not, he said that, in performing the comparative exercise, section 23 requires there to be no material difference between the circumstances relating to each case: '[t]he comparison must be between those who are in circumstances which are not materially different, one from the other, save that in the case of one of the two comparison groups they share the same protected characteristic whereas the members of the other do not.' The focus of the appeal had been on the force of the words 'at that disadvantage' in section 19(2)(c).

24. Langstaff J said it was agreed that the requirement for candidates for promotion to pass the CSA was a PCP. There was no obvious reason to conclude that it was racially biased or favoured younger employees. Were it otherwise, it would have amounted to direct discrimination. Indirect discrimination can, however, arise when an apparently neutral PCP has a disparate effect between persons with different protected characteristics. Discrimination is rarely overt and need not be intentional. A PCP may be intended to be fair but its effects may in fact produce a discriminatory result, although the reasons why it does so may be far from clear.

25. Langstaff J noted Judge Baron's conclusions in [37] and [39] of his reasons (quoted above). He referred to the judge's view that if the claimants were right, an individual could make good a claim of indirect discrimination based on statistics and regardless of whether the adverse differential impact suffered by the group of which he formed part actually affected him. He referred to Judge Baron's example of a test requiring a high level of spoken English, which put BME candidates generally at particular disadvantage within section 19(2)(b) but which did not similarly affect a particular claimant who had a high level of spoken English but still failed the test. Were such a claimant to succeed in his claim, he would be benefiting from a 'statistical fluke'.

26. After summarising the submissions, Langstaff J explained his conclusions at [24] to [34]. He said the starting point was the statutory language and that section 19 does not in terms require members of the disadvantaged group to show *why* they have suffered the disadvantage in addition to the fact that they have done so. Insofar as Judge Baron considered that the *why* question needed to be answered, he was imposing a requirement going beyond what the law required. He had therefore been wrong in [39] to assert that 'the mere fact of failure of the CSA in any particular case is not determinative of whether the Claimant has been put at that disadvantage'. In Langstaff J's view, at [25], the relevant disadvantage to which the group was disproportionately subject was that of 'the greater risk of, or actual, failure of, the test'. Judge Baron's 'mere fact of failure of the test' summarised the potential disadvantage.

27. Secondly, Langstaff J drew on the decision of the Court of Justice in *Enderby v. Frenchay Health Authority* [1994] ICR 112 for the adoption of the following approach to section 19. He said:

> '27. The approach to be derived from EU law is purposive. If, therefore, a domestic statutory provision may be read either as requiring not just that Claimants prove that they have suffered a disadvantage similar to that which the group of which they are a member has suffered as a whole, but also an additional factor (for which the legislation does not specifically provide); or alternatively as not requiring the additional factor to be established, the initial question will be whether to construe the legislation in this way advances the broad purpose of the legislation or impedes it.
>
> 28. The purpose of the provision – eliminating the adverse effects of "disguised" discrimination – is not advanced, but hindered, by requiring the additional proof to which the Employment Judge referred at paragraph 40. If it is clear from reliable and significant statistical or other evidence that a process adopted by an employer has results which disadvantage a particular racial or cultural group in comparison to others, but neither the employer nor its employees can point to a particular feature of the process which has that result, or explain why it does, to require either to show the reason for the disadvantage in any individual case is to ask them to do that which they cannot do. To make liability conditional upon their being able to do so is thus to remove any legal constraint upon it, and to permit the disproportionate effect to continue. If it is said that a person must first be subject to the process, to see what the result is, then this sets him up disproportionately to fail. Nor where the process is the administration of a test does it help an employer to argue that the results of that test in the case of a particular individual are so poor that whatever the unknown feature of that test which is responsible for its disproportionate effects he would not have succeeded – for this could not properly be assessed without isolating the particular feature itself which caused a disadvantage only apparent on a survey comparing one with others.'

28. Langstaff J turned to Mr Waite's argument for the Home Office that the claimants' case, if right, would mean that claimants of the same ethnicity of the disadvantaged group could 'ride on the back' of an unidentified disadvantage that affected only some of the group of which they were part, when the claimants were not themselves subject to that disadvantage.

29. Langstaff J's first answer to that argument, explained at [29], was that it would be open to the employer to seek to justify the PCP as a proportionate means of achieving a legitimate aim. His further point was that the case of such a claimant could be met at the remedy stage. He hypothesised a case in which there was material to show that the claimant was not disadvantaged for a reason true of the group in general and said that in such a case 'the natural inference (that the Claimant has suffered the disadvantage for the same reason as that true of the group when compared to others) may be displaced (that is not the present case, which is one in which there is nothing to suggest this)'. He then hypothesised cases in which there was material showing that a particular claimant would be likely to succeed on the test (despite its unidentified bias), in which case less compensation may be awarded; or that he faced the certainty of failure in it, in which case he would also be likely to receive either only moderate

or no compensation. Those examples tend to show that Langstaff J recognised that inferences drawn from the statistics relating to the group may not, without more, automatically apply to a particular claimant: there can still be an inquiry as to whether (regardless of the unidentified bias) the claimant was anyway likely to succeed or to fail, and the conclusion could be reflected in the remedy awarded.

30. Langstaff J concluded his reasoning for allowing the appeal as follows:

> '32. Mr Waite's argument that the Claimants' case should be rejected because of the adverse consequences of upholding it made by reference to the illustration of the woman who wished to pursue a hobby, rather than child-care, being permitted to succeed on a claim for indirect discrimination is only superficially convincing. On examination it does not address the present case. In his illustration, the reason why the PCP caused relevant disadvantage is known. Whatever the proper analysis of such a case may be, it is not comparable with a case such as the present, where (I assume) despite the best will in the world, the parties remain unclear why precisely the disadvantage is suffered. In such a case there is no basis yet established for distinguishing between the disadvantage to one member of the group as opposed to another. The example would be pertinent if the employer were able to identify the disadvantageous feature of its arrangements with sufficient particularity to show that A, a member of the group which is potentially affected by the arrangements as a whole, was not in fact disadvantaged. In circumstances such as the present he cannot do so.
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> 33. At paragraph 27 of his reasons, the Judge recorded Mr Waite as submitting that "claims of indirect discrimination must start by identifying the reason for the adverse impact on the individual Claimant, and then move on to see if the impact is shared by the relevant group." There was an echo of this in his argument on appeal. He pointed out that most claims began in this way, whereas the claims in the present case began with statistical evidence of differential impact. This approach, he argued, was at odds with custom and practice in the field of indirect discrimination claims.
>
> 34. If and insofar as his argument was (or implied) that it was necessary that a claim should proceed in this way, I reject it – and, it follows, hold that the Judge was in error in this respect also – for a number of reasons. First, it introduces a formalism of approach which is not required by the statute – though such an approach may well be adopted in a particular case, the issue is not whether it can but whether it has to be, and the legislation simply does not require it. Secondly, the legislation is if anything suggestive of the opposite approach – to identify group disadvantage first and only then proceed to ask if an individual has also suffered it ("***that***"disadvantage). If it were the other way round, the statute might more appropriately ask if the group had suffered, e.g. "that disadvantage (suffered by the individual)". Thirdly, it requires a reason to be shown for the disadvantage, and (see the discussion above) this may not be possible in many circumstances, even though it can be shown on the evidence that there has been a disadvantage. Fourthly, seen from the perspective of the Employment Appeal Tribunal I simply do not accept that general experience in employment cases is as the argument suggests: rather, as the comments of the Advocate General at paragraph 51 of his Opinion in *Enderby* show, there are a number of possible routes to a desirable end, which is the identification of discrimination with a view to its elimination.

> Evidence of disparate impact there must be: but to seek to prescribe the form that evidence should take by reference to what is for the time being said to be the prevailing practice would be to permit habit, or preference, to obscure substance and is likely to lead to sterile debate as to what actually is currently prevalent.
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> 35. Accordingly, I hold that the Employment Judge was in error. The appeal must be allowed. The claims should proceed before the Tribunal in accordance with this judgment. …'.

The appeal to this court

31. When giving permission to appeal, Sir Stephen Sedley said the appeal would raise an important issue of legal principle, although he was not persuaded that it had a very high prospect of success. I agree that the appeal is important, as is underlined by the stark difference of approach of the tribunals below.

32. As to that difference, Judge Baron approached the issues by what might be regarded as a logical application to the assumed facts of the statutory hurdles that section 19 may be said to show that a claimant asserting indirect race or age discrimination has to surmount. The requirement for those seeking promotion to sit and pass the CSA is admittedly a PCP. Taking the case of the BME candidates, many such candidates pass the CSA. But the conclusion of the Pearn Kandola statistical analysis was that BME candidates have a proportionately lower CSA pass rate than white candidates. Since, however, not all BME candidates fail, a BME claimant has first to prove the 'particular disadvantage' that the CSA poses for BME candidates as compared with white candidates: section 19(2)(b); and each BME claimant must then also prove that he too is put to '*that disadvantage'* , namely the *same* disadvantage: section 19(2)(c). This, held Judge Baron, is the double probative requirement of a successful claim for indirect race discrimination, which each BME claimant must take on. Likewise with regard to the claimants relying additionally or separately on age discrimination.

33. As an interpretation of an apparently clear statutory provision, the force of that approach may be said to have much to commend it. The intuitive difficulty that I have with it, however, is that the preliminary issue was premised on the factual assumption that Langstaff J identified in [32] of his judgment, namely that the parties do not know *why* the group disadvantage was suffered, that is why members of the group were disproportionately more likely than their competitors to underperform; and that it is probable that neither the claimants nor the Home Office will be able to cast any further light on the answer to that question in the future course of the proceedings. As it seems to me, therefore, the probative burden that Judge Baron loaded upon the claimants is likely to be one that they will be unable to discharge. If so, they will be unable to reach the point at which the Home Office will be required, if it can, to justify the PCP and the claims will necessarily fail.

34. Such a consequence might be acceptable if this were normal civil litigation of a type that daily comes before our ordinary civil courts. But these claims are not of that type. They are discrimination claims which, as is notorious, are often difficult to prove. An

employer may impose a PCP upon his employees that he genuinely regards as applying fairly to all, but it may in practice turn out to disadvantage certain of them who share a protected characteristic not shared by others to whom it also applies; and it may also be difficult in some cases, of which this is an example, to identify precisely why it has such an effect. In such cases, to make a claimant's success depend upon his being able to prove the precise nature of the particular disadvantage to which the PCP puts both him and others sharing his protected characteristic may be to impose upon him too high a burden: because, if he fails, the outcome will or may be the continuation of what apparently amounts to unlawful discrimination, which would be contrary to the public interest: discrimination is a social evil which must be stopped. It might well be regarded as unfortunate if, in a case such as the present, an ET were driven to conclude that, whilst there is a compelling inference that unlawful indirect discrimination is in play, it cannot be stopped because of the claimants' inability to prove precisely *why* such discrimination is causing its disparate impact.

35. Langstaff J was, I consider, rightly sensitive to this and I interpret his decision as being to the effect that (subject always to objective justification) the claimants will have an automatic ride to victory. First, he held that section 19 does not require a claimant to show *why* the members of the disadvantaged group suffered the disadvantage imposed by the PCP in addition to the fact that they had done so. The disadvantage to which the group was subject was, he said, 'that of the greater risk of, or actual, failure of the [CSA].' Each BME claimant was a member of the same disadvantaged group and so also suffered that disadvantage. Second, he said what he did in [28] (cited above) as to the ability of the claimants in a case such as this to rely for proof of their case on 'reliable and significant statistical evidence' of the type produced by Pearn Kandola: if neither the Home Office nor the claimants know which particular feature of the CSA disadvantages the BME group, to require either to show the reason for that disadvantage in any particular case will be to require the impossible.

36. In the factual circumstances of the case, Langstaff J appears therefore to have accepted that proof of the disparate impact upon the group for the purposes of section 19(2)(b) will, without more, enable each individual claimant also to surmount the section 19(2)(c) hurdle. He accepted that this may mean that a 'coat-tailing' claimant may succeed where in principle he should not (because he failed the CSA for a reason other than by reason of the disadvantage to which the PCP put other members of the group), but said that the first answer to that is the Home Office's right, if it can, to justify the PCP.

37. I do not, with respect, understand the point the judge was there making. If the PCP is justified, all the claims fail. If it is not, on his approach they will all succeed, including that of the 'coat-tailer'. But why should a coat-tailer, *if* he can be identified as such, be entitled to succeed? He has, *ex hypothesi*, not satisfied the section 19(2)(c) requirement and so has not proved a case that requires to be answered by objective justification. Secondly, Langstaff J said the answer may also lie at the remedy level. He appeared, at [31], to recognise that, if not in this case, at any rate in other cases the employer might be able to show that a particular claimant had failed a test like the CSA for a reason individual to him and not because of a disadvantage to which the group as a whole was put, in which case either only reduced or no compensation would be awarded. I do not understand this either. Why has the employer in such a

case not so disproved the coat-tailer's claim as to be entitled to have it dismissed? The coat-tailer will not have proved a contravention of the legislation for the purposes of section 124 and so the ET would have no jurisdiction to award any remedy. I add, though, that Langstaff J made clear that he did not regard such a case as having the potential to arise in these claims, in which the precise reason for the disadvantage imposed by the PCP is unknown.

The submissions

38. In support of the Home Office's appeal, Ms Ellenbogen explained at the outset of her submissions that Mr Essop's case (he is the lead respondent to the appeal) pleaded in his ET1 (which I take to be typical of the claims) asserts that he is a 'BME member of staff aged over 35 and these categories of staff members are statistically less likely to pass the CSA than white staff under 35.' One of the points raised in the Home Office's ET3 is that, for the purposes of his race discrimination claim, Mr Essop has failed to identify his racial group. The point is that 'BME' does not identify a particular race or ethnic group but simply groups together a number of races or ethnic groups. The Home Office says that a race discrimination claimant must identify his race, which it says Mr Essop has not done; and it will or may also be said that it does not follow that any disadvantageous impact that the CSA may have upon one or more racial sub-groups within the global BME grouping will have a disadvantageous impact on all of them.

39. All that said, I understand these to be defensive points that the Home Office intends to raise at the substantive hearing. The preliminary issue that the ET and the EAT decided proceeded on the assumption that the BME grouping can be regarded as constituting the protective characteristic of 'race' for the purposes of section 19; with the wider question being as to what, on that basis, the claimants need to establish in order to make good their claims at the substantive hearing. I record, however, that in this context Ms Monaghan referred us in passing to section 9 ('Race') of the Equality Act 2010, but it is not necessary to say more about that section.

40. As regards the statutory requirements imposed by section 19, Ms Ellenbogen submitted that Judge Baron's approach was correct. A claimant asserting indirect discrimination must prove each of the conditions set out in section 19(2)(a), (b) and (c). Only if he can do so will the respondent, if he can, then have to justify the PCP under sub-paragraph (d).

41. There is no issue as to the satisfaction of section 19(2)(a). The debate centres on section 19(2)(b) and (c), primarily the latter. It is said that Langstaff J wrongly elided the requirements of the two subparagraphs. It is necessary, said Ms Ellenbogen, but by itself not enough, for a claimant to show, for the purposes of section 19(2)(b), that he shares a protected characteristic with others whom the PCP puts, or would put, at 'a particular disadvantage' when compared with others who do not share it. Ms Ellenbogen also accepted that statistics such as those produced by Pearn Kandola can be relied upon by a BME claimant to prove the existence of the disadvantaged pool of persons with whom he shares a protected characteristic; and she referred us to *Eweida*

v. British Airways plc [2009] ICR 363, a decision of the EAT (upheld in the Court of Appeal) in which Elias J, then the President, said at [53] that 'Statistics will be an obvious but not the only way in which the group disadvantage, commonly referred to as "disparate impact" can be demonstrated.'

42. It is, however, said Ms Ellenbogen, not enough for a BME claimant to adduce statistics by way of proof of the *group* disadvantage for the purposes of section 19(2)(b). That is because section 19(2)(c) requires the claimant also to prove that he too personally suffered *that* disadvantage, namely the same disadvantage to which the group is subject. The Pearn Kandola statistics do not prove that every BME candidate is less likely to pass the CSA than the white comparators; they prove merely that BME candidates suffer a proportionately higher failure rate than the white comparators; and of course many BME candidates do pass the CSA. It follows, said Ms Ellenbogen, that to make his case under section 19(2)(c), a BME claimant must prove the reason or reasons *why* those BME candidates who are more likely to fail are so disadvantaged and then prove that he too suffers from the same disadvantage.

43. This is, Ms Ellenbogen submitted, consistent with principle. She referred by analogy to the case of an employer who imposes a PCP requiring all employees to work full time, one that is said to discriminate against women because the proportion of women who can comply with it is considerably smaller than the proportion of men who can – because women are more likely than men to have childcare responsibilities. Ms Ellenbogen cited *Home Office v. Holmes* [1984] ICR 678 as an example of such a case, a decision of the EAT decided under the (slightly different) indirect discrimination provisions of the Sex Discrimination Act 1975. A woman making such a claim can, however, only hope to succeed in it if she shows *why* the relevant PCP disadvantages women. She will be able to show, for the purposes of section 19(2)(b), that she shares a characteristic (that of sex) with a pool of women disadvantaged (or potentially disadvantaged) in relation to their childcare responsibilities by the PCP; but unless she can also show that she too is personally disadvantaged by reason of her own childcare responsibilities, she will not be able to prove, for the purposes of section 19(2)(c), that she is put to the same (i.e. *that*) disadvantage suffered or potentially suffered by the generality of the members of the pool. If, for example, all she can show is that the full-time work PCP prevents her from playing golf on a Friday afternoon, her case would fail: she could not satisfy section 19(2)(c).

44. Ms Ellenbogen therefore submitted that whilst reliance on the Pearn Kandola statistics may enable the BME claimants to make good the section 19(2)(b) element of the claim, it cannot enable them to make good the section 19(2)(c) element. That requires proof of why a disproportionate section of the BME candidates suffer the likelihood of failure of the CSA test and proof that the particular claimant suffered from the same disadvantage. It is in particular not enough, as Langstaff J thought, for the claimant merely to prove that he failed the CSA. Mere failure is not the relevant section 19(2)(b) disadvantage, since many BME and older candidates passed the CSA. The only relevant disadvantage (as to which, Judge Baron noted, the parties were agreed) is the likelihood of failure; and the key inquiry, essential for proof of the section 19(2)(c) element, is therefore as to the reason or reasons for such likelihood. Ms Ellenbogen referred us to authorities which show that it is essential for an indirect discrimination claimant to prove that he/she is, for the purposes of section 19(2)(c), personally disadvantaged in the same way as is the pool of which he/she is a member:

McClintock v. Department of Constitutional Affairs [2008] IRLR 29, at [37] to [38], per Elias J; and *Eweida v. British Airways plc* [2009] ICR 303, a decision of the EAT, per Elias J, at [59]; and, [2010] ICR 890, Court of Appeal, which upheld the decision of the EAT and, at [13], per Sedley LJ (with whom Carnwath and Smith LJJ agreed), agreed with what Elias J had said at his [59] subject only to a qualification immaterial for present purposes.

45. To the court's suggestion to Ms Ellenbogen that the statistics in the Pearn Kandola report would or might enable a claimant not merely to prove the section 19(2)(b) element of his case but also to say that he had adduced an evidential case for the purposes of section 19(2)(c) sufficient to require a burden of disproof to shift to the Home Office under section 136, Ms Ellenbogen disagreed. Her response was that proof of the section 19(2)(c) element is a pre-condition of a claimant's right to bring an indirect discrimination claim: its proof, she said, goes to the claimant's *locus standi* to bring such a claim and unless the claimant can discharge that burden he has no right to bring the claim. As I followed the argument, proof of such *locus standi* is a matter to which section 136 has no application. Ms Ellenbogen supported her proposition by referring to the May 2012 issue of the IDS Employment Law Handbook, in which, under the heading 'Individual disadvantage' (a reference to section 19(2)(c)). the author wrote at paragraph 16.119:

> 'The necessity of showing individual disadvantage is a means of ensuring that the claimant has a direct interest in bringing the claim of indirect discrimination – in other words, that he or she has "standing" (or locus standi) to bring the claim.'

If Ms Ellenbogen were to be wrong in her '*locus standi'* submission, she said it was anyway plain that the burden of proving individual disadvantage for the purposes of section 19(2)(c) is squarely on the claimant. I understood her to reject the suggestion that the burden of proof provisions in section 136 have any role to play in that part of the evidential exercise.

46. There was something of a difference between Ms Ellenbogen and Ms Monaghan as to the extent to which the Equality and Human Rights Commission Statutory Code of Practice supports or undermines their respective submissions. Ms Ellenbogen submitted that it is consistent with her submissions; alternatively, that if it is not, it is wrong. We were referred to Chapter 4 of the Code ('Indirect Discrimination'). Each headed sub-section of Chapter 4 deals successively with the criteria for indirect discrimination to be found in section 19. Thus, Ms Ellenbogen submitted, paragraphs 4.9 to 4.14 (upon which Ms Monaghan places reliance), under the heading 'What is a disadvantage?' are dealing *only* with the second bullet point in paragraph 4.4., which is in turn referring only to the 'particular disadvantage' that is the subject of section 19(2)(b): they are therefore dealing only with *group* disadvantage. Paragraphs 4.11 and 4.12 read:

> '4.11 In some situations, the link between the protected characteristic and the disadvantage might be obvious; for example, dress codes create a disadvantage for some workers with particular religious beliefs. In other situations it will be less obvious how people sharing a protected characteristic are put (or would be put) at a disadvantage, in which case statistics or personal testimony may help to demonstrate that a disadvantage exists.

> **Example:** A hairdresser refuses to employ stylists who cover their hair, believing it is important for them to exhibit their flamboyant haircuts. It is clear that this criterion puts at a particular disadvantage both Muslim women and Sikh men who cover their hair. This may amount to indirect discrimination unless the criterion can be objectively justified.
>
> **Example:** A consultancy firm reviews the use of psychometric tests in their recruitment procedures and discovers that men tend to score lower than women. If a man complains that the test is indirectly discriminatory, he would not need to explain the reason for the lower scores or how the lower scores are connected to his sex to show that men have been put at a disadvantage; it is sufficient for him to rely on the statistical information.
>
> 4.12 Statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it causes. Statistics relating to the workplace in question can be obtained through the questions procedure (see paragraphs 15.5 to 15.10). It may also be possible to use national or regional statistics to throw light on the nature and extent of the particular disadvantage. …'.

47. Paragraph 4.23, under the heading 'Is the worker concerned at that disadvantage?' is, said Ms Ellenbogen, concerned with the section 19(2)(c) requirement and, therefore, for the need for the individual claim to prove that he has suffered the same disadvantage as that suffered by the group. It reads:

> '4.23 It is not enough that the provision, criterion or practice puts (or would put) at a particular disadvantage a group of people who share a protected characteristic. It must also have that effect (or be capable of having it) on the individual worker concerned. So it is not enough for a worker merely to establish that they are [sic] a member of the relevant group. They must also show that they have personally suffered (or could suffer) the particular disadvantage as an individual.
>
> **Example:** An airline operates a dress code which forbids workers in customer-facing roles from displaying any item of jewellery. A Sikh cabin steward complains that this policy indirectly discriminates against Sikhs by preventing them from wearing the Kara bracelet. However, because he no longer observes the Sikh articles of faith, the steward is not put at a particular disadvantage by this policy and could not bring a claim for indirect discrimination.'

48. Ms Ellenbogen also criticised Langstaff J's reliance on *Enderby v. Frenchay Health Authority and another* [1994] ICR 112, a decision of the Court of Justice. The decision was on a reference in an equal pay claim in which a woman speech therapist claimed equality of pay with a male psychologist and a male pharmacist on the ground that she was engaged on work of equal value and was being discriminated against on the ground of her sex, since speech therapists (who were predominantly female) were paid at a lower rate than the comparator work groups (which were predominantly male). The rates of pay of the speech therapists and the comparator work groups had been negotiated under statute by collective bargaining agreements. The Court of Appeal referred to the Court of Justice questions confined to whether the employer needed to provide (and if so how) objective justification for the disparity in

pay between two jobs assumed to be of equal value, when one was carried out almost exclusively by women and the other predominantly by men. The Court of Justice held that the statistics showed a *prima facie* case of discrimination on the ground of sex and that it was for the employer to justify such difference in pay on objectively justified factors.

49. Ms Ellenbogen's submission was that the premise of the Court of Justice's decision was that a case of sex discrimination had been established and that the only question was as to objective justification. By analogy with the present claims, the case was therefore one in which the claimants had made good their case under section 19(2)(a) to (c) and all that remained was the question of justification under subparagraph (d). The present claims have not, however, reached that position. On the contrary, the preliminary issue before the ET was as to what the claimants have to prove in order to get themselves to it, as to which the Court's guidance in *Enderby* provides no assistance.

50. Ms Monaghan, in her responsive submissions for the claimants/respondents submitted that Langstaff J was correct in holding that an indirect discrimination claimant does not need to show *why* the PCP disadvantages the group or the individual claimant: it is necessary merely for the claimant to show that both the group and he were comparatively disadvantaged. Ms Monaghan contrasted the statutory language relating to direct discrimination and that relating to indirect discrimination and pointed out that the latter does not include anything comparable to the former: section 13 ('Direct discrimination') requires proof of conduct against the claimant 'because of' a protected characteristic. That requires a causal connection between the intention of the wrongdoer in performing the act complained of and the victim's protected characteristic. Nothing comparable is found in, or required by, the indirect discrimination legislation. She referred us to *Regina (E) v. Governing Body of JFS and another (United Synagogue and others intervening)* [2010] 2 AC 728, in which Baroness Hale of Richmond said:

> '56. The basic difference between direct and indirect discrimination is plain: see Mummery LJ in *R (Elias v. Secretary of State for Defence* [2006] 1 WLR 3213, para 119. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.
>
> 57. Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in the *Elias* case, at para 117, "The conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. …'

51. Ms Monaghan submitted that in the present case it is enough for the claimants to prove that, as a group, they have been comparatively disadvantaged by the PCP; and it is well established that they can do so by the production of valid statistics, which is

what the claimants say they can do by the Pearn Kandola report. Ms Monaghan referred us to the Equal Treatment Directive (Council Directive 2000/43/EC of 29 June 2000), of which recital (15) reads:

> 'The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.'

52. As I have said, Ms Ellenbogen does not question the role that valid statistics may play in proving disparate impact on a group for the purposes of section 19(2)(b) but she does question their role in the bid to prove individual disadvantage for the purposes of section 19(2)(c). Ms Monaghan submitted, however, that they also play a sufficient evidential role for that purpose as well. There is, she said, no need to identify the reasons for the indirect discrimination. In a case like the present, in which statistics can be used to prove the disadvantage to which the group is subject, they can also be used, for the purposes of section 19(2)(c), to prove the individual disadvantage to which the claimant is subject.

53. In support of that, Ms Monaghan placed reliance on paragraph 4.11 of the Code, and in particular on the consultancy firm example that it includes. As it seems to me, however, that does not (at any rate *expressly*) take her the full distance she would wish. Paragraphs 4.9 to 4.14 are, I consider, directed only at section 19(2)(b) considerations, not to those raised by section 19(2)(c): and the consultancy firm example apparently underlines that by saying how the claimant can use the statistics to prove that 'men' (i.e. the men in the *group*) are disadvantaged. It can, however, be said that it may perhaps be implicit in that example that the Code would regard the statistics as enabling the claimant also to satisfy the section 19(2)(c) hurdle, even though (as it seems to me) questions under that subparagraph are formally the subject of consideration in paragraph 4.23. Ms Monaghan also sought to dilute the apparent weight of that paragraph by saying that its example was directed to the case where the individual claimant did not wish to wear the Kara. That is true, but the point of the example is, as Ms Ellenbogen said, to show that the individual claimant has to prove that he is disadvantaged in the same way that the *group* is – which a claimant who chooses not to wear the Kara will not be able to do.

54. In development of her submission that statistics such as those shown by the Pearn Kandola report will also be sufficient to prove the individual disadvantage for the purposes of section 19(2)(c), Ms Monaghan tempered what I understand to have been Langstaff J's rather more unqualified approach by submitting that whilst the Pearn Kandola statistics may perhaps not *unanswerably* enable each individual claimant (subject to objective justification) actually to establish his case of indirect discrimination, they will at least enable each claimant to advance a case of sufficient probative substance (including for section 19(2)(c) purposes) to entitle him to claim that a burden of disproof of discrimination will shift to the Home Office: see section 136. She also submitted, however, that the practical likelihood in a case such as the present is that the Home Office would proceed directly to objective justification. She also defended Langstaff J's reliance upon the Court of Justice's judgment in *Enderby.*

Conclusions

55. In my foregoing discussion, I have referred primarily to the claims of the BME claimants, which were the primary focus of the arguments. Like considerations apply equally to those claims based on alleged age discrimination. What follows is to be taken as applying to all the claims.

56. First, I agree with Ms Ellenbogen that the Court of Justice's decision in *Enderby* does not provide direct assistance in the resolution of the questions of interpretation and application raised by the preliminary issue in this case. The court's decision was concerned with whether or not, and if so how, the apparent disparity of pay was required to be objectively justified. The present claims have not reached a comparable point. The preliminary issue is about what the claimants need to prove in order to reach the point at which considerations of objective justification might arise. For the claimants to reach that point, they must first negotiate the hurdles of section 19(2)(a) to (c). The question is how they might hope to do so.

57. Second, I respectfully disagree with Langstaff J and Ms Monaghan that it is not necessary in indirect discrimination claims for the claimant to show *why* the PCP has disadvantaged the group and the individual claimant.

58. The legislation shows that in a direct discrimination claim the claimant must prove that the respondent's discriminatory treatment of him was because of, or on the grounds of, his protected characteristic. He must therefore, if he is to succeed, show that to be the answer to 'the reason why' question that arises in such claims. In indirect discrimination claims, there is also a necessary 'reason why' question but it is of a different nature. It does not go to the employer's motive or intention, whether conscious or unconscious. It is as to why the PCP disadvantages the group sharing the protected characteristic.

59. Langstaff J was correct to note, at [24], that 'section 19 … does not in terms require members of a disadvantaged group to show why they have suffered the disadvantage, in addition to the fact that they have done so.' But that, perhaps somewhat literal, interpretation of the statutory language overlooks that it is conceptually impossible to prove a group disadvantage for the purpose of section 19(2)(b) without also showing *why* the claimed disadvantage is said to arise. Group disadvantage cannot be proved in the abstract. Its proof necessarily requires a demonstration of why the comparative exercise inherent in the section 19(2)(b) inquiry results in the claimed disadvantage. In the present case, the claimants say they have answered the 'why' question: its answer is that the statistics show the group to be disadvantaged because its members are disproportionately more likely to fail the CSA than are the comparators who do not share the protected characteristics. The difficulty in the present case is as to whether and how each claimant can also discharge the section 19(2)(c) burden. There is no doubt that one way or another they must do so if they are to succeed. The present case is no different in principle from other types of indirect discrimination claim.

60. Thus the woman employee asserting that a full-time work PCP disadvantages women employees as a group must assert and prove why that is so (perhaps because of child care responsibilities) and that the same disadvantage applies to her, namely that she too is disadvantaged by her childcare responsibilities: compare *Holmes.* A justice of the peace with a family ticket who asserts that the requirement upon him by his judicial oath to rule on the placement of children with same sex couples is a PCP that

disproportionately disadvantages a group with which he shares a protected characteristic must prove what the group is, why the PCP does the disadvantageous work he levels at it and that he is disadvantaged in the same way: compare *McClintock.* A member of an airline's uniformed check-in staff who asserts that her employer's restriction on the wearing of jewellery is a PCP disadvantaging a group with which she shares a protected characteristic must prove what the group is, why the PCP disadvantages it and that she is disadvantaged in the same way: compare *Eweida*. Finally, *Chief Constable of West Yorkshire Police and another v. Homer* [2012] ICR 704 illustrates that the Supreme Court recognises the 'why' question as alive in indirect discrimination claims: at [17], Baroness Hale of Richmond concluded that (subject to objective justification) the case was one of indirect age discrimination and explained the reason why those in the relevant group suffered the disadvantage.

61. It follows in my view that Judge Baron was in principle correct to hold that the claimants must prove the nature of the group disadvantage for the purposes of surmounting the section 19(2)(b) hurdle and that each claimant must also prove that he suffered the same disadvantage for the purposes of surmounting the section 19(2)(c) hurdle. I come below to how they might do so.

62. Third, I agree with Ms Ellenbogen that it was inaccurate for Langstaff J, at [25], to advance, as an apparent alternative, that the group disadvantage was the 'actual failure' or the 'mere fact of failure of the test.' It was not. Many BME and older candidates did pass the test and there is no logical warrant for an assertion that any who did not pass failed it only because of the disadvantage to the group posed by the CSA. The most that can be derived from the Pearn Kandola report is that the claimants belonged to a group whose members were, by reason of one or more factors relating to their shared protected characteristic, disproportionately more likely than the comparators to fail the CSA. That is the disadvantage to which the group was subject as a whole (as the parties are agreed), but it does not follow that *each* claimant's failure of the CSA was the consequence of any of such factors. In any particular case it may have been such a consequence; it may perhaps even be said that it was probably such a consequence. The failure could, however, also have been unrelated to such factors.

63. Fourth, I would accept that a statistical report such as the Pearn Kandola report is in principle capable of being relied on by the claimants to prove the group disadvantage caused by the PCP for the purposes of section 19(2)(b). I have indicated above the nature of the disadvantage that the report is said to prove. I am not, however, to be taken as deciding that the Pearn Kandola report will make good that case. That will be a matter for the decision of the ET at the substantive hearing.

64. Fifth, in circumstances in which the present assumptions are that neither side is going to be able at the substantive hearings to shed any clearer light on precisely *why* the race and/or age groups to which the claimants belong are disadvantaged in the way the Pearn Kandola report can be taken as finding, I consider that it will in principle also be open to the claimants to rely on the report as evidence in support of the necessary assertion that each claimant was personally disadvantaged by the PCP in the same way as was the group as a whole, so as to meet the requirements of section 19(2)(c). It will therefore in principle be open to a claimant to adduce the Pearn Kandola report in support not just of his section 19(2)(b) case but also in support of his section 19(2)(c) case, and to submit to the ET that the report proves facts from

which, *in the absence of any other explanation*, the ET could decide that (subject to objective justification) the discrimination case is proved: see section 136.

65. In other words, I accept that it is in principle capable of being argued by each claimant that the report will prove his case sufficiently to the point at which there will be a burden of disproof on the Home Office. I am, once again, not to be taken as pre-judging how the ET should deal with this element of the claims. That will be for the ET, which in practice will probably only arrive at the point of considering such a submission after it has heard all the evidence.

66. Sixth, as follows, I do not accept Ms Ellenbogen's submission that proof by each claimant of his personal disadvantage for the purposes of section 19(2)(c) is a pre-condition of his right to bring a discrimination claim to which the burden of proof provisions in section 136 have no application. Proof of personal disadvantage is merely part of the case that the claimant must make good if he is to get to the point at which the Home Office will be put to the task of objective justification. The claimant will either prove his case or he will not. In his bid to prove it, he is entitled to place such reliance as is open to him on the burden of proof provisions.

67. Seventh, as I have made clear, I am not to be taken as pre-judging how the ET should decide any aspect of these claims. The Home Office may wish to challenge individual claims and seek to make good a factual case to the effect that the failure to pass the CSA in such cases could not be regarded as referable to any disadvantage relating to the protected characteristic to which the group was subject. During the argument, a particular example discussed was the case in which a candidate turns up significantly late for the CSA, does not complete the questions and so fails the test. There is no suggestion that that was the case as regards any claimant. But a case such as that might enable the Home Office to question the soundness of a claimant's case that it should be inferred that he was personally disadvantaged by the same disadvantage as that to which the group was subject. There may well be other factual features relating to a particular claimant's case that will enable the Home Office to question and challenge the claimant's reliance on the Pearn Kandola report as establishing a *prima facie* case of discrimination.

68. Eighth, should it turn out in respect of any claimant that the ET declines to find that he was subject to the same disadvantage as the group as a whole (because he had failed to surmount the section 19(2)(c) hurdle), that claimant would fail to prove a contravention of any applicable provision of the Equality Act 2010. The ET would have no jurisdiction to grant a remedy in his claim and the correct course would be to dismiss it.

69. Ninth, as is common ground, in any case in which a claimant gets as far as satisfying the requirements of section 19(2)(a) to (c), it will be open to the Home Office to seek to justify the PCP under sub-paragraph (d).

70. I would, therefore, give the ET the above general guidance as to how it should approach the claims. As I regard such guidance as departing in certain respects from that favoured by the EAT (in particular, as to the application of the burden of proof provisions), I would regard it as appropriate to allow the appeal.

Lord Justice Lewison :

71. I agree.

The Chancellor (Sir Terence Etherton) :

72. I also agree.