

HOUSE OF LORDS

Lord Nicholls of Birkenhead Lord Mackay of Clashfern Lord Hoffmann Lord Hutton Lord Scott of Foscote

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

CHIEF CONSTABLE OF WEST YORKSHIRE POLICE

(APPELLANT)

v

KHAN

(RESPONDENT)

ON 11 OCTOBER 2001

[2001] UKHL 48

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. Detective Sergeant Raham Noor Khan is a long-serving member of the West Yorkshire constabulary. He is of Indian origin. He has lived in England for over 30 years. He joined the force in 1975, and was promoted to the rank of sergeant in 1985. Sergeant Khan is a most capable and thorough police officer, but his supervising officers perceived a weakness. Over the years he made a number of unsuccessful applications for promotion to the rank of inspector. He was told by his supervising officers that his managerial style and team leadership skills were seen to be a problem.

2. On 31 May 1996 Sergeant Khan tried again. He made another application for promotion. The overall assessment of his work was 'very good'. But Chief Inspector Sidney did not support the application. In her promotion assessment dated 5 June 1996 she said that Sergeant Khan 'has an identified weakness in the area of communication/personnel style which adversely affects his team leadership skills'. This further application by Sergeant Khan was unsuccessful.

3. Sergeant Khan was not satisfied with this outcome. He was of the view that his failure to obtain promotion was not based on a fair assessment of his merits and abilities. The real reason was his racial origin. On 1 September 1996 he made an application to an industrial tribunal. He named the chief constable and four senior officers as respondents. He claimed that his failure to obtain promotion, and the failure by these officers to support his application, constituted racial discrimination. The officers had treated him less favourably than other applicants, and had done so on grounds of race. The application was resisted.

4. In the following month, October 1996, Sergeant Khan responded to an advertisement in the 'Police Review' magazine. He applied to the Norfolk police force for an appointment to the post of inspector. The Norfolk police force asked the West Yorkshire force for a reference. They asked that Sergeant Khan's chief officer should give his observations and recommendations on Sergeant Khan's suitability for the post. They also asked for copies of Sergeant Khan's last two staff appraisals.

5. In the ordinary course such a request would have caused no difficulty. But Sergeant Khan's claim in the industrial tribunal had not yet been heard. Because of the pending claim for racial discrimination the West Yorkshire police sought internal legal advice from the force's solicitor, Mr Ajaz Hussain. Acting on that advice, on 24 October 1996 the West Yorkshire personnel officer replied:

'Sergeant Khan has an outstanding industrial tribunal application against the chief constable for failing to support his application for promotion. In the light of that, the chief constable is unable to comment any further for fear of prejudicing his own case before the tribunal.'

Thus, West Yorkshire made no observations or recommendations on Sergeant Khan's application, nor were copies of his staff appraisals sent to the Norfolk police. In short, Sergeant Khan was not given a reference.

6. On 9 January 1997 Sergeant Khan amended his pending claim in the industrial tribunal. He added a claim against the West Yorkshire chief constable for victimisation, because of the refusal by the West Yorkshire police to provide him with a reference. This claim gives rise to the issue now before the House.

7. The claims for direct discrimination and victimisation were heard at the Leeds industrial tribunal over six days, from February 1997 onwards. The tribunal announced its decision on 22 April 1997. The claim for direct discrimination failed. Sergeant Khan was not treated less favourably, and even if less favourable treatment had been found, it would not have been on the grounds of race. The claim for victimisation, based on the failure to provide a reference, succeeded.

8. Meanwhile, Sergeant Khan's promotion transfer application was considered by the Norfolk police. He underwent assessment, which he passed. But he was unsuccessful at interview on 10 March 1997.

9. On 30 July 1997, after a further hearing, the industrial tribunal announced its decision on the appropriate remedy for West Yorkshire's victimisation of Sergeant Khan. The tribunal found that even if Sergeant Khan had obtained a glowing reference as distinct from no reference, because of his performance at interview he would not have succeeded. So the tribunal made no award for financial loss, but they awarded Sergeant Khan £1,500 compensation for injury to feelings.

10. An appeal by the West Yorkshire police was dismissed by the Employment Appeal Tribunal on 28 July 1998. A further appeal to the Court of Appeal [2000] ICR 1169 was dismissed by that court, comprising Lord Woolf MR, Hale LJ and Lord Mustill, on 24 February 2000:

11. Plainly, in October 1996 West Yorkshire police found themselves in a position of considerable difficulty. The subject matter of the request for a reference for Sergeant Khan was the very matter awaiting adjudication in the industrial tribunal. The Norfolk police force were seeking the views of the West Yorkshire force on Sergeant Khan's suitability for promotion to the rank of inspector. But the views of Sergeant Khan's supervising officers on this matter, expressed as recently as June 1996, were being challenged by Sergeant Khan as racially discriminatory. Those views, he said, constituted unlawful racial

discrimination. That issue remained to be decided. That being so, the chief constable could hardly be expected to repeat those selfsame views to another potential employer while that serious challenge against the authors of those views remained outstanding. Repetition of those views at that time could justifiably have been castigated as irresponsible behaviour by the Chief Constable, as well as possibly leading to a further allegation of direct racial discrimination. Such conduct by the Chief Constable could prejudice his case before the industrial tribunal. It would also mean that if the discrimination claim were to succeed, the Chief Constable would be at risk of being censured for his aggravation of the wrong done to Sergeant Khan by members of the West Yorkshire police, and the amount of compensation increased accordingly.

12. But, according to Sergeant Khan, that is the course the Chief Constable should have followed. The Chief Constable, it was submitted, should have given Sergeant Khan a reference along the lines:

'Sergeant Khan recently applied for internal promotion to the rank of inspector. That application was not supported, and I enclose copies of his last two appraisals. By way of observations on, and recommendations for, Sergeant Khan's suitability for the post you have advertised, the chief constable reiterates what Chief Inspector Sidney said in an assessment for promotion form dated 5 June 1996, a copy of which is enclosed. As a result of that application not being supported Sergeant Khan has commenced proceedings against the chief constable of this force alleging he has been discriminated against on the grounds of his race.'

Thus, according to the submissions advanced on behalf of Sergeant Khan, the Chief Constable should have repeated to the Norfolk police the very views which were being challenged in pending judicial proceedings as evidence of unlawful racial discrimination. By failing to do so, the argument runs, the Chief Constable was himself guilty of discrimination by way of victimisation.

13. This is a surprising proposition. To my mind it has only to be spelled out for it to be apparent that this cannot be right.

The statutory provisions

14. I turn to the statutory provisions. The Race Relations Act 1976 provides that discrimination in certain fields is unlawful. The fields include employment, education, planning, trade unions and trade associations. Part II of the Act concerns discrimination in the employment field. Section 4 renders it unlawful to discriminate against applicants for employment or employees in the ways, or circumstances, described in the section. In the case of employees, the circumstances listed in section 4(2) are (a) in the terms of employment the employer affords the employee, or (b) in the way he affords, or refuses to afford, him access to opportunities for promotion or other benefits, or '(c) by dismissing him, or subjecting him to any other detriment.' I accept Sergeant Khan's claim that the refusal to provide a reference for him constituted a detriment within the meaning of section 4(2)(c) even though, as matters turned out, this did not cause him any financial loss. Provision of a reference is a normal feature of employment.

15. Sections 1 and 2 explain what is meant by discrimination. Discrimination means either racial discrimination, as defined in section 1, or discrimination by way of victimisation, as defined in section 2. Section 1 defines the two familiar types of racial discrimination. Direct discrimination, in subsection (1)(a), occurs if on racial grounds one person treats another less favourably than he treats or would treat other persons in circumstances relevant for the purposes of the Act. Indirect discrimination is defined in section 1(1)(b).

16. The primary object of the victimisation provisions in section 2 is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so. The structure of section 2 is similar to the structure of section 1(1)(a), but with an important difference. Racial discrimination, in section 1(1)(a), is discrimination on the grounds of race. Discrimination by victimisation, in section 2, is discrimination on one of the grounds, colloquially known as the protected acts, described in section 2. Section 2(1) defines discrimination by way of victimisation as follows:

'A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has-

- (a) brought proceedings against the discriminator or any other person under this Act; or
- (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or
- (c) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or
- (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act,

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.'

17. Section 2(2) provides an exception. Section 2(1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith. In the present case the industrial tribunal rejected a contention that Sergeant Khan's allegations of racial discrimination were not made in good faith.

18. Difficulties have arisen in the application of this definition of victimisation and the like definition in section 4 of the Sex Discrimination Act 1975. The difficulties have been most apparent in cases where the employer's impugned conduct was his response to a protected act but he was not racially or gender motivated. I must first refer briefly to the principal authorities. They are illustrative of the problems.

The authorities

19. In *Kirby v Manpower Services Commission* [1980] 1 WLR 725 an employee at a job centre was demoted because he had disclosed confidential information about possible contraventions of the race relations legislation. The Employment Appeal Tribunal held this was not victimisation within section 2. Slynn J, delivering the judgment of the tribunal, said that the relevant question was whether the employers had treated the complainant less favourably than they would have treated someone in their employment who gave away confidential information whatever its kind: see p 732G-H. So Mr Kirby's claim failed, because the Manpower Services Commission would have treated in the same way any employee who gave away confidential information whatever its nature.

20. *Aziz v Trinity Street Taxis Ltd* [1989] QB 463 was a decision of the Court of Appeal, comprising Slade, Neill and Mann LJJ. Mr Aziz was a member of a taxi drivers' association. He collected evidence with a view to pursuing a racial discrimination claim against the association, by secretly recording

conversations with other members. He was expelled for doing so, and he brought a victimisation claim. Slade LJ, delivering the judgment of the court, disapproved the test applied in *Kirby v Manpower Services Commission* [1980] 1 WLR 725. He held that by expelling Mr Aziz the association had treated him less favourably than other members. But, to constitute victimisation, the motive which caused the alleged discriminator to treat the complainant less favourably than others must be a motive consciously connected with the race relations legislation: see [1989] QB 463, 485. Mr Aziz's claim therefore failed, because the fact that the recordings were made by reference to the Act had not influenced the association in expelling Mr Aziz. Any member who made undisclosed recordings of conversations relating to the activities of the association in a controversial context would have been treated in the same way.

21. Next, in order of time, is the decision of the Court of Appeal in the present case. Lord Woolf MR [2000] ICR 1169, 1177 held that Sergeant Khan had been treated less favourably by being refused a reference. It was necessary to compare the way other employees in relation to whom a reference was requested would normally be treated with the way Sergeant Khan was treated. Further, Sergeant Khan was treated less favourably by reason of having done a protected act. If it had not been for the proceedings brought under the Act a reference would have been provided.

22. Finally, in *Brown v TNT Express Worldwide (UK) Ltd* [2001] ICR 182 the employee requested an afternoon off work to consult his adviser about a racial discrimination claim he had brought against his employer. The claim was due for hearing in an employment tribunal the following week. The employer refused permission, although requests for time off for personal reasons were normally granted. Despite this, the employee left work to keep his appointment, whereupon he was dismissed. Mr Brown's victimisation claim succeeded. The Court of Appeal, comprising Peter Gibson and Mantell LJ and Sumner J, rejected the employer's contention that the appropriate comparator was an employee who had brought proceedings against the employer but not under the 1976 Act.

Victimisation: (1) the relevant circumstances

23. Victimisation occurs when, in any circumstances relevant for the purposes of any provision of the Act, a person is treated less favourably than others because he has done one of the protected acts. Thus, the definition of victimisation has, essentially, three ingredients. The first is 'in any circumstances relevant for the purposes of any provision of this Act'. This is a reference to circumstances in respect of which discrimination is unlawful under the Act. For instance, under section 4(2) it is unlawful for an employer to discriminate against an employee by dismissing him. If an employee brings a victimisation claim based on his dismissal, the relevant circumstances are his dismissal by his employer. In the present case Sergeant Khan is treated as employed by the chief officer of police of West Yorkshire: see section 16 of the Act. The relevant circumstances are that, while employed, Sergeant Khan requested a reference when seeking new employment and his request was refused.

(2) Less favourable treatment

24. The second ingredient in the statutory definition calls for a comparison between the treatment afforded to the complainant in the relevant respect with the treatment he affords, or would afford, to other persons 'in those circumstances'.

25. As appears from my summary of the authorities, different views have emerged on the correct way to identify the 'others', or the comparators or control group, as they are usually known. One approach is that, to continue with my example, if an employee is dismissed the control group comprises the other

employees. The complainant was less favourably treated because he was dismissed and they were not. There may be good reasons for this difference in treatment but, on this approach, that is a matter to be taken into account at the third stage when considering why the employer afforded the employee less favourable treatment. This was the approach adopted in *Aziz v Trinity Street Taxis Ltd* [1989] QB 463. It was the approach adopted at all levels in the present case. Sergeant Khan was treated less favourably than other employees, because references are normally provided on request and Sergeant Khan was refused a reference. It was also the approach adopted in *Brown v TNT Express Worldwide (UK) Ltd* [2001] ICR 182.

26. The other approach is that when considering whether a complainant was treated less favourably there should be factored into the comparison features which make the situation of the complainant and the control group fairly comparable. The control group should be limited to employees who have not done the protected act but whose circumstances, in the material respects, are fairly comparable. This approach was adopted by the Employment Appeal Tribunal in *Kirby v Manpower Services Commission* [1980] 1 WLR 725 and by the Court of Appeal in *Nagarajan v London Regional Transport* [1998] IRLR 73, 76, para 13 (this point was not the subject of the subsequent appeal to your Lordships' House [2001] 1 AC 501).

27. There are arguments in favour of both approaches. On the whole I see no sufficient reason for departing from the former approach, adopted by Slade LJ in the *Aziz* case: [1989] QB 463, p 483. The statute is to be regarded as calling for a simple comparison between the treatment afforded to the complainant who has done a protected act and the treatment which was or would be afforded to other employees who have not done the protected act.

28. Applying this approach, Sergeant Khan was treated less favourably than other employees. Ordinarily West Yorkshire provides references for members of the force who are seeking new employment.

(3) 'by reason that'

29. Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.

30. A situation, closely comparable to that in the present case, arose in *Cornelius v University College of Swansea* [1987] IRLR 141. This was a decision of the Court of Appeal, comprising Sir John Donaldson MR, and Fox and Bingham LJ. Like the present case, *Cornelius* concerned steps taken by employers to preserve their position pending the outcome of proceedings. A college declined to act on an employee's transfer request or to operate their grievance procedure while proceedings under the Sex Discrimination Act 1975, brought by the employee against the college, were still awaiting determination. Giving the only reasoned judgment, Bingham LJ said, at pp 145-146, para 33:

'There is no reason whatever to suppose that the decisions of the registrar and his senior assistant on the applicant's requests for a transfer and a hearing under the grievance procedure were influenced in any way by the facts that the appellant had brought proceedings or that those proceedings were under the Act. The existence of proceedings plainly did influence their decisions. No doubt, like most experienced administrators, they recognised the risk of acting in a way which might embarrass the handling or be inconsistent with the outcome of current proceedings. They accordingly wished to defer action until the proceedings were over. But that had ... nothing whatever to do with the appellant's conduct in bringing proceedings under the Act. There is no reason to think that their decisions would have been different whoever had brought the proceedings or whatever their nature, if the subject matter was allied. If the appellant was victimised, it is not shown to have been because of her reliance on the Act.'

Two strands are discernible in this passage. One strand is that the reason why the officers of the college did not act on the complainant's two requests was the *existence* of the pending proceedings, as distinct from the complainant's conduct in *bringing* the proceedings. They wished to defer action until the proceedings were over. The second strand is that the college decisions had nothing to do with the complainant's conduct in bringing proceedings against the college *under the 1975 Act*. The decisions would have been the same, whatever the nature of the proceedings, if the subject matter had been allied to the content of the employee's requests.

31. Mr Hand QC submitted that *Cornelius v University College of Swansea* [1987] IRLR 141 was wrongly decided. I do not agree. Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings. Protected act (a) ('by reason that the person victimised has - (a) brought proceedings against the discriminator ... under this Act') cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably. Acting within this limit, he cannot be regarded as discriminating by way of victimisation against the employee who brought the proceedings.

32. Mr Hussain's evidence was that giving a reference as asked might have compromised the chief constable's handling of the case brought against him. An adjudication by the industrial tribunal in favour of Sergeant Khan would mean that the chief constable had put forward a reference which proved to be inconsistent with the outcome of the proceedings. There was the unacceptable prospect that the chief constable would give a reference upon the opinion of his senior officers which was later rejected by a judicial body. The chief constable would not have been placed in this dilemma had the industrial tribunal hearing been concluded. Meanwhile the only course of action open to the chief constable was to bring the outstanding proceedings to the attention of the Norfolk force and leave it at that.

33. Mr Hussain's evidence was also that he did not believe his advice to the chief constable would have been any different whatever the nature of the pending proceedings. One of the examples he gave was of a civilian employee, dismissed as a consequence of dishonesty, seeking a reference before the determination of a pending unfair dismissal claim. Mr Hussain's evidence was not challenged before the tribunal.

34. The approach of the industrial tribunal was, in effect, that there was no need to look further once it was seen that the West Yorkshire force ordinarily provided a reference and copies of the previous appraisals and that the only difference in this case was Sergeant Khan's commencement of proceedings under the Act: 'it is clearly the respondents' case that that, and that alone, gave them good cause to react the way that they did . . .' With all respect to the tribunal, I think there was a need to look further, for the reasons I have given. In not doing so the tribunal fell into error. I would allow this appeal.

LORD MACKAY OF CLASHFERN

My Lords,

35. The facts giving rise to this appeal are fully set out in the speech of my noble and learned friend Lord Nicholls of Birkenhead and I need not repeat them.

36. I turn to the statutory provisions under which this appeal rises. The Race Relations Act 1976 provides that discrimination in certain fields is unlawful. The fields include employment, education, planning, trade unions and trade associations. Part II of the Act concerns discrimination in the employment field. As a preliminary, I refer to section 16 which provides that for the purposes of Part II of the Act, the holding of the office of constable shall be treated as employment by the chief officer of police as respects any act done by him in relation to a constable. In the circumstances of this case, therefore, Sergeant Khan is treated as employed by the chief officer of police of West Yorkshire in respect of that chief officer's actions in relation to Sergeant Khan. Section 4 of the Act deals with discrimination by employers. Section 4 Discrimination against applicants and employees:

- "(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against another -
 - (a) in the arrangements he makes for the purpose of determining who should be offered that employment; or
 - (b) in the terms on which he offers him that employment; or
 - (c) by refusing or deliberately omitting to offer him that employment.
- (2) It is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee
 - (a) in the terms of employment which he affords him; or
 - (b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
 - (c) by dismissing him or subjecting him to any other detriment . . ."

It will be seen that the statute provides that discrimination is unlawful in a variety of circumstances set out in this section.

37. It was said that the type of discrimination involved in the present appeal was under section 4(2)(c) subjecting Sergeant Khan to any other detriment. Detriment has been widely defined: see *De Souza v Automobile Association* [1986] ICR 514. I think it would also be possible to place this case under section 4(2)(b) in relation to access to other benefits, the benefit in the present instance being that of a reference when an employee applies to another prospective employer. We were informed that there was no specific mention of references in the relevant statutes including the employment statutes but I think the word "benefits" would be wide enough to include them.

38. So far then Sergeant Khan's case rests on the assertion that the Chief Constable of the West Yorkshire Police has dealt with him unlawfully in respect that being a person employed by him at an establishment in Great Britain, the chief officer discriminated against him in the way he refused to afford him access to the benefit of references or by subjecting him to any other detriment. We now have to ascertain what is meant by discrimination in the context of section 4(2) and for that the relevant provision is section 2 which provides:

"Discrimination by way of victimisation

"(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised, less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has-

"(a) brought proceedings against the discriminator or any other person under this Act; or

"(b) given evidence or information in connection with proceedings brought by any person against a discriminator or any other person under this Act; or

"(c) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or

"(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act, or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them."

Section 2(1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith. The industrial tribunal in the present case held that subsection (2) did not apply to the proceedings raised by Sergeant Khan and accordingly subsection (1) does apply to him. I refer, as my noble and learned friend has done, to the matters referred to in paragraphs (a), (b) and (d) as the protected acts.

39. In order that discrimination by way of victimisation under section 2 should occur it is necessary that there should be "circumstances relevant for purposes of any provision of this Act". Secondly, it is necessary that the discriminator treats the person victimised less favourably than in those circumstances he treats or would treat other persons; and, thirdly, it is necessary that he does so by reason that the person victimised has done one of the protected acts. In my view, in order to ascertain who are the "other persons" with whom comparison should be made in any particular case one must identify the circumstances relevant for the purposes of any provision of the Act in which the discrimination is said to have occurred and then to consider how other persons in those circumstances have been treated.

40. Obviously in the present case the circumstances include the fact that Sergeant Khan is to be treated as employed by the chief officer of the West Yorkshire police at an establishment in Great Britain. Assuming, as I have done, that the request for a reference is an access to a benefit I think it can be said that the circumstances relevant for the purposes of this act include also in this case the circumstance of Sergeant Khan's application for a reference. If the case is treated as a subjection of Sergeant Khan to any other detriment I do not see reference to any other circumstance than that he is employed at an establishment in Great Britain. If one now goes back to section 2, in my view the circumstances relevant for the purposes of any provision of this Act which are at issue in this case is the simple fact that Sergeant

Khan is treated for the purposes of this Act as employed by the chief officer of the West Yorkshire police at an establishment in Great Britain and that he is so employed and has made an application for the benefit of a reference.

41. On this basis the other persons with whose treatment the treatment of Sergeant Khan must be compared are persons employed at the same establishment in Great Britain as Sergeant Khan, namely, in the West Yorkshire police, and who have applied for a reference when seeking employment with another employer.

42. The refusal of a reference to Sergeant Khan when it is common ground that generally a reference would be given is in my view sufficient to demonstrate that in the circumstances relevant for the purposes of section 4 of the Act, Sergeant Khan has been treated less favourably than other persons.

43. The third requirement for discrimination under section 2 is that it has occurred by reason that the person victimised has done one of the protected acts. In this case, therefore, the question is was Sergeant Khan refused a reference by reason that he had brought proceedings against the chief officer of police under this Act? It is clear that Sergeant Khan had brought proceedings against the chief officer of police under this Act but the requirement is that the less favourable treatment must be accorded by reason that he has done so.

44. The advice of the solicitor advising the chief officer was laid fully before the industrial tribunal and no challenge was made of it. It was to the effect that because there was pending litigation raising issues which were relevant to the reference it would be inappropriate for the chief officer to give a reference. In my opinion in these circumstances the chief officer having acted in accordance with that perfectly understandable advice did not treat Sergeant Khan less favourably than he would have done others applying for a reference by reason that Sergeant Khan had brought proceedings under the Act.

45. It is clear that if the proceedings had been terminated when the request for a reference was made the obstacle to giving it would have been removed and I have no doubt that the chief officer has clearly established that in the present case he did not refuse a reference by reason that Sergeant Khan had raised proceedings against him under the Act.

46. In my opinion this analysis leads to a workable approach to the statutory provisions and is in accordance with the purpose of the statute as described by Bingham LJ in *Cornelius v University College of Swansea* [1987] IRLR 141, 145, para 31. For these reasons I agree that the appeal should be allowed.

LORD HOFFMANN

My Lords,

47. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead with which I agree.

48. The appeal raised three points. First, when section 2(1) of the 1976 Act speaks of the person victimised being treated "less favourably than in those circumstances he treats or would treat other persons", who are these hypothetical other people and what are the hypothetical circumstances? Mr Khan says that one should suppose a police officer like himself who had asked for a reference and appraisals but had not done "the protected act", i.e. brought proceedings under the Act. Such a person would have

not have been denied a reference. The West Yorkshire police say that in addition to supposing that he had not brought proceedings under the Act, one should also suppose that he had brought proceedings on some other ground, e.g. for libel or constructive dismissal. Such a person would also not have been given a reference. I agree with my noble and learned friend Lord Nicholls of Birkenhead, the Employment Appeal Tribunal and the Court of Appeal that the first view is correct.

49. The purpose of the statute is that a person should not be victimised because he has done the protected act. It seems to me no answer to say that he would equally have been victimised if he had done some other act and that doing such an act should therefore be attributed to the hypothetical "other persons" with whom the person victimised is being compared. Otherwise the employer could escape liability by showing that his regular practice was to victimise anyone who did a class of acts which included but was not confined to the protected act.

50. The requirement that doing the protected act must have been the reason for the less favourable treatment is adequate to safeguard an employer who acted for a different and legitimate reason. On the other hand, it will rightly provide no defence for an employer who can only say that although his reason was indeed the doing of the protected act, it formed part of a larger class of acts to which he would have responded in the same way.

51. The second question is whether Mr Khan was actually treated less favourably than someone who had not brought proceedings would have been. The chief constable says that it is not enough that he was treated differently. His treatment must be worse. This is an objective question and if one looks at the matter objectively, he was better off without a reference. If he had been given one, it would have contained an express statement that his application for promotion was not supported. In that case, the Norfolk constabulary would not even have asked him to an assessment. As it was, he at least got through to interview.

52. This was not a point taken in the industrial tribunal, the Employment Appeal Tribunal or the Court of Appeal. It seems to have surfaced as a result of remarks made at the hearing of the application for leave to appeal before the Appeal Committee. It is attractive but I think that upon analysis it is wrong. There is a distinction between the question of whether treatment is less favourable and the question of whether it has damaging consequences. Mr Khan, with full knowledge of what Chief Inspector Sidney's assessment contained, wanted it to be sent to Norfolk. His request was refused when a similar request by someone else would have been granted. That seems to me to be less favourable treatment which the tribunal found caused injury to Mr Khan's feelings. The fact that he was actually invited to an assessment showed that the less favourable treatment caused him no economic loss but does not prevent it from having been less favourable.

53. The point is allied to the question of whether, assuming that there was discrimination under section 2(1), Mr Khan was subjected to "detriment" within the meaning of section 4(2)(c). Being subjected to detriment (or being treated in one of the other ways mentioned in section 4(2)) is an element in the statutory cause of action additional to being treated "less favourably" which forms part of the definition of discrimination. A person may be treated less favourably and yet suffer no detriment. But, bearing in mind that the employment tribunal has jurisdiction to award compensation to injury to feelings, the courts have given the term "detriment" a wide meaning. In *Ministry of Defence v Jeremiah* [1980] QB 87, 104 Brightman LJ said that "a detriment exists if a reasonable worker would or might take the view that the

[treatment] was in all the circumstances to his detriment." Mr Khan plainly did take the view, at any rate in October 1996, that not having his assessment forwarded was to his detriment and I do not think that, in his state of knowledge at the time, he can be said to have been unreasonable.

54. That brings me to the third and most difficult question, which is whether Mr Khan was treated less favourably "by reason that" he had "brought proceedings...under this Act" (section 2(1)(a)). This raises a question of causation: was the fact that he brought proceedings a *reason* why the West Yorkshire police treated him less favourably.

55. Of course in one sense the fact that he had brought proceedings was a cause of his being treated less favourably. If he had not brought proceedings, he would have been given a reference. In some contexts, a causal link of this kind will be enough. For example, in *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1115 the question was whether the council had treated a girl less favourably "on the ground of her sex", contrary to section 1 of the Sex Discrimination Act 1975. The House of Lords decided that her sex did not have to be the reason why the Council had decided to treat her in that way. It was sufficient that she would have been treated differently if she had been a boy: see also *James v Eastleigh Borough Council* [1990] 2 AC 751.

56. There are parallels between the purposes of sections 1 and 2 of the Race Relations Act 1976 (and between the corresponding sections 1 and 4 of the Sex Discrimination Act 1975): see *Nagarajan v London Regional Transport* [2000] 1 AC 501. But the causal questions which they raise are not identical. As Mr Hand QC, who appeared for Mr Khan, readily accepted, one cannot simply say that Mr Khan would not have been treated less favourably if he had not brought proceedings. It does not follow that his bringing proceedings was a reason (conscious or subconscious) why he was treated less favourably. In *Nagarajan's* case Lord Steyn said, at pp 519-520, that section 2:

"contemplates that the discriminator had knowledge of the protected act and that such knowledge caused or influenced the discriminator to treat the victimised person less favourably than he would treat other persons...But...it does not require the tribunal to distinguish between conscious and subconscious motivation."

57. This is not at all the same thing as saying that but for the protected act, he would not have been treated in the way he was. The difference emerges very clearly from the judgment of Bingham LJ in *Cornelius v University College of Swansea* [1987] IRLR 141. Mrs Cornelius was an employee of the university who made a complaint of sex discrimination to an industrial tribunal. While the proceedings were pending she applied for a transfer to another post and to be heard under the university's grievance procedure. A senior assistant registrar replied that no action could be taken on the transfer until the outcome of the proceedings was known. The registrar himself wrote to say that a grievance hearing was inappropriate while the industrial tribunal proceedings were pending. Mrs Cornelius claimed that this was victimisation. She said that the registrar's letter indicated that but for her commencement of proceedings, her application for a transfer and a grievance hearing would have been considered in the normal way.

58. Bingham LJ rejected the complaint for the following reasons, at p 145, para 33:

"There is no reason whatever to suppose that the decisions of the registrar and his senior assistant on the applicant's requests for a transfer and a hearing under the grievance procedure were influenced in any way by the facts that the appellant had *brought* proceedings or that those proceedings were under the Act. The *existence* of proceedings plainly did influence their

decisions. No doubt, like most experienced administrators, they recognised the risk of acting in a way which might embarrass the handling or be inconsistent with the outcome of current proceedings. They accordingly wished to defer action until the proceedings were over. But that had, so far as the evidence shows, nothing whatever to do with the appellant's conduct in *bringing* proceedings under the Act. There is no reason to think that their decision would have been different whoever had brought the proceedings or whatever their nature, if the subject matter was allied." (My emphasis)

59. This decision, with which I respectfully agree, shows that once proceedings have been commenced, a new relationship is created between the parties. They are not only employer and employee but also adversaries in litigation. The existence of that adversarial relationship may reasonably cause the employer to behave in a way which treats the employee less favourably than someone who had not commenced such proceedings. But the treatment need not be, consciously or unconsciously, a response to the commencement of proceedings. It may simply be a reasonable response to the need to protect the employer's interests as a party to the litigation. It is true that an employee who had not commenced proceedings would not have been treated in the same way. Under section 1, one would have needed to go no further. Under section 2, however, the commencement of proceedings must be a reason for the treatment and in *Cornelius's* case it was not.

60. A test which is likely in most cases to give the right answer is to ask whether the employer would have refused the request if the litigation had been concluded, whatever the outcome. If the answer is no, it will usually follow that the reason for refusal was the existence of the proceedings and not the fact that the employee had commenced them. On the other hand, if the fact that the employee had commenced proceedings under the Act was a real reason why he received less favourable treatment, it is no answer that the employer would have behaved in the same way to an employee who had done some non-protected act, such as commencing proceedings otherwise than under the Act.

LORD HUTTON

My Lords,

61. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Nicholls of Birkenhead and Lord Hoffman. I agree with them and for the reasons which they give I, too, would allow this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

62. The relevant facts and the history of the proceedings in this case have been set out in the opinions of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hoffmann. I need not repeat them save to the extent necessary to explain the conclusions I have reached.

63. The problem is as to the proper application to the facts of the case of section 2(1) of the Race Relations Act 1976. Section 2(1) provides, so far as is relevant to this case:

"A person ('the discriminator') discriminates against another person ('the person victimised') in any circumstances relevant for the purposes of any provision of this Act if he treats the person

victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—

(a) brought proceedings against the discriminator or any other person under this Act

..."

64. Sergeant Khan, an officer in the West Yorkshire police, had applied for promotion to the rank of inspector. But a staff appraisal made by a senior officer, while in some respects complimentary, had referred to perceived weaknesses in his team leadership skills and he was informed that his application for promotion would not be supported by his supervising officers. Sergeant Khan then made an application under the 1976 Act alleging that his chief constable had discriminated against him on the grounds of his race in failing to support him for promotion.

65. While Sergeant Khan's discrimination claim was still pending, he made an application to the Norfolk police force for appointment as an inspector in that force. The Norfolk police force requested a reference from the West Yorkshire police force. Sergeant Khan's personnel officer replied to the request in these terms:

"Sergeant Khan has an outstanding industrial tribunal application against the chief constable for failing to support him for promotion [to the rank of inspector]. In the light of that, the chief constable is unable to comment any further for fear of prejudicing his own case before the tribunal."

66. Sergeant Khan then added a section 2(1) victimisation claim to his race discrimination claim.

67. The two claims were heard together. The race discrimination claim failed; the victimisation claim succeeded.

68. Sergeant Khan's application to the Norfolk police was not, in the event, adversely affected by the West Yorkshire police force's refusal to give him a reference. Indeed, the reverse was the case. Although his application was not in the end successful, it progressed further than it would have done had he received a reference on the same lines as the appraisals which had led to the failure of his application for promotion to inspector in his own police force.

69. In these circumstances Sergeant Khan's section 2(1) victimisation claim raises the following issues:

(1) In considering whether Sergeant Khan was treated by

West Yorkshire police force less favourably than other persons, with whom is Sergeant Khan to be compared?

(2) What is the test of whether the treatment complained of was less favourable than the treatment that would have been accorded to the comparators?

(3) What is the test to determine whether the complainant has been treated in the manner complained of "by reason that" he has done the protected act?

(1) *The comparators*

70. In the submissions to your Lordships various comparators were suggested.

71. One suggestion was that the treatment accorded to Sergeant Khan should be compared to the treatment that would have been accorded to other officers of the West Yorkshire police who had brought discrimination proceedings against their employers. This cannot be right. It would enable an employer to justify victimising an employee who had brought proceedings under the Act by asserting that he would similarly victimise every employee who brought proceedings under the Act.

72. Another suggestion was that the treatment accorded to Sergeant Khan should be compared to the treatment that would have been accorded to other officers who had brought employment-related proceedings, but not race discrimination proceedings, against their employer. This cannot be right either. It would enable employers to victimise employees who brought race discrimination proceedings against them provided they, the employers, were prepared similarly to victimise any employee who had the temerity to sue them for anything.

73. A third suggestion was that the treatment accorded to Sergeant Khan should be compared to the treatment that would have been accorded to an officer in a position the same in all respects as Sergeant Khan's save only that this hypothetical officer had not done the protected act, ie, in this case, had not brought race discrimination proceedings. This, in my opinion, is the correct comparator. It provides to employees who do one or other of the protected acts specified in section 2(1) the protection that Parliament must have intended them to have.

74. In *Aziz v Trinity Street Taxis Ltd* [1989] QB 463 Slade LJ said, at p 483:

"In our judgment, for the purpose of the comparison which section 2(1) makes requisite, the relevant circumstances do not include the fact that the complainant has done a protected act."

I agree. I would add that, save for the fact that the complainant has done a protected act, the relevant circumstances include all the circumstances in which the alleged discriminator treated the complainant in the manner complained of. The Court of Appeal in the present case came, I think, to much the same conclusion: see [2000] ICR 1169, 1180, per Lord Woolf MR.

(2) *Was Sergeant Khan treated "less favourably"?*

75. He was certainly treated differently. If it had not been for the pending race discrimination proceedings the request by the Norfolk Police Force for a reference would have been complied with. But did the chief constable's refusal to provide the reference constitute treatment that was less favourable to Sergeant Khan than if the reference had been provided? The reference would, after all, have been seriously damaging to Sergeant Khan's prospects of obtaining the appointment that he had applied for.

76. It cannot, in my opinion, be enough for section 2(1) purposes simply to show that the complainant has been treated differently. There must also be a quality in the treatment that enables the complainant reasonably to complain about it. I do not think, however, that it is appropriate to pursue the treatment and its consequences down to an end result in order to try and demonstrate that the complainant is, in the end, better off, or at least no worse off, than he would have been if he had not been treated differently. I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently. In the present case Sergeant Khan wanted the reference to be given. He knew it would be likely to contain adverse remarks that would be damaging to the prospects of his application. But he wanted a reference to be given. And in normal circumstances, it would have been given. In these

circumstances he was, in my opinion, entitled to regard himself as having been treated "less favourably" in that the reference was withheld.

(3) *The causation point*

77. Was the reference withheld "by reason that" Sergeant Khan had brought the race discrimination proceedings? In a strict causative sense it was. If the proceedings had not been brought the reference would have been given. The proceedings were a *causa sine qua non*. But the language used in section 2(1) is not the language of strict causation. The words "by reason that" suggest, to my mind, that it is the real reason, the core reason, the *causa causans*, the motive, for the treatment complained of that must be identified.

78. In *Cornelius v University College of Swansea* [1987] IRLR 141 Bingham LJ put his judicial finger on the critical distinction for section 2(1) purposes between the bringing of discrimination proceedings and the existence of the proceedings. He said, at p 145, para 33:

"There is no reason whatever to suppose that the decisions of the registrar and his senior assistant on the applicant's requests for a transfer and a hearing under the grievance procedure were influenced in any way by the facts that the appellant had brought proceedings or that those proceedings were under the [Sex Discrimination Act 1975]. The existence of proceedings plainly did influence their decisions ... They ... wished to defer action until the proceedings were over. But that had, so far as the evidence shows, nothing whatever to do with the appellant's conduct in bringing proceedings under the Act."

79. In the present case, it is clear that the refusal to provide the reference was attributable to the existence of the race discrimination proceedings that Sergeant Khan had brought. But was the reason for the refusal that Sergeant Khan had brought the proceedings? The answer to this question is, in my opinion, apparent from the evidence given by Mr Hussain, force solicitor for West Yorkshire police, in his written statement. He explained that he had advised that "the provision of a reference ... might compromise the chief constable and other respondents' handling of the case against them as brought by the applicant" and said:

"The chief constable would not have been placed in this dilemma had the industrial tribunal hearing been concluded."

He said also:

"I do not believe my advice would have been any different had there been other litigation extant against an officer or employee for whom a reference had been requested" (my emphasis).

Mr Hussain was not cross-examined on this evidence which makes clear that a request for a reference for Sergeant Khan would have been complied with once the litigation had concluded. The evidence establishes that the reason for the refusal of the reference was not that Sergeant Khan had brought the proceedings but that the proceedings were still on foot and might be prejudiced by the content of the reference if it were given.

80. In the Court of Appeal [2000] ICR 1169 Lord Woolf MR referred, at pp 1178-1179, to Bingham LJ's conclusion in *Cornelius's* case [1987] IRLR 141 that the complainant had failed to show that the college's treatment of her was because she had brought proceedings against the college under the 1975 Act, but did not go on to apply the same reasoning to the present case. In my respectful opinion this was an error. I

would allow the appeal in the present case on the ground that Sergeant Khan has failed to show that the reason for the chief constable's refusal to comply with the Norfolk police force's request for a reference about him was that he had brought the race discrimination claim. The reason, on the evidence, was that the proceedings were pending. This conclusion, in my opinion, makes sense of the legislation and its purpose. It does not stand in the way of the success of a section 2(1) victimisation claim where, on the evidence, the conclusion is justified that the employer's reason for singling out the complainant for less favourable treatment is that the complainant has brought the proceedings. It does enable justice to be done to an employer who, as in the present case, would otherwise be placed by the pendency of the proceedings in an unacceptable Morton's fork, forced to choose between conduct which risked a section 2(1) complaint and conduct which risked an aggravated damages award if the race discrimination claim should succeed.

81. Like my noble and learned friends whose opinions I have read and with which I agree, I would allow the appeal and set aside the award of damages to Sergeant Khan.