Case No: A1/2001/1012/EATRF

Neutral Citation Number: [2002] EWCA CIV 93
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE EMPLOYMENT APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 7 February 2002

B e f o r e :

LORD JUSTICE PETER GIBSON
LORD JUSTICE MANTELL
and
LADY JUSTICE ARDEN

- -

TRIESMAN	Appellant
- and -	
ALI AND ANOTHER	Respondents

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

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Mr. John Cavanagh Q.C. and Mr. T Restrick (instructed by Messrs Gregory, Rowcliffe and Milners London for the Appellant)
Mr. Robin Allen Q.C. and Mr. Paul Epstein (instructed by The Litigation Department of the Commission for Racial Equality of London SW1 for the Respondents)

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Judgment
As Approved by the Court

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Peter Gibson L.J. (giving the judgment of the court):

1. In late 1998 the Respondents, Zafar Ali and Harmohinderpal Singh Sohal, both members of the Labour Party, were suspended by the National Executive Committee ("the NEC") of the Labour Party from office within or representation of the Labour Party pending the outcome of a disciplinary investigation into alleged breaches of the Rules of the Labour Party. The Respondents complain that by that suspension they were discriminated against unlawfully on racial grounds. The central question on this appeal is whether such complaint falls within the scope of s. 12 (1)(c) of the Race Relations Act 1976 ("the 1976 Act") so that the Employment Tribunal ("the Tribunal") has jurisdiction to hear the Respondents' complaints. The Appellant is the General Secretary of the Labour Party and is sued on behalf of all the members of the party ("the Labour Party"). When the proceedings commenced, Margaret McDonagh was the General Secretary, but she has been succeeded by David Triesman. The Labour Party claimed that the Tribunal did not have jurisdiction. That claim was rejected by the Tribunal. The Labour Party's appeal was dismissed by the Employment Appeal Tribunal ("the EAT") which also rejected a claim that the County Court had jurisdiction under s. 25 of the 1976 Act. The Labour Party appeals to this court with the permission of the EAT.

Statutory provisions

2. It is convenient at this point to set out the sections of the 1976 Act most relevant to this appeal. In Part II, headed "Discrimination in the employment field", s. 12 (so far as material) provides:

> "12 Qualifying bodies
>
> (1) It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a person –
>
> > (a) in the terms on which it is prepared to confer on him that authorisation or qualification; or
> >
> > (b) by refusing, or deliberately omitting to grant, his application for it; or
> >
> > (c) by withdrawing it from him or varying the terms on which he holds it.
>
> (2) In this section –
>
> > (a) "authorisation or qualification" includes recognition, registration, enrolment, approval and certification;
> >
> > (b) "confer" includes renew or extend."

By s. 78 (1) ""profession" includes any vocation or occupation".

3. In Part III, headed “Discrimination in other fields”, s. 20 provides:

> “20 Discrimination in provision of goods, facilities or services
>
> (1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services –
>
> > (a) by refusing or deliberately omitting to provide him with any of them; or
> >
> > (b) by refusing or deliberately omitting to provide him with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in the first-mentioned person’s case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section.
>
> (2) The following are examples of the facilities and services mentioned in subsection (1) –
>
> > (a) access to and use of any place which members of the public are permitted to enter;
> >
> > (b) accommodation in a hotel, boarding house or other similar establishment;
> >
> > (c) facilities by way of banking or insurance or for grants, loans, credit or finance;
> >
> > (d) facilities for education;
> >
> > (e) facilities for entertainment, recreation or refreshment;
> >
> > (f) facilities for transport or travel;
> >
> > (g) the services of any profession or trade, or any local or other public authority.”

4. Also in Part III s. 25 provides:

> “25 Discrimination: associations not within s 11
>
> (1) This section applies to any association of persons (however described, whether corporate or unincorporate, and whether or not its activities are carried on for profit) if –
>
> > (a) it has twenty-five or more members; and
> >
> > (b) admission to membership is regulated by its constitution and is so conducted that the members do not constitute a section of the public within the meaning of section 20 (1); and

(c) it is not an organisation to which section 11 applies.

(2) It is unlawful for an association to which this section applies, in the case of a person who is not a member of the association, to discriminate against him –

(a) on the terms on which it is prepared to admit him to membership; or

(b) by refusing or deliberately omitting to accept his application for membership.

(3) It is unlawful for an association to which this section applies, in the case of a person who is a member or associate of the association, to discriminate against him –

(a) in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or

(b) in the case of a member, by depriving him of membership, or varying the terms on which he is a member; or

(c) in the case of an associate, by depriving him of his rights as an associate, or varying those rights; or

(d) in either case, by subjecting him to any other detriment.

(4) For the purposes of this section –

(a) a person is a member of an association if he belongs to it by virtue of his admission to any sort of membership provided for by its constitution (and is not merely a person with certain rights under its constitution by virtue of his membership of some other association), and references to membership of an association shall be construed accordingly;

(b) a person is an associate of an association to which this section applies if, not being a member of it, he has under its constitution some or all of the rights enjoyed by members (or would have apart from any provision in its constitution authorising the refusal of those rights in particular cases)."

S. 11 in Part II applies to "an organisation of workers, an organisation or employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists". S. 26 provides an exception from s. 25 for associations whose main object is to enable the benefits of membership to be enjoyed by persons of a particular racial group not defined by colour.

The facts

5. In or about 1984 each of the Respondents became a member of the Labour Party. Each held office within the Slough Branch of the Labour Party from time to time. On 1 May 1997 Mr. Sohal was elected a Labour Councillor in the Slough Unitary Authority for two years. In the ordinary course he would have expected to seek re-selection by the Labour Party in November 1998 with a view to standing in the local elections in May 1999. In October 1997 Mr. Ali applied to become a Labour candidate at those elections. But he claims that in November and December 1997 he encountered hostility to his candidacy which he attributed to his race. Mr. Sohal claims that in May 1998 he found that he would be prevented from standing for re-selection and he attributed that to his race.

6. Allegations were made to the NEC of irregularities relating to the recruitment of membership and the conduct of meetings in the Slough Branch. As a result the NEC established a Task Force in July 1998 to investigate those allegations and to make recommendations to a meeting of the NEC to be held in September 1998. The Task Force made an interim report to the NEC. On considering that, the NEC decided at its meeting on 22 September 1998 to suspend both the Respondents from office or representation of the Labour Party pending the final outcome of a disciplinary investigation into their conduct within the Slough Branch. That step was taken under the power conferred on the NEC, the administrative authority of the Labour Party, by Rule 6A of the Labour Party Rule Book 1998 ("the Rules"). This provides:

> "6A.1 The NEC shall take such disciplinary measures as it feels necessary to see that all party members and officers conform to the constitution, rules and standing orders of the party; such powers shall include:
>
> (a) in relation to any alleged breach of the constitution, rules or standing orders of the party by an individual member or members of the party the NEC may, pending the final outcome of any investigation and charges (if any), suspend that individual or individuals from office or representation of the party notwithstanding the fact that the individual concerned has been or may be eligible to be selected as a candidate in any election or by-election. The general secretary or other national officer shall investigate and report to the NEC on such investigation. Upon such report being submitted, the NEC may instruct the general secretary or other national officer to formulate charges against the individual or individuals concerned and present such charges to the National Constitutional Committee for determination in accordance with their rules.
>
> ….
>
> 6A.3 A 'suspension' of a member whether by the NEC in pursuit of 6A.1 above or by the NCC in imposing a disciplinary penalty, unless otherwise defined by that decision, shall require the membership rights of the individual member concerned to be confined to participation in their own branch meetings and activities as an ordinary member only and in ballots of all individual members where applicable. A suspended member shall not be eligible to seek any

office in the party, nor shall s/he be eligible for nomination to any panel of prospective candidates nor to represent the party in any position at any level."

7. In consequence each of the Respondents was effectively prevented from being nominated for selection as a Labour Party candidate until such time as his suspension was lifted. The decision to suspend was communicated to each by letter dated 22 September 1998 from David Gardner, the Assistant General Secretary of the Labour Party. By letter dated 22 October 1998 each of the Respondents was invited by the Task Force to attend investigative interviews on 9 November 1998. But on 6 November 1998 the Respondents issued a press release that they had resigned their membership of the Labour Party that day, and neither attended the investigative interviews.

8. On 15 October 1998 eligible members of the Slough Branch were invited by the Regional Director of the Labour Party to nominate themselves or others as potential candidates for the May 1999 Local Government elections. The Respondents, being suspended, could not nominate themselves or be nominated. The panel of endorsed nominees for those elections was drawn up over the weekend of 5 and 6 December 1998.

Proceedings in the Tribunal and the EAT

9. On 21 December 1998 each of the Respondents lodged an Originating Application with the Tribunal, complaining of racial discrimination by the Labour Party. Mr. Ali alleges that two white Labour Party members, whom he names, were the subject of serious allegations regarding breaches of the Rules, but were not suspended or prevented from seeking nomination for the Council elections and that there was less favourable treatment of him on racial grounds. Mr. Sohal's Originating Application contains a similar complaint. The Labour Party in its Notice of Appearance took the point that the alleged act of unlawful discrimination did not fall within the terms of any provision in Part II of the 1976 Act, but added that in any event it denied that any act of unlawful race discrimination was committed.

10. On 19 May 2000 the Tribunal Chairman recorded that the case of each of the Respondents was that his suspension was simply a device to ensure that he would be prevented from standing for election as a local councillor because the Labour Party did not wish either of them to be elected in view of his ethnic background. That day the Tribunal began to hear as a preliminary issue the question whether it had jurisdiction to hear the complaints under s. 12 of the 1976 Act. An allegation that there had also been discrimination under s. 4 of the 1976 Act was withdrawn.

11. After a 3-day hearing the Tribunal held that it did have jurisdiction. In so doing it referred to the decision of the EAT in Sawyer v Ahsan [2000] ICR 1 that the Labour Party when undertaking its selection functions in relation to the nomination of candidates for local elections was acting as an authority or body able to confer an authorisation or qualification which is needed for or facilitates engagement in the particular occupation of being a Labour councillor for the purposes of s. 12. An argument by the Labour Party to distinguish Sawyer was rejected by the Tribunal.

12. In Sawyer Lindsay J., giving the judgment of the EAT, referred to the familiar dictum of Templeman L.J. in Savjani v I. R. C. [1981] Q.B. 458 at pp. 466-7: "the [1976] Act was brought in to remedy very great evil. It is expressed in very wide terms, and I should be very slow to find that the effect of something which is humiliatingly discriminating in racial matters falls outside the ambit of the Act." It was common ground in Sawyer that if s. 12 did not outlaw racial discrimination in the circumstances of that case, then nothing else in domestic English law did so either. That was an important factor in the EAT's conclusion in that case.

13. The Tribunal in the present case found that there were three principal requirements for individuals to be qualified for nomination for local government office, viz.

> "(a) Membership of the Labour Party
>
> (b) Payment of party membership and subscription
>
> (c) Membership for a continuous period of 12 months (other than in exceptional circumstances)".

[The Tribunal probably meant by (b) "Payment of party membership annual subscription": see Rule 5B.3(b) of the Rules.]

14. It said that once an individual had fulfilled those requirements the Labour Party had effectively conferred on that person an authorisation or qualification which was needed for nomination as a candidate for local government office, and that the decision to suspend both the Respondents withdrew from them the authorisation or qualification which had been conferred on them by virtue of their length of membership and their payment of the subscription. That, it said, constituted a potential breach of s. 12 (1)(c). The Tribunal concluded by saying:

> "We do not hesitate to express the view that we are happy that our deliberations have led us to such a conclusion. On the basis of [the Labour Party's] submissions, a political party could (theoretically) perpetrate deliberate and malicious racial discrimination against one of its members seeking nomination for selection as a political candidate leaving that member with no recourse under the [1976] Act. Adopting the dictum of Lord Templeman [in Savjani] and the section of the judgment of Lindsay J. [in Sawyer applying Templeman L.J.'s dictum] to which we have referred, such a conclusion would not only be morally repugnant but also something which Parliament could not possibly have intended."

15. The Labour Party's appeal to the EAT was heard by an appeal tribunal which included two members of the EAT in Sawyer. In Sawyer the EAT had given the Labour Party leave to appeal but no appeal had been brought. Not surprisingly it was not argued before the EAT that Sawyer was wrong, though the Labour Party did argue that it should be distinguished. Mr Cavanagh, who had not appeared before the Tribunal but appeared with Mr. Restrick for the Labour Party before the EAT, took a new point without objection from the Respondents.

That point was that the Respondents' complaints came within Part III of the 1976 Act (s. 25) and not within Part II.

16. The EAT found that of the conditions for the application of s. 25 all but that part of paragraph (b) of s. 25 (1) which relates to the requirement that admission to membership is so conducted that members do not constitute a section of the public were satisfied. However on that the EAT said this:

> "22. …. The phrase "So conducted that the members do not constitute a section of the public" was, albeit couched in negative form, a provision intended to include within the ambit of the Act the kinds of association (which for brevity's sake we will call "genuine selecting clubs") which, even if providing goods, services or facilities to their members, had hitherto been excluded.
>
> 23. However, it cannot be said of the Labour Party that it is a genuine selecting club; whilst the Employment Tribunal does not appear to have had direct evidence on the point, no-one pretends that prospective members are truly screened or that any rigorous process is applied to existing members to ensure that they continue to uphold this policy or that principle. We have no reason to believe that membership depends on anything more selective than a willingness to join and to pay the subscription. Joining or remaining as members is, we shall take it, a "rubber stamp" process. Members of the Labour Party therefore do consist of a section of the public; there is no screening sufficient to take them out of that description. On that basis s.25(1)(b) is not satisfied and hence s.25 is not applicable to the Labour Party."

17. The EAT then considered s. 20 but noted that it had not been suggested that the Labour Party fell within that section by reason of providing goods, facilities or services. The EAT also noted that no such provision was found as a fact in this case.

18. The EAT finally considered s. 12, saying (paragraph 29):

> "We therefore approach the construction of s. 12 on the basis that either the Labour Party falls within its terms or the discrimination on racial grounds by the Labour Party in relation, for example, to withdrawing membership from a member or varying the terms on which he holds it, is without any remedy whatsoever."

19. The EAT proceeded on the basis that Sawyer was rightly decided and that the Labour Party was a "body", that representation of the Labour Party as a councillor on a local authority amounted to engagement in a particular occupation, and that a party can confer an approval or recognition which is needed for engagement in that particular occupation. Subject to one authority, the EAT concluded that the Labour Party in relation to some of its functions and some of its members and their rights as such is a body which can make what the EAT called a "conferral" falling within the opening words of s. 12. That authority was the decision of the Northern Ireland Court of Appeal in McLoughlin v Queens University of Belfast [1995]

NI 82 on a provision in the Fair Employment (Northern Ireland) Act 1976 which bears some similarity with, but is not identical to, s. 12. But the EAT did not regard that case, which did not bind the EAT, as requiring it to depart from its provisional conclusion. The EAT detected no error in the Tribunal's reasons and so dismissed the appeal.

The rival contentions

20. Before this court we have had the benefit of admirably skilful arguments from Mr. Cavanagh Q.C. for the Labour Party and Mr. Allen Q.C. for the Respondents.

21. Mr. Cavanagh makes four submissions:

> (1) The Respondents have a remedy in the County Court under s. 25, not in the Tribunal under s. 12, Parts II and III of the 1976 Act being mututally exclusive.
>
> (2) Alternatively, they have a remedy in the County Court under s. 20, not in the Tribunal under s. 12.
>
> (3) Sawyer was wrongly decided in that being a councillor is not "engagement in a profession or trade" within the meaning of s. 12, still less is being a Labour Party councillor such engagement.
>
> (4) If Sawyer was correctly decided and even if Parts II and III of the 1976 Act are not mutually exclusive, s. 12 does not apply to decisions which are not part of the candidate selection process.

22. Mr. Allen challenges each of those submissions. He argues that on the true construction of the 1976 Act Parts II and III are not mutually exclusive, that there was no genuine screening process for becoming a member of the Labour Party and accordingly that s. 25 (1)(b) is not satisfied; that the facts of the case do not engage s. 20, the complaint here not being that the Labour Party failed to provide the Respondents with goods facilities or services; that Sawyer, so far from being wrong, was a carefully and correctly reasoned decision, and that s. 12 is not limited to decisions which are part of the candidate selection process. In effect, he says, Sawyer cannot be distinguished.

Parts II and III of the 1976 Act

23. We start with the question whether Parts II and III are mutually exclusive. It is plain from the framework of the 1976 Act that Parliament considered that complaints of racial discrimination falling within Part II should be dealt with in a different way from complaints of racial discrimination falling within Part III. The headings to the two Parts provide an indication of the type of complaint falling within each Part.

24. Part II (ss. 4 – 16) relates to discrimination in the employment field and whilst it covers relationships other than that of employer/employee (for example, in s.10, partnerships admitting or expelling a partner, and, in s.11, trade unions and other associations admitting

members), in a broad sense the heading to the Part is apposite, and Parliament has allocated exclusive jurisdiction to the Tribunal. As Lord Bingham observed in Anyanwu v South Bank Student Union [2001] 1 WLR 638 at p. 641:

> "Consistently with the modern practice of allocating employment disputes to specially constituted employment (formerly industrial) tribunals, section 54 provides that any complaint of a racially discriminatory act made unlawful by Part II of the Act (the sections dealing with employment) or under sections 32 or 33 in relation to such an act, must be made to an employment tribunal. The Act permits no other procedure."

Thus the complaint will come before the Tribunal consisting of a lawyer as chairman and a representative from each side of industry, whose workload will regularly include employment disputes. The remedies which may be awarded are a declaration of rights, compensation (originally limited to £5,200, but such limit has now been removed) and a recommendation that the respondent takes specified remedial action. By s. 68 (1)(a) the basic limitation period for complaints under s. 54 to the Tribunal is the period of three months beginning when the act complained of was done. Rules of evidence and procedure applicable to cases under Part II are those promulgated for tribunal cases, and differ from those for proceedings in the County Court.

25. Part III (ss. 17 – 27) relates to discrimination in other fields, that is to say in fields other than the employment field covered by Part II. Thus it includes discrimination by bodies in charge of educational establishments (s. 17) and other bodies concerned with education (ss. 18 – 19), discrimination in the disposal or management of certain premises (s. 21) and in withholding consent for assignment or sub-letting of certain premises (s. 24). This is a variegated group of sections with no common characteristic other than what can be inferred from the heading to Part III. But it is clear that Parliament has intended that the treatment of complaints within Part III should be quite different from that of complaints within Part II. By s. 57 (1) a claim of unlawful discrimination under Part III may be made the subject of civil proceedings in like manner as any other claim in tort. Further by s. 57 (2) such proceedings must be brought only in a designated County Court, but all such remedies are to be available as would be available in the High Court. Accordingly in addition to being able to award damages not subject to a statutory ceiling the County Court can grant injunctions. S. 67 specifies which County Courts are designated for the purposes of the Act. By s. 67 (4) the County Court judge will normally sit with two assessors appointed from a list of persons appearing to the Secretary of State to have special knowledge and experience of problems connected with relations between persons of different racial groups. Thus the expertise of the assessors who will normally assist the judge on a Part III complaint is specifically directed to the racial element in the complaint, in contrast to the lay tribunal members sitting in the Tribunal who are drawn from the employers' side and from the employees' side respectively. The function of the assessors to provide assistance to the judge is also quite different from that of the lay members of the Tribunal each of whom has equal status with the lawyer chairman in deciding cases under Part II. The basic limitation period for complaints under s. 57 is double that for complaints under s. 54 (s. 68 (2)). The rules of evidence and procedure which will apply to proceedings in respect of Part III complaints are the stricter rules of the County Court.

26. Given the major differences between the treatment which Parliament intended for Part II complaints and that which was intended for Part III complaints, it would be surprising if Parliament also intended much, if any, overlap between the two Parts such that the complainant could choose whether to institute proceedings in the Tribunal or the County Court for the same complaint. But the EAT rightly drew attention to the express exceptions to be found in each Part which would be unnecessary if the two Parts are mutually exclusive. Thus by s. 12 (3), s. 12 (1) is not to apply to discrimination rendered unlawful by s. 17 or s. 18, while s. 23 (1) provides that ss. 20 (1) and 21 do not apply to discrimination which is rendered unlawful by (amongst other provisions) any provision of Part II. There are other such exceptions in ss. 13 (2)(a) and 25 (1)(c). Those exceptions enabled Mr. Allen to submit that the proper inference is that only in particular identified circumstances overlapping claims are properly to be brought within one Part rather than another Part. He gave as an example of circumstances where it was plain that a complaint could be brought within either s. 12 or s. 25 the case of a solicitor struck off the Roll or whose practising certificate is suspended by the Law Society. But Mr. Cavanagh's riposte to that was to point out, in our view correctly, that s. 11 applies to the Law Society as an organisation whose members carry on a particular profession for the purposes of which the organisation exists, and that, by reason of s. 25 (1)(c), s. 25 does not apply to the Law Society.

27. We do not find it necessary to decide for the purposes of this appeal whether Part II and Part III are mutually exclusive. We are prepared to assume that there may be cases where a complaint may be brought under either Part, though no convincing example of such a case has been drawn to our attention, and if such a case does exist we would expect it to be rare. The real question in this case is whether s. 25 (or s. 20) does apply to the complaint of the Respondents and s. 12 does not.

S. 12

28. It is convenient to start with the question of the applicability of s.12. At first sight this is an unlikely candidate for application to the suspension by a political party of a member wanting to be selected as a party candidate for local government elections. That has nothing to do with employment and while s.12 is in a portion of Part II which covers discrimination in particular circumstances extending beyond employment, it is far from obvious that it was intended to cover a circumstance which does not appear to relate to the employment field even in a wide or loose sense. The obvious application of the section is to cases where a body has among its functions that of granting some qualification on, or authorising, a person who has satisfied appropriate standards of competence, to practice a profession, calling or trade. There are many such bodies, for example, in the medical field.

29. However, the Respondents rely on the width of the language in s.12 as extended by the interpretation provisions of s.12(2) and s.78(1). Thus they say that (1) the Labour Party is a body, (2) which can confer an approval (and hence "an authorisation or qualification") on a member seeking selection as a Labour Party candidate, (3) that approval being needed for or facilitating (a word of wide scope) (4) engagement in a particular profession or occupation (viz. that of a Labour Party councillor) and so engagement in a profession. That is the argument which was accepted by the Tribunal and the EAT.

30. In our judgment so to construe the section runs counter to the approach laid down by this court in Tattari v PPP Ltd. [1998] ICR 106. In that case a doctor with Greek qualifications and an EEC certificate in plastic and reconstructive surgery granted at Athens University was not recognised as a specialist by the defendant, PPP Ltd. (an insurance company specialising in medical insurance), which required the specialists on its lists to have held a substantive NHS consultant post or a certificate of higher specialist training given by the Royal College of Surgeons. The doctor argued that the defendant was a body which was capable of conferring recognition or approval (and hence "an authorisation or qualification") which would facilitate the doctor's engagement in her profession because it would give her access to a significant number of patients in the private medical field of reconstructive plastic surgery. This court rejected that argument. Beldam L.J., with whom Roch L.J. and Sir John Balcombe agreed, said at p. 111:

> "In my judgment PPP is not an authority or body within the meaning of s.12 of the Act of 1976. I consider that the section has to be read as a whole and not construed piecemeal. The kind of bodies referred to are those similar to authorities which are empowered to grant qualifications or recognition for the purpose of practising a profession, calling, trade or activity …."

After referring to the Medical Act 1983, Beldam L.J. said that a European Directive and Order showed "the same indications that in relation to the practice of medicine the recognition, registration or facilitation of practice is granted by bodies authorised in the public interest to ensure an appropriate standard of qualification". Beldam L.J. continued:

> "Thus I consider that section 12 of the Act of 1976, referring as it does to an authority or body which confers recognition or approval, refers to a body which has the power or authority to confer on a person a professional qualification or other approval needed to enable him to practise a profession, exercise a calling or take part in some other activity. It does not refer to a body which is not authorised to or empowered to confer such qualification or permission but which stipulates that for the purpose of its commercial agreements a particular qualification is required."

31. In McLoughlin v Queen's University [1995] NI 82 the Northern Ireland Court of Appeal (Sir Brian Hutton L.C.J., Carswell L.J. and McCollum J.) had to consider s.23 Fair Employment (Northern Ireland) Act 1976 which provides that "it shall be unlawful for a person who has power to confer on another a qualification which is needed for, or facilitates, his engagement in employment in any capacity, or in a particular employment or occupation, in Northern Ireland to discriminate against him – (a) by refusing or deliberately omitting to confer that qualification on him on his application …." "Qualification" was given an extended meaning by the statute to include "registration" and "enrolment". The appellant had applied to Queen's University for a place on a post-graduate course but was informed that the university was unable at that time to offer him a place. He argued that because "qualification" included words like enrolment, s.23 applied to the admission procedure. That was rejected. Carswell L.J., giving the judgment of the court, said at p. 88:

> "The words 'registration' and 'enrolment' refer in our view to variants of conferment of qualifications upon persons who thereby achieve some status in relation to their work or the work which they

propose to do (see the judgment of this court given by Murray L.J. in *Dept of the Environment for Northern Ireland v Bone* (15 September 1993, unreported) ….)."

32. Thus in McLoughlin in a similar field though not in relation to identical statutory wording the Northern Ireland Court of Appeal was unwilling to adopt an over-literal approach to statutory words of extension and referred to conferment of qualifications as the means by which some status is conferred upon persons in relation to their work. In Kelly v Northern Ireland Housing Executive [1999] 1 AC 428 at p. 420 Lord Slynn said that the emphasis on status in Bone might be subject to further argument, as the EAT noted in the present case, but he added that the word "status" may give some indication of the essence of qualification.

33. In the present case, adopting the approach of the court in Tattari and construing s.12 as a whole, we are unable to agree with the EAT in Sawyer or the EAT in the present case that the Labour Party in selecting a candidate for local government elections or allowing a person to be nominated to the pool from which prospective candidates are to be selected is a body which can confer an authorisation or qualification which is needed for or facilitates engagement in a particular profession. We own to having doubts as to whether being a local government councillor is being engaged in a profession or occupation within the meaning of the section, still more so if the profession or occupation is limited to being a Labour Party councillor. To our minds it is certainly not being engaged in a profession and while being a councillor occupies some of the time of the councillor who is entitled to receive allowances, it is not an activity from which the councillor will earn his living or receive a salary, and we question whether it is within the intendment of the section.

34. In Sawyer the EAT plainly struggled to fit into the wording of the section the process of the Labour Party selecting its local government candidates; hence its conclusion that the relevant profession was that of a Labour councillor (as distinct from being merely a councillor), and that assisted the reasoning that the approval of the Labour Party was the authorisation or qualification which is "needed" for the engagement in the "profession". The EAT recognised that there was a difficulty in relying on the word "facilitates" as it was arguable that one can only facilitate that which actually happens, and it was unlikely that Parliament would have intended tribunals to evaluate whether a person would have been elected had the approval of the Labour Party been given.

35. But even if being a Labour councillor is being engaged in a profession for the purposes of s.12, we cannot see that the Labour Party in selecting a candidate or accepting a nomination for such candidacy is conferring an authorisation or qualification such as is within the contemplation of the section. It is not the type of qualifying body to which the section is intended to apply, its activities being for its own political purposes just as PPP's activities were for its commercial purposes. In the present case we cannot accept that there is any conferment of approval by the Labour Party when a member who has nominated himself or been nominated as a local government candidate has his name go forward to the pool available for selection. No status in any meaningful sense is thereby conferred. We have to say that it seems to us wholly artificial to treat s.12 as applying to such a case.

36. We would add that in any event if the Respondents are right the scope of the application of s.12 is limited to discriminatory actions in relation to a member's candidacy for election.

On their argument, which treats s.25 as inapplicable, the Labour Party would be free under the 1976 Act to discriminate against those ordinary members or those applying to become members who have no ambitions to represent the Labour Party. That would be a very narrow basis for the application of the 1976 Act to complaints about discrimination in respect of membership of a political party.

37. For these reasons therefore we would hold that Sawyer was wrongly decided and that s.12 has no application to the present case.

S. 25

38. We turn next to s.25. At first blush one might expect a complaint of discrimination such as is made by the Respondents to fall within Part III, if in any Part of the 1976 Act, because the complaint is of discrimination in a field other than the employment field.

39. It is not in dispute that s. 25 was enacted to extend the reach of the racial discrimination legislation previously in force, a limit on which had been exposed by two decisions of the House of Lords: Charter v Race Relations Board [1973] AC 868 and Dockers' Labour Club Ltd. v Race Relations Board [1976] AC 285. Under the Race Relations Act 1968 s. 2 was a provision against discrimination in the provision of goods, facilities and services to the public or a section of the public in much the same terms as are to be found in s. 20 of the 1976 Act. We were taken to some Parliamentary material which it was suggested by Mr. Cavanagh could be admitted under the principles of Pepper v Hart [1993] AC 593, but we did not find that material of much assistance.

40. In Charter the question was whether a refusal by a local Conservative club, providing the usual amenities of a club to members at the club's premises, on the ground of colour to elect an eligible applicant to membership was unlawful. The rules provided that an applicant for membership had to be proposed and seconded by two members able to vouch for the applicant and that the nomination had to be posted on the club notice board prior to the applicant's election. The House of Lords held that the club's members to whom the club's services were provided were not a section of the public. At p. 887 D Lord Reid said that he could not see any reasonable or workable dividing line so long as there was operated a genuine system of personal selection of members. Although the Race Relations Board had found that any member of the local Conservative association who applied and was eligible was admitted to membership, because the election procedure in accordance with the club rules was used for admission it could not be said that there was no genuine selection of members of the club. Lord Hodson, Lord Simon and Lord Cross expressed views concurring with Lord Reid, while Lord Morris dissented. It is clear that the House of Lords had in mind as an example of a club purporting to be a private club but in reality one whose members were members of the public the case of the Soho club in the licensing case, Panama (Piccadilly) Ltd. v Newberry [1962] 1 WLR 610, where admission to membership was a mere formality on making the required payment.

41. In Dockers the question was whether a working men's club, belonging to a union, which offered admission to associates of the union but which refused goods, facilities and services to an associate on account of his colour, had acted unlawfully under s. 2 Race Relations Act

1968. The House of Lords applied Charter in finding that the club had not acted unlawfully. Lord Reid at p. 291 E said that it was held in Charter that "an appropriate test was to see whether there was any genuine selection on personal grounds in electing candidates for membership". He said that it mattered not that there were a million associates because each of them had been the subject of personal selection by the committee of one of the 4,000 clubs who were members of the union. Lord Diplock at p. 297 G suggested that the test could be put in a way which everyone could understand by putting the question: "Would a notice, 'Public Not Admitted' exhibited on the premises on which the goods, facilities or services were provided, be true?"

42. There is no doubt but that the Labour Party is an association of persons with over 24 members, admission to membership of which is regulated by its constitution and is not an organisation to which s. 11 applies. The only question is whether admission to membership is so conducted that the members do not constitute a section of the public within the meaning of s. 20 (1). S 20 (1) does not in fact directly assist in explaining the meaning of a section of the public, containing as it does no definition of the words in question, but indirectly it does assist because of the meaning given by the House of Lords in Charter and Dockers to the words.

43. The test for members not constituting a section of the public appears to be therefore of genuine personal selection and it is to the rules of the club or association to which it is appropriate to turn in the first place. If the rules so provide, then a factual question arises whether admission is conducted in accordance with the rules.

44. We turn therefore to the Rules. In Clause IV of Chapter 1 of Section A of the Rules the Labour Party is called "a democratic socialist party". By Clause X1(j) the Rules apply to any individual for the time being in receipt of the benefits of party membership provided by the Rules.

45. Chapter 2 relates to membership rules. Rule 2A in that chapter prescribes the conditions of membership. The following provisions are relevant:

> "2A.3 Individual members shall be British subjects or citizens of Eire or other persons resident in Great Britain for more than one year who:
>
> (a) are not less than 15 years of age, and
>
> (b) subscribe to the conditions of membership in this clause, and
>
> (c) are not members of political parties or organisations ancillary or subsidiary thereto declared by party conference or by the NEC in pursuance of party conference decisions to be ineligible for affiliation to the party.
>
> 2A.4 (a) A member of the party who stands for election, or acts as the election agent to a person standing for election, in opposition to a duly endorsed Labour candidate, shall automatically be ineligible to

be or remain a party member, subject to the provisions of part 6A.2 of the disciplinary rules.

(b) A member of the party who joins and/or supports a political organisation other than an official Labour group or other unit of the party, shall automatically be ineligible to be or remain a party member, subject to the provisions of part 6A.2 of the disciplinary rules.

….

2A.6 To be and remain eligible for membership, each individual member must:

(a) accept and conform to the constitution, programme, principles and policy of the party

(b) if applicable, be a member of a trade union affiliated to the Trade Union Congress or considered by the NEC as a bona fide trade union and contribute to the political fund of that union ….

(c) be a member of the constituency party for the address where he or she is registered as an elector

….

2A.8 No member of the party shall engage in a sustained course of conduct prejudicial, or in any act grossly detrimental to the party ….”

46. Rule 2B prescribes membership procedures. The material provisions are these:

“2B.1 (a) Individual members of the party shall be recruited into membership in accordance with these rules either by the appropriate branch, constituency, national or regional party ….

(b) All recruitment to the party shall be in accordance with the NEC code of conduct on membership recruitment which shall be issued to party and affiliated organisations from time to time. Members of affiliated organisations not already members who have paid the political levy or political subscription to the affiliated organisation for a period of at least 12 months may be recruited into membership of the party via that affiliated organisation as registered members.

2B.2 The following enrolment procedures shall apply to applications for membership:

(a) an application to become an individual member shall be submitted on a membership application form by the appropriate CLP [Constituency Labour Party], or by (in the case of an application for registered membership) an affiliated organisation. The application form must be signed by the applicant and sent to the general secretary at the head office of

the party together with the membership fee. The general secretary shall arrange for the applicant's details to be recorded on the national membership list as a provisional member

(b) applications for registered membership may be checked with the affiliated organisation concerned to confirm that the political levy or subscription has been in payment for at least 12 months

….

(f) the constituency party concerned shall be informed by the general secretary of the application for membership. Any objection to any application for membership may be made by the constituency party to the general secretary within eight weeks of this notification. Such objection may only be made by the General Committee or Executive Committee of the CLP concerned, though such objection may initially be made on a provisional basis, pending further enquiries

(g) subject to subparagraph (h) below if no objection is received by the general secretary within eight weeks of the notification in (f) above, and the membership fee has been received by the general secretary the applicant shall be deemed to be a full party member

(h) at any time before the individual is accepted as a full member of the party, the general secretary may rule that the individual application for membership be rejected for any reason which s/he sees fit

(i) in the absence of any notice of objection from the constituency party as in (f) above, and/or any ruling by the general secretary as in (h) above, the applicant shall, on the expiry of eight weeks from the notification in (f) above, become a full member. The provisional member shall then be transferred to the national membership as a full member as soon as practicable

(j) the reasons for the rejection of an application for membership by the general secretary or the objection by the constituency party to the application for membership must be sent to the individual applicant at the address given. S/he shall have the right of individual written appeal to the NEC …."

47. Rule 2C provides for the membership subscription, the standard annual sum being £16, though a reduced subscription of £5 is payable by "unwaged persons", pensioners, persons working less than 16 hours a week and persons on government training schemes, and by members of an affiliated trade union paying the political levy and members of an affiliated socialist society.

48. Rule 2D, headed "Code of conduct – membership recruitment" contains the following statement of intent:

> "The Labour Party is anxious to encourage the recruitment of new members and to ensure that new members are properly welcomed into the party and opportunities offered to enable their full participation in all aspects of party life.
>
> The party is however concerned that no individual or faction should recruit members improperly in order to seek to manipulate our democratic procedures.
>
> The health and democracy of the party depend on the efforts and genuine participation of individuals who support the aims of the Labour Party, wish to join the party and get involved with our activities.
>
> The recruitment of large numbers of 'paper members', who have no wish to participate except at the behest of others in an attempt to manipulate party processes, undermines our internal democracy and is unacceptable to the party as a whole."

49. Mr. Cavanagh criticises the EAT for holding that joining the Labour Party was a "rubber-stamp" process and that membership did not depend on anything more selective than a willingness to join and pay the subscription. He submits that the Rules require an applicant for membership to have a real and genuine commitment to the substantive political aims and objectives of the Labour Party and no other party and he points in particular to Rules 2A.6(a), 2A.3(c) and 2A.4. He argues that the provision enabling objections to the applicant for membership to be made by the constituency Labour Party (Rule 2B.2(f)) and the provision giving a power of rejection of an application to the general secretary for any reason he thinks fit (Rule 2B.2(h)) provide a sufficient filtering process so that it cannot be said that the members of the Labour Party are no more than a section of the public.

50. Mr. Allen argues to the contrary. He points to the fact that there is no automatic pre-membership screening and that an applicant for membership automatically becomes a member after 8 weeks in the absence of objection by the constituency Labour Party or a ruling by the general secretary. He relies on what appears to have been a common acceptance by counsel and the members of the House of Lords in Charter that members of the Conservative party were members of the public (see in particular Lord Reid [1973] AC at pp. 886C and 887F and Lord Morris at p. 895A), and he submits that similarly members of the Labour Party are a section of the public.

51. We confess that we find the question a difficult one, not least because of the narrowness of the test suggested in Charter and apparently adopted by Parliament in s. 25(1) by reason of the reference to s.20. It is easy enough to see why a Soho club, seeking to evade licensing or other regulations by claiming to be a private members' club when in reality allowing entry to anyone willing to pay the entry fee, should be treated as a club whose members remain members of the public. It is harder to see why a society with a serious purpose limited to members interested in that purpose should not be an association whose members are not a section of the public. In the present case, not only are the members of the Labour

Party limited to persons accepting and conforming to the constitution, programme, principles and policy of the Labour Party and no other party, but admission to the Labour Party is subject to the procedure allowing objections to be made by the constituency Labour Party and to the general secretary's veto. On Lord Diplock's test of a 'Public Not Admitted' notice in Labour Party premises, we incline to think that the notice would be true. We reach that conclusion with hesitation, in particular because of the acceptance in Charter that the membership of one of the major political parties remained a section of the public. But it does not appear from the report of Charter that the rules of the Conservative party were in evidence or examined. We must proceed on the limited evidence before us, and on that material we would hold that s.25 is capable of application to the Labour Party. If the Respondents were to pursue proceedings in the County Court that court would have to consider whether in reality admission to membership of the Labour Party was so conducted that s.25(1)(b) was not satisfied

52. This conclusion renders it unnecessary for us to consider the applicability of s.20 to the particular circumstances of the present case. We will only say that whilst it may well be that a political party like the Labour Party can and does provide goods, facilities or services to its members not being a section of the public, it is far from obvious that it does so relevantly in the present case. But we express no concluded view on the point.

53. For these reasons therefore we would respectfully disagree with the conclusion reached by the EAT, allow the appeal and dismiss the Respondents' Originating Applications as raising complaints outside the jurisdiction of the Tribunal.

Order: Appeal allowed with costs as agreed. Permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)