Case No: (1) A1/2002/1587; (2) A1/2001/1894; (3) A1/2002/0122; (4) A1/2001/2717;(5) A1/2002/0121

Neutral Citation Number: [2003] EWCA Civ 645
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 15th May 2003

Before :

LORD JUSTICE PILL
LORD JUSTICE MUMMERY
and
LORD JUSTICE LATHAM

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Between :

(1)[1] BRITISH MEDICAL ASSOCIATION	Appellant
− and −	
MR R CHAUDHARY	Respondent

– –

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

– –

MR JOHN CAVANAGH QC (instructed by the Legal Department of the BMA) for the Appellant
MR JOHN HENDY QC, MS LOUISE CHUDLEIGH AND MS PAROSHA CHANDRAN (instructed by Birchfields) for the Respondent

(2) Case No A1/2001/1894 on appeal from Miss Recorder Slade QC
[2]Mr R Chaudhary -v− The Royal College of Surgeons and Ors
Mr John Hendy QC and Ms Louise Chudleigh and Ms Parosha Chandran (instructed by Russell Jones & Walker)for the Appellant
Mr Philip Mead (instructed by Berwin Leighton Paisners for the Respondent Royal College of Surgeons)
Miss Monica Carss−Frisk QC and Ms Jane Collier (instructed by the Solicitor for the Department of Health for the Respondent Department of Health)

(3) Case No A1/2001/0122 on appeal from HHJ Peter Clark

[1] Case No A1/2002/1587
[2] Case No A1/2001/1894

[3]Department of Health & Ors -v− Mr R Chaudhary
Miss Monica Carss−Frisk QC and Ms Jane Collier (instructed by the Solicitor for the Department of Health for the Appellant Department of Health
Mr John Hendy QC , Ms Lousie Chudleigh and Ms Parosha Chandran instructed by Russell Jones & Walker for the Respondent)

(4) Case No A1/2001/2717 on appeal from HHJ Peter Clark
[4]Mr R Chaudhary -v− The Specialist Training Authority & Ors
Mr John Hendy QC, Ms Louise Chudleigh and Ms Parosha Chandran (instructed by Russell Jones & Walker for the Appellant
Mr Philip Havers QC (instructed by Carter Lemon Cameron for the Respondent Specialist Training Authority).

(5) Case No A1/2002/0121
[5]Dr H Platt -v− Mr R Chaudhary
Miss Gemma White (instructed by Thomas Eggar Church Adams for the Appellant Dr H Platt)
Mr John Hendy QC, Ms Lousie Chudleigh and Ms Parosha Chandran (instructed by Russel Jones & Walker for the Respondent)

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Lord Justice Mummery :

INTRODUCTION

Mr Chaudhary

1. Mr Rajendra Chaudhary is of Indian ethnic origin. He is now 44 years old. From December 1991 until July 1995 he was a Registrar in Urology at the North Manchester General Hospital. The post was advertised in 1991 as offering "excellent training in Urological Surgery" and as being "Royal College approved." He had previously held posts as Senior

House Officer and Registrar in Surgery, Senior House Officer in Orthopaedics and Honorary Registrar in Urology.

2. He qualified in India in 1982. He became an FRCS of Edinburgh (December 1988) and London (July 1989). He is the holder of a Diploma in Urology from the Institute of Urology in London (July 1991). Since 4 January 1996 he has had a right of indefinite residence in the UK.

3. In 1995 Mr Chaudhary left the North Manchester General Hospital to become a researcher in urology at the Christie Hospital, Manchester. From 19 February 1996 until 21 January 1997 he had a locum position in Urology at St Mary's Hospital, Portsmouth. Since then he has held locum Specialist Registrar and Consultant positions in urology at St George's Hospital, London; Leighton Hospital, Crewe; and Gartnavel General Hospital, Glasgow.

Discrimination disputes outlined

4. Between 1997 and 2000 Mr Chaudhary started four sets of proceedings in the employment tribunal. The claims were for direct and indirect race discrimination and victimisation contrary to the Race Relations Act 1976 (the 1976 Act). There are two main disputes.

5. The first dispute concerns the application of the criteria laid down in March 1996 for entry into a new grade of Specialist Registrar. The case centres on whether the Manchester post received the required official recognition from the appropriate professional body. Mr Chaudhary claims that the application of the criteria for entry into the new grade indirectly discriminated against the ethnic group to which he belongs and therefore against him. As a result he was wrongly denied transition into the new grade of Specialist Registrar. This has adversely affected the attainment of his ambition to become a Consultant Urologist.

6. The authorities responsible for applying the criteria disagree with Mr Chaudhary. They deny that there has been any race discrimination, direct or indirect, on their part. They contend that Mr Chaudhary's proper path to appointment as a Consultant Urologist is through entry into the new training grade by open competition, as opposed to the route of automatic entry for which he contends. He has not chosen to take the path of open competition.

7. The second dispute is connected to the first. Mr Chaudhary was unsuccessful in his application to the Specialist Training Authority of the Medical Royal Colleges (the STA) to enter his name on the Specialist Register maintained by the General Medical Council (the GMC). The GMC is the regulatory body for the medical profession. It keeps and maintains medical registers, including the Specialist Register. A doctor's name can only be entered on the Specialist Register if he is able to satisfy the STA that he is eligible for entry. Although entry on the *Specialist Register* is a procedural and legal process distinct from entry into the new training grade of *Specialist Registrar* , the refusal of entry to the new training grade affected the fate of his application to be entered on the Specialist Register and his eligibility for appointment as a consultant.

8. The normally smooth and swift progress of the tribunal proceedings to substantive decisions has been seriously impeded by a crop of preliminary procedural issues on time limits,

jurisdiction and abuse of process. Rulings on those issues have been made by the employment tribunal at different times. They have been appealed to the employment appeal tribunal. Applications are now made to this court for permission to appeal. Directions were given that all the applications should be heard together by the same full court, with appeals to follow immediately in those cases in which permission to appeal is given.

9. It will be necessary to give detailed consideration to each set of proceedings separately. Some of the applications raise points of general interest to legal practitioners. Others raise points of particular interest to medical practitioners and to the professional bodies concerned. This is the first (and it may well be the last) occasion on which all the current proceedings are before one court at the same time. This court should take that opportunity to provide to all concerned a general overview of the current state of the issues in the litigation and of the relevant legislation. That approach is also a convenient way of putting each set of proceedings and the various applications into their proper context. In performing this task the court acknowledges its debt to counsel for the care that they have taken in unravelling the procedural complications and in simplifying the issues. This judgment has to deal with applications and appeals in four sets of proceedings. Hence its unusual length and complexity.

II. GENERAL BACKGROUND TO APPLICATIONS

New Specialist Registrar Grade

10. The dispute started with the introduction into the National Health Service (the NHS) of a new training grade system for junior doctors. It was launched on 1 December 1995. The reforms in specialist medical training followed the Calman Report on *Hospital Doctors:Training for the Future.* A new training grade of Specialist Registrar was to replace the existing grades of Registrar and Senior Registrar. Doctors holding existing grades had to apply for entry to the new grade. Guidance on the conditions and criteria for entry were set out in a *Guide to Specialist Registrar Training* (the Orange Guide) produced and published by the NHS Executive in March 1996. The Editor−in−Chief of the Guide was Professor JG Temple. With effect from 1 April 1996 the postgraduate training arrangements described in the Orange Guide came into effect in relation to the Specialist Registrar grade in urology.

11. There was a period of transition of existing Registrars and Senior Registrars to the new grade of Specialist Registrar. Application for entry to the Specialist Registrar grade in urology had to be made in the transition period, which was fixed to end on 15 July 1996. Otherwise it was necessary to enter the grade by open competition. Mr Chaudhary contended that he satisfied the published criteria for transition: he had acquired a right of residence before transition; he had the minimum entry requirements of the relevant College (FRCS); and he was holding, or had held, a substantive career registrar post with staffing and educational approval by the relevant Royal College; alternatively, he became a visiting registrar through an appointment process, which conformed to the criteria and conditions then in force for an appointment to an NHS career registrar post. He was denied entry to the Specialist Registrar grade solely on the basis that the registrar post held by him in the North Manchester General Hospital had not received what was officially considered to be the requisite approval. His complaint was that the application of the criteria discriminated against him and, in particular, that reference was made to matters not in the Orange Guide.

12. Entry during transition was only open to specified groups, provided that individual candidates satisfied the minimum college or faculty criteria. The relevant groups included the following referred to in paragraph 8 of Section 2 of the Orange Guide:

> "a. senior registrars and honorary senior registrars; and
>
> b. career registrars and honorary registrars who hold either a substantive career registrar appointment or an honorary registrar appointment (for example, lecturers) with staffing and educational approval (by the Royal College or Faculty) recognised by the postgraduate dean; this includes substantive career registrars in this category who are now occupying senior registrar posts on a locum basis."

13. It will be noted that mention was made of approval of a "career registrar appointment" by "the Royal College or Faculty." The Royal College of Surgeons of England is the relevant Royal College. It is responsible for setting and supervising standards of surgical training. The STA has, since 12 January 1996, delegated to it and to the other Surgical Royal Colleges (the Royal College of Surgeons of Edinburgh, the Royal College of Physicians and Surgeons of Glasgow) the responsibility, in the surgical specialities, for inspecting and approving training posts in hospitals. The Royal Colleges also supervise certain educational aspects of the trainees who occupy the posts, conducting surgical examinations and conferring qualifications, such as the FRCS, and making recommendations to the STA for the award of Certificates of Completion of Specialist Training (CCST). The Royal College of Surgeons of England carries out its functions through a network of appointed regional advisers, who advise the Postgraduate Deans on matters relating to their specialities.

14. The Surgical Royal Colleges have a joint committee called the Joint Committee on Higher Surgical Training (JCHST), which operates by means of advisory sub−committees. There is a Specialist Advisory Committee in each of the surgical disciplines. The relevant sub−committee in this case is the Specialist Advisory Committee in Urology (SAC). Professor Mundy was the chairman of the SAC at the relevant time. The SAC gave advice to Postgraduate Deans on applications for the new Specialist Registrar grade. Its members also assessed, on behalf of the STA, applications for entry on the Specialist Register maintained by the GMC.

15. If the criteria for transition to the new grade were satisfied, the applicant would be given a National Training Number (NTN). Subject to guidance in the Orange Guide, an NTN could be received by overseas doctors, who had acquired a right of indefinite residence in the UK before or during transition. The applicant would enter a training programme after an announcement by the Deanery Speciality Committee, which would make recommendations to the Postgraduate Dean. A Specialist Registrar or a Senior Registrar who thereafter completed his training would be entitled to the award of a CCST.

Mr Chaudhary's application for NTN

16. Mr Chaudhary considered that he was entitled to an NTN under the new scheme. This was understandable on his part, as his post at Manchester had been advertised as "Royal College approved" and as offering "excellent training in urological surgery."

17. On 12 April 1996 Mr Chaudhary wrote to Dr HS Platt, the Regional Postgraduate Dean for Wessex (which covered Portsmouth), seeking his advice and guidance about his experience and training in urology, his trainee status and his aim to practise eventually as a Consultant Urologist in the United Kingdom. He enclosed his CV.

18. Dr Platt replied on 17 April, asking for further information to be provided. He treated Mr Chaudhary as having applied to enter the Specialist Registrar grade during the transition period. As Postgraduate Dean, Dr Platt had overall responsibility for postgraduate medical training in all specialities in his deanery. He was vested by the Orange Guide with authority to decide, on advice from the relevant bodies, whether a trainee could be transited to the new Specialist Registrar grade.

19. Inquiries by Dr Platt revealed that, although the post at the North Manchester General Hospital had been advertised as "Royal College approved," and as offering excellent training in urological surgery, it had not been approved by the SAC. It appeared that Mr Chaudhary had not been on an approved training scheme and that he had not been assessed by the training committee. Professor Mundy, as Chairman of the SAC, took the view that only candidates who had held a career registrar post *approved by the SAC* were eligible for an NTN in urology.

20. Mr Chaudhary was a member of the British Medical Association (the BMA), which represents the professional interests and concerns of doctors on such matters as negotiations with government. The BMA wrote on his behalf to Dr Platt on 15 July 1996 seeking to clarify Mr Chaudhary's Registrar post at Manchester. The letter stated that Mr Chaudhary had received confirmation from his consultant, Mr Costello, that it was "a substantive post and was recognised for training purposes by the Royal College." It was contended that he met the criteria in paragraph 8 of the Orange Guide for entry during the transition period and that he should be provided with an NTN.

21. On 23 July 1996 Dr Platt informed Mr Chaudhary by letter that, although he and his colleagues were sympathetic to his situation, the position was that the post of Registrar held by him at Manchester "did not have SAC approval and that Professor Mundy×. has determined that only where individuals have held SAC approved posts will they get a National Training Number." He was told that he would have to compete for Specialist Registrar posts, as and when they were advertised.

22. The ensuing correspondence between Mr Chaudhary, Dr Platt, Professor Mundy, the BMA, the Department of Urology in Manchester and others did not lead to any change in the official view of the Manchester post.

23. In October 1996 Mr Chaudhary informed Dr Platt that he wished to appeal against the decision not to award him an NTN in urology, as he believed that his previous training record met all the normal entry requirements. He cited paragraph 8 of the Orange Guide and he referred to the advertisement for the Manchester post.

24. After an oral hearing on 14 January 1997, his appeal was dismissed. The findings were confirmed in a letter dated 7 February 1997, explaining that, although he held the minimum entry requirement to the grade of Specialist Registrar (i.e. FRCS),

> "×the appointment process to [the] Registrar post in North Manchester did not conform to the criteria and conditions then in force for an NHS Career Registrar post. This is because the post was not recognised by the SAC in Urology for Higher Specialist Training."

25. Mr Chaudhary was assured that this was the unanimous view of the panel and that it was consistent with decisions made throughout the speciality of urology. He was advised to apply for Specialist Registrar posts leading to his being placed on a training programme.

26. A number of points about Mr Chaudhary's case were noted at that time by Dr Platt, who was a member of the five man appeal committee: posts recognised by the Royal College did not need SAC approval in 1991; junior doctors, particularly pre−Calman, did not often know the difference between Royal College approval and SAC approval; the post was correctly advertised, in his opinion, as having "Royal College approval"; there was no mention in Part 2 of the Orange Guide that converted posts must have had SAC approval. He maintained that, if the Royal College of Surgeons was not careful in this case, "it could be viewed as racially discriminatory to impose the need for [Specialist Registrars] to come from posts with SAC approval, as this would exclude all Visiting Registrar posts and therefore all non−EEA doctors", though he recognised that that was not a matter for the Dean.

27. Mr Chaudhary took the matter up with the Junior Doctors Committee of the BMA. On 21 April 1997 a letter was written on his behalf by the Committee's secretary to Professor JG Temple, asking him to look into what was alleged to be an inflexible approach to the application of the criteria to Mr Chaudhary. Professor Temple is an eminent specialist. He was a Special Adviser to the Chief Medical Officer, Chairman of the Calman Implementation Steering Group and Editor−in−Chief of the Orange Guide.

28. In his reply of 30 April 1997 Professor Temple pointed out that he did not as a rule take up specific cases, but he would refer the matter to the Postgraduate Dean of the North West Deanery (Dr Hayden) for her view. Dr Hayden, who was familiar with Mr Chaudhary's case, was of the view that the advertisement for the Manchester post was "technically correct," but that post−Fellowship posts had to have SAC approval for higher training. In his letter of 1 August 1997 to the Junior Doctors Committee of the BMA, Professor Temple stated his view that Mr Chaudhary was not entitled to an NTN under the transition arrangements. He confirmed the view of the Appeal Panel that the post held at the North Manchester General Hospital was not a post approved by the SAC, the appropriate education authority. Professor Temple commented that "the actual recognition of this post is clouded in the confusing phraseology (Royal College approved etc)×", but he added that it was quite clear that, during the time that Mr Chaudhary was there, it was quite specifically not a post which had been inspected and approved by the SAC in Urology. In a letter of 20 November 1997, responding to a further letter from the Junior Doctors Committee, Professor Temple stated that he believed that his letter of 1 August must stand. One of the issues in the case is whether that letter was a fresh decision on Mr Chaudhary's application for entry to the new grade.

Southampton tribunal proceedings

29. On 2 December 1997 Mr Chaudhary presented his first originating application to the employment tribunal at Southampton. He complained of "continuing racial discrimination since 12−10−91." The application made it clear that his claims were for continued race discrimination, both direct and indirect. He decided to start proceedings in the employment tribunal, having met on 25 October 1997 another Asian doctor, Mr Dilip Malkan, whose training had not been recognised and who was pursuing a tribunal claim for race discrimination. The Royal College of Surgeons and its SAC, Dr Platt, the NHS Executive HQ and the Department of Health were named among the 7 respondents. (This was reduced to 6 when Dr Platt was dismissed from the proceedings by a consent order dated 9 March 1999). In the notices of appearance the point was taken that the tribunal had no jurisdiction to hear the complaint in so far as it related to acts occurring on or before 2 September 1997, as it was out of time. It was denied that the act complained of was "an act extending over a period." Mr Chaudhary supplied further and better particulars of his complaint. A date was later fixed for the hearing of a preliminary issue on the time limit point.

30. At the hearing of the preliminary issue, which was adjourned several times, evidence was given by Mr Chaudhary and by Professor Temple. A witness statement by Mr Chaudhary made it clear that his complaint included a claim that the application of the critieria for recognition of the Manchester post had disadvantaged him on racial grounds. The counsel then acting for Mr Chaudhary submitted that one of his client's complaints was that the Royal College had, through the SAC, departed from the criteria set by the Department of Health in the Orange Guide and had applied a racially discriminatory policy in not recognising his training at Manchester. The policy had given rise to the decision not to allow Mr Chaudhary entry to the new training grade. It was also contended that Professor Temple had approved what had gone on and that he had taken a decision relating to Mr Chaudhary's application for entry under the transitional arrangements.

31. In his witness statement Professor Temple explained that the purpose of his letter of 20 November 1997 was to re−iterate that, in his opinion, the original decision had been correct. In his oral evidence to the tribunal he explained that he did not treat the approaches made to him as an appeal. He was not the Postgraduate Dean. He was being asked for an opinion. It was not in his power to change these things. It was not his responsibility to come to a decision. He was simply trying to help and to be fair.

The STA application

32. On 23 December 1997 Mr Chaudhary began to explore another avenue. He applied to the STA for assessment for "mediated entry" to the Specialist Register, which contains the names of doctors eligible to take up consultant posts. After 1 January 1997 entry on the Specialist Register became a requirement for appointment as a consultant. That register is maintained by the GMC under the European Specialist Medical Qualifications Order 1995 (the 1995 Order), which was made under section 2(2) of the European Communities Act 1972 to implement EC Directive 93/16 under Article 39 (previously Article 48) of the Treaty. The Directive is designed to facilitate the free movement of doctors in the European Union. The 1995 Order created a new system for training specialists and established the STA and the Specialist Register. The STA is the designated competent authority for determining entry on the Specialist Register. It determines the applications of doctors who wish to be enrolled on the Specialist Register. It is responsible for approving specialist medical training intended to lead to the award of a CCST. Members of the STA are

appointed by various bodies, including the Royal Colleges, Faculties, the GMC and the Secretary of State.

33. There are several routes for entry on the Specialist Register. For someone in the Specialist Registrar grade undertaking training in the UK, entry to the Specialist Register is through an award of the CCST, which is given following satisfactory completion of Specialist Registrar training. It automatically meets the educational requirements for the holder to be admitted to the Specialist Register. There were also transitional provisions, some of which were time limited and have now expired, which allowed doctors who met transitional entry criteria to enter the Specialist Register.

34. The 1995 Order came into effect on 12 January 1996. It was later amended by the European Specialist Medical Qualifications Amendment Regulations 1997 (the 1997 Regulations) to provide recognition to qualifications and experience of doctors who had worked in non−training grades in the UK or had qualified and worked overseas.

35. On 28 September 1998 the STA informed Mr Chaudhary that his application for entry to the Specialist Register under Article 12(2) (c) (i) and (ii) of the 1995 Order was unsuccessful, because they did not accept much of his UK training. He was notified of his right of appeal.

36. On 1 November 1998 Mr Chaudhary wrote to Dr Platt enclosing a copy of the document received from the STA headed "JCHST− Non Consultant Career Grade Doctors Checklist." He contended that, according to that document, the STA, in reaching their decision, had treated 24 months of his time spent as a Registrar in Urology at North Manchester General Hospital as "recognised by the panel." He contended that he therefore qualified for automatic entry into the Specialist Registrar grade. Dr Platt replied on 15 December 1998, maintaining that the STA recognition for entry to the Specialist Register differed from recognition by the SAC for entry to the Specialist Registrar grade. He repeated that the matter had been fully considered and determined in the past. One of the issues in the case is whether that letter was a new decision on his application for entry to the new training grade, giving rise to a fresh cause of action for a discrimination claim under the 1976 Act.

The Manchester tribunal proceedings

37. On 23 December 1998 Mr Chaudhary presented a second originating application, this time to the employment tribunal in Manchester. He complained of race discrimination. The complaint included reference to Dr Platt's letter of 15 December 1998, which was relied on as a new decision on his application for transitional entry, as well as to the earlier history of the dispute. The STA, the Royal College of Surgeons and the SAC, Dr Platt, the NHS Executive HQ and the Department of Health were named among the 9 respondents. The point was taken by some of the respondents that the complaint was an abuse of process, as it raised matters which were the subject of the Southampton complaint. The issues in both sets of proceedings were whether Mr Chaudhary was entitled to enter the Specialist Registrar grade during transition and the status of the Manchester post. Some of the respondents objected to two applications being allowed to proceed at the same time in two different tribunals, as they raised the same issues against some of the same respondents.

STA appeal panel

38. Mr Chaudhary continued to challenge the STA decision. On 24 May 1999 the original decision was confirmed on a review requested by Mr Chaudhary. Mr Chaudhary appealed. He included a complaint of race discrimination in his notice of appeal lodged on 16 August 1999. On 9 August 2000 the legally qualified chairman of the STA appeal panel, Mr David Farrington, declined to order the STA to respond to a race relations questionnaire submitted by Mr Chaudhary. The questionnaire was in the style of that required by section 65 of the 1976 Act. The notification letter informed Mr Chaudhary that the appeal panel would consider, among other issues, whether the requirements of the STA were in compliance with the law and, if so, whether those requirements were followed.

39. On 13 September 2000 Mr Farrington made a further ruling in response to a letter of 7 September 2000 from Mr Chaudhary's solicitors, asking for confirmation that the appeal panel would consider and determine whether Mr Chaudhary had suffered racial discrimination. Mr Farrington decided that the appeal panel would not consider and determine the allegations of race discrimination. The grounds of the refusal were that the allegations were not "integral to his appeal" and were "bare assertions unsupported by any evidence." The decision letter stated

> " 6. The principal function of the Appeal Panel is to decide the Appeal. It is not under a duty to pronounce separately on a complaint of racial discrimination, particularly where in the context of the Appeal that ground has not been substantially relied upon. The decision in R v.Department of Health ex parte Ghandi [1991] 4 All ER 547 is relevant."

40. In a further letter of 22 September 2000 Mr Chaudhary's solicitors set out in detail the claims of race discrimination, which they submitted were integral to the appeal due to be heard on 28 September 2000. They included complaints of direct and indirect discrimination in respect of the requirement of time spent in a post approved by the SAC. Victimisation of Mr Chaudhary was also alleged to have taken place. Reference was made to an intention to apply for permission for judicial review of the decision not to consider the issues of race discrimination.

41. The appeal panel responded through Mr Farrington on 27 September 2000. The appeal panel declined to amend the order of 13 September on the day before the hearing on the ground that it would be unfair to the STA to do so. The examples of race discrimination referred to in the letter of 22 September had not been disclosed at an earlier stage, when appropriate steps could have been taken to investigate them. The response acknowledged that the race discrimination issues would be dealt with by the appeal panel, if the Divisional Court decided that they did form part of the appeal.

42. The appeal panel dismissed the appeal on 29 November 2000. Written reasons for the decision dated 26 April 2001 were sent to Mr Chaudhary on 8 May 2001. The appeal panel dismissed his appeal under Article 12(2)(c)(i) of the 1995 Order on the ground that "his training did not comply with the requirements current at the time that the training in the speciality was undertaken." (paragraph 31 of the Reasons for Decision). This was the consequence of the Manchester post not being a post approved by the SAC, even though Mr Chaudhary submitted that he had been led to believe by the terms of the advertisement that the post was "Royal College approved" and mentioned training in urology. Mr Chaudhary's

appeal under Article 12(2)(c)(ii) was allowed in part, so that he would have to undertake a further 21 months' (rather than 25 months') training and pass the Intercollegiate Board Examination.

43. In the course of the employment tribunal proceedings correspondence between the Chief Executive of the STA, the Director of Appeals, the Appeals Secretary and Mr Farrington were disclosed. The letters passing between them in August and September 2000 concerned such matters as the jurisdiction of the appeal panel to consider complaints of race discrimination, its duty to take any discrimination into account (in the light of the decision of this court in Ghandi) and consideration of the appointment under Appeal Regulation 11 of an assessor with expertise in race discrimination to be present at the hearing or to review the documentation. (An assessor was in fact appointed to be present at the appeal hearing on 28 and 29 September and 29 November 2000 and to advise the Appeal Panel). Mr Chaudhary complained that copies of the letters should have been supplied to him at the time.

44. On 7 June 2001 Sullivan J refused a renewed application by Mr Chaudhary for permission to apply for judicial review of the appeal panel's decision to refuse to hear his claims of race discrimination. Sullivan J held that the decisions of the appeal panel on 13 and 27 September 2000 were "fully justified" and that the chairman of the appeal panel, faced with "unparticularised assertions of indirect discrimination," had taken "a perfectly reasonable approach." Mr Chaudhary did not seek to renew his application in the Court of Appeal.

Manchester tribunal proceedings (STA)

45. On 25 July 2001 Mr Chaudhary presented a third originating application, this time to the employment tribunal in Manchester, complaining of direct and indirect race discrimination and victimisation in respect of the rejection of his appeal by the appeal panel. He also joined the STA, the Royal College of Surgeons and the SAC as respondents, alleging that they were liable under s 33 of the 1976 Act for aiding acts of discrimination and victimisation by the appeal panel.

BMA tribunal proceedings

46. In the meantime, on 1 March 2000, Mr Chaudhary had presented to the employment tribunal a fourth originating application complaining of direct and indirect race discrimination by the BMA. He claimed that, at various times in the period 1997−1999, they had failed to provide him with adequate support and assistance in relation to the complaints which he wished to make and did make of race discrimination by professional and regulatory bodies. That discrimination was alleged to have occurred when he applied to be entered on the new training grade of Specialist Registrar in urology.

47. The indirect discrimination alleged against the BMA took the form of a requirement or condition that, in order to be supported in discrimination claims, the member must not be alleging race discrimination by a Royal College, the STA, the SAC or a postgraduate dean (as distinct from a claim against a NHS Trust or a Health Authority.)

I. PARTICULAR PROCEEDINGS, APPEALS AND APPLICATIONS

A. BMA proceedings, appeals and application

48. On 24 September 2001, after a 15 day hearing, the employment tribunal sitting at Manchester, found in favour of Mr Chaudhary on his complaints of indirect race discrimination and victimisation against the BMA. They rejected his complaint that the BMA had discriminated against him on racial grounds by refusing to assist him in claims of race discrimination; but they found in his favour on the basis that the BMA had applied the requirement or condition that, in order to be supported in claims of discrimination, a member had not to be alleging race discrimination by a Royal College, a member of the SAC a Postgraduate Dean or the STA. A considerably smaller number of Asian members could comply with that requirement than others. Mr Chaudhary could not comply.

49. On appeal by the BMA, the employment appeal tribunal (Mr Recorder Langstaff QC presiding) held, at a preliminary hearing on 30 April 2002, that one of the grounds of appeal (i.e. perversity in finding a requirement or condition imposed by the BMA contrary to section 1(1)(b) of the 1976 Act), was not reasonably arguable and directed that the appeal on that ground should not proceed to a full hearing.

50. The perversity ground is not directed at re−opening primary findings of fact. It involves challenging inferences to be drawn from the primary findings of fact.

51. There is also a cross appeal against the tribunal's rejection of the claim by Mr Chaudhary for direct discrimination.

52. The BMA sought and were granted permission to appeal on 1 November 2002 The hearing in the Court of Appeal was listed for two days between 7 and 9 April 2003.

53. In the meantime a two day remedies hearing has taken place in the employment tribunal. By their decision, as recorded in extended reasons sent to the parties on 19 June 2002, Mr Chaudhary was awarded £814,877.41, including interest, for loss of the chance (estimated at 50%) of putting his career right by persuasion or litigation. That loss resulted from indirect race discrimination in the failure of the BMA to support his claim against Dr Platt and others. The BMA are also appealing that decision to the appeal tribunal.

54. The parties agreed to ask this court to allow by consent the BMA appeal against the limitation placed on the grounds of its appeal by the employment appeal tribunal and to make an order that the matter be remitted to the appeal tribunal for a full hearing on the merits on the basis that all the grounds of appeal, including perversity, are arguable. On consideration of the decisions of the employment tribunal and the appeal tribunal and of the skeleton arguments on the appeal, this court concluded that it was appropriate to make an order in the terms of the draft consent order.

55. This court also considered that copies of the Chairman's notes of evidence on discrete points should be produced, as requested by Mr Chaudhary and as set out in the draft order. Accordingly on 11 February 2003 the court made an order remitting the matter to the employment appeal tribunal for a full hearing of BMA's appeal. It was also indicated by the

court that it would be convenient for the BMA appeal on remedies to be heard at the same time as the appeal on the issue of liability.

56. All the remaining appeals are essentially challenges to procedural decisions in proceedings, which have not yet been decided on the merits. In each case there is an application for permission to appeal. I shall deal with each in turn.

B.The Southampton proceedings, appeal and application (2001/1894)

57. The proposed appeal in this case concerns time limits for bringing proceedings for race discrimination in the employment tribunal. It turns on whether a question of law arises from the employment tribunal's application of section 68 of the 1976 Act to the facts of the case. The period within which proceedings are to be brought is set by section 68 as follows−

"(1) An employment tribunal shall not consider a complaint under section 54 unless it is presented to the tribunal before the end of−

(a) the period of three months beginning when the act complained of was done; or

(b) [not material]

(6) A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(7) For the purposes of this section−

(a) [not material]; and

(b) any act extending over a period shall be treated as done at the end of that period; and

(c) a deliberate omission shall be treated as done when the person in question decided upon it;

and in the absence of evidence establishing the contrary a person shall be taken for the purposes of this section to decide upon an omission when he does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done."

58. In Extended Reasons sent to the parties on 25 June 1999 the employment tribunal sitting at Southampton held, on a preliminary point considered at hearings (which started in July 1998, were adjourned in September 1998 and were not finally concluded until the end of March 1999), that all the claims for race discrimination against all the respondents in respect of the refusal of entry to the Specialist Registrar grade were at least 7 months out of time; that there was no act extending over a period within section 68(7) of the 1976 Act; and that it was not just and equitable to extend time under section 68(6).

59. The tribunal accepted the evidence of Professor Temple that he did not make any decision on the application of Mr Chaudhary for Specialist Registrar status, so that the letter written by him on 20 November 1997 (i.e. within the period of three months before the issue of the proceedings) could not be relied on as an act of discrimination for which the respondents could be held liable. He was not in a position to alter anything. The formal process had already taken place. He was merely giving his own opinion as the Special Adviser. He was simply trying to help.

60. The tribunal went on to hold that there was no act extending over a period as the acts relied on as discrimination did not constitute the maintenance or operation of a scheme extending over a period or the application of a policy, rule or practice extending over a period.

61. In refusing to extend the time the tribunal accepted the evidence of Mr Chaudhary about Mr Malkan telling him on 25 October 1997 about his claim in the employment tribunal for racial discrimination. The tribunal concluded that there was no proper explanation for the delay in presenting an application some 7 months out of time. Mr Chaudhary had been kept fully informed of developments by Dr Platt from April 1996 onwards. He had continued to receive advice and assistance from him after the initial decision and after the appeal had been heard. He had also received advice from the BMA, who were contending on his behalf that his post in North Manchester did qualify him for entry into the Specialist Registrar grade. Even after his contact with Mr Malkan on 25 October 1997, which he had not mentioned in his originating application, he had not presented his application until 2 December 1997. The tribunal were not certain that the "claim is a very strong one," adding, however, that the delay had not prejudiced either party in the preparation and conduct of the trial. On balance they considered that it was not just and equitable to extend the time.

62. In a judgment delivered on 19 July 2001 the employment appeal tribunal (Miss Recorder Elizabeth Slade QC presiding) dismissed Mr Chaudhary's appeal on the ground that the employment tribunal did not err in law. The appeal tribunal held (paragraph 16) that, whether Mr Chaudhary's claims were regarded as of direct discrimination or, as is more likely, of indirect discrimination, they were founded on the *application* of allegedly discriminatory rules on admission to Specialist Registrar status to his case. In those circumstances the employment tribunal were entitled to conclude that the matters complained of were not acts extending over a period and that time ran from the dismissal of Mr Chaudhary's appeal, that being the last decision taken on his application (paragraph 20). They also held (paragraph 23) that reliance on Professor Temple's letter did not assist Mr Chaudhary on time limits, as he took no decision on Mr Chaudhary's application for Specialist Registrar status. As for the tribunal's refusal to extend time, the appeal tribunal concluded that the employment tribunal had not erred in their approach to the exercise of their discretion nor was the decision perverse.

63. Mr Chaudhary sought permission to appeal. Mr Hendy QC applied, on his behalf, to amend his revised grounds of appeal to re−introduce the question whether this is a case of an act extending over a period. The point was taken in the employment tribunal, in the appeal tribunal and in the grounds of appeal as originally drafted. Through an apparent oversight it was omitted from the revised grounds. I would allow the amendment to be made. Adequate notice was given of the intention to apply for permission to amend. The respondents were not prejudiced by it. It was the main ground relied upon in respect of the claim for indirect discrimination.

64. It was also contended that the tribunal erred in law in finding that Professor Temple's letter written within the period of three months before the presentation of the originating application was not a decision in relation to Mr Chaudhary, as his involvement was not part of the process; and that the tribunal erred in law in refusing to exercise their discretion to extend the time limits under s 68(6).

65. I would only grant permission to appeal on the continuing act point, but I would dismiss the appeal on that point. On the other two points I conclude that an appeal has no real prospect of success and would therefore refuse permission to appeal.

Act extending over a period

66. I agree with the conclusion of the tribunal, which was upheld by the appeal tribunal, that Mr Chaudhary's complaint of race discrimination was not of an act extending over a period. His complaint of indirect discrimination was based on the application to his case of the requirement or condition that the Registrar post, held by Mr Chaudhary at Manchester, should have been one that was approved by the SAC. That requirement or condition was last applied to him when his appeal against the decision of the Postgraduate Dean, Dr Platt, was dismissed by the Appeal Committee. It held that the Manchester post did not entitle him to transition to the new Specialist Registrar grade, as it was not recognised by the SAC. The dismissal of the appeal was formally notified to Mr Chaudhary on 7 February1997. Although the requirement or condition may have continued in existence for the purpose of being applied to appeals by other Registrars seeking entry into the new grade, there was no continuing *application* of the requirement or condition to Mr Chaudhary in the period of three months prior to the issue of his proceedings. The period during which the condition or requirement was applicable to Mr Chaudhary's application for transition to the Specialist Registrar grade had ceased to operate when his appeal against refusal was decided. That was well before the three month period prior to the presentation of his originating application.

67. As for the authorities cited, this case is covered by the reasoning of this court in Rovenska v. General Medical Council [1998] ICR 85 at 94 based on the wording of section 1(1)(b) of the 1976 Act that indirect discrimination occurs when a person "applies" to another a discriminatory requirement or condition to his or her detriment. Cases such as Rovenska and the instant case, in which applications are made for registration by regulatory authorities and are rejected, are distinguishable from the cases in which an employer continuously applies a requirement or condition, in the form of a policy, rule, scheme or practice operated by him in respect of his employees throughout their employment: see Barclays Bank plc v. Kapur [1991] ICR 208; Cast v. Croydon College [1998] ICR 500 at 515B; Owusu v. London Fire and Civil Defence Authority [1995] IRLR 574.

Professor Temple's Role

68. I agree with the appeal tribunal that no question of law arises from the decision of the employment tribunal that Professor Temple's letter of 20 November 1997 did not constitute a decision on Mr Chaudhary's application to enter the Specialist Registrar grade, which would amount to a one off discriminatory act and would mean that the proceedings were brought in time. The employment tribunal were entitled to accept the evidence of Professor Temple and to find as a fact that he did not make a new decision on Mr Chaudhary's application.

Refusal to extend Period

69. I also agree with the appeal tribunal that no question of law arises from the refusal of the employment tribunal to exercise their discretion under s 68(6) to extend the period. Many detailed points on this ground of appeal were made in the written submissions to the effect that the employment tribunal had failed to take into account "all the circumstances" as required under s 68(6). It was submitted in the skeleton argument that they had failed to take into account Mr Chaudhary's state of knowledge and his explanation for the delay until 2 December 1997 in issuing proceedings. It was also submitted that they had wrongly taken into account irrelevant factors, such as the advice obtained by Mr Chaudhary from Dr Platt and the BMA, the fact that he had not referred in his originating application to the knowledge obtained from Mr Malkan about his claim for race discrimination and their perverse view that they were not certain that his claim was "a very strong one", when in fact it was strong. I do not propose to deal in detail with each of these criticisms, as most of them were not pursued at the hearing of the appeal. Mr Hendy concentrated on the point that the tribunal had relied on the fact that the effect of the knowledge obtained from Mr Malkan was not referred to in the originating application and on the view the tribunal had formed on the merits of the claim. I have reached the conclusion that there is insufficient substance in these two points to entitle this court to conclude that the balancing exercise conducted by the tribunal in the exercise of their discretion was vitiated by an error of legal principle or was plainly wrong. For very much the same reasons as were given by the appeal tribunal in their judgment, I would not interfere with the tribunal's exercise of discretion on this point.

C. The Manchester proceedings and appeal (2002/0121 and 2002/0122)

70. These appeals concern abuse of process in the shape of Mr Chaudhary bringing proceedings in the employment tribunal in Manchester against parties who were already respondents to his Southampton proceedings (Dr Platt, the Department of Health and the NHS Executive HQ), allegedly raising matters which were the subject of the Southampton proceedings. The Manchester proceedings included a complaint of discrimination based on the decision of the STA and on Dr Platt's letter of 15 December 1998, both of which post−dated the commencement of the proceedings in the Southampton employment tribunal on 2 December 1997.

71. In extended reasons sent to the parties on 21 July 2000 the chairman of the employment tribunal (Mr CJ Chapman), sitting alone at Manchester, refused to strike out as an abuse of process Mr Chaudhary's claims against those respondents.

72. He held that the Southampton proceedings had only determined the time limit issue; that there had been no final determination of the Southampton proceedings on the merits; that it could not be decided, without hearing evidence, whether Dr Platt's letter of 15 December 1998, which was not a matter referred to in the Southampton proceedings, constituted a reconsideration or a fresh determination of Mr Chaudhary's application; that Mr Chaudhary had a choice between applying to amend the Southampton proceedings and starting fresh proceedings based on the letter of 15 December 1998; and that exercising his choice for the latter course was not an abuse of process. There was no cause of action or issue estoppel. He dismissed the respondents' application to strike out the proceedings which invoked the principle in Henderson v. Henderson requiring the parties to litigation, in tribunals as well as in ordinary courts, to bring forward their whole case at the same time. Unless there are

special circumstances, the parties are prevented from re−opening the same subject of litigation in respect of a matter which might have been brought forward in the earlier proceedings.

73. In a judgment delivered on 20 December 2001 the employment appeal tribunal (HHJ Peter Clark presiding) dismissed the appeal. The appeal tribunal found certain errors of law in the employment tribunal's decision but, at the invitation of the parties and to save further delay and costs, heard the strike out applications *de novo* rather than remit the case to the employment tribunal for a re−hearing. They concluded that, adopting the approach of the House of Lords in the recent case of Johnson v. Gore−Wood [2001] 2 WLR 72, the Manchester proceedings were not an abuse of process. The issuing of a fresh complaint based on Dr Platt's letter of 15 December 1998, rather than applying for permission to amend the existing Southampton proceedings, was a permissible option open to Mr Chaudhary on 23 December 1998. If the time limit defence in the Southampton proceedings had failed, the two sets of proceedings could have been combined for a full merits hearing, No additional expense or inconvenience had been caused to the respondents, because the time limit issue in the Southampton proceedings would have been separately heard, with or without an amendment adding the Manchester complaint.

74. The NHS Executive HQ, the Department of Health and Dr Platt sought permission to appeal. They focused on the decision of the appeal tribunal and sought an order remitting the matter to the appeal tribunal or to the employment tribunal for a fresh determination. Although Dr Platt was separately represented, his counsel adopted the arguments advanced on behalf of the NHS Executive HQ and the Department of Health (which are both part of the same organisation and accept vicarious liability for the acts of Dr Platt) by Miss Monica Carss−Frisk QC and Miss Jane Collier.

75. I would refuse to grant permission, as the appeal has no real prospect of success. The appeal tribunal rightly dismissed the appeal against the refusal of the employment tribunal to strike out the Manchester complaint as an abuse of process.

76. At all levels the question of abuse of process has been argued on paper and orally more elaborately than was ever warranted in the circumstances of the case. In my judgment, the application to strike out for abuse of process was a piece of overkill in a straightforward procedural situation, which could have been appropriately resolved by routine and inexpensive case management procedures. The pursuit of the unsuccessful application to a first tier of appeal was surprising and it failed. The attempt to pursue it to a second tier of appeal is unjustifiable.

77. Further, in the light of the decision against Mr Chaudhary on the Southampton Appeal, the application to strike out time barred claims for abuse of process no longer has any practical importance, save on the question of costs. No useful purpose would be served by granting permission to appeal. For these reasons it is unnecessary to deal with the arguments on this appeal in the same detail as they were debated below.

78. The essence of the argument on the application for permission is that the employment tribunal made errors of law, as was recognised by the appeal tribunal, and that, in hearing the matter *de novo* , the appeal tribunal fell into other errors of law.

79. The position was that, at the time when Mr Chaudhary presented his application to the Manchester tribunal (23 December 1998), it was open to him to apply to amend the Southampton proceedings to raise allegations of fresh causes of action, which post−dated the institution of those proceedings. It was submitted that it was not a permissible course of action for Mr Chaudhary to present a fresh complaint, when he was faced with a jurisdictional point in the Southampton proceedings which, if successful, would dispose of the whole cause of action. The presentation of the Manchester complaint was a second bite at the cherry. It was precisely the type of conduct which the principle in Henderson v. Henderson (1843) 3 Hare 313, as considered by the House of Lords in Johnson v. Gore−Wood [2001] 2 WLR 72 and by this court in Divine−Bortey v. Brent London BC [1998] IRLR 525, is designed to prohibit, with its inevitable risk to the applicants of duplication of costs, time and effort. All the matters raised in the Manchester proceedings could have been resolved at the same time as the preliminary time limit point in the Southampton proceedings.

80. It was submitted that, as well as falling into errors on detailed points of law, the tribunal and the appeal tribunal had fatally failed to take into account the public interest in the finality of litigation, the need to avoid a multiplicity of litigation and the principle that a party should not be vexed twice in the same matter. If they had taken those matters into account, they would have concluded that Mr Chaudhary's conduct in presenting the Manchester complaint was an abuse of process: there was no good reason for his decision to present a second complaint, instead of applying to amend the first complaint in the Southampton tribunal, which he *could* have done, even though the letter of 15 December post−dated the Southampton proceedings; the Manchester complaint was intimately connected with the events, which were the subject of the Southampton complaint, rather than with the other Manchester proceedings against the STA and others; the preliminary issue as to whether Dr Platt made a new decision in his letter of 15 December 1998 could have been determined at the same time as the preliminary time point in Southampton, where a similar point arose on Professor Temple's letter of 20 November 1997 and was awaiting the decision of the tribunal; abuse of process did not require any element of blame or dishonesty; and the issue of the Manchester complaint posed the clearest possible risk of prejudice to the applicants in terms of duplication of evidence, cost, waste of time and inconsistent findings and decisions arising from a multiplicity of proceedings.

81. As for the relevant principles of law I agree with the appeal tribunal that the relevant point of time at which to consider whether proceedings are an abuse of process in this case is the date when they were instituted (23 December 1998); that the principle in Henderson v. Henderson is not limited to cases in which there has been a full hearing on the merits; and that it was open to the Southampton tribunal, if an application to amend had been made, to permit amendment of the complaint to raise allegation post−dating the original complaint.

82. As for the application of the principles, I conclude that, in all the circumstances of this case, the chairman of the employment tribunal was entitled to conclude that Mr Chaudhary's conduct in presenting the Manchester complaint was not an abuse of process. In reaching that conclusion I must not be taken as necessarily agreeing with all the legal and factual reasons given by the employment tribunal and by the appeal tribunal for reaching their respective decisions. The important point is that, as pointed out by Lord Bingham in Johnson v. Gore−Wood at p. 90A−F, it is not appropriate to adopt

> "×too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private

> interests involved and also takes account of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

83. On that approach I would regard the appellant's submission that this is a case of abuse of process because Mr Chaudhary could, but did not, apply to the Southampton tribunal for permission to amend his existing proceedings by introducing into them the matters complained of in the Manchester proceedings, as too dogmatic an approach to the relevant question. It would be a disproportionate response to treat the institution of the Manchester proceedings as an abuse of process. The potential risks posed to the public interest and to the private interests of the applicants could be readily overcome by sensible case management decisions, which it was open to the applicants to request and to the chairman to make: for example, an order staying the Manchester proceedings pending the determination of the preliminary time limit point in the Southampton proceedings; and, depending on the outcome of that preliminary issue, making an order for the consolidation of the two sets of proceedings and giving directions for a full merits hearing.

D. The Manchester proceedings (STA) and appeal

84. This appeal concerns the extent of the jurisdiction of the employment tribunal to entertain complaints of acts of race discrimination under section 12 of the 1976 Act. Is that jurisdiction excluded under s 54(2) of the 1976 Act in view of the statutory jurisdiction of the appeal panel in respect of decisions of the STA?

85. On this question I would grant permission to appeal on the ground that a point of some difficulty and general importance is involved. It is the most difficult question raised in all of Mr Chaudhary's tribunal proceedings. For the reasons given below, I would, however, dismiss the appeal.

86. Mr Chaudhary's complaint is of race discrimination in the refusal of the STA to enter him on the Specialist Register. His case is that the criteria by which the STA assessed his application and the application of the criteria involved unlawful discrimination on the ground of race and victimisation.

87. In extended reasons sent to the parties on 28 September 2000 the chairman of the employment tribunal (Mr CJ Chapman), sitting alone at Manchester, held that the tribunal had no jurisdiction to hear the complaint of race discrimination against the STA and other respondents. The decision was based on sections 12 and 54(2) of the 1976 Act. The employment tribunal held that the appeal to the STA appeal panel was an appeal under an "enactment" within section 54(2). The result was to exclude the tribunal's jurisdiction to entertain a complaint of race discrimination under section 12. It was held that there was no ambiguity in s 54(2) so as to require consideration of Article 6(1) of the European Convention on Human Rights in the process of interpretation.

88. In a judgment delivered on 20 November 2001 the employment appeal tribunal (HHJ Peter Clark presiding) dismissed Mr Chaudhary's appeal, holding that the jurisdiction of the employment tribunal was excluded by section 54(2). They held that the right of appeal to the STA appeal panel derived from Article 13 of the 1995 Order, which was made under s 2(2) of the European Communities Act 1972. The 1995 Order was an "enactment" within s 54(2), which term, on the authorities, encompasses subordinate, as well as primary, legislation.

89. Mr Chaudhary sought permission to appeal. On 5 July 2002 the application was adjourned to the full hearing.

90. The jurisdiction point turns on the interpretation of section 54 of the 1976 Act which provides−

(1) A complaint by any person ("the complainant") that another person (" the respondent")−

(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part II [Discrimination in the Employment Field]; or

(b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination against the complainant,

may be presented to an employment tribunal.

(2) Subsection (1) does not apply to a complaint under section 12(1) of an act in respect of which an appeal, or proceedings in the nature of an appeal, may be brought under any enactment,×"

91. Section 12 is in Part II of the 1976 Act and is concerned with "Qualifying bodies." It provides−

"(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."

92. It is common ground that the STA is a "qualifying body " within section 12.

93. The provisions of the 1995 Order, as amended, are also relevant. Article 12, as amended, provides−

" (1) A person is entitled to have his name included in the specialist register if he applies to the Registrar of the GMC×and satisfies him−

×××××..

(b) that he falls within paragraph (2).

(2) A person falls within this paragraph if−
×××××××.

(c) he has satisfied the STA that−

(i) he has been trained in the United Kingdom in [a medical speciality other than general practice] and that training complied with the requirements relating to training in that speciality current in the United Kingdom at the time he undertook it, or

(ii) he has qualifications awarded in the United Kingdom in such a speciality which, together with any experience which he has in the speciality in question and any further training which he has undertaken at the recommendation of the STA under (2B), give him a level of expertise equivalent to the level of expertise he might reasonably be expected to have attained if he had a [Certificate of Completion of Specialist Training] in that speciality."

94. There is a right of appeal to the STA appeal panel against a refusal to register under Article 12.

95. On 24 January 1997 the STA promulgated Regulations Governing Appeals pursuant to Article 13 of the 1995 Order (the STA appeals procedure.) Article 13 provides−

" (1) The STA shall secure that−
(a) a person to whom it refuses to award a CCST;
(b) a person who fails to satisfy the STA that he is an eligible specialist in accordance with Article 9(2) or (3); and

(c) a person who fails to satisfy the STA of the matters referred to in Article 8(4)(b) or 12(2)(c),

has the right to appeal against its decision to a panel of independent persons (in this article referred to as an "appeal panel") which shall be convened by the STA as soon as practicable

to reconsider the question and determine whether or not the appellant should be awarded a CCST or should so satisfy the STA (as the case may be)."

(2) The STA shall determine and publish the procedure governing its selection of the members of appeal panels and the conduct of appeals.

(3) The STA shall secure that an appeal panel gives reasons for its determination."

96. Under the STA Appeals Regulations the appeal panel consists of a legally qualified chairman and two Fellows of medical Royal Colleges and Faculties, other than the College responsible for the speciality of the appellant. The members of the panel are nominated by a legally qualified Director of Appeals, who is under a duty "to strive to maintain the impartiality of the appeal system." The Fellows volunteer for the duty. They are unpaid, though they are re−imbursed by the STA for their travelling expenses. Oral hearings may take place, to which the rules of natural justice apply. The parties may be represented. Evidence may be given. The function of the appeal panel in hearing an appeal of the kind brought by Mr Chaudhary is to reconsider the decision of the STA and determine whether he is an eligible specialist. Reasons must be given for decisions and rulings.

97. It is common ground that the crucial question of the correct interpretation of section 54(2) must be resolved in accordance with ordinary principles of domestic law. The alleged act of discrimination occurred before the Human Rights Act 1998 (the 1998 Act) came into force on 2 October 2000. Section 3(1) of the 1998 Act was not in force at the date of the decision of the STA (28 September 1998) nor was it in force at the date of the decision of the employment tribunal, although it had come in to force before the decision of the STA appeal panel dismissing the appeal. The fact that section 3(1) came into force before the hearing of the appeal by the employment appeal tribunal and by this court does not make it applicable to the relevant question, which is whether the employment tribunal erred in law in their interpretation of section 54 in the decision sent to the parties on 28 September 2000. Section 3 does not operate retrospectively so as to apply to the interpretation of section 54(2) at the time Mr Chaudhary's cause of action arose or when it was decided by the employment tribunal. As was made clear by the House of Lords in R v. Lyons [2002] 3 WLR 1562 an appellate court, in judging the correctness of a decision under appeal, refers to the law applicable at the date of the trial. This case does not fall within the exceptional cases of retrospectivity covered by s 22(4) of the 1998 Act.

98. It is also common ground that before the 1998 Act the principles of statutory interpretation applicable with regard to the Convention were as stated by Diplock LJ in Salomon v. Commissioners of Customs & Excise [1967] 2 QB 116 at 143

> "×. there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specified Treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred."

99. In R v.. Secretary of the Home Department ex parte Brind [1991] AC 696 at 747H Lord Bridge said

> "×it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. "

100. Thus, although the European Convention was an international treaty, which did not confer rights on individuals in domestic law, there was a presumption in favour of interpreting English law in a way which did not place the UK in breach of the obligations of the Crown under the Convention. The key question is whether section 54(2) is ambiguous in the sense that it is reasonably capable of more than one meaning. If it is ambiguous, the court should prefer the interpretation which conforms to the requirements of Article 6(1) of the Convention. Mr Hendy QC contends that the chairman of the employment tribunal was wrong in holding that s 54(2) is unambiguous and he failed to interpret it accordance with the pre−1998 principles already cited. He contended that s 54(2) is ambiguous in two significant respects.

101. First, the expression "complaint of an act" in subsection (2) is reasonably capable of referring to an act of racial discrimination, as referred to in subsection (1) and in section 12, as distinct from an act of the STA in rejecting an application for registration on the ground that it was not satisfied of the matters of qualifications, experience and training stated in Article 12 (2) (c) of the 1995 Order, as amended. He submitted that, under the appeal procedure, an appeal may only be brought to the appeal panel on a question under Article 12. A complaint of race discrimination under section 12 is not within the jurisdiction of the appeal panel. Section 54(2) does not therefore apply.

102. Secondly, " enactment" is a flexible word and, as used in the context of section 54(2), it is reasonably capable of referring solely to primary legislation, as distinct from extending to instruments and orders made under primary legislation.

103. If, Mr Hendy submitted, section 54 is ambiguous on either point, the court should adopt a purposive interpretation, so as not to exclude the jurisdiction of the employment tribunal. That interpretation would be more consistent with the Convention and, in particular, with the procedural requirements of Article 6(1) of the Convention that there should be a right of access to an impartial and independent tribunal or court with jurisdiction to grant an effective remedy to a victim of race discrimination. The remedies of compensation, declaration and recommendation would be within the power of an employment tribunal , but were not within the power of the appeal panel.

104. With the assistance of Mr Hendy QC and Mr Havers QC on this difficult question of interpretation I have reached the conclusion that the employment tribunal and the employment appeal tribunal correctly decided that section 54(2) is unambiguous. The employment tribunal have no jurisdiction to hear Mr Chaudhary's complaint of race discrimination.

105. In Khan v. General Medical Council [1994] IRLR 646 (a case of alleged indirect race discrimination in the application of criteria for registration as a medical practitioner by the GMC, where primary legislation provided for a right to apply for a review by a Review Board of a refusal to register) at paragraph 30 Hoffmann LJ identified the purpose of section 54(2):

> "[Section 12 (1)] concerns qualifications for professions and trades. Parliament appears to have thought that, although the industrial tribunal is often called a specialist tribunal and has undoubted expertise in matters of sex and racial discrimination, its advantages in providing an effective remedy were outweighed by the even greater specialisation in a particular field or trade or professional qualification of statutory tribunals such as the Review Board, since the Review Board undoubtedly has a duty to give effect to the provisions of s12 ×.This seems to me a perfectly legitimate view for Parliament to have taken. Furthermore, s54(2) makes it clear that decisions of the Review Board would themselves be open to judicial review on the ground that it failed to have proper regard to the provisions of the Race Relations Act. In my view, it cannot be said that Medical Act 1983 does not provide the effective remedy required by European law"

106. Neill LJ said at paragraph 26

> " It seems to me quite clear that s54 provides that where there is an alternative remedy provided by *statute* , that remedy excludes the remedy under s 54(1)."

107. Waite LJ agreed with both judgments.

108. On a purposive approach the "act " in section 54(2) of which complaint is made under section 12 is, in this case, that of the STA in refusing Mr Chaudhary's application for registration: it is not the act of the appeal panel in rejecting the appeal, against which there is no appeal. As Hoffmann LJ said in Khan (at paragraph 35)

> " Section 54(2) distinguishes between an act under s 12(1), in respect of which complaint is made, and an appeal in respect of that act. In my judgment, it follows that for these purposes the appeal cannot itself be the act in respect of which complaint is made."

109. An appeal to the appeal panel may be brought against the STA's act of refusal of registration, including cases in which the appellant makes allegations of direct or indirect discrimination or victimisation in relation to the act complained of. Mr Havers accepted that, on the authority of Khan and R v. Department of Health ex p Ghandi [1991] ICR 805, the appeal panel have a duty to give effect to the provisions of section 12 of the 1976 Act in deciding the question whether an applicant satisfied the requirements of Article 12 of the 1995 Order, as amended. I am unable to accept Mr Hendy's submission that the appeal panel's jurisdiction in respect of race discrimination is limited to consideration of the exercise of a discretion alleged to be flawed by racial discrimination, such as was alleged in the case of the determination of an "administrative" appeal to the Secretary of State in

Ghandi: see p.813B−E. If, for example, a question is raised as to whether the application of a particular requirement was indirectly discriminatory on the ground of race or sex, it would be necessary for that to be determined in order to decide whether to grant the application. It would be unlawful for the STA or the appeal panel to apply a discriminatory requirement. Mr Havers accepted that the appeal panel is a qualifying body under s 12 of the 1976 Act and, as such, it must itself comply with the provisions of the 1976 Act. Its failure to do so would render the decision making process unlawful and amenable to judicial review by the High Court. In this case it is true that the appeal panel refused to entertain Mr Chaudhary's race complaints, but the refusal was not based on lack of jurisdiction. The appeal panel relied on procedural grounds: the complaint was raised late; it was unparticularised; and it consisted of bare assertions unsupported by any evidence. The decision of the appeal panel was unsuccessfully challenged on Mr Chaudhary's application to Sullivan J for permission for judicial review.

110. In my judgment,"enactment" in the context of section 54(2) is unambiguous. On this point I agree with the decision of both the employment tribunal and of the appeal tribunal. "Enactment" includes the subordinate legislation under which the appeal is brought (i.e. the 1995 Order). It is not confined to appeals brought under primary legislation. I cannot detect any sensible or rational purpose in restricting the operation of the section to appeals brought under primary legislation and in excluding appeals brought under subordinate legislation. The wider construction is more consistent with the rationale of section 54(2) expounded by Hoffmann LJ in Khan.

111. It is true that in a different context "enactment" has been held to refer only to primary legislation. In Rathbone v. Bundock [1962] 2 QB 260 at 273 Ashworth J said in the context of section 232 (1) of the Road Traffic Act 1960

> " ..in some contexts the word "enactment" may include within its meaning not only a statute but also a statutory regulation but, as it seems to me , the word does not have that meaning in the Act of 1960. On the contrary, the language used in a number of instances strongly suggests that in this particular Act the draftsman was deliberately distinguishing between an enactment and a statutory regulation."

112. On the other hand, the decision of this court in Allsop v. North Tyneside MBC 90 LGR 462 at 490 is an example of a case in which "enactment" in section 111 of the Local Government Act 1972 was held to cover regulations made by statutory instrument.

113. Although there are provisions in the 1976 Act in which the draftsman has distinguished between primary legislation and subordinate legislation (as, for example, in section 41) the context in section 54(2) indicates that the wider meaning was intended.

114. Other authorities on section 54(2) do not assist. The point did not arise for decision in Khan, as the main point taken was whether an application to the Review Board was "an appeal or in the nature of an appeal" within section 54(2). The Review Board in that case was established by primary legislation (i.e. the Medical Act 1983). The decision of the employment appeal tribunal in Zaida v. FIMBRA [1995] ICR 876 is unhelpful. It was held that an appeal against a decision refusing membership of FIMBRA, a financial services

self−regulating organisation, was not brought under an "enactment", such as the Financial Services Act 1986 or subordinate legislation made under that Act, but under the articles of association of Fimbra. The articles defined the constitution and jurisdiction of the appellate body. The appeal body did not derive its power from either primary or subordinate legislation. It was not a statutory appeal procedure at all, whereas the Appeal Panel is a statutory appeal procedure established by the 1995 Order, which was made under the 1972 Act.

115. It is unnecessary to reach conclusions on the detailed submissions that the exclusion of the jurisdiction of the employment tribunal is incompatible with Article 6(1). In summary, it was contended by Mr Hendy that (a) the appeal panel is not "established by law" within the meaning of Article 6(1), as its basic jurisdiction and the formal framework of its organisation were not laid down by primary legislation (Zand v. Austria [1978] 15 DR 70 at paragraph 69); (b) it is not an independent and impartial tribunal within Article 6, as interpreted in Langborger v. Sweden [1990] 12 EHRR 425 at paragraph 32, as the chairman and members of the appeal panel are nominated by the Director of Appeals (who is appointed by the STA), the remuneration of the Director and the chairman is paid by the STA, the members have no guaranteed term of office, there are insufficient procedural safeguards capable of ensuring that the STA do not bring pressure to bear on the members of the appeal panel and the framework of the appeals does not present an appearance of independence to the fair minded observer; and (c) that s 54(2), as interpreted by the employment tribunal and the employment appeal tribunal, purports to restrict or exclude civil rights of access to an employment tribunal in a manner which is impermissible under Convention law, unless the restriction pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In this case the effect of excluding access to an employment tribunal is that effective judicial remedies normally available for complaints of discrimination (see ss 56 and 57 of the 1976 Act, in particular the right to recover compensation) were unavailable to Mr Chaudhary. The appeal panel had no power to award such remedies. The appeal panel had other disadvantages when compared to the employment tribunal: the appellant was required to pay a fee of £1,000 whereas no fee is payable for an originating application in an employment tribunal, and no questionnaire procedure, like that under s 65 of the 1976 Act, was available to the appellant.

116. Although it is unnecessary to reach a decision on those points in this case, it should be recorded that Mr Havers made an important and, in my judgment, correct concession. He accepted that judicial review of a decision of an appeal panel would be available, if it failed to have proper regard to the provisions of the 1976 Act when allegations of race discrimination were made on an appeal: see Khan at paragraph 30. He submitted that the availability of judicial review of the decision of the appeal panel by a court, which is beyond question impartial and independent, was sufficient in all the circumstances to secure compliance with the requirements of Article 6(1): see R (Alconbury Developments Ltd) v. Secretary of State for the Environment [2001] 2 WLR 1389. Where a Convention right is in play a greater degree of intensity of review may be appropriate: see R (Daly) v. Home Secretary [2001] 2 WLR 1622 at 1636B−C. An application for registration essentially involves a determination of status rather than a claim for compensation and an error of the appeal panel on a discrimination point could be corrected on an application for judicial review in a manner similar to the jurisdiction of the employment appeal tribunal to correct errors of law in the decisions of employment tribunals. Reference was also made in written submissions after the conclusion of the oral hearing to the important recent decisions of the House of Lords in Runa Begum v. Tower Hamlets LBC [2003] 2 WLR 388 and Matthews

v. Ministry of Defence [2003] 2 WLR 435 on the effect of Article 6(1), the availability of judicial review and the distinction between a procedural bar and the extinction of a substantive right.

117. I should also point out, however, that Mr Hendy did not accept that the availability of judicial review of decisions of the appeal panel was a sufficient cure for the defects in the appeal panel. He submitted that the judicial review process only had a limited scope: it would not involve a re−hearing of the facts; it would not determine whether the criteria applied by the STA were discriminatory; and it could not, by simply striking down the findings of the appeal panel, remedy the lack of independence of the appeal panel. Nor could compensation be awarded to the appellant, who was also exposed to a much higher degree of risk in respect of costs than an applicant in an employment tribunal

118. Mr Havers also contended that, in any event, the STA appeals procedure complied with the requirements of Article 6(1): it was established by law, its authority being expressly derived from Article 13(1) of the 1995 Order; the appeal panel is independent and impartial, consisting of persons independent of the STA and of the appellant, including a legally qualified chairman; the Director of Appeals, who has free−standing duties, including the appointment of members of the panel, is independent and legally qualified; the procedure of the appeal panel is judicial or quasi−judicial in character, with its provisions for representation, public hearings governed by the rules of natural justice, the attendance and cross examination of witnesses and the requirement of reasoned decisions, being most, if not all, the procedural safeguards to be found in the ordinary courts.

119. Finally, a point was taken on behalf of Mr Chaudhary that the exclusion of the right of access to the employment tribunal is incompatible with Article 39 (formerly Article 48) of the EC Treaty, which provides for the free movement of workers within the Community. EC Directive 93/16 made pursuant to Article 40 of the EC Treaty was designed to facilitate the free movement of doctors and the mutual recognition of their formal qualifications. The 1995 Order implemented the Directive. The discrimination of which Mr Chaudhary complains affects his rights under Article 39, because he cannot move freely within the Community, unless he secures from the STA recognition of his qualifications and experience. It was submitted that the interpretation of s 54(2), which prevents him from presenting a complaint of race discrimination to an employment tribunal, is incompatible with the principle that the procedural rules applicable to actions to enforce rights conferred by Community law should not be less favourable than those applicable to similar actions of a domestic nature: see Preston & Ors v. Wolverhampton Healthcare NHS Trust & Ors [2000] ICR 961.

120. I would reject the submission of incompatibility on the ground that there is no discrimination between doctors of Member States on the ground of nationality. The procedural rules governing appeals from the STA apply to all those doctors who make applications to the STA. They are not less favourable to some appellants than to others. The non−availability of the right to complain of race discrimination to an employment tribunal applies to all doctors, regardless of their nationality, who have applied to the STA, have appealed unsuccessfully to the appeal panel and complain of discrimination on the ground of race.

IV. THE OUTCOMES: A SUMMARY

121. In summary, I would dispose of the various applications and appeals as follows:

(1) BMA appeal (2002/1587)
I would make an order in the terms of the draft consent order agreed between the parties and approved by the court on 11 February 2003.

(2) Southampton proceedings application (2001/1894)
I would refuse Mr Chaudhary's application for permission to appeal on the ground that there is no real prospect of success in the appeal against the decision of the employment tribunal that the originating application was presented by Mr Chaudhary out of time or in their refusal to exercise its discretion to extend the time. I would grant permission to appeal on the continuing act point, but I would dismiss the appeal, as there was no error of law on that point in the decision of the employment tribunal.

(3) Manchester proceedings applications (2002/0121 and 2002/0122)
I would refuse the applications for permission to appeal by the Secretary of State and by Dr Platt on the ground that there is no real prospect of success in appealing against the ruling of the Manchester employment tribunal that the proceedings instituted by Mr Chaudhary were not an abuse of process.

(4) Manchester proceedings (STA) application (2001/2717)
I would grant permission to appeal to Mr Chaudhary, but I would dismiss the appeal on the ground that there is no error of law in the employment tribunal's interpretation of s 54(2) of the 1976 Act or in the ruling that the employment tribunal does not have jurisdiction to entertain Mr Chaudhary's originating application.

Lord Justice Latham:

122. I agree.

Lord Justice Pill:

123. I also agree.

LORD JUSTICE MUMMERY:

124. This is a complicated case and I will give a little explanation as we go along of the various orders that the court makes in consequence of the judgment, which is a composite judgment dealing with all the cases. For the reasons given in the judgments which have been made available in draft to the various counsel in the case, the court will make the following orders:

125. In the case of 2002/1587, that is British Medical Association v Mr Chaudhary, an order has already been made in the terms of a consent order agreed between the parties. That was approved by the court at the initial hearing on 11th February 2003.

126. In the case of 2001/1894, Mr R Chaudhary v The Senate of the Royal College of Surgeons and others, the following order is made as agreed: (1) the appellant is refused permission to appeal, save on the continuing act point, but the appeal on that point is dismissed; and (2)

the appellant is to pay the costs of the respondents to be assessed on the standard basis if not agreed.

127. Next 2002/0121, the order made is first that permission to appeal is refused. There was then a dispute between the parties on which the court has received written submissions as to whether the costs which the appellant was to pay to Mr Chaudhary, the respondent in that matter, was to be assessed on the indemnity or standard basis if not agreed. In the light of the written submissions which have been put in by each side, the court has decided to accept the submissions which have been made by the appellant so the order will be, paragraph (2), the appellant is to pay the costs of the respondent Mr Chaudhary, to be assessed on the standard basis if not agreed. The arguments in support of an exceptional indemnity order are not accepted.

128. Next, 2002/0122, the same point arises in relation to costs and the court has resolved it in the same way and so the order in that case will be: (1) permission to appeal refused; and (2) the appellants are to pay the costs of the respondent, Mr Chaudhary, to be assessed on the standard basis if not agreed.

129. Next 2001/2717, this is what has been called the specialist training authority case. The order in that case is (1) that the appellant is granted permission to appeal, but the appeal is dismissed; (2) the appellant shall pay the costs of the first respondent to be assessed on the standard basis if not agreed. The court has also been asked to deal with an application in this case for permission to appeal to the House of Lords and written submissions have been placed before members of the court by each side on that question. The court has decided to refuse to grant permission to appeal to the House of Lords in 2717. It will be for Mr Chaudhary, if he so wishes, to make applications to their Lordships' house for permission to appeal.

130. That completes the orders which are made in the various appeals and applications dealt with in the composite judgment. Are there any applications from anyone who is represented today? No. Those are the orders the court makes.