



27 July 2011

## PRESS SUMMARY

**Jivraj (Appellant) v Hashwani (Respondent) [2011] UKSC 40**  
*On appeal from the Court of Appeal [2010] EWCA Civ 712*

**JUSTICES:** Lord Phillips (President), Lord Walker, Lord Mance, Lord Clarke and Lord Dyson

### BACKGROUND TO THE APPEALS

The parties entered into a joint venture agreement on 29 January 1981. Article 8 provided that any dispute arising from the joint venture should be resolved by arbitration before three arbitrators, each of whom was required to be a respected member of the Ismaili community ('the Requirement'). The Ismaili community comprises Shia Imami Ismaili Muslims and is led by the Aga Khan. The issue arising on this appeal is whether the Requirement, and/or the arbitration agreement as a whole, became void when the Employment Equality (Religion or Belief) Regulations 2003 ('the Regulations') came into force on 2 December 2003, as an unlawful arrangement to discriminate on grounds of religion when choosing between persons offering personal services.

The joint venture ended in 1988. The division of the joint venture assets was largely determined by a three man panel appointed in accordance with the arbitration agreement, but some matters remained in dispute. On 31 July 2008 Mr Hashwani's solicitors wrote to Mr Jivraj asserting that a balance of over US\$4.4m was due to him and giving notice of his intention to appoint Sir Anthony Colman, a retired judge of the Commercial Court, as an arbitrator. Sir Anthony was not a member of the Ismaili community. Mr Jivraj commenced proceedings for a declaration that his appointment was void as a breach of the Requirement. Mr Hashwani sought an order that Sir Anthony be appointed as sole arbitrator.

The High Court (David Steel J) held that the appointment of arbitrators fell outside the scope of the Regulations as they were not 'employed' or, if they were, that the Requirement fell within the exception permitted for genuine occupational requirements which it was proportionate to apply. Had he held that the Requirement was void, he would have held that the arbitration agreement as a whole was void. The Court of Appeal allowed Mr Hashwani's appeal in relation to the Regulations, finding that arbitrators were employed and that there had been unlawful religious discrimination. However, they concluded that the agreement should not be enforced with the Requirement severed from it and, accordingly, Sir Anthony's appointment was invalid ('the severance issue').

Mr Jivraj appealed to the Supreme Court in respect of the finding that the clause was void by reason of the Regulations. Mr Hashwani cross-appealed on the severance issue.

### JUDGMENT

The Supreme Court unanimously allows the appeal on the ground that an arbitrator is not a person employed under a contract personally to do work within the meaning of the Regulations, which do not therefore apply. The majority (Lord Phillips, Lord Walker, Lord Clarke and Lord Dyson) also find that the Requirement would have fallen within the exception for genuine occupational requirements if

the Regulations had applied. Lord Mance preferred not to deal with this issue as it did not arise in the light of the finding that the Regulations did not apply. The judgment of the majority is given by Lord Clarke.

## **REASONS FOR THE JUDGMENT**

The High Court judge had correctly concluded that an arbitrator was not employed within the scope of the Regulations [22]. He or she fell outside the definition of a worker laid down by the case law of the European Court of Justice and was instead an independent provider of services who was not in a relationship of subordination with the person who received the services [34][40]. The dominant purpose of the contract was not the sole test for determining employment, although it might be relevant in arriving at the correct conclusion on the facts of a particular case [39]. An arbitrator was a quasi-judicial adjudicator whose duty was not to act in the particular interests of either party [41]. The dominant purpose of the appointment, insofar as it was relevant, was the impartial resolution of the dispute [45].

The question of whether the Requirement was a ‘genuine occupational requirement for the job’ for the purposes of the exception in regulation 7(3) of the Regulations did not therefore arise. However, whether a particular religion or belief was a legitimate and justified requirement of an occupation was an objective question for the court [59]. Arbitration was more than the application of a given national law to a dispute and a stipulation that an arbitrator be of a particular religion or belief can be relevant to the manner in which disputes are resolved [61]. In this case, the judge had correctly found that the Ismaili community had demonstrated an ethos, based on religion, for dispute resolution contained within that community [68]. The test was not one of necessity. The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence [70].

The severance issue did not therefore arise [72].

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgements are public documents and are available at:**

[www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)