Neutral Citation Number: [2021] EWCA Civ 254

Case No: A2/2019/1711

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Choudhury P, Mrs K Bilgan and Mr M Worthington

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE PETER JACKSON

and

LADY JUSTICE SIMLER

- -

RICHARD PAGE **Appellant**

V

(1) THE LORD CHANCELLOR

(2) THE LORD CHIEF JUSTICE OF ENGLAND AND WALES **Respondents**

- -

Mr Paul Diamond (instructed by **Andrew Storch Solicitors**) for the **Appellant**
Ms Naomi Ling (instructed by **the Treasury Solicitor**) for the **Respondents**

Hearing dates: 3rd and 4th November 2020

- -

Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. This is one of two appeals to this Court based on the same sequence of events and with the same Appellant, Mr Richard Page. I will refer to the case in which it arises as "the magistracy case" and to the case giving rise to the other appeal as "the NHS case". The appeals were heard consecutively at the same hearing but we are giving separate judgments in each.

2. The facts giving rise to the magistracy case can be sufficiently summarised by way of introduction as follows. The Appellant, Mr Richard Page, was a magistrate on the Central Kent bench. In July 2014, while sitting as a member of the family panel, he expressed views, based on his beliefs as a Christian, about the appropriateness of the adoption of a child by a same-sex couple and declined to sign an order approving such an adoption. That led, in December that year, to him being formally reprimanded by the Lord Chief Justice and the Lord Chancellor, who are the Respondents to the appeal. On 11 March 2015 he gave an interview to the BBC repeating his views. That in turn led to further disciplinary proceedings, and on 29 February 2016 the Lord Chancellor wrote to inform the Appellant that he and the Lord Chief Justice had decided that he should be removed from the magistracy. His removal took effect from 9 March 2016.

3. On 24 March 2016 the Appellant commenced proceedings against the Respondents in the Employment Tribunal complaining that his removal constituted unlawful discrimination and/or harassment in relation to his religion or belief and/or victimisation. His complaint was heard by a Tribunal sitting at London South comprising Employment Judge Williams QC, Ms B Leverton and Mr N Shanks over four days in February 2018. By a Judgment and Reasons sent to the parties on 10 March 2018 his claims were dismissed. I should say at this stage that the Tribunal's Reasons are exemplarily full and clear.

4. The Appellant appealed to the Employment Appeal Tribunal. The appeal was permitted to proceed only as regards the victimisation claim. It was heard on 14 May 2019 by a constitution consisting of Choudhury P, Ms K Bilgan and Mr M Worthington. By a judgment handed down on 19 June the appeal was dismissed.

5. On the same date the EAT also handed down a judgment dismissing the Appellant's appeal in the NHS case, which had been heard by the same constitution in January that year. That case was brought by him against the NHS Development Authority complaining of a decision the effect of which was to preclude him from (re-) appointment as a non-executive director of the Kent and Medway NHS and Social Care Partnership Trust as a result of public statements of his views which he had made in the media following his removal as a magistrate.

6. On the appeal to this Court Mr Paul Diamond appeared for the Appellant, as he did in both the ET and the EAT. The Respondents were represented by Ms Naomi Ling, who also appeared in the EAT but not the ET (where the Respondents were represented by Mr Mathew Purchase). I have to say that Mr Diamond's skeleton argument[1] contained

[1] It is not in fact signed by Mr Diamond but he told us that he had settled it.

a good deal of material addressing questions which have nothing to do with the issues on this appeal.

7. At the conclusion of the hearing we informed Ms Ling that we did not need to hear from her and that the appeal would be dismissed. These are my reasons for that decision.

THE FACTS

8. The Appellant was appointed as a magistrate in March 1999. On his appointment he signed a "Declaration and Undertaking" in the following terms:

> "I acknowledge and undertake:
>
> - that it will be my duty to administer justice according to the law
> - that my actions as a magistrate will be free from any political, racial, sexual or other bias
> - that I will be circumspect in my conduct and maintain the dignity and good reputation of the magistracy at all times in my private, working and public life."

He also took the judicial oath by which he swore to "do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or ill will".

9. The Appellant initially sat in criminal cases, but he was in due course appointed also to the family panel. Until the matters which give rise to the present case there were no problems with his conduct as a magistrate.

10. In 2012 the Clerk to the Kent Justices, Mr Dodds, circulated an Advice Note, which the Appellant received, about magistrates' contact with the media. This stated, among other things, that the general guidance for all levels of judiciary was that they should not communicate with the media and that they should avoid public comments either on general issues or on particular cases which might cast any doubt on their impartiality. Magistrates were advised that if, nevertheless, they were considering speaking to the press they should consult the judicial press office first.

11. On 2 July 2014 the Appellant sat as part of a panel hearing a same-sex adoption application concerning a young child. The adoption was unopposed and there was a comprehensive report from a social worker in support. However, he expressed views to his fellow-magistrates which made it clear to them that he had objections to a same-sex couple adopting the child, and he declined to sign the order which the court made.

12. The Chair and the clerk to the justices who had been involved in the case communicated to Mr Dodds their concerns both about the views expressed by the Appellant and about his refusal to sign the order. Dr Taylor, the Deputy Chair of the Advisory Committee for Kent, decided that the matter raised a case to answer of judicial misconduct, and the disciplinary procedures applicable to magistrates were put in train. The procedures in question are set out in regulations made under the Constitutional Reform Act 2005. I need not give the details, save to note that the power to impose sanctions short of removal from office lies with the Lord Chief Justice, with the agreement of the Lord

Chancellor, and that the power of removal lies with the Lord Chancellor, with the agreement of the Lord Chief Justice.

13. A hearing took place before a Conduct Panel on 2 September 2014. At para. 41 of its Reasons the ET recorded that the Appellant had said to the Panel that:

> "… he knew his judicial duty was to do what was best for the child. He said that what was best for a child was being cared for by a man and a woman. That was his starting point. He argued that there had been so few same sex adoptions over such a short time that there was no reliable evidence on their outcomes".

The Panel's report also recorded him as saying:

> "A man and a woman were the natural parents or the natural family for a child and in the best interests of the child. In certain circumstances adoption by a same sex couple might be appropriate if there was no other option."

The Tribunal noted that when questioned by Mr Purchase the Appellant accepted that this was and remained his position.

14. The Panel upheld the complaint and found that the Appellant had been guilty of judicial misconduct. The essence of its reasoning was that it was wrong for him as a magistrate to make decisions on the basis of a presumption that same-sex adoption was not in the best interests of a child, rather than on the basis of the evidence before the court. It said:

> "We find that Mr Page does not appreciate the distinction between beliefs and judgment and that judgment requires that honestly held beliefs be put to one side to allow decisions to be made on the evidence put before the court."

It noted that it had given the Appellant ample opportunity to state that he had no general objection to adoption by same-sex couples but that he had declined to do so. It recommended that he receive a reprimand "to show that it is unacceptable for him to allow his religious beliefs to prevent him from acting in an unbiased and unprejudiced manner".

15. The Respondents accepted that recommendation. On 19 December 2014 the Lord Chief Justice wrote to the Appellant as follows:

> "We are seriously concerned about the level of prejudice displayed by you during this case. Despite your assertion that this was part of your decision-making process based solely on the best interests of the child, your assessment of this case was not based on evidence, but was, as you have admitted, influenced by your religious beliefs that two men could not be considered a natural family. We believe that you should have recused yourself from this particular matter because of your beliefs. Your conduct is significantly aggravated by the fact that you have failed to recognise at any stage of this investigation that discriminating against

> a couple on the grounds of their sexual orientation was both wholly inappropriate and contrary to the requirements of the Equality Act.
>
> Whilst we entirely accept that you are entitled to your personal religious beliefs, such beliefs cannot influence your judgment to the extent that this conflicts with your duties as a judicial office order to apply the law fairly and without prejudice.
>
> Your lack of insight and poor judgment are such that the Lord Chancellor and I do agree with the Conduct Panel's recommendation that you be given a reprimand. However, we also require that you receive remedial training on this before you resume sitting."

16. The Appellant received remedial training accordingly and was permitted to resume sitting.

17. In January 2015 the Appellant gave interviews to both the Daily Telegraph and the Daily Mail (the latter appearing in the Mail Online and the Mail on Sunday). It was clear from both articles that his views which had led to the reprimand were unchanged and that he believed that the reprimand was unjustified. I need not give further details, though I should record that the ET found that the way in which he characterised the grounds for the reprimand was unfair and inaccurate.

18. Following that press coverage Mr Dodds wrote to the Appellant reminding him of the Advice Note referred to at para. 10 above.

19. Mr Dodds also asked Dr Taylor whether the matter should be referred to a Conduct Panel. Dr Taylor prepared a report dated 10 February 2015. He concluded that there was a case to answer that the Appellant was guilty of misconduct but he believed that it was not of a sufficient degree to justify the convening of another Conduct Panel. Instead, he recommended that the Appellant should be referred to the Bench Chairman for advice to "take close account of the advice given to magistrates about their conduct in public and private life" and for a warning that if he failed to do so formal disciplinary proceedings would be likely to follow. The Bench Chairman spoke to the Appellant accordingly.

20. On 12 March 2015 there was an item on the *BBC Breakfast* television programme discussing a new report on workplace religious discrimination that had been published by the Equality and Human Rights Commission. The Appellant was interviewed in connection with the piece. He had made a deliberate decision not to discuss his participation with the judicial press office or the Bench Chairman before proceeding.

21. The reporter introduced him as a magistrate in Kent who worked in the family court and who had "ahead of an adoption hearing with a gay couple … expressed a view that resulted in him being suspended and disciplined". The Appellant was then shown speaking. He said:

> "My responsibility as a magistrate, as I saw it, was to do what I considered best for the child and my feeling was therefore that it would be better if it was a man and a woman who were the adopted[2] parents."

That statement has been referred to in these proceedings as "the broadcast words" or "the broadcast statement". The reporter then continued:

> "After diversity training, Richard was reinstated but says he finds it hard that his religious beliefs as a Christian were seen as prejudice. The Equality and Human Rights Commission heard from many Christians who felt pressured to keep their religion hidden at work or felt discriminated against when it came to wearing religious symbols or expressing their beliefs."

22. Dr Taylor prepared a further report arising out of the Appellant's appearance on *BBC Breakfast*. As to this, the ET found, at para. 65 of its Reasons:

> "Dr Taylor found that there was a case to answer within the terms of rules 31 and 36[3] of the 2014 Magistrates Rules and recommended that the Conduct Panel be appointed to consider the complaints further. He said Mr Page appeared to have wilfully disregarded the advice and guidance previously given to him. He observed that the developments in the media could be construed as seeking to bring pressure on senior members of the judiciary to revoke their earlier decisions and, as such, this could be construed as conduct bringing the Magistracy into disrepute. Mr Diamond probed Dr Taylor's reasons for determining there was a case to answer. Dr Taylor stressed that he was particularly concerned that Mr Page had not taken advice before speaking to the media. He also confirmed that his reasons were threefold, as set out at [29] of his witness statement, namely (a) Mr Page had failed to follow the advice he had been given regarding contact with the media; (b) the consequence of this was publicity negative to the Respondents, which could bring the judiciary into disrepute; and (c) the apparent breach of his judicial oath. In re-examination, Dr Taylor indicated that as regards (b), his concern related to the public nature of the criticism of the Respondents, rather than the content of the criticism. The Tribunal accepted that Dr Taylor gave a genuine and accurate account of his reasons."

23. The matter was accordingly considered by another Conduct Panel. It found that the Appellant was guilty of misconduct (a) because he had wilfully ignored Mr Dodds' earlier Advice Note and (b) because the broadcast words had brought the magistracy into disrepute. As regards the latter point, at para. 67 of its Reasons the Tribunal recorded the evidence of a member of the panel, Mr Baker, as follows:

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2 The transcript says "adopted", but I suspect that the Appellant said "adoptive".

3 These are procedural provisions and do not themselves define any particular kind of misconduct.

> "… Mr Baker did not accept Mr Diamond's proposition that the broadcast statement could not conceivably bring the magistracy into disrepute. He said that Mr Page was a magistrate, whose role it was to uphold the law, and his remarks on the broadcast could cause those seeing it to consider he would be motivated by factors other than applying the law and the evidence in the particular case. ... He also said that Mr Page's conduct had raised a broader issue, not confined to the Family Panel, which he had made public, namely that he would not follow the law where he felt his beliefs conflicted with it. The Tribunal accepted Mr Baker's evidence as an accurate articulation of the features leading to the Conduct Panel's decision."

The Panel recommended the Appellant's removal from office.

24. The Appellant exercised his right to have the matter reconsidered by a Disciplinary Panel. That Panel too recommended his removal. Its report, which was dated 14 September 2015, was summarised by the ET, at para. 71 of its Reasons, as follows:

> "The Disciplinary Panel did not endorse the first of the Conduct Panel's findings of misconduct. The contents of the Advice Note were guidance, so that failing to follow it could not amount to misconduct. However, the Panel agreed with the second finding of misconduct. Mr Page was 'wholly mistaken' to argue that his comments should be viewed as a dissenting judgment; the Panel was concerned with what was said in the BBC broadcast, months after the adoption case was heard. A Magistrate's function, like any other judge, was to apply the law. Judges of all levels are forbidden from introducing evidence into cases and were required to decide them on the evidence presented at the hearing. The limited matters that 'judicial notice' could be taken of did not include matters of controversy. *'It is the unanimous view of the Panel that by his comments transmitted via the BBC interview… he would undoubtedly have caused any reasonable person to conclude that he would be biased and prejudiced against single sex adopters. The fact that his opinion may be genuinely and honestly held is irrelevant. Similarly, Mr Page's religious persuasion is wholly irrelevant*.' The Panel said they did not make a recommendation to remove from office lightly, but the history of the matter, coupled with the 'extremely damaging nature of the comments made, given the inevitable suggestion of bias, together with the lack of any apparent insight by Mr Page as to the effect of his comments meant there was no other option. The Panel noted that Mr Page confirmed his views had not changed and that he did not see any harm in relying upon 'evidence' acquired outside of the court hearing, which showed 'a remarkable lack of judgment'."[4]

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[4] The italics in that passage, and others which I quote below, are in the original and are evidently used to denote quotations rather than emphasis.

25. District Judge Parry, the Chair of the Disciplinary Panel, gave evidence to the ET. Para. 72 of its Reasons read:

> "Mr Diamond put to Mr Parry ... that there was no basis for finding that Mr Page's broadcast statement could bring the judiciary into disrepute, that the sanction was punitive and that the Panel's decision had been influenced by the Claimant's religious beliefs and/or the fact that he had criticised the Respondents' earlier disciplining of him publicly. Mr Parry denied each of these propositions, reiterating the reasoning contained in the Panel report. He added: '*I am a Christian District Judge, but I am a District Judge first and foremost when applying the law*'. He went on to say that the Claimant's Christianity was irrelevant to the decision made by the Panel and that they would have made the same decision if the same views have been expressed by a Hindu or by an atheist. It was the Claimant who had emphasised that he was a Christian, but that did not matter to the Panel's decision, '*it was his statement on national television and how that would be seen by a bystander. We judged it on that*.' He also emphasised that whilst the disciplinary history had been considered when it came to sanction, the decision as to whether there was misconduct was based only on the BBC broadcast. The Tribunal accepted that Mr Parry's evidence was an accurate description of the Panel's reasoning."

26. By letter dated 29 February 2016 the Appellant was informed that the Respondents had decided that he should be removed from the magistracy. The substantive part of the letter reads:

> "We have considered the reports and your representations which have been provided to us with great care. We agree with the disciplinary panel's finding that the comments you made in a BBC interview broadcast on national television in March 2015 would have caused any reasonable person to conclude that you would be biased and prejudiced against single sex adopters. We believe that by making such comments you have brought the magistracy into disrepute and that this is a matter of serious misconduct.
>
> We also note that you were given a reprimand for serious misconduct in December 2014. You also received remedial training, and guidance from your Bench Chair in February 2015 regarding the importance of speaking to the Judicial Press Office before you had any contact with the media. Had you sought advice from the Judicial Press Office as recommended by your Bench Chair you would undoubtedly have been advised of the risks involved in undertaking such an interview.
>
> The Declaration and Undertaking signed upon appointment to the magistracy states that a magistrate will be circumspect in their conduct and maintain the dignity, standing and good reputation of the magistracy at all times in their private, working and public life. Your actions have breached this undertaking and you have demonstrated a serious lack of sound judgement.

> In order to maintain confidence in the magistracy I am writing to inform you that the Lord Chief Justice and I have agreed that you will be removed from judicial office with immediate effect."

27. I think it is worth spelling out what that letter is, and is not, saying about why the Respondents had decided that the Appellant could not continue to sit as a magistrate. The Respondents do not say, and their reasons do not mean, that a magistrate is not entitled to hold strong beliefs which may have a bearing on issues that they have to decide: very many magistrates, and judges generally, hold such beliefs, often rooted in a religious faith. The essential point is that they must in deciding such issues put those beliefs (so far as necessary) to one side and proceed only on the basis of the law and the evidence adduced. As appears from the passages quoted above, that point is made repeatedly at the various stages of the disciplinary processes against the Appellant; but it is most pithily summarised in District Judge Parry's evidence that "I am a Christian District Judge, but I am a District Judge first and foremost when applying the law" (see para. 25 above). In the case of adoption by a same-sex couple that means that a judge must approach the issue without any preconception that such adoption is inherently wrong, or second-best. The Appellant was in the broadcast words (which reflected the stance that he had taken throughout) publicly stating that that was not an approach which he was prepared to take: his clearly stated position was that he would proceed on the basis that adoption should be by a man and a woman unless there were no other option. It plainly brings the magistracy into disrepute if a magistrate says publicly that they will judge cases according to their own preconceptions rather than according to the law and the evidence.

THE DECISION OF THE EMPLOYMENT TRIBUNAL

THE ISSUES

28. It is important to emphasise that we are on this appeal concerned only with the Appellant's complaint of victimisation – that is, his claim that the second round of disciplinary proceedings against him were brought, and he was in due course removed, because he had complained that the first round (culminating in the reprimand) was discriminatory. As I have said, his complaints of discrimination and harassment were rejected by the ET, and he was not permitted to pursue them in the EAT.

29. I start with the applicable statutory provisions. Section 27 of the Equality Act defines victimisation. So far as relevant for our purposes it reads:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because —
>
> (a) B does a protected act, or
>
> (b) …
>
> (2) Each of the following is a protected act —
>
> (a)-(c) …

> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3)-(5) …"

Section 50 (9) (c) and (d) makes it unlawful for a "relevant person" to victimise the holder of a public office by terminating their appointment or subjecting them to any other detriment. "Relevant person" is defined in section 52, but I need not set out the definitions since it is common ground that the Respondents are "relevant persons" in this case.

30. The issue for the ET accordingly was whether the Respondents subjected the Appellant to the detriment complained of "because" he had done a protected act (namely, here, made an allegation of discrimination against them). There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test): that terminology is used not only in the definition of victimisation but also in the definition of (direct) discrimination. What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, which in a case of the present kind involves an inquiry into their "mental processes": see the line of cases which begins with the speech of Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in *R (E) v Governing Body of the JFS* ("the *Jewish Free School* case") [2009] UKSC 15, [2010] 2 AC 728, and the decision of the EAT (myself presiding) in *Amnesty International v Ahmed* [2009] UKEAT 0447/08, [2009] ICR 1450 (which I mention only because it is relied on by Mr Diamond). The doing of the protected act does not have to be the sole or even the principal cause: it is enough if it was a significant part of the respondent's reason for doing the act complained of.

31. I should also note in this connection a related line of authority, usually regarded as beginning with the decision of the EAT in *Martin v Devonshires Solicitors* [2010] UKEAT 0086/10, [2011] ICR 352. This is to the effect that, where an employer takes action against an employee in response to a complaint of discrimination, they are not to be treated as acting "because of" that complaint if the true reason for the action is not the fact that the employee has complained but some other genuinely separable feature of the complaint (such as the manner in which it is made). The Tribunal summarised the effect of *Martin* at para. 100 of the Reasons: I come back to it in more detail below.

32. In his ET1 the Appellant formulated his victimisation claim as follows (see para. 45A):

> "The comments made by Mr Page which the Respondent considered to 'bring Magistracy into disrepute [*sic*]' amounted to an allegation that Mr Page was discriminated against and/or harassed in breach of the Equality Act 2010 ... Making those comments was therefore a 'protected act' under s. 27 (2) (d) of the Act ... The consequent disciplinary proceedings and/or the sanction against Mr Page (removal from the Magistracy) were therefore victimisation in breach of s. 27 (1) of the 2010 Act."

The pleading does not refer to section 50, as it should have done; but the disciplinary proceedings would constitute a detriment under subsection (9) (c) and the Appellant's removal would fall within subsection (9) (d).

33. That formulation was amplified in the agreed list of issues which was before the Tribunal. In particular, the protected act was said to be the "broadcast words" which I have set out at para. 21 above. Although, as will be apparent, those words do not in fact allege any breach of the Act, it was said that, understood in their context, "[they] amounted to, and/or were perceived as, an allegation of religious discrimination and/or harassment". Neither the pleading nor the list of issues says, as they should have done, what the alleged discrimination or harassment consisted of, but the reference is evidently to the first round of disciplinary proceedings culminating in the reprimand of 19 December 2014.

34. In short, therefore, there were potentially two issues for the Tribunal –

(1) whether the Appellant had made an allegation that the first round of disciplinary proceedings constituted unlawful discrimination or harassment (the "protected act" issue); and, if so,

(2) whether the second round of disciplinary proceedings, culminating in his reprimand, were because he had made that allegation (the "reason why" issue).

The Appellant also sought to rely on his rights under the European Convention on Human Rights, as given effect to by the Human Rights Act 1998: I will come back later to the way in which he put that part of his case.

35. The Tribunal dealt with the victimisation claim at paras. 139-146 of its Reasons. I take in turn its treatment of the issues identified above.

(1) THE PROTECTED ACT

36. The Tribunal began by accepting a submission by Mr Purchase that the Appellant's case as stated in the list of issues was bound to fail, because the broadcast words were incapable of constituting a protected act: they were simply a statement of why the Appellant had done what he did, and they did not, even implicitly, constitute an allegation by him that the Respondents (or anyone else) were guilty of religious discrimination or harassment. That is obviously correct.

37. However, the Tribunal decided – not, as it said, without hesitation – to permit Mr Diamond to depart from the formulation in the pleaded issues and to rely instead on what he said was the effect of the broadcast as a whole, and specifically the reporter's statements which preceded and followed the broadcast words (see para. 21 above). It concluded that the broadcast as a whole could be taken to indicate "that the Claimant said he had been disciplined because of his religious views as a Christian"; and it said, clearly rightly, that such a statement would amount to a protected act. I agree that the Tribunal was right to take that course, but I have to say that it was very unsatisfactory that the Appellant's case was so poorly expressed in the list of issues. A list of issues is a crucial working tool in any complex discrimination claim, and parties should take care to formulate their cases accurately in it.

(2) THE REASON WHY

38. The Tribunal's finding as to the Respondents' reason for removing the Appellant is at para. 144. This reads:

> "As we have indicated when addressing the direct discrimination allegation, the Respondents and the Conduct Panel and the Disciplinary Panel made the decision to remove the Claimant because he chose to advertise the bias he would apply in the exercise of his judicial functions via the BBC: [130] and [135] above. The Claimant's broadcast statement in that respect was not a protected act and they did not act because of any protected act, but for the reasons they gave contemporaneously."

In short, it held that its earlier findings as to the Respondents' reasons for removing the Appellant (and those of the two Panels for recommending removal) in the context of the discrimination and harassment claims also applied to the claim for victimisation. I should therefore set out the passages to which it refers.

39. Para. 130 reads:

> "The Tribunal has already indicated it accepted that the removal decision was made for the reasons given by the Conduct Panel, the Disciplinary Panel and the Respondents: [67], [71]-[72], [75] and [76] above. The Tribunal was quite satisfied that the evidence established that the Respondents' decision was based on the Claimant publicising on BBC television that his starting point or presumption as a Magistrate was that adoption by same-sex couples was inherently less good for a child than adoption by a father and a mother, irrespective of the evidence in the particular case; and, in turn, that this was a breach of his judicial oath and declaration and was such as to give rise to a perception in reasonable people that he would apply a preconceived and biased view, incompatible with the actions of a judicial office holder. It was made clear that, by contrast, his religion was not in point, nor was the fact that he held certain beliefs: [55], [67], [71], [72] above."

And para. 135 reads (so far as material):

> "Applying the distinction identified and discussed at [84]-[94] above[5], the Tribunal concluded that the finding of misconduct and the decision to remove the Claimant were based on his inappropriate conduct in publicly displaying a preconceived bias towards same-sex adopters in relation to his judicial role, contrary to the declaration and oath and likely to bring the judiciary into disrepute and thereafter showing no

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5 The reference to paras. 84-94 of the Reasons is to a discussion of an issue which does not arise on this appeal, though it does in the NHS appeal: see paras. 68 and 74 of my judgment there.

> insight or remorse or willingness to accept that his conduct was inappropriate for a judicial office holder."

40. In short, therefore, the claim failed because the Respondents' reason for removing the Appellant was solely that he had made it clear that in the context of adoption he was not prepared to discharge his functions as a magistrate according to the law and the evidence (and had not acknowledged that his stance was mistaken). It was accordingly not because he had complained about having been discriminatorily disciplined.

41. At paras. 145-146 the Tribunal went on to address a particular point made by Mr Diamond about Dr Taylor's evidence having referred to public criticism of the Respondents: see para. 22 above. It said at para. 145 that:

> "… [Dr Taylor's] particular concern in this respect was around the publicity the Claimant had deliberately generated and the possibility that that this should be seen as bringing the judiciary into disrepute if it was construed as the Claimant seeking to put pressure on the Respondents. It was not the content of the Claimant's criticism that gave rise to a case to answer. Furthermore, this was only one of three factors that led Dr Taylor to conclude there was a case to answer: [65] above.

It continued, at para. 146:

> "Thus, in so far as there was an element of Dr Taylor's decision that was a response to the Claimant's criticism of the Respondents, the distinction identified by the EAT in *Martin v Devonshires Solicitors* ([100] above) is in point. It was quite clear to the Tribunal that Dr Taylor did not decide there was a case to answer in whole or in substantial part because the Claimant had undertaken a protected act, but for the separable reasons identified and discussed at [65] and [145] above."

(3) THE CONVENTION

42. In the list of issues the Appellant said that he proposed to contend that his removal from office constituted an interference with his right to freedom of thought, conscience and religion under article 9 of the Convention and/or his right to freedom of expression under article 10. It was originally his contention that the ET had jurisdiction to give a remedy for such a breach as a free-standing claim, but para. 101 of its Reasons records that Mr Diamond conceded that that was not the case. That is plainly correct: see *Mba v London Borough of Merton* [2013] EWCA Civ 1562, [2014] ICR 357, *per* Elias LJ at para. 35. But of course, as the Tribunal noted at para. 102, it was obliged by section 3 of the 1998 Act to interpret the relevant provisions of the 2010 Act, so far as possible, in such a way as to avoid such a breach. Accordingly, if the Appellant was able to show that his removal did constitute a breach of his Convention rights that could form the basis of a submission that section 27 of the 2010 Act should be given a meaning which it might not otherwise bear.

43. Since we are now concerned only with victimisation, only article 10 is directly applicable. That reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

44. At para. 109 of its Reasons the ET recorded that

> "[t]he Respondents submitted that article 10 was not engaged as the reasons for the Claimant's removal related to suitability to hold public office, rather than his freedom of expression, since there was no principled objection to the Claimant speaking to the media, but the central issue was whether what he said demonstrated judicial bias making him unfit to continue to hold office".

It noted that Mr Purchase sought to support the distinction inherent in that submission by reference to para. 79 of the judgment of the European Court of Human Rights ("the ECtHR") in *Kudeshkina v Russia* 29492/05, [2009] ECHR 360. However, it said that it was not satisfied that that passage drew a sharp distinction of the kind relied on, and it said that it would proceed, though without positively deciding the point, on the basis that article 10 (1) was indeed engaged. Accordingly the focus was on justification.

45. As to justification, the Respondents contended, in short, that any interference with the Appellant's freedom of expression was, in accordance with the final words of article 10 (2), in the interests of "maintaining the authority and impartiality of the judiciary". The Tribunal summarised the law relevant to that issue at paras. 111-113 of the Reasons and considered its application at paras. 147-163. Its conclusion was that the interference in question was justified. It will be more convenient if I set out its reasoning when I address the grounds of appeal which relate to this issue.

THE DECISION OF THE EMPLOYMENT APPEAL TRIBUNAL

46. The grounds on which the Appellant was permitted in the EAT to challenge the ET's decision on victimisation were pleaded as follows:

> "In considering the issue of the 'severability' of parts of the protected acts as defined in section 27 of the Equality Act 2010, and required by Martin v Devonshire [2011] the Tribunal failed:
>
> a. to analyse fully why the protected act was severable

b. misapplied Martin v Devonshire

c. failed to correctly apply Article 10 of the ECHR (to make a public statement) as required by s.3 of the HRA 1998."

47. Without intending any disrespect to the EAT, I do not propose to set out its reasoning on those grounds at this stage since it will be more convenient to refer to it (so far as necessary) when considering the grounds of appeal before us.

THE APPEAL TO THIS COURT

48. The grounds of appeal, pleaded by Mr Diamond, are under five heads. I take them in turn.

GROUND 1: PROTECTED ACT

49. The broad ground here is that the ET wrongly identified the protected act on which the Appellant relied and that the EAT wrongly accepted its analysis. It will be noted that the permitted grounds of appeal to the EAT did not include any such challenge to the ET's reasoning, but the point seems nevertheless to have been argued in the EAT without objection and I would not therefore exclude it on that account.

50. The essential point pleaded is that "the analysis should depend on the evidence of what exactly the claimant told the media (not what was eventually broadcast)" (see para. 1 (b) of the grounds) and that:

> "… the protected act (making an allegation that the respondents discriminated against the claimant because of his religious beliefs) includes his stating (to substantiate that allegation) what his religious beliefs were (that it was in the best interests of a child to be brought up by a mother and a father)"

(see para. 1 (c)).

51. In so far as the Appellant's point is that in considering whether he had done a protected act it was legitimate to look beyond the broadcast words, I agree. But that is exactly what the ET did. As explained above, it was in fact Mr Diamond who (initially) sought to rely only on the broadcast words. The Tribunal did not accept that those words alone could constitute a protected act, but it permitted him by way of alternative to define the protected act in a way that went beyond them and to treat the effect of the interview as a whole as being "that the Claimant said he had been disciplined because of his religious views as a Christian". I do not therefore see how it can be criticised in the way that ground 1 appears to do.

52. We sought to explore with Mr Diamond in his oral submissions what other point this ground might be intended to make that might undermine the ET's dismissal of the victimisation claim, but he was unable to elucidate what the challenge was. He appeared, at least at one point, to be seeking to revive the submission which the Tribunal rejected, namely that (in accordance with the list of issues) the broadcast words were themselves a protected act, irrespective of anything else in the broadcast, because they stated the relevant religious belief; and he appears to have advanced the same argument

in the EAT. That is, with respect, obviously wrong, as both the ET and the EAT (see paras. 40-43 of its judgment) held: see para. 37 above. But in any event the point goes nowhere, since the ET found that the Appellant's participation in the BBC report was a protected act, even though it reached that finding by a different route.

GROUND 2: *MARTIN v DEVONSHIRES*

53. This ground is directed to the ET's application of the decision in *Martin v Devonshires Solicitors*: see para. 41 above. What is pleaded is that:

> "The EAT has erred in its analysis of 'severability' of particular aspects of the protected act under *Martin v Devonshires Solicitors*".

Although the reference is to the EAT, the real challenge has of course to be to the reasoning of the ET. The pleading uses the term "severability". As I say below, that term does not appear in *Martin* and is not an apt way of expressing the principle which it establishes.

54. I should start by saying something more about what the EAT decided in *Martin*. The claimant, who was employed by a firm of solicitors, was mentally unwell. She made a series of false allegations of sex and disability discrimination against partners in the firm. She was unwilling to accept that the allegations were untrue, and there was medical advice that her behaviour, which was highly disruptive, was likely to continue. The employers dismissed her. The ET dismissed her claim of victimisation notwithstanding that, in one sense, her dismissal had been because of the complaints which she made. I gave the judgment of the EAT. At para. 19 I summarised the ET's reasoning as follows:

> "It acknowledged … that the fact that [the Appellant] had made complaints of sex and disability discrimination … formed part of the facts relied on by the Respondents in deciding to dismiss her. But it did not believe that it followed that that was part of the Respondents' 'reason' for dismissing her in the sense required by the authorities … . Rather, what the Tribunal sought to determine was what it was about the Appellant's conduct, including the making of those complaints, which motivated the Respondents to dismiss her; and it was that which it treated as their 'reason' in the relevant sense. Following that approach it found that the reason had nothing to do with the fact, as such, that the Appellant had made complaints of discrimination, but rather with the facts that those complaints involved false allegations of considerable seriousness, that they were repeated and that the Appellant refused to accept that they were false; the relevance of those facts being, taken together, that they led to the conclusion that she had a mental illness which was likely to lead to unacceptably disruptive conduct in future. To put it another way, it found that the reason for the dismissal was that the Appellant was mentally ill and the management problems to which that gave rise; and that the significance of the complaints was as evidence of that fact."

I upheld that distinction. At para. 22 I said:

> "The question in any claim of victimisation is what was the 'reason' that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. *In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable* [emphasis supplied]."

I went on to illustrate that proposition by reference to the example of an employee who is dismissed not because he or she made a complaint but because of the unreasonable or offensive manner in which they did so. I continued:

> "Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."

At para. 23 I said that tribunals "can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint". I concluded, at para. 25:

> "[T]he distinction made by the Tribunal in reaching its conclusion as to the Respondents' reason for dismissing the Appellant ought as a matter of principle to be regarded as legitimate. The distinctions involved may appear subtle, but they are real; and they require to be recognised if the anti-victimisation provisions, important as they are, are to be confined to their proper effect and not to become an instrument of oppression. This is an area of law where, alas, the questions to be answered cannot always be straightforward – not so much because the law is complex as because of the complexities of legislating for the subtleties of human motivation."

55. The essential point in that reasoning is encapsulated in the sentence which I have italicised in para. 22: dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable. Mr

Diamond's use of the terms "severance" or "severability" is not an apt paraphrase because it brings in unhelpful echoes of completely different areas of the law.

56. The principle recognised in *Martin* has since been applied in a number of decisions of the EAT, most notably *Panayiotou v Kernaghan* [2014] UKEAT 0436/13, [2014] IRLR 500. Although it has not so far been approved in this court, an analogous principle was applied in *Morris v Metrolink RATP DEV Ltd* [2018] EWCA Civ 1358, [2019] ICR 90, which was a case concerning dismissal for taking part in trade union activities: see paras. 19-21 of my judgment. For my part I believe that it is correct. In a case where it applies, the making of the complaint is the context in which the reason for dismissal (or other detriment) arises, but it is not the reason itself.

57. Mr Diamond did not seek to challenge the correctness of the decision in *Martin*, but he did draw our attention to the decision of the EAT in *Woodhouse v West North West Homes Leeds Ltd* [2013] UKEAT 0007/12, [2013] IRLR 773. In that case the respondent's attempt to rely on *Martin* was rejected. At paras. 101-102 of his judgment Judge Hand QC expressed what he described as "a further note of caution", saying that the circumstances in *Martin* were "exceptional" and that if it was followed indiscriminately where complainants acted in an irrational way it would undermine the protection provided by the anti-victimisation provisions. I agree with him that it is important that that should not occur; but I do not, with respect, believe that it is necessary to go beyond what I said in paras. 22 and 23 of my judgment *Martin* as quoted above. As I say there, employment tribunals can be trusted to recognise the circumstances in which the distinction there described can be properly applied, and I do not believe that it is useful to apply a requirement that those circumstances be exceptional: I note that Lewis J made the same point in *Panayiotou* (see para. 54 of his judgment).

58. The pleaded challenge to the ET's reasoning is to its "analysis of 'severability' of particular aspects of the protected act". The "particular aspects" are pleaded as: (a) that the Appellant made his allegations in the media rather than in "some other forum"; (b) that he failed to follow advice not to speak to the media; (c) that his allegations led to negative publicity; and (d) that his words implied a willingness to break the judicial oath.

59. The first point to note is that *Martin* was only relied on by the ET in connection with a single element in the Appellant's complaint, namely Dr Taylor's initial decision that his conduct should be referred to a Conduct Panel, and the "four aspects" pleaded under ground 2 relate specifically to things said by Dr Taylor (see para. 22 above). The issue is thus of very limited significance in the context of the claim overall: even if the Tribunal fell into error as regards this element, that would not impugn its rejection of the claim based on the Respondents' ultimate decision to remove the Appellant (and the recommendations of the two Panels); and it must be debatable whether any substantial award could be made on the basis that there was a discriminatory element in the finding of a case to answer, given that the relevant misconduct was subsequently, and lawfully, found to be proved. However, it seemed from his oral submissions that Mr Diamond might be seeking to rely on ground 2 as impugning the ET's reasoning on the entirety of the victimisation claim, and I have the impression that the EAT may have understood the submissions before it in the same way. As a matter of prudence I will address the "*Martin* issue" on that basis.

60. I start with the removal decision. Here we are not in *Martin* territory at all. This is not a case of the kind where the ostensible reason for the detriment complained of is that the claimant did a protected act but where the employer asserts that the real reason was some separable feature of that act. The Lord Chancellor's letter, which the ET found to be a true reflection of the Respondents' reasons for deciding to remove the Appellant, said nothing about the fact that he had complained of discrimination. Rather, the misconduct which the letter identified (see the first paragraph) consisted in what he had said about how he would perform his duties in the case of a same-sex adoption. It was of course open to the Appellant to try to show that that was not the real reason, or in any event not the only reason, and that the Respondents were motivated (consciously or subconsciously) by the fact that he had complained of being discriminated against. But the Tribunal found otherwise, and that is a finding of fact which Mr Diamond does not, as he confirmed in his oral submissions, seek to challenge, and which was in any event plainly open to it. I would in fact go further and say that it is the finding that I would have expected. It is easy to see why the Lord Chancellor and the Lord Chief Justice would regard it as unacceptable for a magistrate to state publicly on television that he had a bias against same-sex adoption, and it would be surprising if they attached any significant additional weight to the fact that the interview also contained an implicit complaint about their having previously disciplined him for manifesting that bias.

61. The same goes for the recommendations of the Conduct Panel and the Disciplinary Panel. The ET found in the case of both Panels that the reason for their recommendations had nothing to do with the fact that the Appellant had (at least implicitly) complained about his having been disciplined previously: see para. 67 of the Reasons, accepting Mr Baker's account of the reasoning of the Conduct Panel, and para. 72, accepting District Judge Parry's account of the reasoning of the Disciplinary Panel. Those findings are not, and could not be, challenged.

62. That leaves the complaint about Dr Taylor's decision that there was a case to answer – which, as I have said, is in fact the only element in the claim to which ground 2 as pleaded relates. The ET's findings about his reasons for that decision do require a rather more detailed analysis. As recorded at para. 65 of the Reasons, Dr Taylor in his witness statement gave three reasons, though the Tribunal does make some further findings about them. They were: (a) that the Appellant had failed to follow the advice which he had been given regarding contact with the media, (b) that this had led to negative publicity, involving criticism of the Respondents, which could bring the judiciary into disrepute, and (c) that he appeared to be in breach of his judicial oath. Those reasons are of course the last three of the four pleaded "particular aspects of the protected act" to which Mr Diamond argues that *Martin* was wrongly applied: see para. 58 above.

63. As so stated, Dr Taylor's reasons do not clearly correspond to the two Panels' reasons for recommending the Appellant's removal or the Respondents' reasons for accepting that recommendation. I think that this is probably because he was focusing not so much on the misconduct alleged against the Appellant as on why it merited re-referral to the Conduct Panel given that he had already been disciplined. However, whether that is so or not, I believe for the reasons given below that the ET was entitled to conclude that none of the three reasons means that Dr Taylor made his decision because the Appellant had (implicitly) complained of being discriminated against.

64. The position about (a) and (c) is straightforward. As for (a), the Appellant's failure to follow the advice to discuss any proposed media contacts is clearly in principle a

different matter from what he subsequently said to the BBC; and given the history in this case, where the Appellant had been given explicit advice about speaking to the press, the ET in this case was clearly entitled to regard this as genuinely a distinct cause for concern. As for (c), breach of his judicial oath is simply another way of characterising the Appellant's substantive misconduct, i.e. his public statement that he would in cases of same-sex adoption be guided by his preconceptions rather than by the evidence: it has nothing to do with the fact that he also implicitly complained of having been discriminatorily disciplined.

65. The position about (b) is less straightforward, because the "criticism of the Respondents" to which it refers can only be his criticism of their previous conduct in (as he says, discriminatorily) reprimanding him. In most circumstances there could be no real distinction between objecting to a complaint of discrimination and objecting to the negative publicity that that complaint would generate. However, I do not think that that is a fair characterisation of the Tribunal's findings in this case. Although the threefold analysis of Dr Taylor's reasons derives from his own witness statement, categorisations of that kind can be over-neat, and it is necessary to read para. 65 of the Reasons as a whole and together with what the Tribunal says at para. 145. I understand its essential finding (as regards this aspect) to be that Dr Taylor was genuinely not motivated by the Appellant having made a complaint, or by his having done so publicly, but by what he perceived as potentially a deliberate attempt to put illegitimate pressure on the Respondents of a kind inappropriate to a judicial office-holder[6]. In my view it was open to the Tribunal to regard that a separate reason for his action, and there is no basis for our interfering with that assessment.

66. I would accordingly dismiss ground 2. I believe that my reasoning broadly corresponds to that of the EAT at paras. 51-55 of the judgment of Choudhury P.

GROUND 3: "REASON WHY"

67. Ground 3 reads:

> "The EAT has erroneously conflated the Respondents' '*reason'* for the detrimental treatment of the Claimant with their '*motivation'* (EAT [50] et seq). The distinction between 'reason' and 'motive' is essential in discrimination law: see *R (E) v JFS* [2010] 2 AC 728; *Amnesty International v Ahmed* [2009] UKEAT 0447/08. A benign *motive* for detrimental treatment is no defence to a claim for direct discrimination or victimisation."

68. Para. 50 of the EAT's judgment, to which that pleading refers, is the conclusion of a section in which Choudhury P sets out passages from the decision of the House of Lords in *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065, which discuss the meaning of the phrase "by reason that" in the provision of the Race Relations Act 1976 proscribing victimisation. Para. 50 reads:

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6 In fairness to the Appellant I should make clear that the ET itself made no finding to that effect, and it was also, on its findings, no part of the Respondents' reason for removing him. But of course at this stage of the argument we are only concerned with Dr Taylor's thinking.

> "It is clear from these passages in *Khan* that in this context, all of the various formulations, i.e. 'by reason that', 'on the grounds of' and 'because of', are interchangeable [there is a footnote reference to para. 19 of the judgment of this Court in *Onu v Akwiwu* [2014] EWCA Civ 279, [2014] ICR 571, at para. 19] and do not give rise to different approaches to the question of causation. The question for the Tribunal continues to be: 'Why did the employer act as it did?', or, 'What was its motivation for doing so?'."

(Although the ground refers to para. 50 "et seq" the following paragraphs in Choudhury P's judgment are concerned with a separate issue.)

69. There is nothing in this ground of appeal. In the first place, any error in the reasoning of the EAT is immaterial except to the extent that it reflects an error in the reasoning of the ET. No such error is pleaded, nor is one identified in the skeleton argument; and none was apparent from Mr Diamond's oral submissions. In any event, however, para. 50 of the EAT's judgment is wholly unexceptionable. As I say at para. 30 above, the law in this area is well understood following a series of cases including the two to which Mr Diamond specifically refers – *Amnesty International* and the *Jewish Free School* case. His objection is apparently to the EAT's use of the word "motivation", which he treats as identical to "motive". It is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the *locus classicus* is the decision of the House of Lords in *James v Eastleigh Borough Council* [1990] UKHL 6, [1990] 2 AC 751. But the case-law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes" of the alleged discriminator" (p. 511 A-B). I need only refer to two cases:

(1) The first is, again, *Martin v Devonshires.* There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At para. 35 I said:

> "It was well-established long before the decision in the *JFS* case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in *Nagarajan* - see at p. 884F) - one of which may be relevant in considering the 'grounds' of, or reason for, an allegedly discriminatory act, and the other of which is not."

I then quoted paras. 61-64 from the judgment of Lady Hale in the *Jewish Free School* case and continued, at para. 36:

> "The distinction is real, but it has proved difficult to find an unambiguous way of expressing it. … At one point in *Nagarajan* Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation' (see p. 885 E-F). We adopted that term in [*Amnesty International*], explicitly contrasting it with 'motive': see para. 35 (p. 1470 E-F). Lord Clarke uses it in the same sense in his judgment in the *JFS* case: see paras.

> 137-8 and 145 (pp. 158-9). But we note that Lord Kerr uses 'motivation' as synonymous with 'motive' – see para. 116 (p. 155) – and Lord Mance uses it in what may be a different sense again at the end of para. 78 (p. 148). It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved – though we must confess that we still find useful and will continue to employ it in this judgment. …"

(2) The second case is *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010. At para. 11 of my judgment I said:

> "As regards direct discrimination, it is now well-established that a person may be less favourably treated 'on the grounds of' a protected characteristic *either* if the act complained of is inherently discriminatory (e.g. the imposition of an age limit) *or* if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 AC 501, which was endorsed by the majority in the Supreme Court in the *Jewish Free School* case, [2009] UKSC 15, [2010] 2 AC 728. Terminology can be tricky in this area. At p. 512A Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same."

70. As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses, but the passages quoted are sufficient to show that the distinction is well-known to employment lawyers, and I am quite sure that when Choudhury P used the term "motivation" he did not mean "motive".

GROUNDS 4 AND 5: THE CONVENTION

The Reasoning of the ET

71. As noted at para. 44 above, the ET assumed without deciding that the Appellant's removal as a magistrate because of what he said in the BBC interview constituted an interference with his freedom of expression, with the result that the only issue was whether that interference was justified in the interests of maintaining the authority and impartiality of the judiciary.

72. As regards that issue, at paras. 111-113 of its Reasons the ET refers to four decisions of the ECtHR relating to the rights of members of the judiciary to speak publicly about matters relating to their role: *Wille v Liechtenstein* 28396/95 [1999] ECHR 107; *Vajnai v Hungary* 33629/06; *Kudeshkina v Russia*, to which I have already referred; and the decision of the Grand Chamber in *Baka v Hungary* 20261/12, [2016] ECHR 568, in which the earlier decisions are reviewed and the principles to be derived from them are stated. At para. 111 the Tribunal quotes three passages from a section in the judgment

in *Baka* headed "General principles on freedom of expression of judges". I will set out the section in full, italicising the parts quoted by the tribunal:

> "162. While the Court has admitted that it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention (see *Vogt,* cited above, §53, and *Guja,* cited above, §70). It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2. In carrying out this review, the Court will bear in mind that whenever a civil servant's right to freedom of expression is in issue the 'duties and responsibilities' referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim (see *Vogt,* cited above, §53, and *Albayrak v. Turkey*, no. 38406/97, §41, 31 January 2008).
>
> 163. Given the prominent place among State organs that the judiciary occupies in a democratic society, the Court reiterates that this approach also applies in the event of restrictions on the freedom of expression of a judge in connection with the performance of his or her functions, albeit the judiciary is not part of the ordinary civil service (see *Albayrak*, cited above, §42, and *Pitkevich*, cited above).
>
> 164. *The Court has recognised that it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question (see Wille, cited above, §64; Kayasu, cited above, § 92; Kudeshkina cited above, §86; and Di Giovanni, cited above, §71). The dissemination of even accurate information must be carried out with moderation and propriety (see Kudeshkina, cited above, §93). The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties (see Kudeshkina, cited above, §86, and Morice, cited above, §128). It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges (see Olujić, cited above, §59).*
>
> 165. At the same time, the Court has also stressed that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, *any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of*

the Court (see Harabin, cited above; see also Wille, cited above, §64). Furthermore, questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 (see Kudeshkina, cited above, §86, and Morice, cited above, §128). Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter (see *Wille,* cited above, §67). Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate (see *Guja,* cited above, §88).

166. In the context of Article 10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made (see, *mutatis mutandis, Morice,* §162). It must look at the impugned interference in the light of the case as a whole (see *Wille,* cited above, §63, and *Albayrak*, cited above, §40), attaching particular importance to the office held by the applicant, his statements and the context in which they were made.

167. *Finally, the Court reiterates the 'chilling effect' that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary* (see *Kudeshkina,* cited above, §§99-100). This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed (see *Kudeshkina,* cited above, 99)."

73. At paras. 147-163 the ET discusses the application of those principles to the Appellant's case. I need not summarise the details of its discussion. It concludes, at paras. 160-162:

"160. The key consideration is the articulation of principle contained in these authorities … . The ECtHR expressly recognised that whilst there may be circumstances in which judges have an Article 10 protected right to make public pronouncements, the same only extends to the making of moderate and proper statements and in particular it does not extend to the making of statements that compromise the office holder's judicial impartiality. As we have already indicated, this was not the case with Mr Page's public statements.

161. We have also noted earlier that the fairness of the process involved may be relevant to proportionality: [111] above. In this instance we consider that our findings of fact show that the Claimant was afforded a very fair and transparent process, which enabled him to know the concerns raised, the material relied upon and afforded him multiple opportunities to give his response.

162. Accordingly, in all the circumstances the Tribunal concluded that the finding of misconduct and the imposition of the sanction of

> removal from the Magistracy was plainly a proportionate limitation upon the Claimant's right to freedom of expression … and as such would be regarded as necessary in a democratic society."

74. It followed from that conclusion that there was no need to consider whether section 27 of the 2010 Act should be given some special construction in order to avoid a breach of the Appellant's Convention rights.

The Reasoning of the EAT

75. Before the EAT Mr Diamond made various submissions based on the reasoning of the ECtHR in some of the authorities which preceded *Baka*, which I have identified at para. 72 above. The EAT considered and rejected those submissions at paras. 60-67 of its judgment and concluded at para. 68 that the ET "did not err in concluding that the Claimant's removal from the Magistracy was a proportionate limitation upon his right to freedom of expression and as such would be regarded as necessary in a democratic society for maintaining the authority or impartiality of the judiciary".

76. The Respondents had in their Respondent's Notice sought to rely on the contention, on which the ET had made no finding (see para. 44 above), that the Appellant's removal did not engage article 10 in the first place. The EAT's conclusion on the justification issue meant that that issue did not arise, but it nevertheless addressed it at paras. 69-72 of its judgment and upheld the Respondents' contention. At para. 69 it referred to para. 79 of the judgment of the ECtHR in *Kudeshkina,* which emphasised that the applicant in that case had been debarred from holding public office because of the statements that she had made to the media rather than because her "eligibility for public service nor her professional ability to exercise judicial functions" had been called in question. It acknowledged that the ET had been unsure whether that involved a "sharply drawn" distinction, but it went on to refer to the decision of the ECtHR in *Harabin v Slovakia*, 58688/11, [2012] ECHR 1951, which concerned the removal of the President of the Supreme Court of Slovakia. Although the applicant had expressed some controversial opinions on constitutional issues the ECtHR found that his removal was not "exclusively or preponderantly prompted by those views" but rather by "the appraisal of his professional qualifications and personal qualities in the context of its activities and attitudes relating to State administration of the Supreme Court" – in short about his suitability for the role – and held that accordingly article 10 was not engaged. The EAT accepted Ms Ling's submission that it was clear from those authorities "that where action is taken against a judicial office holder essentially for reasons relating to his ability to carry out the duties of the office, rather than for the expression of certain views, then art 10 is not engaged". Applying that principle, it held, at para. 72:

> "It was not the Claimant's views on same-sex adoption which either '*exclusively or preponderantly*' prompted the Respondents to remove him, but the clear indication emerging from those views that he would not be impartial in any adoption decision where same-sex adopters were involved. In our view, the Respondents are correct to say that, in the circumstances of this case, Article 10 was not engaged at all."

Ground 4

77. Ground 4 is based on the decision of this Court in *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127, which was handed down two weeks after the EAT's judgment. Mr Diamond pleads that:

> "The EAT's analysis of the issues under Article 10 ECHR is in contradiction with the judgment of the Court of Appeal in *Ngole* … In particular:
>
> (a) In *Ngole*, the decision-maker considered that a student's Facebook posts expressing his belief that homosexuality was sinful might bring the profession [the claimant was on a social work course] into disrepute because of the risk of public perception that Mr Ngole's beliefs could cause him to discriminate against homosexuals if he qualified as a social worker. There is a parallel with this case, where the Claimant's publicly stated views have been deemed to undermine his fitness for the office, give rise to a perception of bias, and bring the judiciary into disrepute.
>
> (b) The Court of Appeal has condemned the approach of the decision-maker who '*wrongly confused the expression of religious views with the notion of discrimination. The mere expression of views on theological grounds (e.g. that "homosexuality is a sin") does not necessarily connote that the person expressing such views will discriminate on such grounds*' (para. 5 (10). The same reasoning applies in this case, *mutatis mutandis*: the Claimant's public statement was wrongly taken to mean that he would be biased as a Magistrate.
>
> (c) In the (overturned) High Court judgment in *Ngole*, like in this case, a substantive restriction on Article 10 rights was disguised as an issue of personal/professional fitness for the office. The Court of Appeal has rejected that approach in *Ngole*. This undermines the EAT's crucial reasoning in this case."

Those particulars were reproduced verbatim in his skeleton argument and were not developed in his oral submissions.

78. It is not necessary for the purpose of addressing this ground to summarise the facts or the reasoning in *Ngole* beyond what appears from the ground as pleaded. The point that Mr Diamond draws from it is that the fact that a person has expressed discriminatory views does not necessarily mean that they will allow those views to affect their professional conduct. But that has no application to the circumstances of the present case. We are not concerned here with a mere "public perception" or an incorrect assumption that the Appellant's views about adoption by same-case couples would affect his conduct as a magistrate: the whole point is that he himself had said it would affect his conduct. I therefore see nothing in this ground.

Ground 5

79. Ground 5 pleads that the EAT erred in law both in upholding the ET's decision on justification and in holding that there had been no interference with the Appellant's article 10 rights. Those are distinct issues, and I take them in turn.

80. As regards justification, Mr Diamond submits that the facts of the present case are in essential respects indistinguishable from those in the Strasbourg decisions of *Wille*, *Kudeshkina* and *Baka* (see para. 72 above), in each of which the removal of a judge for publicly expressing controversial views on political or constitutional issues was held to be a breach of their rights under article 10. It is unnecessary for me to review the facts of those cases because it is clear that, contrary to Mr Diamond's submission, there is indeed a fundamental distinction. The feature which the Respondents regarded as bringing the judiciary into disrepute, and justifying the Appellant's removal, was his public statement that he would be biased in the execution of his judicial duties: see para. 27 above. There is no equivalent to that feature in any of the cases on which Mr Diamond relies, which are of an entirely different character. The ET was plainly entitled, indeed I would say right, to find that the making of such a statement compromised the Appellant's judicial impartiality and accordingly that proportionate sanctions were justified in accordance with the principles summarised by the Grand Chamber in *Baka*: see in particular para. 164 of its judgment. The Appellant was speaking directly about "the exercise of [his] adjudicatory function" and he was, as the Grand Chamber puts it, "required to exercise maximum discretion" in order to preserve the appearance of impartiality.

81. Mr Diamond did not advance any distinct challenge to the proportionality of the Appellant's removal, but I have no doubt that it was indeed proportionate. He had already been reprimanded for putting his own preconceptions before his duty to decide cases in accordance with the law and the evidence, and had undergone re-training. He had also disregarded the advice that he had received about the procedure to follow before speaking to the media.

82. Since I would therefore uphold the ET's finding on justification, it is unnecessary to decide whether the EAT was right to conclude that article 10 was not engaged in the first place. In my view it is indeed clear from the Strasbourg authorities that that depends on whether the Appellant's public statement of his views, rather than the views themselves, were the "preponderant" reason for his removal. Mr Diamond's submission to the contrary was simply that the facts in *Harabin* were very different; but what matters is the principle which the Court enunciated. But it is rather less straightforward how that principle applies in the present case. The EAT evidently believed that the Respondents' essential reason for removing the Appellant was that he would be biased in the performance of his judicial duties. I see the force of that, and no doubt a decision might have been taken on that basis and would have been justified. However, the fact has to be faced that the focus of the Respondents' letter of 29 February 2016 is squarely on "the comments you made in a BBC interview", which it is said "brought the magistracy into disrepute", which in turn constituted the misconduct relied on. Whether it is legitimate to go behind that explicit statement is a nice question. Since the point is not determinative I do not think it is necessary to express a concluded view.

CONCLUSION

83. Those are my reasons for concluding that this appeal should be dismissed. The multiplicity of points advanced by Mr Diamond which I have had to address may make the case look less straightforward than it truly is. The Appellant was removed as a magistrate because he declared publicly that in dealing with cases involving adoption by same-sex couples he would proceed not on the basis of the law or the evidence but on the basis of his own preconceived beliefs about such adoptions. He was not, which was the only issue on this appeal, removed because he had complained about the earlier disciplinary proceedings against him. The basis on which he was dismissed was entirely lawful and involved no breach of his human rights.

Peter Jackson LJ:

84. I agree that the appeal fails for the reasons given by Underhill V-P, and only add the following.

85. Our system of justice owes a great debt to those who, like the Appellant, give so much time and commitment when they sit as magistrates. The fact that the magistracy contains individuals with differing backgrounds and beliefs is one of its strengths. But once a private individual takes on a judicial role, he is subject to the same obligations as any other judge. In this case the Appellant is not a victim. He was not dismissed for complaining about his treatment but because he had shown himself incapable of honouring his undertaking, recorded at paragraph 8 above, to act as a magistrate in a way that was free from bias. His inability to see any harm in relying on "evidence" acquired outside the court hearing was rightly described by the Disciplinary Panel as "a remarkable lack of judgment" (see paragraph 24). His belief that he was entitled to insert his personal views on same-sex adoption into the performance of his judicial functions led to conduct at the adoption hearing on 2 July 2014 that has no place in the Family Court, for the reasons so clearly given by the Vice-President at paragraph 27. A child's future is to be decided on the evidence before the court and in accordance with the law. In passing the Adoption and Children Act 2002, Parliament has decided that a child may be adopted by a couple or by a single person, regardless of sexual orientation and without hierarchy. It is not open to individual judges to superimpose their own beliefs, however sincerely held.

86. In a tendentious series of opening remarks, Mr Diamond baldly asserted that the Appellant had been "singled out because of his Christian belief". His loyalty to his judicial oath had led him to give paramount consideration to the interests of the child as he saw them, but this had been twisted as if it was discrimination. There was nothing unlawful in the Appellant's position but the Respondents had "got rid of a judge because he would not endorse the zeitgeist". These submissions are a patent distortion of the facts. They demonstrate a profound misunderstanding of the responsibilities of a judge as a public servant and the fact that the Appellant continues to hold them is a further confirmation that his dismissal from the magistracy was both lawful and inevitable.

Simler LJ:

87. I agree with both judgments.