Hashwani v. Jivraj, Supreme Court of the United Kingdom, 27 July 2011

Arbitrators are not employed by the parties but fall in the category of independent providers of services who are not in a relationship of subordination with the parties who receive their services. As a consequence, the requirement in an arbitration clause that arbitrators be respected members of the Ismaili community is not void under the UK Employment Equality (Religion or Belief) Regulations 2003. In any event, this would be a genuine occupational requirement allowed by way of an exception under the Regulations.

Summary

On 29 January 1981, Mr. Jivraj and Mr. Hashwani – both members of the Ismaili community, which comprises Shia Imami Ismaili Muslims and is led by the Aga Khan – entered into a joint venture greement (the JVA) to make real estate investments. Art. 8 of the JVA provided that any dispute be referred to arbitration in London by "three arbitrators (acting by a majority), one to be appointed by each party and the third arbitrator to be the President of the HH Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community."

In 1988, Jivraj and Hashwani decided to terminate their joint venture. On 30 October 1988, they entered into an agreement under which they appointed three Ismaili community members to a panel which was to decide on the division of the joint venture's assets. The panel ceased to act in February 1990 and the remaining issues between the parties were submitted to arbitration or conciliation by a member
of the Ismaili community, Mr. Zaher Ahamed. Mr. Ahamed issued a determination in December 1993; however, the determination did not resolve all open questions between the parties.

On 31 July 2008, Hashwani wrote to Jivraj asserting a claim for US$ 4,403,817 – being a principal sum of US$ 1,412,494 and compound interest thereon – and appointing Sir Anthony Colman as an arbitrator. He also wrote that if Jivraj did not appoint an arbitrator within seven days, steps would be taken to appoint Sir Anthony as sole arbitrator. Jivraj commenced an action in the Commercial Court, seeking a declaration that the appointment of Sir Anthony was invalid because he is not a member of the Ismaili community.

On 26 June 2009, the Commercial Court, per David Steel J, dismissed Haswani's contention that the requirement in the arbitration clause that the arbitrators be members of the Ismaili community was invalid under the Employment Equality (Religion or Belief) Regulations 2003 (the Regulations), the Human Rights Act 1998 (the HRA) or public policy at common law.

The court held (1) that the requirement did not constitute unlawful discrimination on any of those bases; specifically, arbitrators are not "employed" within the meaning of the Regulations; (2) that even if the appointment of arbitrators fell within the scope of the Regulations, the requirement that the arbitrators be members of the Ismaili community constituted a proportionate "genuine occupational requirement" and was therefore allowed by way of an exception under the Regulations, in the light of the Ismaili sect's demonstrated "enthusiasm for dispute resolution" within their own community; and (3) that in any event the requirement was not severable from the arbitration provision as a whole, so that if that requirement were void the whole arbitration clause would be void as well (the severance issue). On 7 October 2009, permission was granted to appeal in respect of the Regulations and severance issues.

On 22 June 2010, the Court of Appeal reversed the decision of the first instance court, finding that the appointment of an arbitrator involves a contract for the provision of services which satisfies the definition of "employment" in the Regulations, and that being a member of the Ismaili community was not "a genuine occupational requirement" within the meaning of the exception in the Regulations.

Consequently, the requirement in the arbitration clause constituted unlawful discrimination on religious grounds. On the severance issue, the Court of Appeal agreed with the court below that removing the discriminatory requirement would render the arbitration agreement substantially different from that originally intended, so that the clause was void in its entirety.

By the present decision, the Supreme Court, before Lord Phillips, President, Lord Walker, Lord Mance, Lord Clarke and Lord Dyson, in an opinion by Lord Clarke, granted the appeal and reversed the decision of the court below.

The Supreme Court first dealt with the question whether the Court of Appeal correctly found that the contract that undisputedly exists between the parties and the arbitrator means that the arbitrator is "employed" by the parties. The Supreme Court answered this question in the negative, reasoning that the role of an arbitrator is not naturally described as "employment under a contract personally to do work", because an arbitrator's role is not naturally described as one of employment at all. The jurisprudence of the European Court of Justice distinguishes between those who are employed and those
who are "independent providers of services who are not in a relationship of subordination with the person who receives the services". This distinction, opined the Supreme Court, can also be drawn for the purposes of the Regulations between those who are employed and those who are not notionally but genuinely selfemployed.

As no English authorities require a different conclusion, the Supreme Court held that arbitrators, rather than performing their services or earning their fees for and under the direction of the parties, are rather in the category of independent providers of services who are not in a relationship of subordination with the parties who receive their services. As a consequence, Clause 8 of the JVA was not invalid by reason of the Regulations. In the light of this conclusion, the issue whether being a member of

In the light of this conclusion, the issue whether being a member of the Ismaili community was a "genuine occupational requirement" allowed by way of an exception under the Regulations did not arise.
However, the Supreme Court considered it, as this argument was fully discussed in the proceedings, and concluded that the first instance court was justified in holding that the requirement of an Ismaili arbitrator was indeed not only genuine but both legitimate and justified. The Court based its holding on an examination of the history and development of the Ismaili community, which led it to conclude that one of the more significant and characteristic spirits of the Ismaili sect was an enthusiasm for dispute resolution contained within the Ismaili community.

Lord Mance filed a concurring opinion, also reported.