

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**Watt (formerly Carter) (sued on his own on behalf of the other  
members of the Labour Party) (Respondent)**

**v.**

**Ahsan (Appellant)**

**Appellate Committee**

**Lord Hoffmann**

**Lord Rodger of Earlsferry**

**Lord Walker of Gestingthorpe**

**Lord Carswell**

**Lord Brown of Eaton-under-Heywood**

**Counsel**

*Appellants:*

Robin Allen QC

Akua Reindorf

(Instructed by Commission for Racial Equality)

*Respondents:*

Gavin Millar QC

Michael Ford

(Instructed by Thompsons)

*Hearing date:*

16, 17 & 18 JULY 2007

**ON**  
**WEDNESDAY 21 NOVEMBER 2007**



## HOUSE OF LORDS

### OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

**Watt (formerly Carter) (sued on his own on behalf of the other  
members of the Labour Party) (Respondent) v Ahsan (Appellant)**

**[2007] UKHL 51**

#### **LORD HOFFMANN**

My Lords,

1. Between 1991 and 1998 Mr Raghیب Ahsan was a Labour Party councillor for the Sparkhill Ward of Birmingham. The ward has a large Pakistani population and he is from Pakistan. When the 1998 local government elections were approaching, he hoped to be readopted as the Labour candidate. Ordinarily, the candidate would have been chosen by the Sparkhill branch of the party. But when the selection process was due to take place, late in 1997, the Sparkhill branch had been suspended for nearly three years. The reason was that, early in 1995, articles had appeared in the *Observer* and the *Daily Mail* in which it was alleged that local councillors of Pakistani origin or associated with the Pakistani community were helping Pakistani residents to jump the queue for housing grants. The journalists made free with words like “sleaze” and “scandal”. One of the councillors named in this connection was Mr Ahsan, who was known to be an aspirant for adoption as prospective parliamentary candidate for the Sparkbrook constituency, which included the Sparkhill ward. The newspapers linked the housing grant story to another story that large numbers of Pakistanis, real or imaginary, had suddenly joined the Birmingham Labour party. The implication was that Mr Ahsan was recruiting or inventing countrymen to support his parliamentary ambitions.

2. The reaction of the Labour Party national executive was immediately to suspend four constituency parties and their branches, including Sparkhill. These were mainly the wards with the highest concentration of ethnic minority groups. In the event, after inquiry by the party, no evidence was found of any impropriety in connection with housing grants on the part of Mr Ahsan or the other Pakistani

councillors. They appear to have been doing no more than advising or encouraging their constituents to exercise their statutory rights. The executive's concerns about new members were addressed by requiring all members to attend in person at the Labour Party office to verify their membership. Again, no evidence of any abuse involving Mr Ahsan was found. Nevertheless eight branches remained suspended throughout the 1997 general election campaign and they remained suspended when it came to the selection of candidates for the council at the end of 1997. The suspended wards included (with one exception) all the wards with a significant Pakistani population.

3. As the branches were suspended, the National Executive Committee of the Labour Party decided that the candidates would be selected by a panel from the Regional Executive Committee. On 19 December 1997 Mr Ahsan and others were interviewed by the panel, consisting of five members. He was not chosen. The candidate chosen for the Sparkhill ward was a white man from the Fox Hollies branch, a Mr Ian Jamieson.

4. On 26 February 1998 Mr Ahsan made a complaint to an employment tribunal, alleging that the Labour Party had discriminated against him on racial grounds, contrary to section 12(1) of the Race Relations Act 1976:

“It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a person—

- (a) in the terms on which it is prepared to confer on him that authorisation or qualification; or
- (b) by refusing, or deliberately omitting to grant, his application for it; or
- (c) by withdrawing it from him or varying the terms on which he holds it.”

5. By section 3, “discriminate” means to discriminate on racial grounds and by section 78(1), “profession” is defined to include “any vocation or occupation”. Mr Ahsan says that being a councillor is a profession, or at any rate an occupation, and that the Labour Party is able to confer its authorisation to stand as a Labour candidate, which he needs to be elected or which will facilitate his election.

6. The Labour Party objected that section 12 did not apply to them. They said they did not confer authorisations or qualifications within the meaning of the Act. Section 12 is headed “Qualifying bodies” and appears in Part II of the Act, which is headed “Discrimination in the Employment Field.” It is, they said, concerned with vocational or professional qualifications and not with politics.

7. The employment tribunal decided that they would decide the question of whether section 12 was applicable as a preliminary point. While that question was pending before the tribunal in July 1998, the secretary of the Birmingham Labour Party’s Local Government Committee circulated to branches a draft list of approved candidates for selection by ward parties. Notwithstanding that Mr Ahsan was an approved candidate, his name had been taken off the list on the ground that he had brought proceedings against the Labour Party. This incident formed the subject of a second complaint to the employment tribunal on 22 September 1998, this time alleging victimisation contrary to section 2(1) of the 1976 Act:

A person (“the discriminator”) discriminates against another person (“the person victimised”) in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—

(a) brought proceedings against the discriminator or any other person under this Act...

8. On 25 August 1998 the tribunal found against the Labour Party on the preliminary point. The Labour Party said that they would appeal and the tribunal therefore adjourned the second complaint to await the outcome of the appeal.

9. On 14 July 1999 the Employment Appeal Tribunal (Lindsay J presiding) dismissed the Labour Party’s appeal: see *Sawyer v Ahsan* [2000] ICR 1. The tribunal gave the Labour Party leave to appeal to the Court of Appeal and ordered that, if they did not appeal, the case should be relisted for hearing on the merits.

10. On 26 May 2000 Mr Ahsan made another complaint of racial discrimination, again under section 12, in connection with the selection of candidates in that year and his candidature for the National Executive Committee. That made three complaints in all.

11. The Labour Party did not exercise their right to appeal against the decision of the EAT. In accordance with the tribunal's direction, the first case was therefore heard on the merits and by agreement the other two complaints were heard at the same time, over 15 days between June and September 2001.

12. Meanwhile, the Labour Party had argued the same preliminary point on section 12 in another entirely unconnected case in the Reading Employment Tribunal, also concerning alleged discrimination in the selection of a candidate for council elections. The Employment Tribunal followed *Sawyer v Ahsan* [2000] ICR 1 and rejected the Labour Party's objection. An appeal to the EAT (Lindsay J again presiding) was dismissed on the same ground. Again leave to appeal was granted. But this time the Labour Party took it up and pursued the appeal.

13. On 7 February 2002 the Court of Appeal gave judgment. The appeal succeeded: see *Ali v McDonagh* [2002] ICR 1026. Peter Gibson LJ, who gave the judgment of the court, said (at p 1040) that the Labour Party was "not the type of qualifying body to which the section is intended to apply."

14. At the time of the judgment in *Ali v McDonagh*, the judgment of the tribunal in Mr Ahsan's case was still reserved. The Labour Party asked to make further submissions on the effect of the Court of Appeal's decision and did so on 10 July 2003. It invited the tribunal to dismiss the applications on the ground that, following the decision of the Court of Appeal, the tribunal was now bound to hold that the Labour Party was not a "qualifying body" under section 12. It therefore had no jurisdiction to proceed with the case. But the tribunal decided that, as between the parties, it was still bound by the unappealed decision in *Sawyer v Ahsan* [2000] ICR 1. On the merits, it found for Mr Ahsan on all three complaints.

15. The Labour Party appealed to the EAT (Burton P presiding) [2004] ICR 938 on the preliminary point alone. The EAT dismissed the appeal in respect of the first complaint but allowed it in respect of the

other two. The ground for distinction was that the EAT in *Sawyer v Ahsan* had directed a hearing on the merits of the first complaint but said nothing about the other two, of which it was not at the time seized. There followed an appeal to the EAT (Silber J presiding) against the employment tribunal's decision on the merits of the first complaint. The EAT held that the tribunal had made no error of law and dismissed the appeal.

16. The Labour Party then appealed against the decision of the EAT presided over by Burton P which had dismissed their appeal on the preliminary point. The Court of Appeal (Buxton LJ and Rimer J, Sedley LJ dissenting) [2005] ICR 1817 allowed the appeal, primarily on the ground that the earlier decision of the Court of Appeal had established that the employment tribunal had no jurisdiction to hear a complaint against the Labour Party under section 12. The majority were also of the opinion that Mr Ahsan's case should have failed on the merits because he had not been discriminated against on racial grounds.

17. Mr Ahsan appeals to your Lordships' House against the decisions of the Court of Appeal both on section 12 and the merits. On section 12, he argues that the Labour Party is a qualifying body and that *Ali v McDonagh* [2002] ICR 1026 was wrongly decided. In any case, he submits, the interpretation given to section 12 by the EAT in *Sawyer v Ahsan* [2000] ICR 1 is *res judicata* between him and the Labour Party, not only for the purposes of his first complaint but for the other two as well.

18. My Lords, it seems to me that logically the first question to be answered is whether the Labour Party is a qualifying body for the purposes of section 12. In my opinion, for the reasons given by Peter Gibson LJ in *Ali v McDonagh* [2002] ICR 1026, it is not. The notion of an "authorisation or qualification" suggests some kind of objective standard which the qualifying body applies, an even-handed, not to say "transparent", test which people may pass or fail. The qualifying body vouches to the public for the qualifications of the candidate and the public rely upon the qualification in offering him employment or professional engagements. That is why section 12 falls under the general heading of discrimination "in the employment field". But that is far removed from the basis upon which a political party chooses its candidates. The main criterion is likely to be the popularity of the candidate with the voters, which is unlikely to be based on the most objective criteria. That will certainly be true of selection by vote of the branch and I doubt whether greater objectivity can be expected of a

selection committee. The members or selection panel want to choose the candidate who, for whatever reason, seems to them most likely to win or at least put up a respectable showing in the election.

19. That does not mean that a political party is entitled to discriminate on racial grounds in choosing its candidates. It would be most surprising if it could lawfully do so. But the relevant prohibition is to be found, not in section 12, but in section 25, which deals with discrimination by associations against members or prospective members:

“(1) This section applies to any association of persons (however described, whether corporate or unincorporate, and whether or not its activities are carried on for profit) if—

- (a) it has 25 or more members; and
  - (b) admission to membership is regulated by its constitution and is so conducted that the members do not constitute a section of the public within the meaning of section 20(1); and
  - (c) it is not an organisation to which section 11 applies....
- (3) It is unlawful for an association to which this section applies, in the case of a person who is a member or associate of the association, to discriminate against him—
- (a) in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them...”

20. As is well known, section 25 was enacted to fill a gap in the Race Relations Act 1968 revealed by the decisions of the House of Lords in *Race Relations Board v Charter* [1973] AC 868 and *Race Relations Board v Dockers' Labour Club and Institute Ltd* [1976] AC 285. In the 1968 Act, there was nothing which dealt expressly with race discrimination in the admission of members to clubs or associations or the treatment of those who had been admitted. There was only the provision which is now section 20 of the 1976 Act (section 2(1) of the 1968 Act) which prohibits anyone “concerned with the provision to the public or a section of the public...of any goods, facilities or services” from discriminating on racial grounds. When, in *Charter's* case, the East Ham South Conservative Club refused on racial grounds to admit Mr Amarjit Singh Shah as a member, the Race Relations Board brought

proceedings under section 2(1). But the club said that they were not supplying anything to the public. They were a private club which offered services only to members. This defence was upheld by the House of Lords. The same happened in the *Dockers Labour Club* case.

21. Section 25 was intended to reverse these decisions and prohibit racial discrimination in the choice or treatment of members in all but very small associations or clubs. The section contains two qualifications which are intended to prevent overlap with other sections of the Act. The first is the exclusion of the trade unions and employers' organisations which come within section 11. The second is exclusion of cases which come within section 20 because, although the association or club is nominally supplying goods or services only to its members, the procedure for admission to membership is so conducted that the supply is in fact to the public or a section of the public. The formulation of section 25(1)(b) appears to be based upon the way Lord Simon of Glaisdale put the matter in *Charter's* case (at p 903):

“The essential feature is that there should be a genuine screening at some stage as a pledge of general acceptability to fellow members. It is this screening that determines that membership is a private role. Without it the association remains a section of the public: see *Panama (Piccadilly) Ltd v Newberry* [1962] 1 WLR 610. The rules will determine prima facie whether the association is in this way a private club or a section of the public: omnia praesumuntur rite esse acta. But this is a rebuttable presumption; so it will always be open to any interested person (including the board) to show that the rules are a sham, that anyone who applies can join, that the mode of entry is, in other words, a mere formality.”

22. The Act therefore starts with the requirement that admission to membership must be regulated by the constitution. It is the constitution which must provide the “screening” to which Lord Simon refers. But the statute allows for the possibility that in practice there is no “regulation” of membership and that anyone can avail themselves of the privileges to which, under the constitution, members are entitled.

23. There is no dispute that the Labour Party is an unincorporated association which has more than 25 members and a constitution which regulates admission to membership. It is not one of the organisations

mentioned in section 11, which deals with trade unions and employers' associations. But Mr Allen QC submitted on behalf of Mr Ahsan that admission to membership is so conducted that the members are a section of the public.

24. The reason why the Labour Party was said to be a section of the public was that it has a large membership and anyone who supports its objects can join. In my opinion, however, the distinction between an association and a section of the public does not depend upon whether the association has a large number of members or upon how easy it is to join. The qualification in section 25(1)(b) which excludes associations where admission to membership is "so conducted" that the members are a section of the public is directed at cases in which a business purports to be a proprietary club but such conditions of membership as the constitution may specify are in practice nugatory or not enforced, so that there is no genuine selection. An example may be found in *Panama (Piccadilly) Ltd v Newberry* [1962] 1 WLR 610 to which Lord Simon of Glaisdale referred.

25. The Labour Party, on the other hand, takes its admission procedures seriously. Applicants for membership must accept the principles and policies of the party and not belong to inconsistent or proscribed organisations. Constituency parties and the General Secretary have the right to object to applicants for membership. Members of the general public are not free, either in theory or in practice, to attend party meetings.

26. It is true that in emphasising the private nature of the Conservative Club, both Lord Reid [1973] AC 868, 886 and Lord Morris of Borth-y-Gest (at p 895) said that "Conservatives" (but not members of the club) were a section of the public. But I suspect that what they had in mind was Conservative supporters rather than the persons admitted to membership under the Party's constitution. In any event, the remarks were obiter dicta.

27. It follows that the Labour Party comes within section 25. In the present case, however, that section does not help Mr Ahsan because it cannot be relied upon before an employment tribunal. Proceedings under Part III of the Act must be brought in the County Court. Back in 1998, after the Labour Party had first taken the point that it was not a qualifying body under section 12, Mr Ahsan started proceedings under section 25 (and, in the alternative, section 20) in the Birmingham

County Court. But these proceedings have been on hold pending the resolution of the present dispute.

28. It follows that in my opinion the EAT was wrong in *Sawyer v Ahsan* [2000] ICR 1 to hold that the Labour Party was a qualifying body within the meaning of section 12 and that the employment tribunal had jurisdiction to hear Mr Ahsan's complaint. He should have been told to pursue his proceedings in the County Court under section 25. But there was no appeal against the decision of the EAT. So the question is whether, notwithstanding that it was wrong in law, the decision in *Sawyer v Ahsan* remains binding upon the parties.

29. The majority of the Court of Appeal held that it was not binding because it involved an error as to the employment tribunal's jurisdiction. Rimer J said a party could not be estopped by conduct from disputing a tribunal's jurisdiction (see, for example, *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1979] ICR 706, 711 and *Department of Health and Social Security v Coy* [1984] ICR 309, 315-316). It followed, in his opinion, that a decision on jurisdiction could not give rise to an issue estoppel either: see [2005] ICR 1817 1836-1837. Buxton LJ likewise said (at pp 1840-1841) that:

“if it becomes apparent through a decision of a court of superior authority that the tribunal lacks... jurisdiction, then the [obligation of the tribunal to decline jurisdiction] arises; and that obligation, it is trite law, cannot be offset by any previous determination between, or lack of action by, the parties themselves.”

30. Although it is well established that the parties cannot by agreement or conduct confer upon a tribunal a jurisdiction which it does not otherwise have, the question in this case is whether an actual decision by a tribunal that it has jurisdiction can estop the parties *per rem judicatam* from asserting the contrary. Neither Buxton LJ nor Rimer J cited any authority which decides that it cannot. The law on this point is not at all trite. Although estoppel *in pais* and estoppel *per rem judicatam* share the word estoppel, they share very little else. The former is based upon a policy of giving a limited effect to non-contractual representations and promises while the latter is based upon the altogether different policy of avoiding relitigation of the same issues. It is easy to see why parties should not be able to agree to confer upon a tribunal a jurisdiction which Parliament has not given it. And if they

cannot do this by contract, it would be illogical if they could do it by non-contractual representations or promises. But when the tribunal has decided that it does have jurisdiction, the question of whether this decision is binding at a later stage of the same litigation, or in subsequent litigation, involves, as Sedley LJ explained in his dissenting judgment, quite different issues about fairness and economy in the administration of justice.

31. Issue estoppel arises when a court of competent jurisdiction has determined some question of fact or law, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties: see *Thoday v Thoday* [1964] P 181, 198. The question is therefore whether the EAT was a court of competent jurisdiction to determine whether the Labour Party was a qualifying body within the meaning of section 12.

32. The jurisdiction of an employment tribunal depends upon whether the facts fall within certain statutory concepts which the Act defines with varying degrees of precision. These include concepts such as a “contract of employment” (section 230 of the Employment Rights Act 1996), “redundancy” (section 139 of the 1996 Act) and, in the present case, “body which can confer an authorisation or qualification”. The decision as to whether the facts found by the tribunal answer to the statutory description is sometimes treated as a question of fact (from which there is no appeal to the EAT) and sometimes as a question of law (from which there is). In either case, however, the tribunal has jurisdiction to decide the question. I can see no basis for distinguishing between questions which “go to its jurisdiction” and those which do not. A decision that a contract falls outside the jurisdiction of the Tribunal because it is for services, or for service overseas, seems to me just as much a question which goes to the jurisdiction as the question of whether the Labour Party is within the jurisdiction because it is a qualifying body. Both are decisions of fact or law, which are (subject to appeal on questions of law) within the competence of the tribunal.

33. In my opinion, therefore, the decision that the Labour Party was a qualifying body for the purposes of section 12 was made by a competent court and is therefore binding upon the parties. It does not matter that a later decision, now approved by this House, has shown that it was erroneous in law: see *In re Waring; Westminster Bank v Burton-Butler* [1948] Ch 221. The whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision.

34. As Rimer J pointed out [2005] ICR 1817, 1837, the issue estoppel is in principle binding between the parties in subsequent litigation raising the same issue, as in the second and third applications by Mr Ahsan. I cannot therefore see any basis for the distinction drawn by the EAT between the application of res judicata in relation to the first application and in relation to the second and third. It is true that the severity of this rule is tempered by a discretion to allow the issue to be re-opened in subsequent proceedings when there are special circumstances in which it would cause injustice not to do so: see *Arnold v National Westminster Bank plc* [1991] 2 AC 93. As Lord Keith of Kinkel said (at p 109), the purpose of the estoppel is to work justice between the parties. In the present case, however, I think it would be unjust if the issue estoppel did not apply to the second and third applications. Although the Labour Party knew that it had given notice of appeal in *Ali v McDonagh* [2002] ICR 1026, it made no attempt to obtain an extension of its time for appealing in this case. Instead, it involved Mr Ahsan in a lengthy and expensive hearing over the summer of 2001, during which the merits of all three applications were examined. It would be quite unfair for Mr Ahsan now to be told that he must start again in the County Court.

35. In my opinion, therefore, the Labour Party is estopped from challenging the ruling that it was a qualifying body and was not entitled to discriminate on racial grounds in its choice of candidates for the council election. The tribunal found that it had done so. This finding was held by the EAT (presided over by Silber J) to involve no error of law. But the majority of the Court of Appeal expressed the opinion that if the tribunal had had jurisdiction to consider the complaints at all, their findings of fact would not have supported a conclusion that there had been discrimination. I must therefore consider the facts in greater detail.

36. The discrimination which section 12 makes unlawful is defined by section 1(1)(a) as treating someone on racial grounds “less favourably than he treats or would treat other persons”. The meaning of these apparently simple words was considered by the House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:

- (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the

- “statutory comparator”) actual or hypothetical, who is not of the same sex or racial group, as the case may be.
- (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant: section 3(4).
  - (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in *Shamoon* at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the “evidential comparator”) to those of the complainant and all the other evidence in the case.

37. It is probably uncommon to find a real person who qualifies under section 3(4) as a statutory comparator. Lord Rodger’s example at paragraph 139 of *Shamoon* of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are “materially different” is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.

38. In this case, the tribunal did not do so. In relation to the first complaint, it began by saying that the Labour Party had provided no satisfactory grounds for the continued suspension of the Sparkhill branch and seven others for nearly three years. The allegations about housing grants had been “laid to rest” by the middle of 1995 and “no single case” of membership abuse had been established. Three of the four wards which had been reinstated were predominantly white and the

fourth had a relatively low Pakistani population. By contrast, seven of the eight wards which remained suspended had a significant Pakistani population. The tribunal concluded (in paragraph 49):

“As has been noted above, the respondent suspected membership abuse particularly within the Pakistani population. There clearly was a racial dimension to the consideration to suspend those branches where Pakistani members were numerous and where it was suspected that some at least of those members were guilty of abuses of the membership system.”

39. The tribunal then considered the positive evidence from the Labour Party about the way in which the selection panel had made its choice. It declared itself “extremely unhappy” about the way in which the members appeared to have gone about the matter and was not satisfied with the explanation of the Party’s failure to preserve vital documents, despite having been told within two days that there would be a challenge to the procedure.

40. Section 65 of the Act permits a person who complains of race discrimination to serve a questionnaire on the respondent asking about the reasons for doing a relevant act. If the questionnaire is not answered within a reasonable period or the reply is “evasive or equivocal”, the tribunal may draw such inference as it considers just and equitable. In this case, Mr Ahsan served his questionnaire on 17 March 1998 and received a reply on 30 June 2000. The tribunal noted that it was “provided with no satisfactory explanation for that delay”. One would expect such a questionnaire to be answered while memory was fresh and documents available, but even if the Labour Party had been waiting for the decision of the EAT on the preliminary point, that had been given in August 1999. The tribunal also found some of the replies to be “evasive”.

41. The candidate selected by the Panel, Mr Ian Jamieson, did not qualify under the rules, which required candidates to have been verified party members for 12 months. The tribunal said that “different rules were applied to Ian Jamieson” and asked itself why. They quoted the evidence of the National Constitutional Officer, Mr Penn: “It was felt that he...was best placed to counter some of the problems which had arisen in the ward”. What were these problems? They were the adverse publicity on housing grants and the suspicions about membership abuse,

“both matters which were closely associated with the Pakistani community”:

“The respondent associated the applicant’s continuing representation of that ward with a continuation of those two perceived problems. In point of fact the applicant had been exonerated of any wrongdoing in connection with the allocation of grants, nor had anything been established – whether against the applicant or at all – in connection with the membership abuse allegation. Nevertheless, in the mind of the respondent, both of these remained problems. They were both intimately associated with the Pakistani community.”

42. The tribunal reached its conclusion in paragraphs 55 and 56:

55. The applicant is himself of Pakistani Muslim origin. The respondent identified him with that section of the community and with those perceived problems and with the embarrassment which the party and the city council had suffered as a result of them. A councillor not of the same racial group would not in the respondent’s eyes be likely to identify with the Pakistani Muslim community in particular, or to pursue the same campaigns...

56. It was perfectly plain to us on the evidence we heard that the respondent wanted the applicant off the council. There was more than one reason for that. However, the ethnic origins of the applicant, and of Ian Jamieson, were not irrelevant to the respondent’s considerations. Considerations relating to the applicant’s ethnic origins were a significant cause of his non-selection by the respondent in December 1997.”

43. These two paragraphs are saying, as clearly as you could wish, that a significant reason why Mr Jamieson was chosen instead of Mr Ahsan was that Mr Jamieson was white and Mr Ahsan was Pakistani. It did not say that Mr Jamieson was a statutory comparator because in some respects his circumstances were obviously different. But it regarded his selection as evidence that a person whose circumstances were the same as those of Mr Ahsan but who was not Pakistani would not have been rejected. That is discrimination on racial grounds.

44. Buxton LJ, with the benefit of further reflection after the end of argument, was not satisfied that the findings were sufficient. After quoting extracts from the passages to which I have referred, he said that “on their face, these findings are more than sufficient to ground a finding of discrimination.” So they are. But, he said, the point was not so simple. The Labour Party’s wish not to have a candidate who would be seen to identify with the Pakistani community was a “legitimate objective...provided that the perception that the problem was predominantly a Pakistani one was itself legitimate”: [2005] ICR 1817, para 93.

45. What is the difference between a legitimate and an illegitimate perception that the problem is a Pakistani one? Buxton LJ, at para 94, said it would have been illegitimate if “the judgment that the problems were particularly associated with the Pakistani community had been influenced at least in part by the racial make-up of that community.” But he said that there was no finding to this effect.

46. I must confess that I have great difficulty in understanding the distinction. How can one form a view that a problem is “associated with the Pakistani community” but reach that view uninfluenced by “the racial make-up of that community”? Its racial make-up is what enables it to be described as a Pakistani community. The only meaning which I can ascribe to the distinction is that it would be acceptable for the Labour Party to discriminate against a Pakistani candidate if they held no racist views about Pakistanis but thought that it was better not to have a Pakistani candidate because the electorate would identify “the problem” with the Pakistani community.

47. If that is what the distinction means, it seems to me unacceptable. It is nothing more than the old plea that you have nothing against employing a black person but the customers would not like it. In essence it is a defence of justification based on political expediency. It may salvage the purity of the personal motives of the selection panel but it does not in my opinion satisfy the terms of the 1976 Act, which does not allow any justification for “direct” discrimination. It simply says that one shall not discriminate on racial grounds.

48. On the second complaint, the tribunal found the allegation of victimisation made out on the facts. On the third complaint, the allegations of racial discrimination and victimisation in relation to the shortlisting of candidates for the council in 2000 were again found

proved. A separate allegation of discrimination in relation to election to the National Executive Committee was dismissed. All of these complaints turn upon findings of fact against which there is no appeal.

49. I would therefore allow the appeal and restore the decision of the employment tribunal.

### **LORD RODGER OF EARLSFERRY**

My Lords,

50. I have had the privilege of considering the speech of my noble and learned friend, Lord Hoffmann, in draft. I agree with it and, for the reasons that he gives, I too would allow the appeal and restore the decision of the employment tribunal.

### **LORD WALKER OF GESTINGTHORPE**

My Lords,

51. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with it, and for the reasons which Lord Hoffmann gives I would allow this appeal and restore the decision of the employment tribunal.

### **LORD CARSWELL**

My Lords,

52. I have had the privilege of reading the speech of my noble and learned friend, Lord Hoffmann, in draft. I agree with it and, for the reasons that he gives, I too would allow the appeal and restore the decision of the employment tribunal.

**LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

53. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with it, and for the reasons which Lord Hoffmann gives I too would allow this appeal and restore the decision of the Employment Tribunal.