In *Jivraj v Hashwani*¹ the UK Supreme Court examined an arbitration clause in the contract between the parties, which required the appointed arbitrators to be members of the Ismaili community. It was held that such a clause would not amount to discrimination on grounds of religion or belief, since arbitrators were independent providers of services and the relevant equality law did not apply to them. This ruling can be interpreted in two ways. Its narrow reading concerns mostly the arbitration industry, as it establishes that arbitrators do not have the legal status of employees. On a wider view, the case restricts the scope of discrimination law in employment by placing the self-employed outside of the law’s protection.

I – The Facts

The facts of the case go back to 1981, when Mr Hashwani (the claimant) and Mr Jivraj (the defendant) embarked upon a joint venture to advance property investments. Article 8 of the joint venture agreement contained a clause requiring any disputes between the parties to be referred to arbitration. This provision (henceforth referred to as “the Clause”) read as follows:

"(1) If any dispute difference or question shall at any time hereafter arise between the investors with respect to the construction of this agreement or concerning anything herein contained or arising out of this agreement or as to the rights liabilities or duties of the investors or either of them or arising out of (without limitation) any of the businesses or activities of the joint venture herein agreed the same (subject to sub-clause 8(5) below) shall be referred to 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.

(2) The arbitration shall take place in London and the arbitrators' award shall be final and binding on both parties."²

Thus, an arbitration panel was to be composed of three arbitrators, including one appointed by each of the parties, all of whom needed to be respected members of the Ismaili community (Shia Imami Ismaili Muslims) to which both Mr Jivraj and Mr Hashwani also belonged. It is worth noting that according to Article 9 of the joint venture agreement, any disputes were to be governed by English law, not the Ismaili rules.

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¹ [2011] 1 WLR 1872.
² ibid [2].
Successful throughout the 1980s, the joint venture was terminated by agreement in 1988. On 30 October 1988 a conciliation panel was appointed to divide the assets and, as required by the Clause, its three members all belonged to the Ismaili community. Since it was unable to resolve all the matters in dispute, the parties agreed to refer the remaining points to a single Ismaili arbitrator. He worked on them until 1995, leaving unresolved Hashwani's claim for payment and Jivraj's claim in tax liabilities.

In 2008 Hashwani through his solicitors claimed the payment due to him from Jivraj, calling on the defendant to appoint his arbitrator in pursuance of the Clause. The same letter contained a name of the claimant's appointee, who turned out not to be a member of the Ismaili community. Non-compliance with the Clause was justified on the basis that honouring the provision would now amount to a violation of the Human Rights Act 1998 which prohibits religious discrimination. Jivraj nevertheless contested the claimant's choice of arbitrator. Hashwani, in turn, applied for an order confirming his appointment under section 18(2) of the Arbitration Act 1996, which allows such application to the court in the absence of an agreed procedure on failure of appointment. The claimant also invoked The Employment Equality (Religion or Belief) Regulations 2003 as justification for his appointment.

II – The Law

The only legal instruments relevant on appeal were the EU Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, and The Employment Equality (Religion or Belief) Regulations 2003 which were enacted to implement that Directive. 4

As regards the 2003 Regulations, regulation 3, headed “Discrimination on grounds of religion or belief”, defined discrimination as treating someone less favourably than one treats or would treat other persons. 5 Regulation 6 provides that “(1) It is unlawful for an employer … to discriminate against a person … (a) in the arrangements he makes for the purpose of determining to whom he should offer employment; … or (c) by refusing to offer a person employment.” 6 Employment means “employment under a contract of service or of apprenticeship or a contract personally to do any work” (regulation 2(3)). 7 Finally, the prohibition of discrimination was subject to the genuine occupational requirement exception, as stated in reg. 7: “This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out (a) being of a particular religion or belief is a genuine and determining occupational requirement; (b) it is proportionate to apply that requirement in the particular case …” (reg. 7(2)) or where “an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out (a) being of a particular religion or belief is a

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3 Arbitration Act 1996, s.18(1)-(2).
5 The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1661), reg 3(1).
6 ibid reg 6(1).
7 ibid reg 2(3).
genuine occupational requirement for the job; (b) it is proportionate to apply that requirement in the particular case …” (reg. 7(3)).

For the present purposes, it will suffice to mention article 3 of the 2000 Directive, which defines the scope of its application. Accordingly, the Directive should apply to, inter alia, “conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion”. 9

A few issues need to be addressed before examining the judgments in the case. As noted by both the Court of Appeal and the Supreme Court, the scope of the Directive is wider than that of the Regulations. The former deals with religious, disability, age and sexual orientation discrimination, while the latter focused on religion or belief specifically. 10 This was explained by the UK legislation having already covered other grounds referred to in the Directive. 11 Furthermore, both Courts also agreed that the Regulations should be interpreted as “complementing all the other legislation prohibiting discrimination”, since all the provisions use similar language and terminology. 12 Nowhere in the judgment was it noted that the Regulations are silent on the issue of access to self-employment, expressly required by the Directive.

It should also be noted that the Regulations have now been repealed by s. 211 and Schedule 27 (Part 2) of the Equality Act 2010. Although the Act represents the current state of the law, nothing in the Supreme Court’s judgment suggests a different outcome under the new legislative framework.

III – The Judgment of the Commercial Court

Faced with the question of the Clause's validity, David Steel J ruled for the defendant. 13 It was held that there was no discrimination on any of the submitted grounds (2003 Regulations, Human Rights Act 1998, public policy). Regarding the 2003 Regulations specifically, the judge did not consider arbitrators to be employees for the purposes of regulation 6. 14 In any case, membership of the Ismaili community amounted to a genuine occupational requirement under regulation 7(3). The Clause should therefore apply between the parties to the dispute. Lastly, the religious requirement was not severable from the arbitration provision, which meant that the whole clause would be void without it. 15

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8 ibid reg 7(2)-(3).
10 Jivraj (n 1)[10].
12 Jivraj (n 1) [11].
14 ibid [28].
15 ibid [75]-[77].

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IV – Court of Appeal’s Ruling and the Subsequent Controversy
The Court of Appeal took a different view of the law and overturned the judgment of Steel J. Moore-Bick LJ, Aikens LJ and Sir Richard Buxton unanimously decided that (a) the appointment of an arbitrator involved a contract for services which falls under the definition of “a contract personally to do any work” and thus constitutes “employment” as stated in the Regulations. It was also held that (b) the genuine occupational requirement exception could not assist Mr Jivraj in the present case. The disputes were to be governed by English law and being a member of the Ismaili community is not necessary to perform the arbitrator's function. On the issue of severance, it was found that (c) removing the discriminatory clause would render the whole agreement substantially different and therefore it should be void in its entirety.

The implications of Court of Appeal's ruling to the arbitration profession were evidenced by the mere fact that the London Court of International Arbitration joined the proceedings and was separately represented in the Supreme Court. It was argued that the ruling jeopardised the standard practices in the industry, since clauses referring to arbitrators' ethnic or religious background are increasingly common. For example, a requirement for an arbitrator to be neutral to both parties necessarily carries with itself a nationality clause (i.e. an exclusion of arbitrators who share the nationality of any of the parties). If such clauses were held unlawful, it was submitted London's reputation as the arbitration capital of Europe would be tarnished. A broader objection was also raised, namely that one of the main reasons for arbitrating instead of litigating is the ability of the parties to choose the decision-maker. The parties can appoint someone who is familiar with their cultural values and shares their perspective. With the parties' confidence in the arbitration process threatened, no wonder that commentators from the arbitrators' side warned against a “minefield of complications”.

V – The Supreme Court
The worries outlined above were eased after the Supreme Court delivered its judgment on 27 July 2011. Lord Clarke of Stone-cum-Ebony JSC (with whom Lord Phillips, Lord Walker and Lord Dyson agreed) delivered the leading speech. Lord Mance JSC delivered a separate speech, agreeing with Lord Clarke and focusing on the peculiar nature of the arbitrators' profession. Lord Clarke addressed the issue of employment and the genuine occupational requirement, each of which will now be separately examined. Due to the Court's findings in these two respects, the issue of severance did not arise.

17 ibid [25].
18 Employment Equality Regulations 2003 (n 6).
19 Jivraj (n 17) [27]-[29].
20 ibid [34].
22 Jivraj (n 1).
V(a) – Are arbitrators employees for the purposes of the 2003 Regulations?

In answering the key question as to whether a contract between the parties and the arbitrator provides for “employment under … a contract personally to do any work”, emphasis was placed on the word “under”. This led His Lordship to ultimately decide that “the role of an arbitrator is not naturally described as employment under a contract personally to do work. That is because his role is not naturally described as one of employment at all”.23 The Court rightly noted its obligation to as far as possible interpret the Regulations in light of the Directive's purpose.24 Consequently, the jurisprudence of the European Court of Justice (ECJ) was considered. Lord Clarke relied in particular on two cases – Allonby v Accrington and Ressendale College and Lawrie-Blum v Land Baden-Wurttemberg.25 In Lawrie-Blum the ECJ defined “worker” as someone who “performs services for and under the direction of another”.26 In Allonby a distinction was made between workers and independent suppliers of services in the context of equal pay. In the absence of any domestic authority to the contrary, His Lordship found “no reason why the same distinction should not be drawn for the purposes of the 2003 Regulations”.27 Applying the principles to the facts before the Court, His Lordship concluded that arbitrators are not subject to the Regulations as they are not subordinate to the parties with whom they contract for provision of services.

V(b) – Does the genuine occupational requirement exception apply?

In light of the above-mentioned finding, there was no practical significance to this issue. Nevertheless, Lord Clarke dismissed the claimant's argument that a dispute under English law does not require an Ismaili arbitrator as adopting “a very narrow view on the function of arbitration proceedings”, thereby aligning with the expectations of the arbitration industry.28

VI – Concluding Remarks

In the eyes of the Supreme Court, the practical worries voiced by the thriving arbitration industry prevailed. With a sigh of relief from the arbitration community came a rather “surprising conclusion” that in the view of the Supreme Court, the European Union law allows for discrimination on grounds of religion or belief, disability, age or sexual orientation.29 This result should logically extend beyond the arbitration industry, since the broad purpose of the 2003 Regulations was to implement the Directive which dealt with all of the mentioned prohibited grounds. Such an outcome is even more bizarre when contrasted with articles 18 and 19 of the

23 Jivraj (n 1) [23].
26 Lawrie-Blum (n 18) [17].
27 Jivraj (n 1) [27].
28 ibid [60].
Treaty on the Functioning of the European Union (TFEU) which embody a general prohibition of discrimination. What is more, the Court's analysis equates “employment” with “occupation”. It was noted above that the Directive refers to both concepts separately and it is submitted that “occupation” is wide enough to include self-employment. Finally, it can be argued that the Supreme Court should have referred the case to the ECJ pursuant to article 267 TFEU. Lord Clarke, however, proclaimed the matter acte clair and did not make a reference in the absence of any reasonable doubt as to the application of the community law. 30

Whatever one's opinion on the result in Jivraj v Hashwani, there can be no doubt that the decision will have a profound impact on the personal scope of application of equality laws in the context of employment.

30 Jivraj (n 1) [73].