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Case No: A2/2016/3797  
A2/2017/1650

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
**HH Judge Richardson; HH Judge Eady QC**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/10/2018

**Before :**

**LORD JUSTICE UNDERHILL**  
**(Vice-President of the Court of Appeal (Civil Division))**  
**LORD JUSTICE LONGMORE**  
and  
**LORD JUSTICE PETER JACKSON**

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**Between :**

<b>THE BRITISH COUNCIL</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>DAVID JEFFERY</b>	<b><u>Respondent</u></b>
<b>JONATHAN GREEN</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>SIG TRADING LTD</b>	<b><u>Respondent</u></b>

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**Mr James Laddie QC** (instructed by **Mills & Reeve LLP**) for the **Appellant in *Jeffery***  
**Mr James Stuart** (instructed by **Pitmans Solicitors**) for the **Respondent in *Jeffery***

**Mr Edward Kemp** and **Mr Grahame Anderson** (instructed by **Slater & Gordon (UK) LLP**)  
for the **Appellant in *Green***

**Mr Bruce Carr QC** (instructed by **Pinsent Masons LLP**) for the **Respondent in *Green***

Hearing dates: 15<sup>th</sup> & 16<sup>th</sup> May 2018  
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**Approved Judgment**

**Lord Justice Underhill:**

**INTRODUCTION**

1. The two appeals before us, to which I will refer for short as *Jeffery* and *Green*, concern the jurisdiction of the Employment Tribunal to entertain claims by employees working outside Great Britain. In *Jeffery* the Claimant lived in Bangladesh, where he worked for the British Council (“the Council”). The ET held that it had no jurisdiction to entertain his claims of unfair dismissal, whistleblower detriment and discrimination, but the Employment Appeal Tribunal reversed that decision. In *Green* the Claimant lived in Lebanon and was employed by the Respondent, SIG Trading Ltd (“SIG”), to work for it in Saudi Arabia. The EAT upheld the ET’s decision that it had no jurisdiction to entertain his claims of whistleblower detriment and unfair dismissal.
2. The question of the territorial reach of British employment legislation has notoriously given rise to problems in recent years and has produced a plethora of reported cases, including one decision of the House of Lords and two of the Supreme Court – *Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250; *Duncombe v Secretary of State for Children, Schools and Families (no. 2)* [2011] UKSC 36, [2011] ICR 1312; and *Ravat v Halliburton Manufacturing & Services Ltd* [2012] UKSC 1, [2012] ICR 389. The effect of those decisions has been fairly recently reviewed in this Court in *Bates van Winkelhof v Clyde & Co LLP* [2012] EWCA Civ 1207, [2013] ICR 883, and *Dhunna v CreditSights Ltd* [2014] EWCA Civ 1238, [2015] ICR 105. It will not be necessary in these appeals, and would indeed be likely to be positively unhelpful, to attempt a further comprehensive survey of that well-travelled ground. The position as now established by the case-law can be sufficiently summarised for the purpose of the cases before us as follows:
  - (1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then the Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94 (1) of the Act); nor is there any such provision in the Equality Act 2010.
  - (2) The House of Lords held in *Lawson* that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the Act in the cases where an employee works overseas.
  - (3) In the generality of cases Parliament can be taken to have intended that an expatriate worker – that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer – will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case-law as “the territorial pull of the place of work”. (This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended the Act to apply if they are based in Great Britain.)

- (4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law,<sup>1</sup> which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as “the sufficient connection question”.
- (5) In *Lawson* Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called “the posted worker exception”) and (b) where he or she works in a “British enclave” abroad. But the decisions of the Supreme Court in *Duncombe* and *Ravat* made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.
- (6) In the case of a worker who is “truly expatriate”, in the sense that he or she both lives and works abroad (as opposed, for example, to a “commuting expatriate”, which is what *Ravat* was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/EU-funded international schools considered in *Duncombe*.
- (7) The same principles have been held by this Court to apply to the territorial reach of the 2010 Act: see *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438, [2016] ICR 975.

I emphasise that this is not intended as a comprehensive summary of the effect of the decided cases. I am simply setting the background for the issues that arise in these appeals.

3. There are two issues which are common to both the appeals before us:
- The first is whether the sufficient connection question is to be characterised as a question of fact or law: the importance of the characterisation is that it determines the scope of the review permissible on appeal.
  - The second is whether, in answering the sufficient connection question, it is relevant that the contract of employment contains a provision to the effect that it will be governed by English law.

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<sup>1</sup> The authorities fairly consistently refer to factors connecting the employment “with Great Britain *and* British employment law”; but these two elements largely overlap, and I will sometimes for brevity refer simply to the former.

However, the issues arise in different ways in the two appeals and there are also issues peculiar to the reasoning of the ET in each appeal. Accordingly, it will be more convenient to deal with each appeal in turn. That means that the common points will be principally considered in the context of *Jeffery*, which is the earlier of the two; but I will take into account the submissions made by counsel in *Green*. *Green* also raises a question of general application about whether the rules are any different in the case of whistleblower claims.

4. In *Jeffery* the Council is represented by Mr James Laddie QC, and Mr Jeffery by Mr James Stuart, both of whom also appeared in the ET and the EAT. In *Green* Mr Green is represented by Mr Edward Kemp and Mr Grahame Anderson, and SIG by Mr Bruce Carr QC. Mr Kemp has represented Mr Green throughout, but SIG was represented in the ET by Mr Alexander Modgill of counsel and in the EAT by Mr Carr.

## A. JEFFERY

### THE FACTS

5. As regards the facts found by the ET, I gratefully reproduce verbatim at paras. 6-14 below the clear and comprehensive summary of the facts in the judgment of HH Judge Richardson in the EAT.
6. The Council is a public corporation established by Royal Charter. It is governed by a Board of Trustees. It is a registered charity. It describes itself as “the United Kingdom’s international organisation for cultural relations and educational opportunities”. It emphasises that its staff are public servants and are not government employees or part of the UK civil service.
7. The Royal Charter determines the scope of its work as being to:
  - a. promote cultural relationships and the understanding of different cultures between peoples of the UK and other countries;
  - b. promote a wider knowledge of the UK;
  - c. develop a wider knowledge of the English language;
  - d. encourage cultural, scientific, technological and other educational co-operation between the UK and other countries.”
8. As part of its work the Council runs teaching centres (“TCs”) in many parts of the world. They operate in a similar way to private language schools, offering English courses to students of all ages. There were three such centres in Dhaka in Bangladesh. Their purpose was to help local people, not expatriates, and they were integrated into the local community.
9. Although there is a teaching centre department based in London the great majority of operational decisions were taken at a regional, country or local level. Subject of course to the governance of the Board of Trustees, the TCs have a high degree of financial and commercial autonomy. Thus in Bangladesh the TCs are funded entirely from fees

raised in Bangladesh from either the many thousands of students attending the centres or from corporate clients. Salaries and expenses are generally met by TCs locally. The money of UK taxpayers is not used to support them. The Employment Judge said that the business was carried out locally, managed locally and relied on its own fee income.

10. Mr Jeffery was first employed by the Council in 1994. He is a UK citizen, recruited in the UK, but he has almost always worked abroad within TCs – as a teacher, a senior teacher, a Director of Studies and latterly as a Centre Manager in locations as diverse as Lisbon, Seoul, Saudi Arabia, Porto, Athens, Japan, the Middle East, Brazil and Bangladesh. He had a career break for one year in 2010 and two short assignments in the UK from September 2011 to February 2012 and from May 2012 to 7 August 2012. The Employment Judge described him as an enthusiastic expatriate, enjoying the fact that he was based abroad. He did not ordinarily live in the UK or even have a home in the UK, although he owned properties which he let, visited his parents in the UK and hoped to retire to the UK.
11. Mr Jeffery’s employment was governed by an offer letter dated 6 September 2005 given to him when he was offered further employment “on an indefinite contract basis”. It expressly provided that his contract was governed by the laws of England and Wales (paragraph 22). His salary was payable in sterling. He was entitled to membership of the Civil Service Pension Scheme and his employment was pensionable (paragraphs 14, 15). It was said that “all officers are subject to the Official Secrets Act” (paragraph 13).
12. With effect from 8 August 2012 Mr Jeffery became a teaching centre manager (“TCM”) in Bangladesh. His appointment was confirmed by a letter dated 19 June 2012. It was initially for a period of three years with the possibility of remaining for a further year. A letter dated 27 June 2012 set out further provisions. His salary was £33,455, and there were in addition substantial mobility and location allowances of £11,000 and £12,400. But there was also a “notional deduction for UK tax”. He was entitled to free accommodation and other benefits. Mr Jeffery acknowledged in his evidence the benefits of being employed abroad.
13. The Council has an equality policy expressly said to be “aligned to the Equality Act 2010 ... and relevant legislation aligned to the geographical regions in which we operate”. The policy does not, however, purport to directly apply any single piece of legislation.
14. Mr Jeffery was a successful and highly regarded TCM. About 30-40 people reported to him. He was responsible for “growing the business”, as the Employment Judge put it. He turned round the TC for which he was responsible so that it made a profit. It is not necessary to set out in any detail the circumstances of his resignation; it is sufficient to say that they concern a decision to close his TC; he and others strongly protested against that decision over some months; it was reversed, but he resigned shortly afterwards.
15. Three particular aspects of those findings were expanded by Judge Richardson as a result of further submissions in the EAT (though they involve no new findings of primary fact).

16. First, as regards the finding that Mr Jeffery was entitled to membership of the Civil Service Pension scheme, Judge Richardson said, at paras. 34-35 of his judgment:

“34. As a general rule the Civil Service Pension Scheme is available only to persons in employment in the Civil Service of the State: see section 1(4)(a) of the Superannuation Act 1992. But the Scheme can also be made available to persons who are in employment or offices of a kind listed in Schedule 1 to the Act: see section 1(4)(b). The British Council was added to Schedule 1 by section 1 of the British Council and Commonwealth Institute Superannuation Act 1986. Schedule 1 lists major national museums and galleries followed by a large number of institutions which are in a broad sense public or governmental or both.

35. A document produced by the Respondent and provided to me by counsel dated 2009 indicates that 'most British Council UK-appointed staff' are members of the Civil Service Pension Scheme. The Employment Judge was provided, for comparison with the Claimant's conditions, with the contract of a locally employed member of staff. As one would expect it makes no similar provision.”

17. Secondly, as regards the ET's findings about a notional deduction for income tax, he said, at paras. 37-39:

“37. The provision in question is found in the Guide to Benefits which was attached to the letter dated 27 June 2012. It notes that as a 'British Council member of staff working overseas', it was unlikely that the Claimant would pay income tax. It said that:

‘Notional tax is deducted from your gross salary (excluding Mobility, Location and Cost of Living Allowances) to maintain comparability with the position were you to be working for the British Council in the UK. You should note carefully that notional tax deductions are not intended to replicate the actual tax payable if you were working in the UK.’

38. The amount deducted appears, in broad terms, to be the amount which would be paid in basic rate tax after a personal allowance.

39. The Employment Judge said that he found this to be a policy applied 'across the board' by the Respondent. I assume by this he meant across the board to UK appointed staff working overseas. The contract for locally employed teachers which I have in my papers for comparison indicates that income tax will be deducted at source in accordance with the tax regulations of the Government of Bangladesh (clause 10).”

18. Thirdly, as regards the provision in the contract that Mr Jeffery was subject to the Official Secrets Act 1989, at paras. 41-44 Judge Richardson carefully analysed which provisions of the statute could in practice have any application to his employment and concluded, at para. 45:

“In summary, therefore, the provisions of the Official Secrets Act 1989 have only limited application to the Claimant; but the fact that his contract tells the Claimant that the 1989 Act applies to him at all is not without significance. It draws his attention to the fact that even when serving abroad, as a British citizen working for a body of a public nature (the Respondent describes itself as a 'non departmental public body'), he may come within its purview. It is difficult to envisage such a provision in the contract of an expatriate unless his employment had an exceptional connection with the UK. It is also difficult to envisage the inclusion of such a provision in the contract of a locally employed teacher - indeed it is not to be found in the sample which the Respondent provided.”

#### THE ET PROCEEDINGS

19. Following his resignation, Mr Jeffery brought proceedings in the ET complaining of unfair (constructive) dismissal, both under section 94 of the 1996 Act and under section 103A (“automatic” unfair dismissal for whistleblowing); for “whistleblower detriment” contrary to section 47B of the Act; and for discrimination on the ground of religion or belief under the 2010 Act.
20. The Council contended that the ET did not have jurisdiction to entertain the claims because, essentially, Mr Jeffery worked exclusively outside Great Britain. That issue was heard by Employment Judge Pearl at a preliminary hearing in London Central on 9 and 10 April 2015.
21. By a judgment sent to the parties on 1 June 2015 the ET upheld the Council’s contention and dismissed the claims. Judge Pearl made his findings of fact at paras. 4-24 of the Reasons. I have already summarised these. At paras. 26-36 he reviews the authorities. Since it is not contended before us that this part of the judgment contains any error of law I need say no more about it. The Judge’s conclusions and supporting reasoning appear at paras. 37-44. I can summarise them as follows:
- (1) He starts, at para. 37, with the fact that Mr Jeffery was on any view a true expatriate, in the sense noted at para. 2 (5) above, and was thus subject to the general rule unless there were “sufficiently strong connections with Great Britain and British employment law” to “displace [the] territorial pull” to Bangladesh.
  - (2) At paras. 39-43 he reviews various factors which he concludes do not exert any particularly strong pull towards Great Britain. These include the fact that the contract of employment is said to be governed by English law and the peculiar nature of the work of the British Council. As to the latter, he says at para. 42 that it is irrelevant that the Council “promotes the interests of the UK”, observing that it is not a “governmental organisation” and that Mr Jeffery “is not a civil servant or a Crown employee”.

(3) His conclusion, at paras. 43-44, is:

“43. In assessing these points, I am not persuaded that the aims and policies of the British Council have any particular relevance. Some of the citations relied upon, for example from the Respondent’s Code of Conduct, point in the opposite direction. For example: ‘As the world’s leading cultural relations organisation, the British Council touches the lives of millions each year ...’ (paragraph 15a of written submission.) This strikes me as pointing to the countries in which the Respondent operates. ‘Our Code ... sets the standards for the way we work in all our activities and locations ...’ (paragraph 15b.) This does not establish any tangible link with the UK or UK employment law, especially when ‘our Code of Conduct sets out the principles that everyone who works for the British Council must follow ... Our Code of Conduct applies worldwide ...’ (Paragraph 15d.) The Equality Policy is said to originate in the UK, but that is hardly surprising. I conclude that none of these expressions of policy, or the nature of the Respondent’s work meet Mr Laddie’s fundamental point that the Claimant was posted abroad, for a British employer, for the purposes of a business carried on in Bangladesh. This is what I consider the evidence establishes. It would not be a reflection of the facts to say he worked for a business carried out in the UK or London.

44. There was no reporting line to London and the TCM had considerable autonomy. His line management was local and regional, as I have described. These facts are inconsistent with his submission. They also have to be placed in the context of an employment history in which the Claimant was always based abroad. Such connections as there are to the UK do not amount to connections of sufficient strength to displace the general rule. On the contrary, his circumstances appear to me to fall within that rule. ...”

He then deals in a little more detail with the fact that Mr Jeffery is said to be subject to the Official Secrets Act, but concludes that it does not have “decisive weight”.

## THE JUDGMENT OF THE EAT

22. Mr Stuart advanced three grounds of appeal in the EAT. I can ignore the third, but the first two were (as summarised by Judge Richardson):

“(1) ... that the Employment Judge limited his analysis to whether the Claimant fell within one of the two identified categories of employee mentioned by Lord Hoffmann in *Serco*; he argues that the Employment Judge did not have sufficient regard to the underlying principle identified in *Ravat*. The Employment Judge, while making findings of fact on many of the factors, did not then carry out the required comparative

analysis which is required by the modern cases. If he had done, he would have appreciated that the connections with Great Britain and British employment law were indeed overwhelmingly closer than with any other country.

(2) ... that the Employment Judge, perhaps because he did not carry out the comparative exercise required, did not mention and left out of account a whole range of factors which ought to have borne upon his decision.”

23. Broadly, Judge Richardson accepted those submissions. At para. 55 of his judgment he said:

“I have ... reached the conclusion that the Claimant established an overwhelmingly closer connection with Great Britain and with British employment law than any other system; and that Mr Stuart’s first submission is partly correct and his second submission correct. While the Employment Judge set out the law correctly he did not carry out in any structured way the exercise of looking at the factors as a whole pointing towards and away from a connection with Great Britain and with British employment law; and his conclusions show that he left out of account factors which point strongly in favour of the Claimant’s case.”

He proceeded to set out the factors which he regarded as pointing to “a closer connection with Great Britain and with British employment law than any other system – keeping in mind that this is the test to be applied because the Claimant is truly expatriate” (para. 56) and then comparing those with the factors which might be said to point the other way. I take them in turn.

24. Judge Richardson identified five factors as pointing to a closer connection with Great Britain than any other system. The first two were that Mr Jeffery was “a UK citizen recruited in the UK to work for a UK organisation” and that the contract of employment provided for English law to apply (para. 57). He described the first factor as “never unimportant” and the second as “important”; but he correctly recognised that by themselves they could not tip the balance because they could not be described as exceptional. I should set out in full what he says about the remaining three factors:

“58. The third factor is that the Claimant was entitled to a Civil Service pension – an entitlement granted by a UK Act of Parliament which specifically added the Respondent to a list of institutions of a generally public or governmental nature. This is a remarkable feature to find in the contract of employment of an expatriate employee. It creates another strong link to the UK and to UK employment law: a Civil Service pension is a benefit of enormous value, itself governed by UK statutory provision. It also points to the particular standing of the Respondent, to which I will return in a moment. This pension was not granted to locally employed teachers; the Claimant received it because he was in the special category of being UK appointed staff.

59. The fourth factor is that the Claimant's salary was subject to a notional deduction for UK income tax to maintain comparability with the position if he were working in the UK. This again is an exceptional provision to find in the contract of an expatriate employee.

60. The fifth factor is the nature of the Respondent. It is, as it describes itself, a 'non departmental public body'. Its status for pension purposes reflects the fact that it belongs to a list of organisations which, while not directly part of government, are recognised as playing such a part in the life of the nation that it is right to afford a Civil Service pension to their employees."

He concludes, at para. 61:

"These factors, taken together, to my mind establish a quite exceptional degree of connection with Great Britain and British employment law."

25. At para. 62 of his judgment Judge Richardson refers to a number of other particular features of Mr Jeffery's employment on which Mr Stuart relied –

"the Claimant could use the FCO diplomatic bag; his salary was paid in London and funded in London, not from the local TC in Bangladesh; he had statutory sick pay; his contractual holiday rights were related to UK based trips, and the like".

He said that these were essentially "outworkings" of the factors already identified but that they nevertheless confirmed the exceptional degree of connection with Great Britain and British employment law.

26. As for the factors going the other way, Judge Richardson said, at paras. 64-65:

"64. I can see very little to establish any connection with Bangladeshi employment law; the Claimant's rights were derived from his contract which was governed by English law, and it is fanciful to suppose that the parties intended that he would enforce them by bringing proceedings in Bangladesh. Moreover his stay in Bangladesh was always intended to be short term.

65. There was of course an important connection with Bangladesh while the Claimant was employed there: he was full-time, running a language centre, working with locally employed staff and expected to ensure that it broke even. The Employment Judge was entitled to say that he worked in a business which was carried on locally, was managed locally and substantially relied on its own fee income - indeed, it was expected to be self sufficient. As against this, the Respondent was not a profit making business; the TC was part of the operation of the Respondent, a UK charity and public body; and it was part of a

broader operation intended to serve as the UK's international organisation for cultural relations and educational opportunities. Moreover he was expected to stay in Bangladesh only for a limited period and then to move on elsewhere, as he had done throughout his career.”

27. Judge Richardson gave his conclusion at para. 66 as follows:

“I have therefore concluded, even without taking into account the provision of the contract concerning the Official Secrets Act 1989, that when the requisite comparative exercise is carried out the Claimant established the 'overwhelmingly closer connection' with Great Britain and British employment law. I have reminded myself that respect is due to the fact finder's view and that whether the test is satisfied will often be a question of degree. In my judgment, given the facts which were found by the Employment Judge, as a matter of law territorial jurisdiction was established.”

At para. 67 he said that the inclusion in the contract of a reference to the Official Secrets Act was a further factor reinforcing his conclusion.

#### THE ISSUES IN THE APPEAL

28. There are five grounds of appeal, which I take in turn.

(1) Fact or law ?

##### *The Submissions*

29. Mr Laddie contended that Judge Richardson had treated the appeal to the EAT as if the question whether Mr Jeffery's case fell outside the general rule was a question of law to which there was a single right answer, so that he was entitled (indeed obliged) to allow the appeal if his assessment of the various factors differed from that of the Judge in the ET. He acknowledged that there were passages in the opinion of Lord Hoffmann in *Lawson* which apparently justified that approach, but he submitted that the law had now moved on and that the scope of review was more limited. He relied in particular on the judgments of Lord Hope in *Ravat* and of Langstaff P in the EAT in *Olsen v Gearbulk Services Ltd* [2015] UKEAT 0345/15, [2015] IRLR 818. I consider those cases in turn.

30. The first of the relevant passages in *Lawson* is at the very start of the section in which Lord Hoffmann addresses the issues. He says, at para. 23 (p. 259E):

“In my opinion the question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements. This is a question of the construction of section 94(1) and I believe that it is a mistake to try to formulate an ancillary rule of territorial scope, in the sense of a verbal formula such as section 196 used to provide, which must then itself be interpreted and applied.”

After developing that point a little further, he says, at para. 24 (p. 259H):

“On the other hand, the fact that we are dealing in principles and not rules does not mean that the decision as to whether section 94(1) applies (and therefore, whether the Employment Tribunal has jurisdiction) is an exercise of discretion. The section either applies to the employment relationship in question or it does not and, as I shall explain later, I think that is a question of law, although involving judgment in the application of the law to the facts.”

He returns to the topic in the context of one of the cases heard by the Committee with *Lawson* itself, *Crofts v Veta Ltd*, which concerned pilots of a Hong Kong airline based in London. Having set out the ET’s conclusion, he says, at para. 34 (p. 263 D-G):

“[Counsel for the employees] said that the tribunal's conclusion was a finding of fact which the Employment Appeal Tribunal (and your Lordship's House on appeal) had no jurisdiction to disturb. Like many such decisions, it does not involve any finding of primary facts (none of which appear to have been in dispute) but an evaluation of those facts to decide a question posed by the interpretation which I have suggested should be given to section 94(1), namely that it applies to peripatetic employees who are based in Great Britain. Whether one characterises this as a question of fact depends, as I pointed out in *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929, upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review. I would be reluctant, at least at this stage in the development of a post-section 196 jurisprudence, altogether to exclude a right of appeal. In my opinion, therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect. In the present case I think not only that the tribunal was entitled to reach the conclusion which it did but also that it was right. I would therefore dismiss Veta's appeal.”

31. The point to note for present purposes is that, although Lord Hoffmann holds in terms that the question whether on given facts a case falls within the territorial scope of the 1996 Act should be treated as a question of law, to which accordingly there is in principle only one right answer, he makes it clear in para. 34 that that characterisation is a matter of policy and raises the possibility that at a later stage in “the development of a post-section 196 jurisprudence” policy considerations might justify a different approach.
32. Mr Laddie took us to the post-*Lawson* decisions in this Court in *Duncombe* ([2009] EWCA Civ 1355, [2010] ICR 815), *Ministry of Defence v Wallis* [2011] EWCA Civ 231, [2011] ICR 617, and *Dhunna* in which he said that the language used was more

appropriate to a reasonableness review than the decision of a point of law; but I found the passages in question of only limited value since they were not directly addressing the fact/law issue.

33. More substantially, he took us, as I have said, to the judgment of Lord Hope in *Ravat*. In that case the employee lived in England and was employed by a company based in Scotland, but he worked exclusively in Libya, commuting to and fro on a monthly basis. The question was whether the employment fell within the territorial scope of the 1996 Act. The ET held that it did. That decision was overturned by the EAT but restored by the Inner House, whose decision was upheld by the Supreme Court. Lord Hope, with whom the other members of the Court agreed, re-stated at para. 28 of his judgment the principles to be derived from the opinion of Lord Hoffmann in *Lawson*, particularly in the case of expatriate employees. He said, at pp. 399-400:

“27. ... [The] starting point ... is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.

28. The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them. The expatriate cases that Lord Hoffmann identified as falling within its scope were referred to by him as exceptional cases: para 36. This was because, as he said in para 36, the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.”

At para. 29 he considered the case of the “commuting expatriate”, such as the claimant in that case. That of course is not our case, but what is important is how he characterised the issue in terms of the fact/law distinction. He said (p. 400 C-E):

“The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a

question of degree. . . . The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain.”

34. I turn to *Olsen*. It is unnecessary to set out the nature of the particular issue in that case. At para. 35 of his judgment Langstaff P referred to paras. 24 and 34 of Lord Hoffmann’s opinion in *Lawson*. He continued, at para. 36 (p. 823):

“The words ‘at least at this stage in the development of a post-Section 196 jurisprudence’ anticipate that a change might be desirable once that jurisprudence had sufficiently developed. In paragraph 29 of *Ravat* . . . Lord Hope treated the question of whether a case was within the scope of Section 94(1) as a question of law, but also a question of degree: and recognised that it was a question of fact whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain. At the outset of the hearing I asked whether the time may now have come to treat the question of ‘sufficiently close connection’ as indeed being a question of fact, such that a decision by a Tribunal, properly directing itself as to the applicable law, with regard to appropriate cases, would disclose no error of law unless it were shown to be perverse. [Counsel for the respondents] submitted that this was so. In the light of Lord Hope’s words, I consider his submission to be well founded.”

35. Mr Laddie submitted that Langstaff P was right to treat Lord Hope’s statement at para. 29 of his judgment in *Ravat* as having authoritatively established the correct characterisation of the sufficient connection question. It is a question of fact and degree, involving an evaluation of a number of different factors, on the answer to which in any given case views might reasonably differ. It is not a question of law to which there could only be one right answer. He acknowledged that there was a tension between that approach and what Lord Hoffmann had said in *Lawson*, which was not directly confronted in *Ravat* (by taking the *Olsen* line or otherwise); but he submitted that *Ravat* was a clear, and evidently considered, statement by the Supreme Court post-dating *Lawson* of how the question should be characterised and that it must be treated as authoritative.
36. Mr Laddie further submitted that even apart from authority the characterisation of the sufficient connection question as a question of fact was self-evidently correct. Other questions involving multifactorial evaluations of this kind are always so characterised. To treat this question differently would be anomalous and would encourage appeals in circumstances where justice did not require.

37. Mr Carr, who was seeking to uphold the finding of the ET in *Green*, adopted Mr Laddie’s submissions. But he drew our attention also to a passage in the judgment of Lord Carnwath in the Supreme Court in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 29, [2013] 2 AC 48. The issue before the Court was the meaning of the phrase “a crime of violence” in the Criminal Injuries Compensation Scheme, and in that context the issue arose of whether the question was to be characterised as one of law or fact. Lord Carnwath addressed that issue at paras. 41-47 of his judgment (with which the other members of the Court agreed). He referred to the recommendation of the Leggatt report that appeals should lie from the FTT to the UT on a point of law but that the concept of what constituted a point of law should be “interpreted widely”. He continued, at para. 43 (p. 63 F-G):

“Thus it was hoped that the Upper Tribunal might be permitted to interpret ‘points of law’ flexibly to include other points of principle or even factual judgment of general relevance to the specialised area in question. That might have seemed controversial. However, as an approach it was not out of line with the developing jurisprudence in the appellate courts.”

He then referred to *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929 – to which, it will be recalled, Lord Hoffmann had referred in *Lawson* (see para. 30 above) – and to *Lawson* itself. He quoted paras. 26-27 of Lord Hoffmann’s speech in *Moyna*, and I think it is also useful also to quote part of para. 25. These read (pp. 1935-6):

“25. ... There is a good deal of high authority for saying that the question of whether the facts as found or admitted fall one side or the other of some conceptual line drawn by the law is a question of fact: see, for example, *Edwards v Bairstow* [1956] AC 14 and *O’Kelly v Trusthouse Forte plc* [1984] QB 90. What this means in practice is that an appellate court with jurisdiction to entertain appeals only on questions of law will not hear an appeal against such a decision unless it falls outside the bounds of reasonable judgment.

26. ... It may seem rather odd to say that something is a question of fact when there is no dispute whatever over the facts and the question is whether they fall within some legal category. In his classic work on *Trial by Jury* Lord Devlin said (at p 61):

‘The questions of law which are for the judge fall into two categories: first, there are questions which cannot be correctly answered except by someone who is skilled in the law; secondly, there are questions of fact which lawyers have decided that judges can answer better than juries.’

27. Likewise it may be said that there are two kinds of questions of fact: there are questions of fact; and there are questions of law as to which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment. But the usage is well established and causes no

difficulty as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question: see *In re Grayan Building Services Ltd* [1995] Ch 241, 254-255.”

Lord Carnwath continued, at para. 46 (pp. 64-65):

“I discussed these developments in an article in 2009 (*Tribunal Justice, A New Start* [2009] PL 48, pp 63-64). Commenting on *Moyna* I said:

‘The idea that the division between law and fact should come down to a matter of expediency might seem almost revolutionary. However, the passage did not attract any note of dissent or caution from the other members of the House. That it was intended to signal a new approach was confirmed in another recent case relating to a decision of an employment tribunal, *Lawson*.’

Of Lord Hoffmann's words in *Serco* itself, I said:

‘Two important points emerge from this passage. First, it seems now to be authoritatively established that the division between law and fact in such classification cases is not purely objective, but must take account of factors of “expediency” or “policy”. Those factors include the utility of an appeal, having regard to the development of the law in the particular field, and the relative competencies in that field of the tribunal of fact on the one hand, and the appellate court on the other. Secondly, even if such a question is classed as one of law, the view of the tribunal of fact must still be given weight.

This clarifies the position as between an appellate *court* on the one hand and a first instance tribunal. But what if there is an intermediate appeal on law only to a specialist appellate tribunal? Logically, if expediency and the competency of the tribunal are relevant, the dividing line between law and fact may vary at each stage. Reverting to Hale LJ's comments in [*Cooke v Secretary of State for Social Security* [2002] 3 All ER 279 paras 5-17], an expert appellate tribunal, such as the Social Security Commissioners, is peculiarly fitted to determine, or provide guidance, on categorisation issues within the social security scheme. Accordingly, such a tribunal, even though its jurisdiction is limited to “errors of law”, should be permitted to venture more freely into the 'grey area' separating fact from law, than an ordinary court. Arguably, “issues of law” in this context should be interpreted as extending to any issues of general principle affecting the specialist jurisdiction. In other words,

expediency requires that, where Parliament has established such a specialist appellate tribunal in a particular field, its expertise should be used to best effect, to shape and direct the development of law and practice in that field.”

Mr Carr submitted that that was a valuable exegesis of the principles underlying what Lord Hoffmann had said in *Lawson* and was entirely consistent with the subsequent developments in *Ravat* and *Olsen*.

38. Mr Carr also referred to the decisions of this Court in *O’Kelly v Trusthouse Forte plc* [1983] ICR 728 and *Clifford v Union of Democratic Mineworkers* [1991] IRLR 518 concerning issues of employee status traditionally characterised as “mixed fact and law”; but I do not believe I need consider them here.
39. Mr Stuart submitted that it was wrong to read the judgment of Lord Hope in *Ravat* as departing from what Lord Hoffmann had held in *Lawson*: if that had been Lord Hope’s intention he would have said so explicitly. As for *Olsen*, he submitted that although Lord Hoffmann may have contemplated the possibility of a different characterisation being adopted of the sufficient connection question at some stage in the future, any such change could only be effected by the Supreme Court. He also drew our attention to a passage in the judgment of Denning LJ in *British Launderers’ Research Association v Borough of Hendon Rating Authority* [1949] 1 KB 462, at pp. 471-2; but this seems to me no more than a re-statement of well-known principle which does not advance the argument.
40. Mr Kemp, who was seeking to overturn the decision of the ET in *Green*, likewise submitted that nothing in *Ravat* justified a departure from the clear statement of principle in *Lawson*. He made, however, a more specific point to the effect that Lord Hope’s observations in *Ravat* were concerned only with the approach to what he described as the “residual category” of expatriate workers who might have a sufficiently strong connection with Great Britain and had no application to the specific exceptions recognised by Lord Hoffmann: the question whether a worker fell into one of those categories remained straightforwardly one of law.

#### *Discussion and Conclusion*

41. In my view the correct starting-point must be Lord Hope’s judgment in *Ravat*, and in particular para. 29, quoted at para. 33 above, since it contains an explicit and authoritative statement of the correct characterisation of the relevant issues. Lord Hope distinguishes between “whether section 94 (1) applies to [the] particular employment”, which is a question of law, and whether the sufficient connection requirement is satisfied, which is a question of fact. In the typical case, however, the answer to the former question will depend entirely on the answer to the latter, with the result that in practice the dispositive issue is one of fact, except in a case where the decision made, to use Lord Hoffmann’s phrase in *Moyna*, “falls outside the bounds of reasonable judgment”, in which case the issue becomes one of law and an appeal will lie. I say something more at para. 44 below about how that line is to be drawn in cases of the kind we are concerned with here.
42. It seems to me that we are bound as a matter of authority to follow that approach. In any event I believe that it is correct. I agree with Mr Laddie that it makes sense in

policy terms and is consistent with how analogous questions involving multifactorial evaluations in other contexts are characterised. As appears from *Olsen*, it is also clearly the preferred approach of the specialist appeal tribunal. I do not accept Mr Kemp's submission that Lord Hope's characterisation was limited to the "residual category". He is referring to the sufficient connection question generally, and he had previously identified that question as embodying the general principle underlying the application of the Act in cases where employees work abroad: see paras. 14-16 and 26 of his judgment (pp. 394-5 and 399).

43. I accept that, as Mr Laddie acknowledged, it is a nice question how that conclusion is to be reconciled with what Lord Hoffmann says in *Lawson*. One possible route is that taken by Langstaff P in *Olsen*, but Lord Hope does not appear to have been intending to avail himself of the "maturing case-law" option floated in *Lawson*. As I read it, he saw no real distinction between his characterisation and Lord Hoffmann's. Although a purist might say that to treat the sufficient connection test as a question of fact, so that an appeal only lies if the decision falls outside the bounds of reasonable judgment, is not the same as Lord Hoffmann's statement (see at para. 34 of his opinion) that the application of the correct principles in a particular case "is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect", they might be thought to amount to much the same thing in practice (see n. 2 below). However, I do not think it is useful to spill further ink on the question. If there is any significant difference between the two approaches, which I doubt, I believe we should follow Lord Hope's, as being the more recent and the more explicit.
44. However, I wish to make one further point. It is now well accepted that the intensity of a "rationality" review may vary according to the kind of question being considered. I would not for my part wish to set the bar for legitimate review by the EAT too high. The question of the territorial scope of the 1996 and 2010 Acts is a particularly important one, going as it does to the jurisdiction of the tribunal, and it is very desirable – particularly in the absence of a statutory test – to ensure a level of consistency and predictability in the decisions taken by ETs. Promoting such consistency is an appropriate role for the EAT, itself of course a specialist tribunal, and it should not be unduly inhibited. I respectfully agree with the observations in the final paragraph of Lord Carnwath's article which he quotes in his judgment in *Jones* (see para. 37 above).<sup>2</sup> Precise calibration is impossible, but the labels used can help convey the correct level of intensity of review. That being so, I am uneasy about Langstaff P's reference in *Olsen* to a need for an appellant to show (in the absence of an explicit misdirection) that the ET's decision was "perverse". I would rather say that the EAT should not interfere unless it is satisfied that the ET's assessment of the relevant factors was wrong. That means more than that it would have made a different assessment itself, and I was initially attracted to the phrase "plainly wrong", in order to emphasise that point. But the use of that phrase has been deprecated by the Supreme Court: see *Re B* [2013] UKSC 33, [2013] 1 WLR 1911, esp *per* Lord Wilson at para. 44 (p. 1930 F-G), albeit

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<sup>2</sup> I accept that Lord Carnwath's observations were made in the context of the question of where the line between fact and law should be drawn, whereas I have accepted that the sufficient connection issue is one of fact and I am dealing here with the conceptually separate question of the intensity of review. However, both questions are concerned with essentially the same underlying issue of the appropriate intensity of appellate review. But for Lord Hope's analysis in *Ravat*, I might have been inclined to follow the *Moyna/Jones* approach and address the issue in terms of the dividing-line between fact and law; but we come out at the same place.

not so much on the basis that it was positively wrong (these being, as Lord Wilson recognised, “matters of little more than nuance”) as that “plainly” was redundant, and I would not go to the stake over an adverb.

45. Since drafting the foregoing I have seen the judgments of Longmore and Peter Jackson LJJ, who conclude that the issue should be treated as one of law. As will have appeared, I see the attraction of that approach and might have adopted it myself but for Lord Hope’s analysis in *Ravat*. Fortunately, we are all three agreed that the difference in the theoretical justification makes no practical difference in the present case or, I think, more generally.
46. I have thought it necessary to deal so fully with this issue because the point of principle is important, but I do not in fact believe that it is decisive of this appeal, for the following reasons.
47. In the first place, Judge Richardson did not simply disagree with the ET about the outcome of the assessment. He held both that the Judge failed to carry out the required comparative exercise and that he failed to take into account relevant factors: see para. 55 of his judgment, quoted at para. 23 above. Those are classic errors of law even if the actual result was one to which the Judge could reasonably have come.
48. However that cannot be the end of the matter. If Judge Richardson’s reasoning went no further than to identify a misdirection by the Employment Judge he would have been obliged to remit the issue to the ET for re-determination unless (a) the parties agreed to his deciding it himself or (b) there was only one decision to which the ET could properly have come if it had approached the issue correctly (see *Jafri v Lincoln College* [2014] EWCA Civ 449, [2015] ICR 920). So far as I can see, there was no explicit agreement by the parties to Judge Richardson deciding the point for himself. Accordingly his positive decision that the ET had jurisdiction can only be upheld on the basis that that was indeed the only right answer on the facts. In my view it is adequately clear that that is what he intended to hold. Although at para. 55 of his judgment he identifies the particular errors of law to which I have referred, his first sentence states unequivocally his conclusion that Mr Jeffery had “established an overwhelmingly closer connection with Great Britain and with British employment law than any other system”. In context, that is to be understood as meaning that that was the only correct answer; and the remainder of the paragraph shows more particularly how the ET Judge came to go astray. As will appear, I think he was right in that conclusion; but my only concern at this stage is to show that he took the right approach.
49. I would accordingly dismiss this ground.

(2) The relevance of the choice of English law

50. As noted at para. 11 above, Mr Jeffery’s contract of employment contained an express provision to the effect that it was governed by the laws of England and Wales. Judge Richardson regarded that as one of the five factors pointing to a closer connection with British employment law than any other system, though he acknowledged that it could not be decisive by itself – see para. 24 above.
51. Mr Laddie submitted that that was an error of law, and that an express choice of English law was in principle immaterial. The issue of the relevance of an express choice of law

also arises, as I have said, in *Green*, and by agreement between them the principal submissions on this aspect were made by Mr Carr. The broad case advanced by both counsel was that the question of what law governs the contract of employment (whether a result of an express choice or of the operation of general conflicts rules) is wholly distinct from the question of jurisdiction: it is of course not uncommon for courts in country A to have to apply the law of country B. Further, a choice of law clause of this kind is of its nature concerned only with obligations arising from the contract itself, whereas the present issue concerns the applicability of statutory rights. The parties cannot contract in to the application of British statutory employment law in circumstances where the Act itself does not provide for it to apply.

52. Mr Laddie also relied on *Dhunna*, where the ET had held that the claimant, who was an expatriate employee, had not shown a sufficiently strong connection with Great Britain. Rimer LJ observed at para. 43 (p. 123 G-H):

“The fact that Mr Dhunna was engaged under an English contract of employment by a company incorporated in England and Wales might be thought to be a compelling factor in his favour. But it is not; Lord Hoffmann made it clear in *Lawson*, at [27], that what counts is whether or not the employee was working in Great Britain at the time of his dismissal, rather than what was contemplated when his employment contract was made ... .”

It is convenient to say at this stage that I do not find *Dhunna* of assistance on this point. It is not wholly clear that Rimer LJ’s reference to “an English contract of employment” is to an express choice of English law. But even if it is, he said only that it was not “compelling”, which is not the same as saying that it was not relevant; and in any event the reason which he gives is to do with the date at which the question has to be assessed and not with the relevance of the choice of law in itself.

53. In addition to those general points, Mr Carr also advanced an argument based on section 204 of the 1996 Act which had not been relied on below in either *Green* or *Jeffery* (and which indeed Mr Laddie had not even raised in his skeleton argument, though he adopted Mr Carr’s submissions). Section 204 (1) appears in Part XIII of the Act, which is headed “Miscellaneous”. Chapter I of that Part, headed “Particular Types of Employment”, originally included section 196. Section 204 falls under Chapter II, which is headed “Other Miscellaneous Matters”, as part of a group of three sections under the further heading “Contracting out etc and remedies”. The first section in the group is section 203, which contains the general provisions prohibiting contracting out. Section 205 provides that complainants under the Act have no remedies other than those provided for under it.

54. In its original version section 204 reads:

*“Law governing employment*

(1) For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not.

(2) Subsection (1) is subject to section 196(1)(b).”

(I need to explain the reference in sub-section (2) to section 196 (1) (b). Section 196 (1) provided that the provisions of the Act requiring employers to give particulars of the contract of employment and prescribing minimum notice periods should not apply during any period when the employee was working wholly or mainly outside Great Britain, subject to two exceptions, one of which – (b) – was where “the law which governs his contract of employment is the law of England and Wales or the law of Scotland”.)

55. Section 204 (2) was repealed by the 1999 Act at the same time as the repeal of section 196.
56. Mr Carr submitted that section 204 (1) prohibits any reliance on a contractual choice of English law for the purpose of establishing the territorial reach of the Act: it says in terms that the fact that the contract is (or is not) governed by English law is immaterial<sup>3</sup>. In support of that submission he relied on the decision of the EAT (Elias P sitting alone) in *Bleuse v MBT Transport Ltd* [2007] UKEAT 0339/07, [2018] ICR 488. The claimant in that case, who was a German national living in Germany, was employed by an English company to work exclusively outside Great Britain. His contract of employment contained a provision (“clause 17”) stating that it was governed by English law. The ET held that it had no jurisdiction to entertain the claim, and the EAT dismissed the appeal. One of the issues was the relevance of the English choice of law clause. As to that Elias P said, at pp. 498-9:

“43. The first question raised on this part of the appeal is whether clause 17 of the agreement which makes English law the proper law of the contract, alters the picture. I am satisfied that it does not. Section 204, not referred to by the appellant, makes it plain that the proper law of the contract is of no materiality when considering the reach of the statutory rights. Moreover, precisely this same argument has been rejected twice by this Tribunal, both in the *Serco* case when that case was heard by the EAT (EAT/0018/02) and also by the EAT in *Bishop v Financial Times* ... In the latter case the EAT said this (paras 54-55):

‘[Counsel] referred to Dicey & Morris "The Conflict of Laws" 13<sup>th</sup> Edition paragraph 3-075 which sets out the general principle that a United Kingdom statute does not normally apply to a contract unless the governing law of the contract is the law of some part of the United Kingdom. He submits that the corollary of that principle is that a United Kingdom statute

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<sup>3</sup> I appreciate that the actual language is “the law of the United Kingdom” (an odd expression) or “of a part of the United Kingdom”; but I refer to “English law” for simplicity because that is what we are concerned with here. It is also worth observing that section 204 is not concerned with choice of law as such but with the identity of the governing law (which in 1996 was to be determined in accordance with the Rome Convention and now is to be determined in accordance with the Rome I Regulation). But in the present context we are in reality concerned with express choice of law.

does apply to a contract, the governing law of which is English law, as in Mr Bishop's case and that section 204 of the ERA has the additional effect of applying or permitting the application of the provisions of the ERA to cases in which the proper law is not English law.

We do not accept these submissions. It has been said in many contexts that the rights given by the ERA to the employee and in particular the right not to be unfairly dismissed are not contractual but statutory rights. Although of course the termination of the contract of employment is an essential prerequisite to a successful unfair dismissal claim, that is so because the terms of the ERA require it. A constructive dismissal claim requires a fundamental breach of the contract of employment; but it is not a claim for breach of contract; it is a claim for breach of a statutory right; and section 204 expressly provides that, for the purposes of ERA, whether the proper law of the contract is or is not the law of the UK or part of it is immaterial.'

I respectfully agree.

44. The point was not appealed to the Court of Appeal in *Serco*, although Pill LJ, giving the only judgment of the Court, observed that section 204(1) was not inconsistent with the conclusion that the Act applies only to employment in Great Britain: see [2004] IRLR 206 para.18. It seems to me that the section would be inconsistent with that conclusion if the legislation inevitably applied whenever English law was the proper law of the contract. Moreover, the contract in the *Serco* case was in fact found to be governed by English law, as a perusal of the decision in the EAT makes clear. Had that fact been decisive, I have little doubt that the Court of Appeal and/or the House of Lords would have said so, even although it was not specifically argued on appeal, because it would have been the short answer to the issue in the case. Moreover, Lord Hoffmann expressly approved the judgment of the EAT in the *Bishop* case.

45. In my judgment the earlier decisions were right. Parties cannot by agreement extend the scope of the rights which Parliament has conferred. The only issue is whether, as a matter of fact, the employee is based in the UK and neither the terms of the contract nor its proper law determine that question."

57. Mr Stuart and Mr Kemp realistically did not object to Mr Carr and Mr Laddie advancing the section 204 argument. The application of the section is a matter of pure law and there is no difficulty in dealing with it for the first time on appeal.
58. The primary difficulty facing Mr Carr's and Mr Laddie's submissions is that in *Duncombe* the Supreme Court expressly took into account the existence of an English choice of law clause in considering the sufficient connection issue. At para. 16 of her

judgment (with which the other members of the Court agreed) Lady Hale enumerated the particular factors which in her view meant that the substantial connection test was met on the facts of the cases before it. The second such factor was as follows (p. 1317 E-F):

“... [The claimants] were employed under contracts governed by English law; the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Although this factor is not mentioned in *Lawson*, it must be relevant to the expectation of each party as to the protection which the employees would enjoy. The law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by Parliament in order to fill a well-known gap in the protection offered by the common law to those whose contracts of employment were ended.”

(Lady Hale’s reference to the contracts being “governed by English law” reflects an express choice of law provision: see paras. 22 and 24 of the judgment of Mummery LJ in the Court of Appeal, at pp. 822-3.) It will be noted that Lady Hale expressly acknowledges the difference between the rights governed by the contract and those afforded by the statute, but she treats the question of what law governs the former as relevant to the territorial reach of the latter. That approach is plainly part of the ratio of the Court’s decision and is on its face fatal to the position adopted by Mr Laddie and Mr Carr.

59. Mr Carr sought to get round that difficulty by submitting that it was clear that the Supreme Court in *Duncombe* had not been referred to section 204, and that this part of Lady Hale’s judgment must be regarded as *per incuriam*. Indeed he submitted that it appeared that the claimants in *Duncombe* had never sought to rely on the fact that their contracts were governed by English law. He showed us a passage in the judgment of Mummery LJ in the Court of Appeal recording a concession by their counsel “that the contractual choice of English law does not affect the *Serco* principles” (see para. 109 (p. 840G)), and he observed that in those circumstances it was unsurprising that section 204 had not been brought to the attention of the Supreme Court.
60. I am satisfied that Lady Hale’s judgment was indeed given without the Court having been referred to section 204 of the 1996 Act. However I do not believe that it follows that we are entitled to treat the relevant part of her reasoning as *per incuriam*. Mr Kemp referred us to the decision of the House of Lords in *Broome v Cassell & Co Ltd* [1972] AC 1027, which he said established that it was not open to this Court to disregard a decision of the House or Lords – or, now, the Supreme Court – on that basis. The relevant passage is in the speech of Lord Diplock, who said, at p. 1131D:

“That label [i.e. *per incuriam*] is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal.”

I agree with Mr Kemp that it follows that we cannot disregard Lady Hale’s reasoning in *Duncombe*.

61. That conclusion relieves me of the difficulty of deciding whether section 204 (1) of the 1996 Act does indeed preclude a tribunal, in considering the sufficient connection question, from taking into account the fact that the contract of employment in question is – or indeed is not – governed by English (or Scots) law, and in particular that it includes an express choice of law clause. I am bound to say that I do not think the question is straightforward. On the one hand, the terms of the sub-section are pretty unequivocal: on the face of it, the *Lawson* enquiry is carried out “for the purposes of the Act”, namely to establish whether its provisions apply to the case in question. That is clearly how it struck both Judge Burke QC in *Financial Times v Bishop* and Elias P in *Bleuse*; and experienced counsel in *Duncombe* appear to have thought the contrary not worth arguing. On the other hand, I cannot help thinking that the focus of the draftsman, both in 1996 and in 1999, was on the (ir)relevance of the governing law to the express provisions of the Act as it then stood<sup>4</sup> rather than on the exercise which it has subsequently been held that tribunals have to perform in order to fill the lacuna caused by the absence of any express provision. It might be arguable that in those circumstances the phrase “for the purposes of the Act” should be given a limited meaning. Such an argument would be attractive, since I respectfully agree with Lady Hale that it seems obvious that an express choice of English (or Scots) law may be a relevant factor in assessing the strength of the connection of a particular employment relationship with Britain and British employment law for the purpose of the *Lawson* exercise. I accept of course, as Mr Carr and Mr Laddie emphasised, that contractual rights and statutory rights are quite different creatures, but that does not mean that the choice of law governing the former may not be relevant to the question of the territorial scope of the latter. However, as I say, I need not try to decide between those arguments: we are bound by *Duncombe*.
62. It is important to emphasise that Lady Hale went no further than to say that the choice of English law was a relevant factor in performing the necessary exercise. She did not say that it was decisive (as it appears may have been argued in *Bleuse*). Indeed I would agree with Judge Richardson that a choice of English law by itself would be incapable of overcoming the territorial pull of the place of work in the case of a true expatriate: I suspect that the contracts of many or most such employees of British companies contain such provisions, but if that were to be treated as decisive the exception would overwhelm the rule, which is clearly contrary to the message of the authorities. Mr Carr and Mr Laddie are plainly right at least to the extent that they submit that an employee cannot contract in to the protection of the 1996 Act.

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<sup>4</sup> It is not in fact entirely clear to me what particular mischief section 204 was aimed at. I think it can be taken that Parliament intended to prevent employers seeking to evade the effect of the Act by arguing – typically by reference to a choice of law clause (though, as previously noted, the sub-section is concerned with the governing law generally) – that the governing law of the contract was neither English nor Scots: that might explain why section 204 appears under the heading “Contracting out etc ...”. But it was clearly appreciated that it might also prevent attempts to contract in by employees working abroad, in reliance on an express choice of English or Scots law: that is why sub-section (2) was thought necessary, because there would otherwise have been a clash with section 196 (1) (b), which permits reliance on a choice of English or Scots law in certain circumstances. However, whether either form of protection was really necessary, given the explicit language of section 196, may be debatable. It may be that there are other substantive provisions of the Act in relation to which parties could have argued that the identity of the governing law of the contract was relevant; but none were drawn to our attention.

63. Although the argument on this aspect was conducted before us on the basis specifically of Lady Hale’s judgment in *Duncombe*, it is important to appreciate that Lord Hope said something to very much the same effect in *Ravat*. That case, as I have said, concerned a “commuting expatriate” working in Libya. It was expressly found by the ET that at the time the employee started to work in Libya he asked “whether his employment contract would remain governed by UK employment law ... and was assured that he would continue to have the full protection of UK law” (see para. 8 of Lord Hope’s judgment, at pp. 392-3). So far as I can glean from the reports, there was no express choice of law in the written contract. Lady Smith in the EAT held that the proper law of the contract (which appears to have been accepted to be English) and the reassurance given to the employee were irrelevant. Lord Hope disagreed. At para. 32 of his judgment (p. 401 B-D) he said:

“The better view, I think, is that, while neither of these things can be regarded as determinative, they are nevertheless relevant. Of course, it was not open to the parties to contract in to the jurisdiction of the employment tribunal. As [counsel] put it, the parties cannot alter the statutory reach of section 94(1) by an estoppel based on what they agreed to. The question whether the tribunal has jurisdiction will always depend on whether it can be held that Parliament can reasonably be taken to have intended that an employee in the claimant’s position should have the right to take his claim to an employment tribunal. But, as this is a question of fact and degree, factors such as any assurance that the employer may have given to the employee and the way the employment relationship is then handled in practice must play a part in the assessment.”

I note that Lord Hope referred separately to the proper law of the contract and the specific assurance given (“neither of these things”) and that he said that both were relevant. I can see no basis for holding that his observations would not apply equally in a case where, as here, the proper law derives from an express choice in the contractual paperwork even in the absence of an assurance of the kind that was given in *Ravat*: the underlying principle is the same.

64. For those reasons I would reject Mr Laddie’s contention that Judge Richardson was wrong to attach any weight to the fact that Mr Jeffery’s contract contained an express choice of English law.
65. It was Mr Laddie’s fallback contention that, even if an express contractual choice of law could in principle be relevant, that could only be the case where the provision had been drawn to the employee’s attention: no doubt he had in mind the effect of *Ravat*. I accept that where both parties have consciously adverted to a choice of law clause there will be an analogy with the specific assurance given in *Ravat* and the factor may have more weight in answering the sufficient connection question. But I do not accept that that is the only situation where an express choice of English (or Scots) law will be relevant. It does not appear that there was any such specific notice in *Duncombe*. Nor in any event is it easy to see how a workable line can be drawn in any principled way between cases where the clause was “drawn to the worker’s attention” and where it was not. Would it be sufficient for him or her to say “you sent me the contract and I read it”? And if not, why not?

66. Mr Laddie also in his oral submissions submitted simply that Judge Richardson attached too much weight to the contractual choice of English law. But I do not believe he did so. It is true that he described it as “important”, and that might, in the light of what I say at para. 62 above, be capable of suggesting that he gave it a greater weight than it might merit. But he immediately went on to observe that it could not be decisive in itself, and it is clear that it was the three factors identified at paras. 58-60 of his judgment (see para. 24 above) which he regarded as, to pursue the tug-of-war metaphor, getting the mark over the line.
67. I accordingly dismiss ground 2 of the appeal.

(3) The Employment Judge’s approach

68. For the purpose of this ground, Mr Laddie referred to Judge Richardson’s statement in para. 55 of his judgment that Mr Stuart’s first ground of appeal was “partly correct” (see para. 23 above). He said that that meant that Judge Richardson had accepted Mr Stuart’s submission (see para. 22 (1)) that Judge Pearl had considered only whether Mr Jeffery’s case fell within one of the specific categories identified by Lord Hoffmann in *Lawson*, rather than adopting the more flexible approach endorsed in *Ravat* (cf. para. 2 (5) above); and that that was plainly unfair since, as Judge Richardson acknowledged elsewhere in his judgment, Judge Pearl’s self-direction had been unimpeachable.
69. I do not accept this ground. It is based on a misunderstanding of which part of Mr Stuart’s first ground Judge Richardson was accepting. In my view it is perfectly clear from the very next sentence of para. 55 that what he was accepting was the submission that the Judge had not carried out “the ... comparative exercise required by the modern cases”. Whether he was right to do so is the subject of the following ground.

(4) Did the ET carry out the right exercise ?

70. Mr Laddie submitted that Judge Richardson was wrong to hold that Judge Pearl had failed to carry out the necessary comparative exercise (see para. 2 (5) above). While his Reasons are not structured explicitly as a balance sheet, what mattered was the substance rather than the form. The Judge had in the section where he found the facts (paras. 4-24) made findings about all the relevant factors, and it was unnecessary for him “mechanistically to re-quote each of these in a formal totting-up exercise”; all he needed to do was to say where in his judgment the balance came down and address Mr Jeffery’s key arguments to the contrary – and that is what he had done at paras. 37-44 (see para. 21 above).
71. I am sympathetic to the spirit of that submission. I agree that decisions of the ET should not be overturned simply because they have not been cast in the best form, provided that the substance of any required assessment has been done. If the EAT’s criticism had been limited to the way in which the Reasons were structured I doubt if it would have been right to allow Mr Jeffery’s appeal. But it is in fact clear that the criticism went further. Judge Richardson found that the way that Judge Pearl had structured the Reasons led to him failing to take into account the three factors which he himself regarded as decisive – the entitlement to a Civil Service pension, the tax equalisation adjustment, and the nature of the British Council as a non-departmental public body (see paras. 58-60 of his judgment). These factors are not discussed at all in the paragraphs where Judge Pearl gives the reasons for his decision, and I cannot accept

Mr Laddie's submission that it is enough that the underlying facts themselves are mentioned earlier in the Reasons.

72. Mr Laddie showed us Mr Stuart's skeleton argument lodged in advance of the hearing in the ET, in which no fewer than 22 separate factors are identified connecting the employment with Great Britain; and he submitted that the Judge had focused on the points on which Mr Stuart himself had placed most weight. I do not think that this is a useful exercise. Quite understandably, Mr Stuart initially advanced a comprehensive list of factors, many of which overlap and which could no doubt be grouped or emphasised in different ways in the course of closing submissions. They include two of the three factors to which the EAT attached crucial importance: as to the third, the tax equalisation adjustment, he told us that the reason that there was no reference to it was that the facts only became clear in the course of the hearing and that he did rely on it in his oral submissions. It is unsafe, and unhelpful, to try to reconstruct the nuances of the oral submissions. Ultimately the question must be whether the Judge took account of the key factors that were advanced before him: if he failed to do so, that cannot be excused on the basis of the degree of emphasis that they may or may not have received in the parties' submissions.
73. I would accordingly dismiss this ground. Of course, it follows from my analysis at para. 48 above that even if Judge Richardson had been wrong to say that Judge Pearl had failed to take account of the factors in question he would nevertheless have allowed the appeal, since it was his view that the ET's decision was plainly wrong. Mr Laddie challenges that part of the reasoning under the following ground.

(5) The EAT's assessment of the relevant factors

74. Under this ground Mr Laddie contends that the relevant factors did not, contrary to what the EAT held, show that Mr Jeffery's employment had an overwhelmingly stronger connection with Great Britain than with Bangladesh, and accordingly that the ET's decision should have been upheld – or in any event, if it were otherwise legally flawed, that the case should have been remitted. Mr Laddie took us through the three factors that Judge Richardson regarded as decisive (see para. 24 above) and also his treatment of the factors going the other way (para. 26). I take them in turn.
75. *Entitlement to a Civil Service pension.* Mr Laddie submitted that Mr Jeffery's entitlement to a Civil Service pension could not fairly be described as, in Judge Richardson's language, "remarkable": being entitled to a Civil Service pension was not the same as being a civil servant. Whatever adjective is used, I share Judge Richardson's view that the fact that Mr Jeffery was entitled to a Civil Service pension is indeed a factor which strongly connects his employment with Great Britain and which would be absent in the case of most expatriate workers.
76. *Tax equalisation adjustment.* Mr Laddie submitted that, far from supporting a connection with Great Britain, this factor pointed away from it: it was only necessary because Mr Jeffery was not liable to pay UK income tax in the first place. Again, I do not agree. Of course, the fact that a "true" expatriate will be paying tax locally and not in the UK is one of the aspects of the territorial pull of the place of work. What Judge Richardson regarded as unusual (rightly, in my experience as far as it goes – and in any event Mr Laddie did not suggest otherwise) was that the Council went out of its way to seek to adjust Mr Jeffery's remuneration so that he was in an equivalent position in net

terms to Council employees in the UK – in other words, to cancel out the tax benefits of being an expatriate. That too seems to me plainly to strengthen the connection of his employment with the UK.

77. *The nature of the British Council.* Mr Laddie submitted that Judge Richardson took too broad-brush a view of the Council and its activities. It was necessary to look at the particular nature of Mr Jeffery’s employment. As he put it in his skeleton argument:

“While there are doubtless certain functions in which [the Council] could properly be regarded as being central to British public life, it is submitted that nobody could regard the management of a self-funded overseas English language school as falling among them.”

In his oral submissions he said that Judge Richardson had in practice put the present case into the same category as those of the teachers in *Duncombe*, who worked in government/EU-funded international schools; but the situation here was significantly different. I see more force in this point than in Mr Laddie’s objections to the other factors relied on by Judge Richardson. It cannot be in any way conclusive that Mr Jeffery was working for a British public body<sup>5</sup>, and I agree that it is not only legitimate but necessary to look at the nature of the work being done. But Judge Richardson did not believe that it was right to treat the Council’s TCs simply as commercial language schools. As he observed at para. 65 of his judgment, the TC in Bangladesh was non-profit-making and “was part of a broader operation intended to serve as the UK’s international organisation for cultural relations and educational opportunities”. That aligns the nature of the work more closely with British public service than Mr Laddie’s submission suggests. Even so, Judge Richardson did not treat the nature of the British Council as a decisive factor in its own right. He simply gave it substantial weight in the overall conclusion which he reached; and in my judgment he was right to do so.

78. *The factors in favour of a connection with Bangladesh.* The essential point made by Judge Richardson at para. 64 of his judgment is that “there [is] very little to establish any connection with Bangladeshi employment law”. In support of that general statement he makes two more particular points – (a) that it is “fanciful” to suppose that that the parties intended that Mr Jeffery would enforce his (NB) contractual rights by bringing proceedings in Bangladesh; and (b) that his stay in Bangladesh was always intended to be short-term. Mr Laddie challenged both elements. I take them in turn:

- As to (a), he submitted that there was no evidential basis for what Judge Richardson says about where Mr Jeffery might be expected to enforce his contractual rights and that very likely neither party had considered the question at all. But I see no need for any express evidence: it is obvious that an employee whose contractual rights against an English-based employer are governed by English law would, absent special circumstances, seek to enforce them in England. And if that is so it is immaterial whether either party had thought about it at the time of contracting: the only point Judge Richardson was making was that there were no positive links with Bangladeshi employment law. It is important in that connection to note that he was

<sup>5</sup> NB that in *Lawson* Lord Hoffmann expressly approved the decision of the EAT in *Bryant v Foreign & Commonwealth Office* [2003] UKEAT 174/02 that the Act did not apply to a locally-engaged (British) employee in the British embassy in Rome— see para. 65 (p. 265 C-D). See also the judgment of Sir Colin Rimer in *Hottak*, at para. 56 (p. 998)

referring specifically to the enforcement of Mr Jeffery's *contractual* rights. He was not saying that it was fanciful to suppose that Mr Jeffery would have sought to enforce such rights as he might have been entitled to under any applicable Bangladeshi employment protection legislation: that is a different (and legally irrelevant<sup>6</sup>) question.

- As to (b), he submitted that the evidence was that it was expected that Mr Jeffery would be in Bangladesh for four years, which could not fairly be said to be "short-term". However, that has to be seen in the context of an overall contract which envisaged Mr Jeffery moving countries from time to time, as he had throughout his career with the Council (see para. 10 above); and I think it was that aspect that Judge Richardson had principally in mind. It is important to appreciate that Mr Jeffery was not someone engaged to work in a particular overseas location.

Overall, I can see no error of law in Judge Richardson's treatment of this element of the comparative exercise.

79. Accordingly I do not believe that any of the criticisms of the EAT's judgment made under ground 5 are well-founded.

#### CONCLUSION IN JEFFERY

80. Despite Mr Laddie's cogent and well-presented submissions I would dismiss the Council's appeal. I believe that in the very particular circumstances of the present case the EAT was right to hold that the only correct conclusion was that the factors connecting Mr Jeffery's employment with Great Britain outweighed the strong territorial pull of the place of work.

#### (B) GREEN

#### THE FACTS

81. Again, I gratefully reproduce (almost) verbatim in the following paragraphs the summary of the facts given by Judge Eady in the EAT. This derives partly from an agreed statement of facts which was before the ET and partly from certain further findings which it made after hearing evidence.
82. SIG is a limited company, registered in the UK; it is a subsidiary of a UK plc. Mr Green is married to a Lebanese national and has lived (with his family) in the Middle East for over 15 years (he has no private residence in the UK). From 2013, he had provided consultancy services for SIG through his firm.
83. In March 2014, SIG began an interview process for the post of Managing Director for the Kingdom of Saudi Arabia ("KSA"); Mr Green was invited to a meeting with Mrs

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<sup>6</sup> In practice the likelihood of an expatriate employee seeking to invoke the employment protection rights of the country where he or she works will depend on how effective those rights are – in terms both of the rights nominally granted and their real-world enforceability. But the quality of employment protection in the country of the place of work is irrelevant in considering the substantial connection question: see per Rimer LJ in *Dhunna*, at para. 40 (p. 122H).

Kennedy-McCarthy in Sheffield (where SIG is registered) relating to this position, to which he was appointed with effect from 1 May 2014.

84. On taking up his new post, Mr Green continued to live in Lebanon, commuting to work in KSA two to four days at a time, with SIG then paying for his accommodation. Although SIG registered Mr Green with HMRC, he was treated as exempt from UK tax or national insurance contributions. Mr Green's contract referred to his "secondment" in KSA but the ET found that did not accurately represent the position: there was no secondment; Mr Green was appointed as Managing Director in KSA, where he worked for the majority of the time, albeit on limited occasions he was required to attend the UK for training and for some meetings relating to SIG's KSA business operations.
85. Mr Green's contract was expressly stated to be governed by English law and referred to British employment legislation and UK policies concerning ethics, corporate responsibility, anti-bribery and corruption. It also included a mobility clause, which allowed that Mr Green might be required to work in the UK, and post-termination covenants relating to the UK and Ireland. The ET found SIG had found it convenient to give Mr Green a standard UK contract, amended in some parts, and noted that he had been unable to join SIG's pension scheme as he was not working in the UK.
86. IT, HR and payroll support for the KSA operation was based in the UK as was Mr Green's line manager and the three employees who reported to him; he was, further, paid in UK pounds sterling. That said, his employment was stated to be subject to his being permitted to hold a residence visa and work permit such as would allow him to effectively carry out his role and the ET found that could only refer to the KSA; it was common ground that it was Mr Green's responsibility to secure the appropriate visa and work permit
87. Due to local legal requirements, SIG traded in KSA in partnership with a local company, and Mr Green was therefore based in the Riyadh office of that partner, Fanar Trading Ltd. The ET further recorded that it had been important to SIG that Mr Green worked in KSA as it had previously attempted to obtain business with an employee not based there and it had not worked. It said, at para. 5.6 of the Reasons that he "was appointed in order to be on the ground in Saudi Arabia to develop business there". It continued:

"In practice the Saudi Arabia budget was independent of the company's UK financial budget, illustrated in particular by the fact that when the Saudi Arabia business was closed because of poor financial performance the Saudi Arabian losses were not absorbed into the company's UK finances. ..."
88. Mr Green was dismissed ostensibly for redundancy. The decision was taken by SIG's Board of Directors in Sheffield and handled by SIG's HR Director for UK and Ireland, who telephoned Mr Green in KSA to inform him of the decision. Mr Green appealed against that decision and his appeal was heard in Sheffield, the hearing being chaired by Mrs Kennedy-McCarthy of SIG's HR team with Mr Green attending via Skype.

## THE ET PROCEEDINGS

89. Mr Green brought proceedings in the ET complaining of whistleblower detriment contrary to section 47B of the 1996 Act and “automatic” unfair dismissal on whistleblower grounds under section 103A: he had insufficient service to bring proceedings for “ordinary” unfair dismissal. There was also a claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
90. Although, as will appear, I do not believe that this is ultimately material to any issue before us, I should say something about where the protected disclosures and detriments pleaded by Mr Green occurred. Ten protected disclosures are relied on. Most take the form of communications from Mr Green in KSA (or Lebanon) to SIG managers in England, though one is said to have occurred at a face-to-face meeting in Riyadh and one at a meeting in London. Twenty-two detriments are pleaded. They are of various different kinds, and in relation to some (e.g. non-payment of sums due) it may be debatable where they occurred. Most, however, take the form of communications between SIG managers in England and Mr Green in KSA (or Lebanon), though one at least is said to have occurred at the same meeting in London as one of the disclosures. Mr Green’s dismissal, as I have said, occurred in a telephone call from England to Riyadh.
91. SIG contended that the ET did not have jurisdiction to entertain the claim under the 1996 Act because Mr Green was employed outside Great Britain. That issue was heard by Employment Judge Hepworth at a preliminary hearing in Leeds on 21 July 2016.
92. By a Judgment and Reasons sent to the parties on 18 August 2016 the Judge upheld the objection and dismissed the claims. I should note for completeness that it was common ground before the Judge that the ET had jurisdiction to hear the breach of contract claim.
93. In section 3 of the Reasons the Judge set out the facts agreed by the parties. In section 4 he summarised the oral evidence which he heard from Mr Green, who he found to be an unsatisfactory witness. In section 5 he made certain further findings of fact. The contents of these sections are sufficiently summarised in the passage which I have reproduced above from the judgment of the EAT.
94. At section 6 of the Reasons the Judge reviewed the case-law. Neither party suggested that the review contains any misdirection. I should note, however, that at para. 6.7 he summarised the core reasoning of Lady Hale’s judgment in *Duncombe*, including her reference to the importance of the choice of English law. He also referred at para. 6.9 to *Financial Times Ltd v Bishop* [2003] UKEAT 0147/03, a decision of the EAT which was expressly approved by Lord Hoffmann in *Lawson*. It will be convenient to set out here the relevant passage from Lord Hoffmann’s opinion, at paras. 37-38 (pp. 246-7):

“37. First, I think that it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to

be British or even that he was recruited in Britain, so that the relationship was 'rooted and forged' in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary.

38. Something more may be provided by the fact that the employee is posted abroad by a British employer for the purposes of a business carried on in Great Britain. He is not working for a business conducted in a foreign country which belongs to British owners or is a branch of a British business, but as representative of a business conducted at home. I have in mind, for example, a foreign correspondent on the staff of a British newspaper, who is posted to Rome or Peking and may remain for years living in Italy or China but remains nevertheless a permanent employee of the newspaper who could be posted to some other country. He would in my opinion fall within the scope of section 94(1). The distinction is illustrated by *Financial Times Ltd v Bishop ...*, a decision of the Employment Appeal Tribunal delivered by Judge Burke QC. Mr Bishop was originally a sales executive working for the *Financial Times* in London. At the time of his dismissal in 2002 he had been working for three years in San Francisco selling advertising space. The employment tribunal accepted jurisdiction on the ground that under European rules it had personal jurisdiction over the *Financial Times*: see article 19 of Council Regulation (EC) No 44/2201 (OJ 2001 L12, p 1). But that was not a sufficient ground: the Regulation assumes that the employee has a claim to enforce, whereas the question was whether section 94(1) gave Mr Bishop a substantive claim. Having set aside this decision, the appeal tribunal was in my opinion right in saying that the findings of fact were inadequate to enable it to give its own decision. The question was whether Mr Bishop was selling advertising space in San Francisco as a part of the business which the *Financial Times* conducted in London or whether he was working for a business which the *Financial Times* or an associated company was conducting in the United States: for example, by selling advertising in the 'Financial Times' American edition. In the latter case, section 94 would not in my view apply. (Compare *Jackson v Ghost Ltd* [2003] IRLR 824, which was a clear case of employment in a foreign business.)”

95. In section 7 of his judgment the Judge set out, at paras. 7.2 and 7.3 respectively, in turn the factors counting for and against the application of the general rule (though he took them the other way round). I will not enumerate them here, because no point arises in relation to most of them or indeed to how the Judge performed the exercise: those to which he attached most weight are identified in the summary paragraph which I quote below. I should, however, note that at (c) under para. 7.2 he included the fact that “[the] claimant’s contract of employment was expressly governed by English law and there were references to UK and UK laws throughout the contract”.

96. At para. 7.4 the Judge considered a comparison with what Lord Hoffmann said about *Financial Times v Bishop*. After summarising the facts of that case he said:

“However in this case the Tribunal found that in this case the claimant was not selling to suppliers as an extension of business carried on in the UK but was developing an entirely new business selling to new contractors in a new country pursuant to Saudi Arabian laws and customs.”

At para. 7.5 he distinguished the decision of the EAT in *Lodge v Dignity and Choice in Dying* [2014] UKEAT 0252/14, [2015] IRLR 184, where the claimant had gone to live in Australia but had continued to work there for the employer in the same role as she had performed in London and was held by the EAT (overturning the ET) to be within the scope of the statute. He said:

“[T]he Tribunal found that this case was different in that the claimant never worked in Great Britain and his work in Saudi Arabia was entirely separate to UK operations. The claimant was working on an entirely new venture in Saudi Arabia, attracting new business and new contractors there. He had never performed any work for the benefit of the UK business. The Saudi Arabian budget came within the overall UK budget but it was in practice administered separately.”

97. The Judge gave his conclusions in section 8 of his judgment. Paras. 8.1-8.3 read as follows:

“8.1 For the above reasons the Tribunal concludes that there is not a strong connection between the claimant’s employment and Great Britain and British Employment Law. *Although there are factors identified above which point in that direction, these in most instances (such as, for example, the terms of the claimant’s written employment contract, were there because of convenience in that the standard form UK contract was used because the claimant did not have a standard form document appropriate for Saudi Arabia) were decided by the Tribunal to be in the minority so far as significance to this issue is concerned.*

8.2 As stated above, the Tribunal’s conclusion was that the claimant is an expatriate employee and was not working for the benefit of a business in Great Britain within the principles stated in *Financial Times v Bishop*, as the Tribunal found that the claimant had stronger connections to Saudi Arabia and the Middle East than to Great Britain and British Law. In particular, the claimant was not selling business supplies as an entirely new business selling to new contractors in Saudi Arabia pursuant to local Saudi Arabian laws and customs.

8.3 The factors which the Tribunal found most significant in this case were:

8.3.1 The normal rule for an expatriate employee is that the Act does not apply.

8.3.2 The claimant has lived in Lebanon for 10 years with a Lebanese wife. He commuted to work in Riyadh. He paid no UK tax or national insurance. He did not sell as an extension of a business in the UK. He had no property in the UK. The respondent paid for his accommodation in Riyadh. Saudi Arabian operations were funded from a separate budget. The claimant's business visits to the UK were limited in number. He was not part of the respondent's pension scheme as he lived abroad. It was his duty to obtain the appropriate work permits and visas."

98. I have italicised part of para. 8.1 because these words are central to SIG's cross-appeal, considered below. Unfortunately something seems to have gone wrong with the English, but what is sufficiently clear, and what matters for present purposes, is that the Judge to some extent discounted the significance of "the terms of the claimant's written employment contract", to the extent that they supported Mr Green's case, because SIG had employed a standard-form contract as a matter of convenience. The finding of fact underlying that point had been made at para. 5.8 of the Reasons, which read:

"In relation to the claimant's contract of employment, the Tribunal found that the particular UK terms and conditions were used because of convenience. The respondent found it convenient to give to the claimant a standard UK contract amended in some parts."

I shall have to return to the question of which terms the Judge had in mind in what he said at para. 8.1; but I note at this stage a further uncertainty as to whether the terms in question were being discounted altogether or merely given less weight than they would have been entitled to if they had been chosen advisedly.

#### THE JUDGMENT OF THE EAT

99. Judge Eady summarised Mr Green's grounds of appeal to the EAT as follows:

"(1) The ET erred in its application of *Lawson*, wrongly failing to find that the Claimant was working in KSA as part of a business conducted in the UK [i.e., in the common shorthand, that he fell within the posted worker exception].

(2) Alternatively, the ET erred in its approach to the comparative exercise it had to undertake: it had erroneously evaluated the factors showing a connection with Great Britain and British employment law as in the 'minority' and had wrongly had regard to what it found to be the subjective intention of the Respondent (its reason for using a British contract 'for convenience', for example) rather than applying an objective test.

(3) Further, the ET had reached a perverse conclusion in finding that the KSA budget was independent of the UK budget as ‘illustrated in particular by the fact that when the Saudi Arabia business was closed because of poor financial performance the Saudi Arabian losses were not absorbed into the company’s UK finances’; there was no evidence for that finding.”

100. Judge Eady started by considering the third of those grounds. At para. 33 of her judgment she rejected it. Since there is no appeal against that aspect of her decision I need not set out her reasoning here.

101. At paras. 36-38 Judge Eady considered the second ground. She did not accept the challenge in its entirety, but she accepted Mr Kemp’s core point, which was based on the passage which I have italicised passage in para. 8.1 of the Reasons (para. 96 above). His submission was that this showed that the ET had disregarded the fact that the contract of employment was expressly governed by English law, and that the reason that it gave for doing so – namely that the employer had only used that form of contract “for convenience” – was wrong in principle. At para. 38 of her judgment she said:

“Returning to the parties’ agreement that the contract should be governed by British law, ... I am unable to see that it was properly open to the ET to simply disregard this by virtue of the Respondent’s evidence that this was for ‘convenience’. On this point, I consider the Claimant is correct: the ET wrongly disregarded a relevant factor - that the parties had entered into a binding contractual agreement as to the applicability of British law - because it had regard to the Respondent’s subjective explanation rather than to the objective fact.”

(She also made essentially the same point, by way of recapitulation, at para. 40.)

102. At para. 39 Judge Eady considered the first ground, i.e. that the ET should have found that Mr Green fell within the posted worker exception. She rejected it on two alternative bases:

(1) She accepted the view of Langstaff P in *Olsen* that the issue was one of fact. That, as I understand it, was sufficient to dispose of the appeal, since it was not Mr Kemp’s case that the ET’s decision was not reasonably open to it on the facts. However:

(2) She went on to say that even if, contrary to her view, the issue was one of law, the case did not fall within the posted worker exception, as expounded in *Lawson*. Rather, it was a case of a true expatriate, falling to be determined by reference to the strength of the connection with Great Britain. She says:

“I do not accept that the ET was bound to find - as a matter of law - that the present case fell squarely within the ‘posted worker’ category identified by Lord Hoffmann. This was a case where a UK company was establishing a new business in the KSA and the ET was entitled to find a degree of separation in that regard - to see it as akin to working for a business conducted in a foreign country, albeit belonging to British

owners, or as a branch of a British business (*Lawson*, paragraph 38). I am satisfied that the ET was correct to see this as a case where it had to undertake a comparative assessment (per Elias LJ in *Bates*); the only question is whether it then failed to have regard to a relevant factor when carrying out this task.”

103. Since – picking up the final words of that passage – the ET had indeed failed to take account of a relevant factor, by reason of ground 2, and since she did not regard it as certain what answer the ET would have given if it had taken it into account, the only course open to her was to remit, which she did.

### THE APPEAL

104. There are three grounds of appeal, which I take in turn.

#### (1) Fact or law ?

105. Ground 1 straightforwardly asserts that the EAT was wrong to follow *Olsen* and that the issue of the territorial reach of the 1996 Act should have been treated as one of law. If it were well-founded we would have to consider for ourselves whether Mr Green’s employment came within the territorial scope of the 1996 Act, rather than simply reviewing the reasoning of the ET. But for the reasons given in *Jeffery* I believe that it is not well-founded.

#### (2) Did Mr Green fall within the posted worker exception ?

106. Mr Kemp’s case is based squarely on para. 38 of Lord Hoffmann’s opinion in *Lawson*, which I have set out at para. 94 above. He contends that it is clear from the primary facts found that Mr Green “fell within the posted workers exception” – that is, that he was “posted abroad by a British employer for the purposes of a business carried on in Great Britain”. He submitted in his skeleton argument that the touchstone for recognising such a case is to ask “who, in reality, was the worker working for when they were posted overseas”. In his oral submissions, he put it more in terms of who was the beneficiary of the work done by the worker, but no doubt that could be said to be simply another way of putting the same point. On that basis, he submitted, the only possible answer was “the English business”. He contended that on the primary facts as found by the ET there was no separate business, or even a branch of a business, in KSA.
107. Mr Kemp acknowledged that at paras. 7.4, 7.5 and 8.2 of its Reasons (see paras. 93-94 above) the ET had rejected the argument that there was no separate business in KSA, but he submitted that it did so by focusing on Mr Green’s “job role or job content” and failed to ask the essential question of who was the beneficiary of his work. As for Judge Eady’s reasoning at para. 39 of her judgment in the EAT (para. 98 (2) above), she had wrongly treated what may have been SIG’s aspirations to develop a distinct business in KSA in the future as relevant to the question of who Mr Green was working for at the time of his appointment, when there was on any view no such business. “Akin to” working for a business conducted in a foreign company was not enough.
108. I do not accept those submissions. My reasons are as follows.

109. In the first place, I do not think that in the light of the post-*Lawson* case-law it is right to conduct the analysis by reference to labels such as “the posted workers exception”, useful as they may be as shorthands. The correct approach is explicitly to address the sufficient connection question, as the ET did here. Lord Hoffmann’s statement that the 1996 Act applies to workers of the kind identified at para. 38 of his opinion establishes that in such a case the connection with Great Britain will typically overcome the territorial pull of the place of work, but his observations are in fairly general language and are not a substitute for a careful examination of the facts of the particular case: the developing case-law has shown a number of different factual circumstances that do not fall neatly into Lord Hoffmann’s exceptions.
110. Still less do I think that the exercise can be resolved by resort to Mr Kemp’s touchstones of for whom “in reality” the employee was working or who had the benefit of his or her work. Simple phrases of that kind conceal a variety of complexities and nuances when they fall to be applied to a particular situation and give no useful guidance in answering the sufficient connection question, which is the actual test propounded by the authorities.
111. Against that background, I am not persuaded that the question whether the business in KSA should be characterised as distinct from the rest of SIG’s business has the decisive weight that Mr Kemp attributes to it. But I accept that it is relevant to the overall exercise, and I should therefore say that I see no basis on which the Judge’s conclusion that the KSA business was indeed distinct can be impugned. It was a reasoned factual finding to which he was entitled to come. It makes no difference that it did not consist of much more than Mr Green’s own activities in KSA. That was unsurprising since it was starting from scratch, but it does not follow that it was not a separate business.
112. In short, I agree with Judge Eady that the Judge carried out the correct comparative exercise and that his conclusion cannot be impugned unless he failed to take into account a relevant factor. She of course held that that was the case; but that is the subject of SIG’s cross-appeal, which I will consider in due course.

(3) Article 10

113. Mr Green has been granted permission to take a point not argued in the ET or the EAT based primarily on article 10 of the European Convention on Human Rights, protecting freedom of expression. Paragraph (1) of the article reads (so far as material):

“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. ...”

114. The ground, as developed by Mr Kemp in his skeleton argument can be summarised as follows:
- (1) Mr Green’s claims were that he had been subjected to detriments, and ultimately dismissed, for making protected disclosures – in other words, for whistleblowing.
  - (2) It is well-established that article 10 encompasses the right of a worker to make responsible disclosures relating to his or her employment, and that Convention

states are required to ensure that that right is effectively protected in law – see *Heinisch v Germany* [2011] ECHR 1175, [2011] IRLR 922, and *Matusz v Hungary* [2014] ECHR 1112, [2015] IRLR 74.

- (3) In so far as any point might be taken on where the acts complained of, or the disclosures, occurred, the effect of the phrase “regardless of frontiers” in article 10 (1) is that the worker is entitled to protection wherever the disclosure or the breach of his or her rights occurred – see *Cox v Turkey* [2010] ECHR 700, *Women on Waves v Portugal* [2011] ECHR 1693 and *R (Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546.
- (4) It followed that the UK would be in breach of its rights under the Convention if Mr Green were unable to bring proceedings to obtain an effective remedy for the detriments (including dismissal) that he had, as alleged, suffered for making protected disclosures.
- (5) It was open to the Court to exercise its powers under section 3 of the Human Rights Act 1998 to interpret the Act as conferring jurisdiction on the ET to determine those claims notwithstanding that Mr Green was employed outside Great Britain and that he fell outside the territorial reach of the Act for the purpose of other provisions of the Act. Mr Kemp proposed that sections 48 (1A) and 111 (1) of the 1996 Act, which confer jurisdiction on the ET to determine claims of whistleblower detriment and unfair dismissal respectively, should be treated as if they read (with the added words italicised):

[48 (1A)] “A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B *and where the act or deliberate failure to act complained of was done in Great Britain.*”

[111 (1)] “A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. *Where the dismissal is alleged to be unfair by virtue of section 103A an employment tribunal may consider a complaint where the dismissal was decided upon in Great Britain.*”

Mr Kemp submitted that the same result could be reached by reference to article 11 of the EU Charter of Fundamental Rights, but in his submissions he focused on the Convention, and I will do the same, subject only to the point based on *Bleuse* considered at paras. 122-3 below.

115. With respect, those submissions ignore the essential starting-point, which is to establish that the Convention applies to the treatment of Mr Green in the first place. Article 1 of the Convention reads:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

The question then is whether, for the relevant purposes, Mr Green was “within [the] jurisdiction” of the UK.

116. As to that, in his oral submissions Mr Kemp formulated a primary and a fallback case. The primary submission was:

“Any detriment suffered in Great Britain by an employee or worker as a result of having made a protected disclosure anywhere in the world will constitute a breach of article 10 and ought therefore to be justiciable under Part 5 of the 1996 Act wherever in the world the employer is based and whether or not the employee is working in Great Britain at the relevant time: all that matters is that he is physically present in Great Britain.”

But he corrected the final part of that submission, saying that the worker did not need to be present in Great Britain: it was enough that the act complained of – i.e. the detriment – occurred or was decided on in Great Britain.

117. Mr Kemp’s fallback submission was that article 10 would require the employment tribunal to assume jurisdiction where there was a sufficient “nexus” with Great Britain; and that such a nexus existed in the present case (a) because SIG was an English company, and (b) because the acts complained of (or in any event most of them) occurred in England – i.e. because most of them (including the dismissal) consisted of telephone fax or e-mail communications from SIG managers in England to Mr Green in KSA.
118. Mr Kemp’s primary submission is, to say the least, extravagant, and I have no hesitation in rejecting it. It would mean that if, say, a Japanese employee working in Japan for a Japanese company were, while he was on a one-day business trip to London, rebuked by his manager for making a responsible disclosure – or, to take up the corrected version, were so rebuked in Japan over the phone by his manager who was temporarily in London – the employment tribunal would have jurisdiction. The Convention cannot on any view be interpreted as treating so adventitious a connection as bringing a worker within the jurisdiction of the UK.
119. I have hardly less hesitation in rejecting Mr Kemp’s fallback submission. In the case of protected rights arising out of an employment relationship with a foreign element it seems to me that the dispositive question must be whether the *relationship* is within the jurisdiction of the state in question, rather than depending on the chance of where a particular act is done or whether the worker happens to be within its territory at any particular moment. I would be inclined to accept, though the point was not fully explored before us, that the question of whether that is so in any given case cannot depend wholly on the choice of that state: that is, there may be cases where for the purposes of the Convention a state is to be treated as having jurisdiction over an employment relationship even though it does not itself seek to exercise such a jurisdiction. But in the generality of cases I see no reason why the jurisdictional parameters recognised by a particular state should not be respected for the purposes of the Convention. Certainly in the present case I can see no reason why the Convention should be understood as requiring the UK to exercise a more extensive jurisdiction than is established by reference to the *Lawson/Ravat* principles summarised at para. 2 above. Indeed I can see very good reason why it should not. Convention rights may be engaged in a variety of different ways in the context of the rights afforded by the 1996 and 2010 Acts. Quite apart from article 10, articles 8, 9, 11 and 14 are not infrequently invoked.

It would lead to extraordinary incoherence and confusion if the jurisdictional rules differed as between causes of action that do or do not engage a Convention right.

120. This approach is not conceptually different from Mr Kemp's fallback position, in that it requires, as his approach does, a nexus – in fact, a sufficient connection – between the employment and Great Britain, or British employment law. It differs only in that it regards the nexus required by the Convention as corresponding to that required by the *Lawson/Ravat* principles.
121. There is nothing in the phrase “regardless of frontiers”, as invoked in *Cox v Turkey*, that suggests any different analysis. *Cox* was not an employment case. The applicant, who was a US national, was banned from re-entering Turkey as a result of her having made statements there about the Armenian genocide. The Court referred to the phrase to establish that “no distinction can be drawn between the protected freedom of expression of nationals and that of foreigners”, and that it is an interference with article 10 to prevent foreigners from entering a Convention state in order to prevent them imparting information or expressing opinions within that country (see para. 31 of the judgment of the Court). *Women on Waves* and *Naik* were cases essentially of the same kind, in as much as they were concerned with denying non-nationals access to a Convention state on account of views that it was believed that they would express – though in fact the Court in *Women on Waves* did not expressly advert to the phrase “regardless of frontiers”. That lends no support to Mr Kemp's submission, as indeed he eventually acknowledged, saying that he relied on the Strasbourg cases only for their general statement of principle in the context of article 10 cases with an international element.
122. For myself, I doubt whether the context in which the phrase “regardless of frontiers” was relied on in *Cox* is the only, or even the principal, kind of case where it may have work to do. In the employment context, for example, in a case where the employment itself was within the jurisdiction of a Convention state and an employee had been dismissed for expressing certain views, it would preclude any argument that article 10 did not apply because the views had only been published abroad. But it is not necessary in this judgment to consider the precise effect of the phrase any further: it is sufficient to say that it does not have the effect of bringing within the scope of the Convention an infringement of freedom of expression in the employment context where the employment itself would not otherwise be within the jurisdiction of the state in question.
123. Mr Kemp also sought to rely on *Bleuse* (see para. 56 above). In that case Elias P held that since, as the result of an express choice of law clause, the proper law of the claimant's contract of employment was English an employment tribunal was obliged to seek, so far as possible, to afford the claimant the rights deriving from the EU Working Time Directive notwithstanding that he worked wholly outside Great Britain (but within the EU): see paras. 52-61 (pp. 501-3). Mr Kemp contended that the same reasoning should apply in this case because of the rights to freedom of expression contained in the EU Charter of Fundamental Rights. Elias P's reasoning on this point has since been adopted by this Court both in *Ministry of Defence v Wallis* [2011] EWCA Civ 231, [2011] ICR 617, and in *Duncombe*, in both of which the employees worked entirely in the EU.

124. In my view this argument suffers from the same fundamental defect as his claim based on article 10 of the Convention. The essential first step is to establish that the Charter applies to employments where the employee works wholly outside not only the UK but the EU. For essentially the reasons already given in relation to the Convention, I do not believe that it does.
125. I have reached that conclusion without reference to the authorities. But it is to the same effect as the decision of the EAT (Langstaff P sitting alone) in *Smania v Standard Chartered Bank* [2014] UKEAT 0181/14, [2015] ICR 436. In that case the claimant was an Italian national employed by the Bank, whose head office was in London, to work in its branch in Singapore. His contract of employment contained an express choice of Singaporean law. He sought to bring proceedings in the ET for under sections 47B and 103A of the 1996 Act, i.e. for whistleblower detriment and dismissal. The ET held that it had no jurisdiction on conventional *Lawson/Ravat* grounds. In the EAT he contended that it should have applied a “looser” test because article 10 of the Convention and article 11 of the Charter were engaged. Langstaff P rejected that submission. His reasoning was directed to the particular arguments in that case, which were not directly advanced by Mr Kemp before us, and it is not profitable for me to summarise it here; but the essential proposition underlying it was that the fact that whistleblowing claims engage article 10 of the Convention of the Convention or article 11 of the Charter does not justify a different approach to the territorial reach of the 1996 Act, at least where the employment is outside the EU. As he put it at para. 32 of his judgment:

“There is no suggestion that any European Union legislation has effect in Singapore. Nor does the ECHR. The extension of jurisdiction of the 1996 Act was implicitly limited to the Member States of the European Union.”

126. Simler P recently followed *Smania* in *Bamieh v Eulex Kosovo* [2018] UKEAT 0268/16, saying, at para. 132 of her judgment, “there is no obvious justification for introducing a more generous test of extraterritoriality in cases involving whistleblowing.” I agree.
127. I would accordingly reject this ground of appeal.

### THE CROSS-APPEAL

128. SIG cross appeals against the EAT’s decision to allow the appeal on ground 2 – that is, that the ET wrongly disregarded the fact that Mr Green’s contract contained an express choice of English law – and accordingly to remit the case to the ET.
129. Mr Carr’s primary challenge to that decision was that the express choice of English law was immaterial in any event. I have rejected that argument in my consideration of *Jeffery*. His alternative submission was that it was wrong to treat what the ET said in para. 8.1 of the Reasons as showing that it had disregarded the express choice of English law. The reference there was simply to “the terms of the claimant’s written employment contract”: the Judge did not identify any particular term. He should not be taken to have been referring to the choice of English law since he had earlier referred to the relevant passage from Lady Hale’s judgment in *Duncombe* (see para. 93 above) and had expressly identified the choice of English law as one of the factors connecting the employment with Great Britain (see para. 94). Mr Carr submitted that it was likely that

the Judge was referring to certain of the substantive terms of the contract about which it had made findings in section 5 of the Reasons. These included findings that the contract referred to a UK tax code, in circumstances where the parties were aware that Mr Green would not be paying UK tax, and to membership of the company pension scheme, when it was common ground that he was not entitled to such membership and he had received a separate payment for that reason (see para. 5.2); and a finding that it included post-termination restrictive covenants relating to employment in the UK and Ireland (para. 5.3) which plainly the parties cannot have regarded as applicable.

130. Mr Kemp submitted that that was not a reasonable reading of para. 8.1 of the Reasons, but I do not agree. The passage in question is not as clear as it should be, and I can see how on a literal reading it could be taken to be referring to the totality of the “boiler-plate” terms; but on balance I would accept Mr Carr’s submission that the Judge is unlikely to have been intending to discount the weight of one of the factors to which he had expressly referred in his earlier balance-sheet.
131. Accordingly I believe that the EAT was wrong to allow Mr Green’s appeal on his “ground 2” and I would allow the cross-appeal accordingly.
132. I should add that even if the reference in question was to the choice of law provision I would not accept that it was necessarily wrong for the ET to attach less weight to it because of the circumstances in which it came to be included in the contract. This is not a question of admitting evidence of the parties’ subjective intentions on order to construe a contract. We are concerned with the different question of assessing the degree of connection that the contract has with Great Britain. I can see nothing wrong with treating a specifically-negotiated provision as having greater strength in that connection than the inclusion of a provision which neither of the parties had consciously sought to include and which appears only because of the use of a standard form which can be shown in other respects to be positively inapt: cf. para. 65 above.

### CONCLUSION IN GREEN

133. Since I would dismiss Mr Green’s appeal and allow SIG’s cross-appeal, the consequence is that I would dismiss his claim in its entirety, subject only to the contractual claim over which it is common ground that the ET has jurisdiction under the 1994 Order (see para. 92 above).

### Lord Justice Longmore:

134. I agree with Underhill LJ’s disposition of these appeals.
135. For my part I do not find it altogether easy to reconcile the statement by Lord Hoffmann in paragraph 30 of Lawson v Serco [2006] ICR 250 that the question, whether on given facts a case falls within the territorial scope of section 94(1) of the 1999 Act, should be treated as a question of law with the statement by Lord Hope in Ravat v Halliburton [2012] ICR 389 at 400 C-E that the question, whether the connection between the circumstances of an employee’s employment and Great Britain is sufficiently strong to enable it to be said that it is appropriate for the employee to have a claim for unfair dismissal, is a question of fact. It is most unlikely that Lord Hope intended to disagree with Lord Hoffmann on the matter.

136. The differing approaches can, in my view, be reconciled on the basis that the decision on the question whether the connection is sufficiently strong is an evaluative judgment to be made on the basis of the underlying facts (as to which there will often be no dispute). That is, strictly speaking, a question of law but it is well settled that an appellate tribunal will not interfere with a first instance evaluative judgment of this kind unless that tribunal took into account matters it should not have taken into account or failed to take into account matters it should have taken into account or made some error or was otherwise wrong: see Aldi Stores v WSP Stores Ltd [2008] 1 WLR 848 para 16 as followed in Stuart v Goldberg [2008] 1 WLR 823 para 81 per Sir Anthony Clarke MR, as now corrected by Lord Wilson in Re B at para. 44.
137. On this, to my mind, orthodox approach I agree with Underhill LJ that HHJ Richardson in the EAT was entitled to reverse the tribunal on the basis that it failed to give weight to the five factors identified in para 24 of my Lord's judgment and that, if it had done, the answer would have been that the connection between Mr Jeffery's employment and Great Britain was indeed sufficiently strong for it to be appropriate that Mr Jeffery should have a claim for unfair dismissal. The fact that the EAT is itself a specialist tribunal makes it all the more difficult for Mr Laddie to establish that the EAT decision was wrong.

**Lord Justice Peter Jackson:**

138. I also agree with Underhill LJ's disposition of both appeals and, subject to what appears below, with his reasoning.
139. Concerning the distinction between matters of law and fact, I share the difficulty articulated by my lords as to how the dicta in *Lawson* and *Ravat* are to be reconciled. In agreement with Longmore LJ, I would rest on the conclusion that a decision whether a case falls within the territorial scope of section 94(1) of the 1999 Act is, as stated by Lord Hoffman in *Lawson*, an evaluation of facts, but that the evaluation itself should be treated as a matter of law. The formulation by Lord Hope in *Ravat* does not in my view chart a clear departure from this approach.
140. The correctness or otherwise of this conclusion has no effect on the outcome of these appeals nor, I believe, on the law generally. Whether an appeal tribunal is undertaking a relatively generous rationality review (favoured by Underhill LJ) or a relatively restrained substantive review (preferred by Longmore LJ and myself), the practical outcome is the same, namely that an appeal tribunal should be slow to interfere with an evaluative judgment of a first instance tribunal in a matter of this kind and should not do so unless it is satisfied that the judgment is wrong.