Case No: C01RG184

IN THE COUNTY COURT AT OXFORD

St Aldates, Oxford OX1 2TL

Date: 6 December 2019

Before:

HER HONOUR JUDGE MELISSA CLARKE

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B e t w e e n:

(1) SANDEEP MANDER
(2) REENA MANDER **Claimants**

- and -

(1) ROYAL BOROUGH OF WINDSOR & MAIDENHEAD
(2) ADOPT BERKSHIRE **Defendants**

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Mr James Robottom (instructed by **McAllister Olivarius**) for the **Claimant**
Ms Catherine Foster (instructed by **Kennedys**) for the **Defendant**

Hearing dates: 4, 5, 6 and 7 November 2019

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JUDGMENT

Her Honour Judge Melissa Clarke:

I. Introduction

1. The Claimants, Mr Sandeep and Mrs Reena Mander are born, bred and educated in the UK. They are British citizens. Their parents were all born in India and came here as children or young adults. Mr Mander's childhood was spent in Maidenhead. Mrs Mander is from Leamington Spa. They met at Leeds Metropolitan University. Both are educated professionals. Mr Mander is a Vice-President of Sales at an IT company and Mrs Mander works as a Senior Programme Manager at a major telecoms company. They are high-earners. They own a number of properties, including their main home, which is a 5-bedroom house in Maidenhead. They enjoy close relationships with their parents, siblings and wider family including nieces and nephews. Mr and Mrs Mander identify as part of the wider Sikh community, but are not religious. They go to Temple a few times a year much as, they say, some of their non-practising Christian friends go to church at Christmas or Easter. They consider themselves culturally British, whilst acknowledging their Indian heritage.

2. Mr and Mrs Mander have had a long and difficult road to travel in becoming parents. They spent some seven years and numerous attempts at IVF before accepting, in 2015, that they were unlikely to be able to have a child biologically their own, and so their thoughts turned to adoption.

3. They approached the second Defendant, Adopt Berkshire. This is a local authority offering adoption services in a number of Berkshire boroughs at that time, including that of the first Defendant, the Royal Borough of Windsor & Maidenhead ("**RBWM**"). Mr and Mrs Mander were, and remain, resident in RBWM. They attended an Adopt Berkshire introductory seminar aimed at attracting potential adopters, but after an initial telephone conversation or two, and a home visit by an Adopt Berkshire social worker, Ms Shirley Popat, she informed them that Adopt Berkshire would not progress their interest in adoption further. In particular, they would not be

invited to fill in an application for adoption form, called a Registration of Interest form ("**ROI**").

4. Mr and Mrs Mander say that Ms Popat told them that the decision not to progress them to the ROI stage had been taken following a meeting with her manager Ms Hilary Loades. They say Ms Popat told them this was because:

> (i) Adopt Berkshire only had white British pre-school children available for adoption;
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> (ii) this situation would continue for the foreseeable future;
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> (iii) Adopt Berkshire already had a surfeit of white British pre-approved prospective adopters;
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> (iv) priority would be given to white British adopters in the placement of these children as they shared the same background; and
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> (v) the chances of Adopt Berkshire placing a child with Mr and Mrs Mander were therefore remote.

5. Mr and Mrs Mander say that Ms Popat told them not to be discouraged from adopting entirely, as she saw no reason why they would not be good prospective adopters. She suggested they keep in touch with Adopt Berkshire and try again in a few years in case the situation had changed. She suggested they consider an international adoption from India.

6. Ms Popat disputes Mr and Mrs Mander's account of that conversation. However it is not disputed that Mr Mander asked for those reasons to be put in writing, and that Ms Loades, who was the Service Manager of Adopt Berkshire, wrote to them on 4 May 2016 providing her reasons which are very similar to those which Mr and Mrs Mander say were given to them orally by Ms Popat. That letter stated:

> "In making this decision [not to progress you to application stage], we took into account a number of factors including:
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> - the profile of children currently available for placement both locally and nationally;

- the fact that in the 17 months since Adopt Berkshire was launched we have not had a single child of Indian or Pakistani heritage referred to us for placement;

- the fact that we had recently made contact with a number of local authorities which have significant Indian and Pakistani communities and with several Voluntary Adoption Agencies and they all reported that they had a number of sets of Indian and Pakistani adopters approved and waiting placement but were experiencing a dearth of children requiring placement who would be appropriately culturally placed with these families;

- the fact that there are currently many more approved and waiting adoptive families across the U.K who are hoping to achieve the placement of a child/ren of pre-school age than there are children for placement and that this therefore makes it unlikely that a child whose cultural heritage was significantly different to your own would be placed with you."

7. After acknowledging that the local and national picture may change over time, Ms Loades continued:

> "…it is hard at the current time to advise you how best to proceed regarding adopting within the U.K.; however another option that you may wish to explore is the option of adopting from India – while this is likely to be a lengthy process and may be financially stretching, it may ultimately be more likely to enable you to achieve the placement of a young child whose cultural heritage is similar to your own".

8. Ms Loades provided them with details of the Inter-country Adoption Centre ("**ICA**") which could assist them in exploring the possibilities of an adoption from abroad.

II. The parties' cases

9. It is important to understand that Mr and Mrs Mander's claim is **not** that they applied to be approved as adopters but were wrongly or unfairly rejected or discriminated against either during the process of consideration of their application for adoption, or when considering whether to match them to a child. Mr and Mrs Mander's case is that the Defendants discriminated

against them on the basis of their race before they made formal application to adopt, *inter alia* by refusing to progress them to the ROI/application stage.

10. The Defendants have at all times made clear that there was nothing in Adopt Berkshire's dealings with Mr and Mrs Mander which suggested that they would not be suitable people to adopt or could not offer a loving and caring home to a child. The Defendants' witnesses reiterated this in their written and oral evidence.

11. Mr and Mrs Mander are supported in this litigation by the Equality and Human Rights Commission. They claim for:

    i) unlawful direct (alternatively, indirect) discrimination on the grounds of race, in particular on the basis of their national or ethnic origins and/or their colour, contrary to sections 13, 19 and 29 of the Equality Act 2010 ("**EA**"); and

    ii) breach of section 7(1) of the Human Rights Act 1998 ("**HRA**") for breach of section 6(1) of the HRA and Schedule 1, Articles 8 (right to respect of private and family life), 12 (right to marriage, including the right to found a family) and 14 (prohibition on discrimination) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("**the Convention**").

12. In fact Mr and Mrs Mander did not press the claim for indirect discrimination, or for breach of Article 8 of the Convention, at trial.

13. Mr and Mrs Mander seek (i) general damages for injury to feelings, (ii) aggravated damages, (iii) damages under the HRA, (iv) declarations that they have been subject to unlawful race discrimination and breaches of their Convention rights, and (v) special damages in relation to the costs they have incurred in going through the process of inter-country adoption after they were discouraged from applying to Adopt Berkshire. They successfully and joyfully adopted a little boy from the USA in January 2019.

14. The Defendants deny the claims. They accept that they were both responsible for the running, management and/or management of the adoption service in Windsor and Maidenhead, and have filed a joint defence and are jointly represented. They plead that they decided not to progress Mr and Mrs

Mander's expression of interest in being approved to adopt any further, because it was adjudged that there was insufficient likelihood at that time that a child or children would be matched and subsequently placed with them for adoption within a reasonable timescale. Additionally, they plead, Adopt Berkshire had a limited capacity to assess prospective adopters. Accordingly Adopt Berkshire's actions were justified because they were following a policy and plan which *"gave priority to the likelihood of applicants being approved and the subsequent likelihood of having children placed with them for adoption in reasonable timescales"*. They plead that they took into account the profile of children who required placement because of the necessity to match prospective adopters and children who were to be adopted and fulfil the requirements of section 1 of the Adoption and Children Act 2002. In relation to the HRA claim, they deny that they have breached Mr and Mrs Mander's Convention rights pursuant to Articles 8, 12, 14 and section 6 HRA.

15. The Defendants deny that Mr and Mrs Mander are entitled to damages or declarations as sought or at all.

III. The Trial

16. Mr James Robottom, counsel, represents Mr and Mrs Mander. Miss Catherine Foster, counsel, represents the Defendants. I thank them for their concise skeleton arguments and skilful oral submissions.

17. I have had the benefit of sitting with a court appointed assessor with significant experience of discrimination and Equality Act issues, Ms Nicola Duncan. She has provided valuable assistance to the court, for which I thank her.

18. For the Claimants I heard from Mr and Mrs Mander. I consider them both to be good, honest, credible and reliable witnesses. Miss Foster suggests that their recollection about what happened in the initial phone call or calls and at the visit by Ms Popat to their house has been coloured and made inaccurate by the anger which they felt later about their perceived treatment by Adopt Berkshire, but I do not accept that submission. I consider their accounts have

remained consistent and are supported by Ms Popat's notes of the Initial Review meeting, the near-contemporaneous complaint form lodged by Mr Mander after notification by Ms Popat that their interest in adoption would not be progressed, and other contemporaneous documents including the letter written by Ms Loades on 4 May 2016.

19. For the Defendants I heard from Ms Ryan, Ms Popat, and Ms Loades who were all employed by Adopt Berkshire at the relevant time. I found Ms Ryan to be an honest and credible witness albeit one whose memory was not as reliable as she thought it was.

20. I have some difficulties with the credibility and reliability of Ms Popat's evidence. There are aspects of her witness statement and oral evidence relating to what she says Mr and Mrs Mander told her during the Initial Visit which Mr and Mrs Mander vigorously deny, and which are not reflected in her record of the Initial Visit, or the notes of the IVR Meeting, or indeed in any of the later correspondence written by RBWM or Adopt Berkshire which I summarise later. In particular, I do not accept Ms Popat's evidence that Mr and Mrs Mander told her they would not consider adopting a black child. I accept the evidence of Mr and Mrs Mander that there was no such discussion and they always made clear, as Ms Popat's contemporaneous notes reflect, that they would consider a child of any ethnicity. I also do not accept Ms Popat's evidence provided for the first time in the witness box that Mr Mander said he would not take a sibling group together, but would only consider taking a single pre-school child first, and possibly a sibling for that child at a later time. I accept the evidence of both Mr and Mrs Mander who were visibly bemused by this thought and say they were clear, as Ms Popat's contemporaneous notes reflect, that they would consider a sibling group if one sibling was of pre-school age. Where Ms Popat's evidence conflicts with that of Mr and Mrs Mander and is not supported by contemporaneous documentation, I prefer Mr and Mrs Mander's evidence.

21. I believe that Ms Loades came to court to assist it and provide truthful evidence to the best of her recollection. I do not accept all of what she says, and I consider that at times she adopted certain aspects of Ms Popat's

evidence which I do not accept (although at other times she did not). However I am satisfied that in general, she believes what she says is true.

IV. Detailed chronology

22. In December 2016 Mr and Mrs Mander went to an introductory adoption seminar hosted by Adopt Berkshire. They described it as a welcoming and inclusive event.

23. After a few months consideration and, no doubt, discussion between them, on 31 March 2016 Mr Mander called Adopt Berkshire to express their interest in adopting a child. He believes he spoke to Ms Deon Ryan on that occasion. Ms Ryan agrees she did speak to Mr Mander but only on a single occasion, and she gives an account of a conversation which is very similar to Mr Mander's account of his second telephone call to Adopt Berkshire. Accordingly I think it is more likely than not that in this first telephone call Mr Mander spoke to another social worker whose identity we do not know, because that social worker has not been identified by Adopt Berkshire, and no notes or computer entries relating to that telephone call have been disclosed by Adopt Berkshire.

24. The absence of any evidence from Adopt Berkshire about that call means that Mr Mander's account is not challenged. He says that the social worker he spoke to asked him about his and his wife's cultural background. Upon hearing that the couple were born and raised in Britain but ethnically Indian, Mr Mander says that the social worker told him that they should not bother to apply to be approved as prospective adopters as they would be unlikely to be approved or to have a child placed with them. Mr Mander says the social worker explained that Adopt Berkshire had a policy of placing adoptive children with parents who come from the *"same background"* and that since all pre-school children currently seeking placement by Adopt Berkshire were classified by them as 'White British', and they already had a surfeit of approved adopters also classified as White British, it was very unlikely that they would have a child placed with them.

25. Mr Mander called Adopt Berkshire again on 6 April 2016. He told the court that he could not believe what the social worker on the 31 March 2016 telephone call had told him, and thought she must be mistaken, so he called hoping to speak to somebody else who would take a different view of them as prospective adopters. He spoke to someone I am now satisfied was Ms Ryan. He says he told Ms Ryan that he couldn't believe that they wouldn't take him and his wife forward as potential adopters as they had everything to give a child a happy home and four empty bedrooms to fill. He says that at that point Ms Ryan asked if he and his wife would accept a sibling group and he said they would consider it. She then agreed to arrange an initial visit by a social worker ("**Initial Visit**").

26. Ms Ryan did not recall that she had made an appointment for an Initial Visit to Mr and Mrs Mander, but upon being shown an email she had sent on 6 April 2017 setting that up, she accepted that she had done so. She broadly agreed with Mr Mander's account of the call. She said *"We spoke about adoption… he told me about the size of his property so I said would you be interested in siblings as we are looking for prospective adopters for sibling groups and older children. He said he would consider a sibling group. He didn't say that he would consider an older child"*. She said that they spoke about ethnicity: *"He did not say that he would consider a child of any ethnicity. He said that he and his wife were fair skinned and would be able to consider taking a white child"*. She didn't think that she would have asked him about his ethnicity, but said *"If his information was already on the system, I wouldn't need to ask him about his ethnicity as it would be logged. He was already on the system"*. She agreed that she told him that the majority of children that Adopt Berkshire were looking to place at that time were white British: *"Yes I did. All the older children and sibling groups we were looking to place at that time were White British"*. She later said, *"We had a significant number of children in the system for a good while in Adopt Berkshire. Our priority was to get those children placed. We were recruiting adopters for those children"*.

27. Ms Shirley Popat visited Mr and Mrs Mander at their home for the Initial Visit on 14 April 2016. Both Mr and Mrs Mander describe her as a lovely person, and say she was kind and welcoming. Ms Popat described how she took a blank Initial Visit form with her which she filled in in manuscript and typed up and printed the following day. I have the typed form, which records Mr and Mrs Mander as indicating that: (i) they ideally would like to parent a child a child of 0-2 years; (ii) they would consider siblings but would want one child to be of pre-school age; and (iii) they are open to parenting a child from a different ethnicity to their own, including a white British child. The form notes: *"They commented that they are "fair skinned" and when they were looking into adoption they saw themselves with a white child. Those within their close support network of friends are white British heritage".*

28. In the 'Summary' section, Ms Popat sets out 13 bullet points under the heading 'Apparent strengths', two of which are *"Able to consider a sibling group but a preference for one child"* and *"Able to consider a child / children from a different culture / race to theirs"*. Under 'Possible issues of Concern' there is a single bullet point: *"The couple are limited ideally want a child under the age of two years. Given their Indian background they may not be considered for children from a different ethnicity/background to their own. Therefore they may have a long wait in terms of identifying a suitable child to join their family"*.

29. Ms Popat in cross-examination said that she considered Mr and Mrs Mander were limited because of the narrow category of children they were willing to consider: preschool age, without high healthcare or other special needs, a single child (although I am satisfied that they said they would consider sibling groups), and white or Asian children (although I am satisfied they said they would consider a child of any ethnicity). She said that reduced their chances of achieving a match with a child in the future, based on the children who were coming through the system both locally and nationally, and that was why they were not taken forward to ROI stage.

30. Mr Robottom asked her whether, at the time, a part of her consideration was based on their ethnicity as Indian, to which Ms Popat replied, *"I think so. I*

was trying to be realistic. The likelihood of being matched to a different ethnicity which they were willing to consider was low because of the age that they were looking at".

31. Ms Popat confirmed that she took a printed copy of her Initial Visit notes about Mr and Mrs Mander to an Initial Visit review meeting ("**IVR Meeting**") with Ms Loades and a colleague on 15 April 2016. Ms Popat was questioned about the decision taken not to move forward with Mr and Mrs Mander to ROI stage. Ms Popat said, *"We were recruiting adopters who were able to take children coming through at that time. We were not recruiting for the age range Mr and Mrs Mander were interested in. They were unlikely to achieve a match later in the process."* Again, Mr Robottom asked whether ethnicity was a factor taken into account in the decision not to move forward with Mr and Mrs Mander. Ms Popat said *"It was one consideration…"*. She then paused, thought and said, *"No, it wasn't. At that time we were not recruiting for adopters who only wanted one young child".* I remind myself that her own notes say that Mr and Mrs Mander were able to consider a sibling group, that this was the basis on which the Initial Visit was booked, and that I have found that they told Ms Popat they would consider a sibling group.

32. I have seen the typewritten notes from the 15 April 2016 IVR Meeting, which Ms Loades confirmed she produced a few days after the meeting from her manuscript originals. They show that other prospective adopters were considered at that meeting apart from Mr and Mrs Mander. For example, Person A is described in detail with 12 bullet points covering the sort of detail that was included in the 'Summary' section of Ms Popat's Initial Visit notes for Mr and Mrs Mander. Persons B and C are dealt with in a similar way. In relation to each of those, the notes provide a clear idea of the type of people they are, the condition of their finances, health and relationships, and the pros and cons of each as prospective adopters. The section on Mr and Mrs Mander says:

- "A young Indian/Sikh couple

- Reena and Sandi [sic] are a childless couple with no childcare experience and are hoping to achieve placement of a child aged under a year.

- The couple would consider placement of a child who is not Indian, however in the current adoption climate would be unlikely to be considered for a child from a different cultural or religious background.

Decision:

- Given the profile of adopters approved locally and nationally and given the lack of young Indian or Pakistani children available for placement both locally and nationally it would be very unlikely in the current climate that if approved Reena and Sandi [sic] would achieve placement, given this it would not be appropriate to progress their application."

33. I have already set out the detail of the telephone conversation between Mr and Mrs Mander and Ms Popat telling them this news (in relation to which I accept Mr and Mrs Mander's account) and the letter then written by Ms Loades to Mr and Mrs Mander on 4 May 2016 setting out the reasons for the decision. Both of these reflect the decision noted in the IVR Meeting notes of 15 April.

34. Ms Loades confirmed that these IVR Meetings were regular, fortnightly meetings with the two social workers in her team who she entrusted with carrying out all the Initial Visits. Although they were put in place by Adopt Berkshire they appear to have been within the knowledge and approval of RBWM, as Ms Redding referred to them in her letter to Mrs Theresa May MP on 14 June 2016: *"All initial visits are reviewed by Adopt Berkshire's Team Manager on a fortnightly basis and a decision is made at this meeting as to whether an application should be progressed"*. These IVR Meetings cannot be found in the statutory framework or Adopt Berkshire's own procedures and guidance, which I describe in the next section of this judgment.

35. Ms Loades stated in oral evidence that she instigated the IVR Meetings in part because of the statutory requirement to respond to a completed ROI

form in 5 working days. She said, *"That was one of the reasons we had gone to having a meeting with me and the two experienced social workers who did all the initial visits, so we could then make a decision about which potential adopters to take forward. It was more equitable than deciding in five days"*.

36. Ms Loades accepted that the Adopt Berkshire procedures and guidance she had drafted to reflect the requirements of the statutory framework, provided that Adopt Berkshire: (i) must not refuse an ROI form on the grounds of the prospective adopters' ethnicity; and (ii) may only exclude them on the grounds that they do not meet the basic eligibility criteria (over 21, domiciled in the British Isles, no convictions or cautions for specified offences). However she said that didn't apply to her IVR Meetings, because no ROI form had been completed, so it had not been refused. She said, *"Yes, that's why we deferred a lot of applications, as they met the eligibility criteria but we did not have capacity to deal with their applications. We deferred them but did not turn them away"*. She accepted in cross-examination that such a 'deferral' was an indefinite deferral.

37. Ms Loades in oral evidence said that at the time that she refused to take Mr and Mrs Mander forward, Adopt Berkshire was not recruiting prospective adopters generally, but recruiting to their 2016/2017 plan priorities, i.e. prospective adopters who were willing to consider older children, those with significant additional needs, and sibling groups. Although she accepted that she knew that Mr and Mrs Mander had said they would be willing to take a sibling group, she said that Ms Popat advised her they did not have sufficient experience to take on sibling groups. She said *"We were not required to prioritise Mr and Mrs Mander's application on the grounds they didn't meet our placement criteria"*.

38. Mr Robottom asked Ms Loades why in the 4 May 2016 letter she referred to Adopt Berkshire as not having *"a single child of Indian/Pakistani heritage"*. Ms Loades said that when considering whether to prioritise an application she asked herself whether the prospective adopters: (i) could meet the priority needs of children; (ii) were likely to be approved; and (iii) were likely to achieve a placement needs of a child. She said, *"The reason I*

referred to Indian/Pakistani children is that if I had known we had a child for whom they could offer a place, we would have prioritised them. We didn't have many adopters who could offer a good cultural match. They would have had an extra tick in the box in order to prioritise their application."

39. Ms Loades said that she had to prioritise applications because Adopt Berkshire had many more people seeking to apply for approval as prospective adopters than it had capacity to deal with. She said, *"The strategy and direction of Adopt Berkshire was not for me, but for the Board of Directors. They agreed our statement of principles and our recruitment strategy… The Board said do not recruit adopters looking for straightforward pre-school children. Chances are they would not be matched"*. Ms Loades confirmed that the Defendants' *"Policy and Plan on the Recruitment of Prospective Adopters"* ran from April 2016 to March 2017 and that it planned for Adopt Berkshire to recruit 30 prospective adoptive families within that year, including at least 10 who were able to provide for sibling pairs. She said: *"In line with our recruitment priorities we were looking to process 30 – 35 applications [from prospective adopters] that year. We had two or three times as many expressions of interest. So we had to prioritise. If it was inappropriate to progress in the sense that an applicant did not meet our priority criteria and we did not expect that we would achieve a placement, it was not possible to accept the application. That is why we would defer it. We didn't turn them away. But they weren't given the Registration of Interest Form."*

40. In fact the evidence does not suggest that Adopt Berkshire did have too many expressions of interest to manage at the relevant time. Ms Loades told the court in oral evidence that in 2016/2017 she operated the IVR Meetings with the intention of sending through about 30-35 prospective adopter families (i.e. single adopters or a couple together each being one unit) to lodge ROI forms, to meet the Adopt Berkshire plan for that year of recruiting 30 families, 10 of which could take sibling groups. I pause to note that such a congruity in numbers suggests that she was carrying out pre-screening

through the IVR Meeting process to endeavour to meet Adopt Berkshire's planned needs almost exactly.

41. Ms Loades said that the Board reviewed the placement priorities half-way through 2016/2017 because, following a strict application of those criteria in the first 6 months of 2016/2017, it found that the number of applications went down substantially and they had significantly under-recruited to meet the plan. Accordingly, she said, she was instructed by the Board in early November 2016 to go back to all prospective applicants who, like Mr and Mrs Mander, she had 'indefinitely deferred' and refused to provide with ROI forms in the previous 12 – 18 months. There were only 8 of them, plus Mr and Mrs Mander. She said the other 8 families all filled in ROI forms when given a second chance to do so in November 2016. I asked Ms Loades whether she had received additional resources to manage those assessments, and she said she had not, and didn't need any more resources, because she had sufficient capacity remaining.

42. For those reasons, I am satisfied on the evidence before me that Adopt Berkshire had sufficient capacity and resources to deal with Mr and Mrs Mander's ROI at the very beginning of the financial year in April 2016, had they been permitted to file one at that time.

43. Mr Mander filed a complaint with RBWM on 26 April 2016, the day after his telephone conversation with Ms Popat, complaining that they had been rejected from the application process for adoption because of their ethnic origin. He said, *"My wife and I have a loving home. We have everything to give to a child in need of a home. We have no requirements in terms of the colour of the child we would be placed with however we have been rejected through the first process because of the lack of "Indian" children up for adoption even [though] we have no requirement to adopt only an Indian child"*. He described it as discrimination bordering on racism. He asked not to be discriminated against and to allow him to *"go through the application process like any other future adopter"*. That complaint was acknowledged but not substantively responded to by RBWM. Mr Mander emailed Claire Burns, Complaints Coordinator at RBWM chasing a response. He emailed

his local councillor and met with his MP, the Right Honourable Theresa May MP who was then Secretary of State for the Home Department, at her surgery. Mrs May wrote to RBWM asking the Managing Director and Head of Children's Services to look into the circumstances of Mr and Mrs Mander's rejection.

44. RBWM responded to Mrs May (but not to Mr and Mrs Mander), by way of a letter of 14 June 2016 from Elaine Redding, Deputy Director of Health, Early Help and Children's Safeguarding of RBWM. She stated, *inter alia*:

> "All initial visits are reviewed by Adopt Berkshire's Team Manager on a fortnightly basis and a decision is made at this meeting as to whether an application should be progressed. In common with most adoption agencies, Adopt Berkshire currently receives more applications from potential applicants wanting to be approved than it is able to accept and applications are therefore prioritised according to:
>
> - The likelihood of the applicant/s being approved
> - The likelihood of the applicant/s if approved achieving placement.
>
> Where more potentially suitable applicants apply to be assessed/approved than can be accepted, it is incumbent of [sic] all adoption agencies to prioritise applications where the applicants appear to offer a placement in keeping with the profiles of the children in Local Authority Care who require adoption. Applications are usually not accepted where this for any reason appears unlikely.
>
> The Adopt Berkshire Team Manager considered Mr and Mrs Mander's application on the 15th April and the decision was made that their interest would not be progressed. This was fed back to them immediately and at their request a letter was subsequently set to them on the 4th of May detailing the reasons for this decision. *[Quotation from Ms Loades' 4 May 2016 letter providing reasons and explanation then followed]*.
>
> While the Children and Families Act does, as your letter states, repeal the requirement for adoption agencies to go to extensive lengths to place children in adoptive families that have their racial cultural and religious heritage, it is still accepted good practice that where it will not cause undue delay in placing a child, Local

> Authorities should seek to place children with families that offer an appropriate match as there is considerable evidence that this best meets the longer term identity needs of adopted children; given this Adopt Berkshire, in common with most Local Authority Adoption Agencies, will look holistically at the full-range of a child's placement needs and will as part of this seek to place children in adoptive families who provide a positive cultural and religious 'match' where achieving this will not unduly delay placement. Whilst Mr and Mrs Mander have both lived in the UK since birth, given their cultural and religious background they do have the option to consider adopting from India via an Inter-Country Adoption arrangement. While they may not choose to pursue this option, the letter sent to them on the 4th May brought this to their attention in order to ensure that they were aware of the full range of options open to them…
>
> I sincerely regret that Mr and Mrs Mander feel that they have been discriminated against and can assure you that this was never our intention, our decision being made purely on the grounds that all the available evidence suggests that if approved they would be unlikely in the current adoption climate to achieve a placement within a reasonable timescale".

45. Mr and Mrs Mander were not satisfied with this. As they seemed to be going nowhere, they started looking into inter-country adoption, attending a first session at the ICA on 8 July 2016. They applied to adopt a child from the USA, which they felt was culturally close to their country of origin, the UK, and where they also had extended family.

46. Mr and Mrs Mander were then invited to, and attended, a round table meeting at RBWM on 4 August 2016, attended by Kelly Emmett, Corporate Complaints officer at RBWM and also by Ms Loades of Adopt Berkshire. Ms Emmett produced a summary note of the meeting on 12 August. That recorded, amongst other things:

> "Outcome – the position from Adopt Berkshire as outline[d] in their letter dated 4th May has not changed and your application will not be progressed at this time.
>
> Hilary [Loades] confirmed that from the information that she holds she has not identified any factor that suggests you and your wife would not be suitable people to adopt, the issues are around Adopt

> Berkshire not being able to prioritise your application at the current time, due to the profile of children requiring placement, both locally and nationally"

47. RBWM never progressed the complaint further and closed the file. However Elaine Redding of RBWM wrote a further letter to Mrs May on 18 August 2016. That included the following:

> "Firstly I must apologize that my letter of the 14th June did not make it clear that when I referred to 'cultural heritage' and 'identity needs' I was referring to the heritage and identity needs of any child for whom an adoptive placement might be sought, not to Mr and Mrs Mander's cultural or religious background.
>
> Given the current position regarding the availability of children for adoption within the UK, Mrs and Mrs [sic] Mander are, for the reasons outlined in my previous letter, unlikely at this time to be able to achieve the placement of a child of Indian, Pakistani or mixed heritage. In addition there is currently a significant surplus of already approved White British/European adopters within the UK who are seeking placement of a child aged under four years. Therefore it is also highly unlikely that Mr & Mrs Mander would be able to achieve the placement of such a child however open they are to considering this placement option. (As of 26th July the market leading adoption matching agency – Adoption Link – had a total of 1589 White British / European adopters registered who are approved and awaiting matching, whereas there were only 15 White British/European children of pre-school age without significant health or medical conditions referred for consideration by families approved outside of the children's originating agencies)…
>
> We recognise that Mr and Mrs Mander are financially secure and that there is nothing known at the current time that would suggest that they could not offer a loving and caring home to a child; however as a Local Authority Adoption Agency we are in the position of having to concentrate our resources on recruiting applicants who are most likely to be selected for the placement of the children currently requiring adoption either locally or nationally."

48. Mr and Mrs Mander issued this claim on 3 November 2016. The previous day their solicitor had telephoned Adopt Berkshire to enquire as to the correct legal entity and address for service. On 4 November 2016 Hilary

Loades wrote to Mr and Mrs Mander stating that she was: *"in the process of reviewing the potential prospective adopters who have applied to Adopt Berkshire in the last 12 months whose applications we were not able to progress at the time due to a 'mismatch between the profile of children available for placement (both locally and nationally) and the placement range that potential applicants would be likely to be considered for. In recent months the climate in which are working has changed…"* She offered to meet with them *"to reconsider their [sic] previous decision if you remain of the view that you would like to consider progressing an adoption application through Adopt Berkshire"*.

49. Mr and Mrs Mander, who were committed to an inter-country adoption process having signed a contract and paid a significant portion of the fees, refused that offer.

V. Law – EA Claim

Direct Discrimination

50. Direct discrimination is defined in section 13 Equality Act 2010 ("**EA**"):

> "13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

51. The protected characteristics are set out in section 4 EA. They include race, which by section 9 EA includes colour, nationality, and ethnic or national origins.

52. Section 29 EA permits claims to be brought in respect of services provided to the public (by Section 29 (1) and (2) EA) and in respect of the exercise of public functions which do not constitute the provision of services to the public (Section 29(6) EA):

> "29(1) A person (a "service provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)-
>
> (a) as to the terms on which A provides the service to B;
>
> (b) by terminating the provision of the service to B;
>
> (c) by subjecting B to any other detriment.
>
> …
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

53. Although Schedule 3 to the Act specifically excludes some services and public functions from being subject to claims under section 29, the Defendants do not claim that the operation of adoption services by local authorities is so excluded. The pleadings disclose some dispute between the parties as to whether the process of recruiting and approving prospective adopters is a provision of a service to the public or a section of the public (which is Mr and Mrs Mander's position), or the exercise of a public function which is not the provision of services to the public (the Defendants' position), but Miss Foster does not press that at trial. She submits that nothing turns on it because whether it is one or the other, the Defendants must not discriminate. I agree.

54. In the context of the earlier race and sex discrimination legislation which preceded the EA, a ground of discrimination was held to mean the factual criteria applied to determine the decision (*R v Birmingham City Council Ex Parte Equal Opportunities Commission 1989* AC 1155). Lord Goff at 1194 of *R v Birmingham*, which related to a sex discrimination claim in relation to entrance exams to selective grammar schools, said:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned… is not a necessary condition of liability; it is perfectly possible to envisage

> cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex".

55. This difference between motive and factual criteria used to make the decision was also identified in *James v Eastleigh BC* [1990] 2 AC 751, which related to entrance fees for men and women at a local swimming pool. Lord Bridge stated at page 765:

> "Lord Goff's test [in *R v Birmingham*], it will be observed, is not subjective but objective. Adopting it here the question becomes "Would the plaintiff, a man of 61, have received the same treatment as his wife but for his sex?". The answer is inescapable."

56. Lord Phillips considered this point at length in *Regina (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2010] 2 AC, [2009] UKSC 15. Giving a judgment supported by the majority (Lord Hope of Craighead DPSC, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood JJSC dissenting), Lord Phillips said:

> "[20] I find the reasoning of the majority compelling. Whether there has been discrimination on the ground of sex or race depends upon whether sex or race was the criterion applied as the basis for discrimination. The motive for discriminating according to that criterion is not relevant.
>
> [21] The observations of Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [2000] 1 AC 501 and *Chief Constable of West Yorkshire Police v Khan* [2001] 1 WLR 1947, cited by Lord Hope of Craighead DPSC at paras 193 and 194 of his judgment, throw no doubt on those principles. Those observations address the situation where the factual criteria that influenced the discriminator to act as he did are not plain. In those circumstances it is necessary to explore the mental processes of the discriminator in order to discover what facts led him to discriminate. This can be illustrated by a simple example. A fat black man goes into a shop to make a purchase. The shopkeeper says, "I do not serve people like you". To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that the man was black? In the former case the ground of his refusal was not racial; in the latter it was. The reason why the

> particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated.
>
> [22] In the *Nagarajan* case… Lord Nicholls approved the reasoning in both the *Birmingham* case… and the *James* case [1990] 2 AC 751. At p 511 he identified two separate questions. The first was the question of the factual basis of the discrimination. Was it because of race or was it because of lack of qualification? He then pointed out that there was a second and different question. If the discriminator discriminated on the ground of race, what was his motive for so doing? That question was irrelevant.
>
> [23] When, at para 29 in the Khan case… Lord Nicholls spoke of a "subjective test" he was speaking of the exercise of determining the *facts* that operated on the mind of the discriminator, not his motive for discriminating. The subjective test described by Lord Nicholls, is only necessary as a seminal step where there is doubt as to the factual criteria that have caused the discriminator to discriminate. There is no need for that step in this case, for the factual criteria that governed the refusal to admit M to JFS are clear".

57. This reference to clear factual criteria at the end of [23] is a reference to the admissions policy of the JFS. This was a clear, published, admissions policy and there was no suggestion in that case that the discriminator had reached his decision on anything other than those published criteria. That is not the situation in this case, as I will come to consider.

58. Lady Hale in *JFS* put the criteria/motive question this way in [62] of her judgment:

> "[62] … there are in truth two different sorts of "why" question, one relevant and one irrelevant. The irrelevant one is the discriminator's motive, intention, reason or purpose. The relevant one is what caused him to act as he did. In some cases this is absolutely plain. The facts are not in dispute. The girls in the *Birmingham* case [1989] AC 1155 were denied grammar school places, when the boys with the same marks got them, simply because they were girls. The husband in the *James* case [1990] 2 AC 751 was charged admission to the pool, when his wife was not, simply because he was a man. This is what Lord Goff was referring to as "the application of a gender-based criterion".

> [63] But, as Lord Goff pointed out, there are also cases where a choice has been made because of the applicant's sex or race. As Lord Nicholls put it in the *Nagarajan* case [2000] 1 AC 501, 510 – 511:
>
> > "In every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator."

Burden of Proof

59. All EA claims are subject to the reverse burden of proof under section 136 EA:

> "136(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

60. The test is set out in *Chief Constable of Greater Manchester v Bailey* [2017] EWCA Civ 425, in which Underhill LJ (with whom the rest of the court agreed) stated at [14]:

> > "The effect of section 136 (or, strictly, the cognate provisions in the predecessor legislation) has been authoritatively expounded in a line of decisions culminating in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] ECR 931 and *Madarassy v Nomura International plc* [2007] EWCA Civ 22, [2007] ICR 867. In brief, a tribunal must first decide whether a claimant has established a prima facie case of unlawful discrimination (or victimisation) in the sense elucidated in *Madarassy* at paras 56-57; if he has, the burden shifts to the respondent to prove a non-discriminatory explanation."

61. *Madarassy* said that the bare facts from which a tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination

were insufficient, without more, to provide sufficient material from which a tribunal "could conclude" (in the EA, worded "could decide") that on the balance of probabilities the respondent had committed an unlawful act of discrimination. Instead, it must mean that a reasonable tribunal could properly conclude/decide that there was unlawful discrimination from all the evidence before it, which included all evidence adduced by the respondent contesting the complaint, save for the statutory 'absence of an adequate explanation'. If the *prima facie* case of discrimination is proved, the burden of proof shifts to the respondent that he has not committed an act of unlawful discrimination, which *"he may prove by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim"* (per *Madarassy* at [58]).

The Statutory Framework for Adoption

Adoption and Children Act 2002

62. The principal piece of legislation governing adoption in England & Wales is the Adoption and Children Act 2002 ("**2002 Act**"). Section 3 of the 2002 Act places a duty on local authorities to maintain an adoption service within their area, and sets out the minimum facilities that must be made in the provision of the service. The Defendants agree that at all relevant times they were responsible for the running, management and/or operation of the 'adoption service' in RBWM as required by section 2(1) of the 2002 Act.

63. Sections 1(1) and 1(2) of the 2002 Act provide that whenever a court or adoption agency is coming to a decision relating to the adoption of a child, the paramount consideration of the court or adoption agency must be the child's welfare, throughout its life.

64. Section 1(5) of the 2002 Act as originally enacted provided that: *"In placing the child for adoption, the adoption agency must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background"*. That provision was repealed to the extent that it related to adoption agencies and local authorities in England, by section 3(1) Children and Families Act 2014. The explanatory notes to that Act set out at

paragraph 8 that *"The amendment to subsection (5) is intended to avoid any suggestion that the current legislation places a child's religious persuasion, racial origin and cultural and linguistic background above the factors in section 1(2) to (4)"* of the 2002 Act.

Adoption Agencies Regulations 2005

65. The Adoption Agencies Regulations 2005 ("**AAR**") are made under the Children Act 1989 ("**the Children Act**") and the 2002 Act. These set out the requirements on adoption agencies in the exercise of their functions relating to adoption. These include, so far as is relevant:

i) The duties of an adoption agency where that agency is considering adoption for a child (in Part 3 AAR);

ii) The duties of an adoption agency in respect of a prospective adopter (in Part 4 AAR); and

iii) The duties of an adoption agency in respect of the proposed placement of a child with prospective adopters (in Part 5 AAR).

66. Regulation 22(1) is headed 'Requirement to consider application for an assessment of suitability to adopt a child' and provides:

> "Where the adoption agency, following the procedures referred to in Regulation 21, receives an application in writing in the form provided by the agency from a prospective adopter for an assessment of his suitability to adopt a child, the agency must set up a case record in respect of that prospective adopter ("the prospective adopter's case record") and consider his suitability to adopt a child…"

67. Mr and Mrs Mander submit that this case falls firmly within Part 4 AAR because it relates to actions of Adopt Berkshire in respect of them as prospective adopters, and not in relation to any consideration of adoption for a child (which would fall within Part 3) or the matching of a child with prospective adopters (which would fall within Part 5). They further submit that in reaching a decision under Part 4, an adoption agency is not concerned with a particular child's needs, and the welfare checklist regarding decisions to be made in the best interests of 'a child' under section 1 of the 2002 Act

(and section 1 of the Children Act), does not apply. I accept those submissions for reasons which were, if I may respectfully say so, carefully and precisely explained by Bennett J sitting alone in the Administrative Court at [30] – [31] of *R (AT, TT and S) v Newham London Borough Council* [2008] EWHC 2640 (Admin) 311:

> [30] What is so noticeable about the regulations I have set out is that under Parts 3 and 5 of the AAR the adoption panel and agency must take into account the duties imposed on the adoption agency under the 2002 Act because Parts 3 and 5 are dealing with the adoption panel's functions in relation to an identified child. Section 1 applies whenever a court or adoption agency is coming to a decision relation to the adoption of a child. The paramount consideration of the court or adoption agency must be the welfare of the child throughout its life and by subs (4) the court or adoption agency must have regard to several matters which, for convenience, can be called the 'welfare checklist'. Thus when the adoption panel is considering whether the child should be placed for adoption with a particular proposed adopter, by virtue of reg. 18(2) and 32(2) respectively of the AAR it must have regard to s 1(2), (4), (5) and (6) of the 2002 Act re Part 3 and s 1(2), (4) and (5) of the 2002 Act in respect of Part 5.
>
> [31] By contrast, Part 4 of the AAR is not concerned with an identified child. It is concerned with the suitability of a prospective adopter to adopt children in general. The absence in Part 4 of any duty imposed on the panel and/or adoption agency to take into account any part of s 1 of the 2002 Act is striking and entirely logical when the function of the panel/agency under Part 4 is properly understood. When the matching process is undertaken under Part 5 of the AAR between a child and his/her prospective adopter s 1 is brought fully into play".

68. To the extent that the Defendants rely in their defence on s 1 of the 2002 Act and upon Article 20 of the UN Convention on the Rights of the Child 1989, then, I find that reliance to be misconceived. As Mr Robottom succinctly puts it in his skeleton argument, this is a case about the recruitment of prospective adopters, and not about a child.

2013 Amendments to the AAR

69. The AAR was amended by the Adoption Agencies (Miscellaneous Amendments) Regulations 2013 ("**2013 Amendments**") which substituted a new Part 4 to the AAR from that at that time in force. This provided for: (i) a two-stage approval process for prospective adopters made up of a pre-assessment stage ("**Stage 1**") and an assessment stage involving consideration by an adoption panel ("**Stage 2**"); and (ii) introduced a requirement that if, within three months after approval by an adoption panel of a prospective adopter, an adoption agency had not identified a child it was considering placing with that prospective adopter, their information must be provided to the National Adoption Register, thus widening the pool of children with whom prospective adopters might be matched. The latter amendment has since been repealed, but it is common ground it was in force at the relevant time for the purposes of this case.

70. Before the 2013 Amendments, pursuant to Regulation 25(2) of the AAR, an adoption agency was required to obtain certain information from prospective adopters, as set out in Schedule 4 to the AAR. This included details about the racial origin, cultural and linguistic background of the prospective adopter (at para 4 to Schedule 4 AAR) and religious persuasion of the prospective adopter (at para 5 to Schedule 4 AAR). However, the 2013 Amendments changed this. Now, pursuant to Regulation 26, at the new Stage 1, the adoption agency must *only* obtain the information set out in the Amended Schedule 4. This does *not* include any information on race, ethnicity or religion, and focuses instead on sex, marital status and medical health. It is now only at Stage 2 (Assessment Stage) that the adoption agency must obtain the prospective adopter's racial origin, cultural and linguistic background and religious persuasion (by Regulation 30(1) and Schedule 4, part 3).

71. The 2013 Amendments arose out of a document published by the Department for Education in 2011 entitled 'An Action Plan for Adoption: Tackling Delay'. The reason for this change can be found in the Ministerial foreword, the then Secretary of State Michael Gove set out, *inter alia*, that the Government would *"legislate to reduce the number of adoptions delayed*

in order to achieve a perfect or near ethnic match between adoptive parents and the adoptive child".

72. I remind myself that it is common ground that Mr and Mrs Mander did not even get to Stage 1, as they were not permitted to file an ROI, and so did not undergo the statutory Stage 1 pre-assessment.

Statutory Guidance on Adoption July 2013

73. The 2013 Amendments were accompanied by Statutory Guidance on Adoption for Local Authorities, Voluntary Adoption Agencies and Adoption Support Agencies of July 2013 ("**Statutory Guidance**"). Guidance on preparing, assessing and approving prospective adopters is dealt with in Chapter 3. That sets out the following material stages of recruitment of potential adopters, in accordance with the system established by AAR as amended by the 2013 Amendments: (a) Seeking information; (b) Registration of Interest; (c) Stage 1 – the Pre-Assessment Process; and (d) Stage 2 – the Assessment Process. Once again, there is no dispute that Mr and Mrs Mander did not progress beyond the first, "Seeking Information" stage, as they were not permitted to file an ROI, which was the formal adoption application form.

74. The parties agree that the following paragraphs of the Statutory Guidance are relevant to this case (my emphasis):

> "3.6 **The agency should develop a plan for securing sufficient potential adopters who can meet the needs of the children waiting for adoption and any children who are likely to need adoption in the future.** This may be through the agency's own recruitment and approval process or by using adopters approved by other agencies, or a combination of these approaches. The plan should also take into account the role that the National Gateway for Adoption (operating as First4Adoption) and the Adoption Register can play, and consider any other national or regional recruitment activity. In developing this plan the agency should take account of past trends and projections of future need for numbers of adopters, the needs of the children awaiting adoption or those who might need adopting in the future. **The agency should consider how prospective adopters might be encouraged and supported to**

meet any particular needs of children, including older children, disabled children, black and minority ethnic children, or children in sibling groups, who they might not have initially considered themselves able to adopt; and where appropriate should plan for increasing the number of available adopters from particular communities…

3.11 **Where an agency is not recruiting or knows that it will not have the capacity to undertake assessments in the immediate future it should advise the potential adopter of this and offer to refer them to the National Gateway for Adoption** or, if it knows of one, another agency which is recruiting…

3.14 The agency should decide within five working days from receipt of a registration of interest form whether or not to accept this, unless there are exceptional circumstances which mean that longer is needed. To help the agency make this decision, the agency may need to arrange a visit, have a meeting or a pre-planned telephone call (whichever is considered the most appropriate in each individual case) with the prospective adopter. **Provided an agency has sufficient capacity, they should assess prospective adopters who are able to meet the needs of any children awaiting adoption and not just focus on recruiting adopters for children in their own local area. There may be circumstances in which it would not be appropriate for an agency to accept a registration of interest, such as where they temporarily lack capacity to take on more prospective adopters. In cases like this, the agency should redirect the prospective adopter to the National Gateway for Adoption** or another agency which is currently recruiting.

3.15 **Adoption agencies must not refuse to accept a registration of interest on the grounds of, for example, a prospective adopter's ethnicity, age, health, sexual orientation, religious beliefs or because they do not share the same ethnicity, culture or religious beliefs as the children waiting for an adoptive family**.

3.16 **Religious persuasion, racial origin and cultural and linguistic background are among the matters to be considered in determining the appropriate match for a child**. In some cases one of them may be an important consideration. **Only in very exceptional circumstances should matching a child with prospective adopters be delayed solely on the ground that the available prospective adopters do not match the child's religious persuasion, racial origin, or cultural or linguistic background.**

> The agency must assess a prospective adopter's ability to parent and meet the needs of the child throughout childhood, whether or not they share all or any of those characteristics. Where the child is matched with prospective adopters who do not share those characteristics, the agency must provide them with flexible and creative support as necessary. See Chapter 4 for further information on matching considerations…
>
> 3.18 **Where an agency declines a registration of interest it should provide the prospective adopter with a clear written explanation of the reasons why, and explain to them the choice of going directly to another agency or to the National Gateway for Adoption** for signposting to another agency."

75. As referred to in paragraph 3.16 of Chapter 3 set out above, Chapter 4 includes the following guidance on 'Matching Considerations', i.e. considerations which take place when considering whether and if to match a child with an approved prospective adopter:

> "There are many people who wish to adopt – including those who are not of the same ethnic origin of the children needing adoption or who are of mixed origin, are single or older. Such applicants should be seen by agencies as an opportunity to address more effectively the needs of a range of children who are themselves older, and/or from different backgrounds including mixed and minority ethnic backgrounds. **Any practice that classifies couples/single people in a way that effectively rules out the adoption because of their status, age or because they and the child do not share the same racial or cultural background is not child-centred and is unacceptable**." (Emphasis in the original).

Adopt Berkshire Adoption Procedures and Guidance

76. The Adopt Berkshire Adoption Procedures and Guidance ("**AB Guidance**") set out guidance in relation to potential adopters and reflect the requirements of the AAR and Statutory Guidance. Section 2(a)(i) sets out the eligibility criteria of prospective adopters as follows:

> "…
>
> - Applicants must be at least 21 years old (there is no upper age limit)

- At least one of the couple or the single applicant must be domiciled in the British Isles or both of the couple or the single applicant have been habitually resident for at least one year

- Neither applicant nor any adult member of their household can have been convicted or cautioned in respect of a specified offence.

There are no other criteria and **none** other should be added as the Government is clear about wanting to attract a wider range of adopters." (Emphasis in the original)

77. It then splits the AB Guidance into various stages of application:

i) **Information stage.** This is where a potential adopter makes an enquiry. The AB Guidance provides that basic details should be taken if the enquiry is taken by telephone and an information pack sent out within 2 working days. Prospective Adopters should be made aware of forthcoming Information Session dates.

ii) **The Information Session.** The AB Guidance provides that it is not compulsory for potential adopters attend an information session, but they should be encouraged to do so. It is common ground that Mr and Mrs Mander did attend an information session.

iii) **Enquiry Stage.** The AB Guidance provides that where a potential adopter decides to pursue his or her interest in adoption, they should complete and return an Adoption Enquiry Form, and Adopt Berkshire must respond offering the potential adopter the opportunity to meet with a social worker in their own home at an Initial Visit within 10 working days of the returned form. It is now common ground that Mr and Mrs Mander were offered an Initial Visit after the second telephone call.

iv) **The Initial Visit.** The AB Guidance provides that this must be undertaken by workers who are very knowledgeable about adoption in general and the children requiring placement both locally and nationally. It provides that *"where there is nothing to suggest that it would be inappropriate for an application to be progressed a Registration of Interest Form should be provided to potential adopters".* It is not disputed that despite the Initial Visit raising no concerns about Mr and Mrs Mander as potential adopters, no ROI form was provided to them.

v) **Registration of Interest Form.** The AB Guidance provides that on receipt of a completed ROI form, Adopt Berkshire must decide within 5 working days whether or not to accept it. It states:

> "In regard to the decision:
>
> - …the Agency **must** take into account the national need for adopters not just local need
> - agencies **cannot** refuse Registrations of Interest on grounds of a prospective adopter's ethnicity, age, health, sexual orientation or religious beliefs
> - prospective adopters may **only** be excluded if they fail to meet the eligibility criteria detailed in (i) above [over 21, UK resident or domiciled, no adults in household with convictions or cautions for specified offences]. (It will be in the matching process that how they can meet the needs of any individual children is discussed **not** at the point of assessment)." (All emphasis in the original.)

vi) **Stage One** – the pre-Assessment Process

vii) **Stage Two** – the Assessment Process, which includes Adoption Panel approval.

78. The AB Guidance provides that a matching process with a child will only be carried out once these stages have been completed and the Adoption Panel has approved the prospective adopter.

VI. The EA claim for direct discrimination

79. Mr and Mrs Mander case is that the Defendants directly discriminated against them by treating them less favourably than they treat or would treat others because of their race, and specifically:

i) From 26 April onwards, refusing to progress Mr and Mrs Mander's application for approval as prospective adopters, and therefore refusing to permit them access to the adoption service provided by Adopt Berkshire, contrary to section 29(1) EA;

ii) By terminating the provision of the adoption service provided by Adopt Berkshire to Mr and Mrs Mander on 26 April 2016 contrary to section 29(2)(b) EA;

iii) By subjecting Mr and Mrs Mander to the following detriments contrary to section 29(2)(c) EA:

a) informing Mr and Mrs Mander by telephone on 31 March 2016 that they should not bother to apply to be approved to adopt because of their "Indian background";

b) from 26 April 2016 refusing to progress their application for approval as potential adoptive parents and refusing to reconsider the reasons for the rejection of their application; and

c) suggesting in the letters of 4th May 2016 and 16 June 2016, that Mr and Mrs Mander should consider adopting from India.

Finding of prima facie case of direct discrimination

80. In this case, I am satisfied on the evidence before me that Mr and Mrs Mander have made out a prima facie case of direct discrimination. The basis of the claim is well and contemporaneously documented. There is either no dispute that the acts complained of took place (refusing to progress Mr and Mrs Mander's interest in adoption, refusing to reconsider their application, suggesting they adopt from India), or Mr and Mrs Mander's account is not challenged and I have accepted it (informing them by telephone that they should not bother to apply to be approved to adopt because of their Indian background). There can be no real dispute that both contemporaneous notes and the reasons given in writing afterwards by Ms Loades and Ms Redding, being employees of Adopt Berkshire and RBWM respectively, cited Mr and Mrs Mander's ethnicity as a relevant consideration. The defence is really on the basis of an adequate explanation for differential treatment, which the authorities make clear that I do not consider at the stage of determining whether a *prima facie* case is made out. Accordingly, I must find that there is direct discrimination unless the Defendants can satisfy me on the balance of probabilities that they did not discriminate against Mr and Mrs Mander.

Submissions and determination

81. In the *JFS* case, the factual criteria which influenced the discriminator to act as he did were plain. There was a published school admissions policy, and the school had followed that published admissions policy. In that case, there

was no need to explore and determine what were the factual criteria which operated on the mind of the discriminator to act as he did. The only question that needed to be asked was whether the application of those criteria was discriminatory on the grounds of ethnic origin.

82. In this case, although there is: (i) a statutory framework made up of the 2002 Act, the Children Act, the AAR as amended by the 2013 Amendments, and associated Statutory Guidance; and (ii) local implementation of that statutory framework by Adopt Berkshire in the form of the AB Guidance; each of which set out clear factual criteria to be followed; I am satisfied on the evidence I have heard that Adopt Berkshire did not follow it. That is because it became apparent in Ms Loades' evidence that although she was fully cognisant of the statutory framework and in fact had drafted the AB Guidance, she did not adhere to the published criteria. She added another step after Initial Visit and before the ROI form, and that was the IVR Meeting.

83. Mr Robottom put to Ms Loades in cross-examination that by instigating the formal IVR Meeting, she had devised her own system to assess prospective adopters after the Initial Visit and before the ROI stage, and filter prospective adopters out, using her own criteria. Ms Loades said that she had not, but I am satisfied that is exactly what she did. In effect, the IVR Meeting enabled Ms Loades to refuse to accept – or, as she put it, 'indefinitely defer' - the ROI form from certain prospective adopters on the basis of criteria which Adopt Berkshire's own AB Guidance would not have allowed Ms Loades to apply at the ROI stage: i.e. factual criteria which went beyond the basic eligibility criteria. In fact, Ms Loades agreed in cross-examination that at this pre-ROI stage she was the gatekeeper who decided which prospective adopters who had expressed interest in adopting would progress to the next, ROI stage. This is entirely outwith the spirit and letter of the statutory framework and the AB Guidance. More importantly for the purposes of determining the discrimination claim, it means that I must look into the mind of both the unknown social worker and Ms Loades to try and determine the

factual criteria which caused them to act in the way they did. I will deal with those in reverse order.

84. What were the factual criteria that Ms Loades applied in rejecting Mr and Mrs Mander from proceeding to ROI? Ms Loades agreed in cross-examination that she selected potential adopters to progress at the IVR Meetings who she felt were mostly likely to succeed to placement. This was also the evidence of Ms Popat, it is reflected in Ms Loades letter of 4 May and Ms Redding's letters of 14 June and 18 August 2016. I remind myself that was summarised in Ms Redding's 18 August 2016 letter as follows: *"Given the current position regarding the availability of children for adoption within the UK, Mrs and Mrs [sic] Mander are, for the reasons outlined in my previous letter, unlikely at this time to be able to achieve the placement of a child of Indian, Pakistani or mixed heritage. In addition there is currently a significant surplus of already approved White British/European adopters within the UK who are seeking placement of a child aged under four years. Therefore it is also highly unlikely that Mr & Mrs Mander would be able to achieve the placement of such a child however open they are to considering this placement option".* Most importantly, it is also the Defendants' pleaded case. They plead that they decided not to progress Mr and Mrs Mander's expression of interest in being approved to adopt any further, because it was adjudged that there was insufficient likelihood at that time that a child or children would be matched and subsequently placed with them for adoption within a reasonable timescale, and in reaching this decision, they took into account the profile of children who required placement.

85. Miss Foster in her skeleton and closing submissions has sought to widen the Defendants' pleaded case.

86. Firstly, she submits for the Defendants that targeted recruitment is condoned in the Statutory Guidance (at paragraph 3.6 of Chapter 3) as a legitimate method by which to recruit potential adopters who can meet the needs of waiting children and, in particular, the needs of harder to place children. I agree. However, in my judgment that guidance is about encouraging

applications from a wider pool of prospective adopters and increasing the number of available adopters from particular communities, not about turning away applications on a summary basis, outwith the published processes, from prospective adopters who meet the eligibility criteria but who Adopt Berkshire consider on an Initial Visit do not, or might not, meet further unspecified and unpublished criteria.

87. Secondly, she submits that whether a prospective adopter can meet the needs of harder to place children lies within the discretion of experienced social workers, such as Ms Popat and Ms Loades. Although Mr and Mrs Mander say that they were willing to take sibling groups and look outside their own ethnicity, Miss Foster submits that it is for Ms Popat and Ms Loades as experienced social workers to interpret that and *"filter it through the lens of their professional judgment"* to decide as a matter of judgment and discretion whether they fitted within the Defendant's criteria.

88. I do not accept this submission. It is clear from the statutory framework and the AB Guidance that whether or not Mr and Mrs Mander were suitable to be approved as prospective adopters should be a matter for information gathering at the post-ROI pre-assessment Stage 1, and for assessment by an Adoption Panel at Stage 2. Whether Mr and Mrs Mander could meet the needs of harder to place children should be a matter for assessment only after an Adoption Panel has approved them, at the matching stage. Ms Loades in cross-examination accepted that:

i) part of the next stage of the process, once an ROI form was filed, was to work with potential adopters to see if they were willing to broaden the scope of the children that they might consider adopting, whether that was in terms of age, or higher needs, or differing ethnicities, or taking sibling groups;

ii) the ROI application form was much lengthier and contained much more in-depth and detailed information than would have been gleaned by a social worker at the Initial Visit.

89. Accordingly, although the *motive* for the decision-making may have been to try and put forward prospective adopters who Ms Loades and her team considered would provide a good match for children waiting for adoption, I

do not accept that the ability to meet harder to place children was a factual *criterion* at this stage, as Adopt Berkshire did not have the information properly to assess it. I remind myself that the motives of discriminators are irrelevant, per *R v Birmingham* and *JFS*.

90. Thirdly, Miss Foster submits for the Defendants that the Statutory Guidance specifically contemplates that there will be times when agencies are not recruiting or do not have capacity to undertake assessments: accordingly no prospective adopter, including Mr and Mrs Mander, has a right to be assessed *per se*. In particular, she submits, an agency may be recruiting, or have capacity to assess, prospective adopters who might be suitable to meet the needs of harder to place children, but not be recruiting for, or have the capacity to assess, prospective adopters who cannot meet such needs. She submits that whether or not an agency chooses to use its capacity to assess one prospective adopter or another is a decision which is within the discretion of agencies through professional and experienced social workers, who formulate strategies for recruitment and determine if their criteria are met on a case-by-case basis.

91. I have already found that the statutory framework and Adopt Berkshire's own Procedure and Guidance provides that the assessment of whether a prospective adopter is suitable at all, and if so, suitable to meet the needs of harder to place children is for investigation and assessment after the ROI has been filed, and not before and was not a criterion for decision-making in this case although it may have been a motive. In addition, I have found as a fact that Adopt Berkshire did have capacity to assess Mr and Mrs Mander's ROI form, had they been permitted to file one. I have also found that Mr and Mrs Mander did express an interest in considering sibling groups, which was one of Adopt Berkshire's prioritised groups of harder to place children, and both Ms Popat and Ms Loades knew that. I note that Mr and Mrs Mander had expressed an interest in adopting a sibling group right at the beginning of the financial year, which was one of the key harder-to-place cohorts for which Adopt Berkshire had specific targets for recruitment. Those targets had only just been set for that financial year, and there has been no evidence before

me that those 10 families had already been found. Accordingly the Defendants have failed to satisfy me that the factual criteria for refusal to accept Mr and Mrs Mander's ROI included either lack of capacity, or that Adopt Berkshire was not recruiting comparable adopters to Mr and Mrs Mander (i.e. those willing to consider sibling groups) at that time.

92. Mr Robottom submits for Mr and Mrs Mander that the Defendants' reasoning that they were unlikely to be matched with a child was: (i) speculative; and (ii) based entirely on their race and nothing else. Alternatively, even if it was not entirely to do with race, he submits that race was an important factual criterion, and that is sufficient to satisfy the EA causation requirement.

93. Miss Foster for the Defendants submits that the decision to defer Mr and Mrs Mander was *"nothing to do with ethnicity"*, consideration of which came only as a 'second layer' after they were rejected for not meeting Adopt Berkshire's recruitment priorities, when Ms Loades helpfully tried to think of ways that Mr and Mrs Mander could gain priority in the process. I consider this to be a rather Orwellian submission to ignore the evidence of my eyes and ears.

94. Ms Loades in cross-examination explicitly stated that if Mr and Mrs Mander had expressed a willingness to take a black child or children, she would have progressed their application to ROI because there was a disproportionate number of very young black children which local authorities nationally were struggling to place. She said that if Adopt Berkshire or its neighbouring authority, Slough, had an Asian child that needed placing, she would have prioritised Mr and Mrs Mander and accepted their application. She further stated in cross-examination that *"If Mr and Mrs Mander were Black African and wanted a Black African child, we would have recruited them, no doubt about it"*. In relation to that latter remark, Miss Foster in closing submissions asked me to find that although Ms Loades had said that, she didn't mean it. I decline to do so. I consider that is clear evidence that Mr and Mrs Mander, who I have found expressed willingness to consider a child of *any* ethnicity,

received less favourable treatment than would a comparable couple of a different ethnicity.

95. All of this discloses, in my judgment, what the unknown social worker stated in the very first phone call with Mr Mander, namely that Adopt Berkshire operated a policy of placing adoptive children with parents who come from the *"same background"*, namely race. I am satisfied that race was the criterion by which the unknown social worker decided not to book an Initial Visit with Mr and Mrs Mander, because the Defendants have not satisfied me that there was any other criterion applied by that unknown social worker. The operation of this policy is further supported, in my view, by Ms Popat's evidence that she took Mr and Mrs Mander's ethnicity into account in collating her summary in the Initial Visit notes, saying *"I was trying to be realistic. The likelihood of being matched to a different ethnicity which they were willing to consider was low…".* As Mr Robottom submits, and I accept, all the evidence points to Adopt Berkshire's refusal to progress Mr and Mrs Mander being made on the assumption that it would not be in a putative child's best interests to be matched with prospective adopters who did not share their race. This assumption was a stereotype which gave race a disproportionate importance as a factor regarding the welfare of children, and it was to move away from such stereotypes, and reduce the delays caused by attempts to achieve a perfect or near ethnic match between adoptive parents and adoptive children, that Michael Gove as Minister for State for Education introduced the 2011 Action Plan and 2013 Amendments to the 2002 Act and AAR. The Statutory Guidance following those amendments specifically provided in Chapter 4 'Matching Considerations' that *"Any practice that classifies couples/single people in a way that effectively rules out the adoption because… they and the child do not share the same racial or cultural background is not child-centred and is unacceptable".* In my judgment, this was the effect the IVR Meeting practice put in place by Adopt Berkshire had upon Mr and Mrs Mander's expression of interest. It effectively ruled them out from being approved to adopt through Adopt Berkshire. It is also a motive, and not a factual criterion. I am satisfied that the factual criterion which was given overwhelming priority in that decision,

and the later decision not to reconsider that decision at the round-table meeting, was Mr and Mrs Mander's ethnicity.

96. I note that information about Mr and Mrs Mander's ethnicity appears to have been collected from that very first telephone call that Mr Mander had with Adopt Berkshire, because he says it was discussed and that formed part of the reason why the unknown social worker told him not to bother applying; and Ms Ryan, whose evidence I accept, says that ethnicity information was already collected and formed part of Mr Mander's computer record when she looked at it during the second telephone call. In addition, there are references to Mr and Mrs Mander's ethnicity and religion (which references to not being religious) in the Initial Visit notes and IVR Meeting notes. In collecting this information at this pre-assessment stage, Adopt Berkshire was in breach of Regulation 26 of the AAR as amended by the 2013 Amendments, which provides that an adoption agency at until Stage 2 must only obtain information set out in the Amended Schedule 4 which does **not** include information on race, ethnicity or religion.

97. I have set out at the beginning of this judgment extracts from all of the relevant notes before the decision was made not to progress with Mr and Mrs Mander, and later correspondence of Adopt Berkshire and RBWM setting out the reasons why the decision was made. All of them refer to Mr and Mrs Mander's Indian background; several refer to the lack of Indian/Pakistani children who could be matched with Mr and Mrs Mander (and I share Mr and Mrs Mander's concern that the bracketing of Indian and Pakistani children cannot be for reasons of ethnicity, culture or religion and so are likely to be for reasons of colour); several explain that they seek to place children who provide a positive cultural and religious 'match' with adopters; Ms Loades and Ms Redding both advise Mr and Mrs Mander to seek international adoption from India.

98. The sheer volume of evidence that race was considered early, constantly and as a key criterion in Adopt Berkshire's dealings with Mr and Mrs Mander means that I do not accept Miss Fosters submission for the Defendants that references to ethnicity came only as 'a second layer' after Ms Loades had

reached a justifiable and non-discriminatory decision to refuse to accept Mr and Mrs Mander's ROI form. That is simply not what the documentation and the oral evidence of Mr and Mrs Mander and the Defendants' witnesses discloses, in my judgment, and that does not explain the unknown social worker's refusal to book an Initial Visit after the first telephone call, which I have found was made on the basis of Mr and Mrs Mander's race. That is why, when considering this evidence together with the evidence filed in defence, I found that Mr and Mrs Mander had made out a *prima facie* case of direct discrimination.

99. The 'crucial question', as Lady Hale put it in *JFS*, is whether Mr and Mrs Mander received less favourable treatment by being (i) refused to progress to ROI; (ii) terminated from the prospective adopters approval process (and so the adoption service of Adopt Berkshire); and (iii) subjected to the pleaded detriments; on the grounds of race, or for some other reason. The Defendants have not satisfied me to the civil standard that Mr and Mrs Mander received this less favourable treatment for some other reason and so they have not displaced the presumption of direct discrimination arising from Mr and Mrs Mander's *prima facie* case.

100. For those reasons I find that the Defendants directly discriminated against Mr and Mrs Mander on the grounds of race, as pleaded.

Causation

101. It is Mr and Mrs Mander's case that if the published criteria in the AB Guidance had been followed, they would have been provided with a ROI form to fill in and return after the Initial visit, as they met the eligibility criteria. Ms Popat admitted as much. On the evidence before me, I am satisfied that if Mr and Mrs Mander had been given that form, they would have completed it. I do not understand that to be disputed. In that case, the ROI form would have been considered and progressed to Stage 2. The Defendants have consistently said that they know of no reason why Mr and Mrs Mander would not be approved as suitable prospective parents. The fact that they were later approved for inter-country adoption means that I

consider it more likely than not that they would have been approved as prospective adopters at Stage 2, if Adopt Berkshire had accepted their ROI.

102. Mr and Mrs Mander's case is that if they had not been discriminated against, they would not have incurred the pecuniary losses expended on their inter-country adoption, because they would have been successful in adopting in England. The Defendants directed them to the IAC, and this is where they went as a first step. Mr Robottom submits that they were entitled to look anywhere for international adoption and the Defendants have taken no mitigation point to say, for example, that they could have gone to another, cheaper country to the USA. By the time Mrs Loades had invited them to consider filing an ROI with them again, in November 2016, they had already contracted and paid fees for the US adoption.

103. Miss Foster for the Defendants submits that there were a number of other options open to Mr and Mrs Mander, including in the UK. In particular, Miss Foster submits that if they had gone to another authority in the UK and said they were willing to adopt a black child, they *"could have had one in a matter of months"* in light of the lack of adopters available to meet the needs of harder to place children, including black children. I do not know how Mr and Mrs Mander could have been expected to know that, when they told Adopt Berkshire that they were willing to adopt a child of any ethnicity and they were still removed from the process. I note that neither Adopt Berkshire nor, later, RBWM directed Mr and Mrs Mander to the National Gateway or any other UK based adoption agency, as required to do when refusing to accept an ROI under the Statutory Guidance. Instead both suggested adopting internationally, albeit from India. In those circumstances it sits ill for them to say that it was not reasonable for Mr and Mrs Mander to go down the international adoption route and the reasons they give for choosing the USA seem entirely reasonable to me. For those reasons I consider that those losses flow from, and are caused by, the direct discrimination that I have found.

VI. Human Rights Act

Law

104. Mr and Mrs Mander at trial pursued only the claims of breach of Articles 12 and 14 of the European Convention on Human Rights ("**Convention**") (and as such a breach of section 6 of the Human Rights Act 1996 ("**HRA**"). Article 12 provides that *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right"*. The right is derived from Article 16 of the Universal Declaration of Human Rights, which provides that *"Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family"*. Article 14 provides that the ECHR rights and freedoms shall be secured without discrimination on any ground including race.

105. Section 2 of the HRA requires UK courts and tribunals determining a question in connection with a Convention right to take into account, *inter alia*, Commission decisions. However where UK law is clear, it is no part of the purpose of s.2 HRA to oblige courts to interpret Convention rights, or to develop European jurisprudence in a manner inconsistent with it (per Sir Mark Potter in *Wilkinson v Kitzinger* [2006] H.R.L.R. 36, [2006] EWHC 2022 (Fam), at [63])

106. Mr and Mrs Mander rely on the Commission decision *X v Netherlands*, App. No. 8896/80 24 D.R. 176 (10 March 1981), relating to the right to found a family by adoption under Article 12, in which the Commission stated at paragraph 1:

> "The Commission recalls that it has previously held that the adoption of a child and its integration into a family with a couple might, at least in some circumstances, be said to constitute the foundation of a family by that couple. It further held that it was quite conceivable that a "family" might be "founded" in such a way. It considered that it was left to national law to determine whether, or subject to what conditions, the exercise of the right in such a way should be permitted (see Application No. 7229/75, D.R. 12, p.32).
>
> The Commission is of the opinion that the concept of family life in a great number of member States legitimates the view that the

> founding of a family, within the meaning of Article 12, does not only envisage natural children, but also adoptive children. As provided by the Article, the exercise of such a right is governed by the national laws."

107. The Defendants rely on the European Court of Human Rights' "Guide on [sic] Article 8 of the European Convention on Human Rights" which states at para 299 and 300 under the heading 'Adoption':

> "299. The Court has established that although the right to adopt is not, as such, included among the rights guaranteed by the Convention, the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 (*Kurochkin v Ukraine*; *Ageyevy v Russia*). A lawful and genuine adoption may constitute family life, even in the absence of cohabitation or any real ties between an adopted child and the adoptive parents (*Pini and Others v Romania* [143] – [148], *Topcici-Rosenberg v Croatia*, [38]).
>
> 300. However the provisions of Article 8 taken alone do not guarantee either the right to found a family or the right to adopt (*Paradiso and Campanelli v Italy* [GC], [141]; *E.B. v France* [GC])…".

Submissions and determination

108. Mr and Mrs Mander submit that in this case the Defendants by their actions prohibited them from founding a family contrary to Article 12, which was breached in a manner that was not in accordance with the national law as it constituted direct discrimination on the grounds of race contrary to the EA. Further, they claim that because it constituted direct discrimination, it was in breach of Article 14 when read with Article 12.

109. Mr and Mrs Mander have not satisfied me that the ambit of Article 12 encompasses the right to found a family by adoption of a child in all circumstances. *X v Netherlands* specifically holds that it does not, and that it is left to the national law to determine whether, or subject to what conditions, the exercise of the right in such a way should be permitted. Accordingly, to paraphrase Lord Nicholls at [26] of *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 WLR 637, [2006] H.R.L.R. 19 (cited at

[65] of *Wilkinson v Kitzinger*) the Commission in *X v Netherlands* is saying that Contracting States are not currently required by the Convention to include within the right to found a family guaranteed by Article 12, the right to adopt a child. That is left to the national law. The manner in which the UK has determined rights relating to adoption is in the statutory framework that it has put in place by way of the 2002 Act, the Children Act, the AAR and the Statutory Guidance, and the remedies for discrimination in relation to the provision of adoption services are found in the EA. Accordingly I accept Miss Foster's submission for the Defendants that there is no place in this case for a claim of breach of the HRA.

110. For those reasons I dismiss this element of the claim.

VII. Remedies

General Damages

111. Section 119 EA sets out remedies that apply for a breach of, *inter alia*, section 13 and section 29 EA. It provides that the county court has the power to grant any remedy that could be granted by the High Court in proceedings in tort or on a claim for judicial review.

112. Mr and Mrs Mander seek damages for distress and injury to feelings in accordance with the normal principles of the law of EA discrimination, applying the bands of awards for injury to feelings used in tribunals known as the *Vento* guidelines. These are named for the case of *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102, in which the Court of Appeal set out categories of damages for injury to feelings. Those were revised upwards in *Da'Bell v National Society for the Prevention of Cruelty to Children* [2010] IRLR 19, to account for inflation, and at the time of the issue of this claim on 6 January 2017 were (i) £1,000 - £6,000 (*"less serious cases, such as where the act of discrimination is an isolated or one off occurrence"*); (ii) £6,000 - £18,000 (*"serious cases that do not merit an award in the upper band"*); and (iii) £18,000 - £30,000 ("*the most serious cases, such as where there has been a lengthy campaign of discriminatory*

harassment"). The Court of Appeal in *Vento* stated that it would only be in *"the most exceptional cases"* that an award would exceed this top band.

113. The *Vento* bands have since been further updated for claims filed on or after 6 April 2019, to (i) £900 - £8,800; (ii) £8800 to £26,300; and (iii) £26,300 to £44,000, with the most exceptional cases capable of exceeding £44,000.

114. Miss Foster for the Defendants invites me to place this in the lower bracket and has provided a number of authorities where damages for injury to feelings were awarded by the High Court in cases involving rape and sexual abuse, which she submits should put the injury to Mr and Mrs Mander into perspective. I have considered them, but assessment of quantum is necessarily fact-specific and I do not think it is helpful to measure and weigh one type of wrong against another. I also do not consider that the lower bracket is appropriate in this case, which is not a case of a single discriminatory action. I have found that the racial discrimination started in the initial phone call that Mr Mander had with Adopt Berkshire, and continued through the decision not to progress their application, the handling of their complaint by RBWM, correspondence with Mr and Mrs Mander's MP and the decision not to reconsider progressing their application at the time of the round-table review.

115. I consider that Mr and Mrs Mander were particularly vulnerable, being a childless couple who had gone through numerous rounds of IVF and a sad early pregnancy loss, and were seeking adoption to create their family. The Defendants described them as desperate to adopt. This is an aggravating feature. Another aggravating feature is the fact that the discrimination caused Mr and Mrs Mander to make public matters which were private to them, including their desire to adopt and difficulty in having their own biological children. This is because the complaint was not handled properly by RBWM (and in fact was never determined), which meant Mr and Mrs Mander felt forced to seek assistance from Mrs May MP, their local councillor, the Local Government Ombudsman, the Equality and Human Rights Commission and ultimately the courts. In addition, Mr and Mrs Mander describe the hurt, stress and anxiety that the actions of the Defendants caused them in stark

terms which, if anything, they have understated in their written evidence. Mrs Mander describes that she and Mr Mander were shocked and dismayed by the first telephone call, and discussed how unfair it was: *"I immediately thought that we would never have a family and that our big house was just a waste – we would never fill it with our children. I was very distressed"*. She then described being upset and hurt by Ms Popat's call, saying she considered that Adopt Berkshire's decision not to progress them was *"an insurmountable roadblock, the end of the line for us to have a real family"*. She said, *"There was no doubt in my mind that she in fact made a judgment based on the colour of our skin. I was never treated like this before. I grew up in this country. My grandfather fought in the British Army – I was hurt and disappointed"*. Mrs Mander said it was the first time she had been singled out because of the colour of her skin before, and described her and Mr Mander as being deeply unhappy and hurt.

116. Mr Mander said, *"Adopt Berkshire made me feel that the country where I grew up still saw me as different. It did not matter that I grew up here, as long as I was not white, I could not be British. I found this thought very disturbing – I had trouble sleeping at night because of how angry and helpless I felt"*. His reaction to it can be seen from his immediate lodging of a complaint with RBWM, and following that up with letters seeking assistance from his MP, his local councillor, the Local Government Ombudsman and others, culminating in the bringing of these proceedings. He said that he was further upset by RBWM's response to their complaints, saying *"…they still did not treat it seriously, missed deadlines for getting back to us and generally did not seem to care that Reena and I had felt discriminated against by Adopt Berkshire*".

117. I accept Mr and Mrs Mander's evidence. I consider this to be a very serious case, which sits at the top of the middle, or bottom of the upper, range of the *Vento* bands, i.e. £18,000 as updated in 2010. I understand from the President of Tribunal's guidance of September 2017 that this should be subject to an increase for RPI with reference to the month and year of the issued claim, plus a 10% *Simmons & Castle* uplift, but will hear submissions on that

following the handing down of this judgment. I will order the Defendants to pay that uplifted figure to *each* of Mr and Mrs Mander in damages for distress and injury to feelings.

118. Mr and Mrs Mander also claim aggravated damages. I decline to award this as I have made no finding that there was any intentionality in the direct discrimination, and have fixed the general damages to a level which I think fairly compensates Mr and Mrs Mander.

Special damages

119. For reasons which I have given, I consider that Mr and Mrs Mander are entitled to the pecuniary losses arising from their inter-country adoption. The Defendants have considered the various contracts and receipts that Mr and Mrs Mander have produced and take no issue with the sums claimed as set out in the Claimant's Schedule of Loss. Accordingly I will order the Defendants to pay to Mr & Mrs Mander the sum of £60,013.43 in special damages.

Declaration

120. I will make a declaration that the Defendants have directly discriminated against the Manders in the provision of adoption services, on the grounds of race. I will hear submissions from the parties on the wording of the declaration, if not agreed, following the handing down of this judgment.