Claim No K03CL112

**IN THE COUNTY COURT AT CENTRAL LONDON**

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Date: 16 January 2026

**Before** :

**HIS HONOUR JUDGE MONTY KC**

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**Between :**

**(1) Mr ALEXANDER MIGITA**
**(2) Mr DMITRII PODOPRIKHIN**
**(3) Mr DMITRY SHAKIN**

**Claimants**

**- and -**
**J.P. MORGAN SE**

**Defendant**

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**Mr Mohinderpal Sethi KC and Ms Sophie Cashell**
(instructed by **Stewarts Law LLP**) for the **Claimants**
**Mr Ben Cooper KC and Mr Spencer Keen**
(instructed by **Hogan Lovells International LLP**) for the **Defendant**

Hearing dates: 10-14 November 2025

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# Approved Judgment

## HHJ Monty KC:

## Introduction

1. In February 2023, the Defendant refused to take on the Claimants as clients. The Claimants, who were all born in Russia, assert that this was because of direct or indirect racial discrimination, and they seek a declaration to that effect as well as damages. The Defendant says that the refusal was due to the effect of EU sanctions pursuant to which it was not possible to take the Claimants on as clients. However, the reason given by the Defendant at the time of its refusal made no reference to the sanctions being the reason, and instead was that the Defendant had a firm-wide policy in place that meant that it was not taking on any Russian clients.

2. The trial took place over 4 days. Both sides had the benefit of extremely good representation. The Claimants were represented by Mr Sethi KC leading Ms Cashell, and the Defendant by Mr Cooper KC leading Mr Keen. I thank counsel for their detailed and helpful written and oral submissions.

3. I have also had the benefit of live transcription of the whole trial, and although I have relied principally on my own notes I have read all 4 days of transcripts when preparing this judgment. I am also grateful to Opus2 and the transcriber for their work.

## The background

4. The following is a brief overview of the case.

5. Underpinning everything are the sanctions imposed by the EU following Russia's invasion of Ukraine in February 2022, and in particular Article 5(b)(1) of Council Regulation 833/2014 (referred to at trial as the EU Deposit Restriction and in this judgment as the "EUDR") which provided (as at 5 February 2023):

> "1. It shall be prohibited to accept any deposits from Russian nationals or natural persons residing in Russia, legal persons, entities or bodies established in Russia or a legal person, entity or body established outside the Union and whose proprietary rights are directly or indirectly owned for more than 50 % by Russian nationals or natural persons residing in Russia, if the total value of deposits of that natural or legal person, entity or body per credit institution exceeds EUR 100 000.
>
> 2. It shall be prohibited to provide crypto-asset wallet, account or custody services to Russian nationals or natural persons residing in Russia, or legal persons, entities or bodies established in Russia.
>
> 3. Paragraphs 1 and 2 shall not apply to nationals of a Member State, of a country member of the European Economic Area or of Switzerland, or to natural persons having a temporary or permanent residence permit in a Member State, in a country member of the European Economic Area or in Switzerland."

6. Article 13(d) of Council Regulation 833/2014 provides that the Regulation applies to any legal person, entity or body outside of the EU which was incorporated or constituted under the law of a Member State.

7. The Defendant ("JPM") is a European company registered with the local court of Frankfurt am Main in Germany. JPM is authorised as a credit institution by the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) and jointly supervised by the BaFin, the German Central Bank (Deutsche Bundesbank) and the European Central Bank (ECB). It is common ground between the parties that the EUDR applied to JPM.

8. JPM operates as a private bank, providing services to high-net-worth individuals. It has a London branch.

9. It is also common ground that the Claimants did not fall within any exception to the EUDR and that the amount each was seeking to deposit was (considerably) more than the €100,000 referred to in the EUDR.

10. It follows that JPM could not have taken the Claimants on as clients – a process known as "onboarding" – because of the EUDR. In this judgment I will continue to use the words "onboard" and "onboarding", although I think them rather awkward, but these expressions were used contemporaneously in the documentation and by all the witnesses and they are no more than shorthand for "taking on as a client".

## The parties and other relevant individuals

11. The Claimants were, at the material times, all quants (which is short for quantitative financial analysts) working for XTX in London. XTX Markets is a leading algorithmic trading firm established in London by Dr Alex Gerko, who was born in Russia but became a British citizen in 2022 having renounced his Russian citizenship.

12. The First Claimant, Mr Migita, was born in Russia and holds Russian citizenship. Mr Migita moved to the UK in 2008 and acquired UK citizenship in 2016.

13. The Second Claimant, Mr Podoprikhin, was born in Russia and holds Russian citizenship. He moved to the UK in 2018.

14. The Third Claimant, Mr Shakin, was born in Russia and held Russian citizenship until 25 October 2023 (so at the material times, he also was a Russian citizen). He moved to the UK in 2006 and obtained UK citizenship in 2016.

15. At the heart of the factual background are the following individuals at JPM:

    (1) Ms Aastha Gurbax – Ms Gurbax was at the relevant time a Managing Director and banker with the JPM UK International Team, and she worked from JPM's London branch.

    (2) Mr Massimo Zanette – Mr Zanette is vice-chair of JPM's UK International Team. He is a global investments specialist working from JPM's London branch.

    (3) Mr Oliver Gregson – Mr Gregson was then JPM's London branch manager and Region Head for the UK, Channel Islands and Ireland. He was Ms Gurbax's manager.

(4) Mr Pablo Garnica – Mr Garnica is CEO of the EMEA (Europe, Middle East and Africa) team at JPM. He is on the management board of JPM. Mr Garnica is based in Spain.

(5) Mr Patrick Waller – Mr Waller is a banker at JPM's London branch, but in a different team from Ms Gurbax and Mr Zanette. Mr Waller was part of the FSG (Financial Services Group) team.

(6) Ms Victoria Psareva – Ms Psareva was then Executive Director of JPM's Emerging Markets team (which was referred to internally at JPM as "the Russia team").

16. Other JPM individuals – for example Mr Jamie Dimon, the CEO of JPMorgan Chase in the US – will be mentioned later in this judgment.

17. Colleagues of the three Claimants – fellow quants at XTX – included Mr Renat Khabibullin and Mr Yuri Bedny, both of whom were Russian born and Russian citizens.

18. A pivotal role was also played by Mr Michael Irwin, the Chief Operating Officer of XTX Markets. I have already mentioned Dr Gerko.

**A brief chronology**

19. Before JPM was approached about onboarding the Claimants, Mr Khabibullin had been dealing with Mr Waller and Ms Psareva, and had been told that because of the EUDR he could not be onboarded by JPM.

20. It would seem that as a result, Dr Gerko asked Mr Irwin to see if it would in fact be possible for some of the XTX quants – and Dr Gerko himself – to be taken on as clients by a JP Morgan UK or non-EU entity, on the understanding that the EUDR would most probably apply if the relevant entity was in the EU with the effect that an EU entity would not be able to onboard anyone who fell within the wording of the EUDR.

21. Using his contacts at JP Morgan in the US, in early February 2023 Mr Irwin was introduced to Ms Gurbax and Mr Zanette, who are based in London. They exchanged emails and spoke on the telephone. The three Claimants and Dr Gerko were identified as prospective clients (the list of prospective clients also included a Mr Alex Kurshev and Mr Khabibullin) and Mr Irwin provided details for them (when each moved to the UK, whether they were UK citizens, whether they were Russian citizens and their sources of wealth). Mr Irwin told Ms Gurbax that apart from Dr Gerko, the others were Russian citizens.

22. On 22 February 2023, Ms Gurbax sent Mr Irwin an email in which she said that JPM could onboard Dr Gerko, but not the others at that time. Her email said,

> "However, we are not onboarding any Russian citizens so the answer re the others will be a 'wait and see' in terms of 1) when they renunciate their citizenship and 2) what the JPM rules will be at the time of renunciation."

23. On 23 February 2023, there was a telephone discussion between Ms Gurbax and Mr Irwin in which Ms Gurbax gave a more detailed explanation of why "the others" – which included the Claimants – were not being onboarded. In summary Ms Gurbax

referred to there having been "an exec firm wide decision" and that "We have taken a collective decision that we are not onboarding any new Russian passport holder at the moment"; she referred to "the firm's policy on what we are doing with respect to onboarding Russians" and to the "criteria" applied by JPM. She said that the clear position, as she had been told by the Russia team, was "No new Russian passport holders". Ms Gurbax said that this was "one, an accurate and two, a comprehensive … response... after we have internally consulted ... our Risk Legal and Compliance teams ...". Ms Gurbax said in relation to sanctions, "no one's saying that this is an interpretation of sanctions, just to be clear … No one's ever suggesting that these individuals are impacted by sanctions."

24. Shortly after this, a letter of claim was sent to JPM (addressed to Ms Gurbax) by solicitors for the Claimants, asserting unlawful discrimination. The response was that the Claimants had not been onboarded because of the EUDR.

25. It is and has always been the Claimants' case that in refusing to onboard them for the reasons set out by Ms Gurbax in her call with Mr Irwin, JPM had unlawfully discriminated against them. JPM's case is that the reason for not onboarding the Claimants was not the reason given by Ms Gurbax, but was the EUDR which prevented their onboarding.

**The Equality Act 2010**

26. In this judgment all section numbers are, unless otherwise stated, sections in the Equality Act 2010.

27. Section 29(1) provides:

> "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."

28. Section 13(1) provides that direct discrimination is where:

> "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."

29. Section 4 sets out the protected characteristics. These include race. Section 9 provides that race includes nationality and ethnic or national origins.

30. Section 19 provides that indirect discrimination is where:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

31. Race is a protected characteristic for the purpose of indirect discrimination: section 19(3).

32. It is common ground that JPM was a service provider, and the Claimants were service users, within the relevant provisions of the 2010 Act.

**These proceedings**

33. This claim was brought on 8 November 2023. It is alleged that JPM had, by refusing to provide services to the Claimants because of their nationality, directly and or alternatively indirectly discriminated against them on the grounds of race. The provisions of the 2010 Act referred to in the Claim Form are sections 13 (direct discrimination), 19 (indirect discrimination), and 29(1) (discrimination by not providing a service).

34. At paragraph 33 of the Particulars of Claim, it is said:

> "33. The Claimants aver that the conduct pleaded above amounted to direct discrimination. In breach of s.13 EqA 2010, the Defendants treated the Claimants less favourably because of their race, in that they:
>
> PARTICULARS
>
> 33.1. Failed to contact the Claimants directly to obtain the necessary information to continue with the onboarding process;
>
> 33.2. Applied a 'firmwide' policy to the Claimants which stipulated that the Defendant would not onboard new clients with Russian citizenship and/or Russian passports (despite previously confirming that the Russian citizens would be dealt with by another team);
>
> 33.3. Failed to provide services to the Claimants on the basis of their nationality (despite legal advice confirming that none of the Claimants were subject to applicable sanctions)"

35. Paragraph 34 of the Particulars of Claim states:

> "34. Alternatively, that the conduct pleaded above amounted to indirect discrimination in breach of s.19 EqA 2010, in that they:
>
> PARTICULARS
>
> 34.1. Applied a provision, criterion or practice to the Claimants which stipulated that the Defendant would not onboard new clients with Russian citizenship and/or a Russian passport;

> 34.2. That provision, criterion or practice placed potential new clients with Russian citizenship and/or a Russian passport at a particular disadvantage by comparison with potential new clients who did not have Russian citizenship and/or a Russian passport; and
>
> 34.3. The Claimants were placed at that disadvantage and were so by reason of their protected characteristic of Russian nationality."

36. The discrimination claims are based on the explanation for not onboarding the Claimants which was given by Ms Gurbax (a) in the email to Mr Irwin of 22 February 2023, and (b) in her telephone call with Mr Irwin on 23 February 2023.

37. In the Defence, JPM say that the reason why the Claimants were not onboarded was "in order to comply with" the EUDR, and that to the extent that any different reason was given by Ms Gurbax, "that was not true or accurate and she was mistaken and/or misspoke." The Defence also referred to the fact that Mr Irwin – and the Claimants – were aware of the effect of the EUDR.

38. As I shall explain, the only contact with JPM in relation to the possible onboarding of the Claimants was between Mr Irwin (on behalf of the Claimants through his role at XTX) and for JPM either or both of Ms Gurbax and Mr Zanette. There was, however, quite a lot going on within both JPM and XTX, as the documentary and oral evidence shows – I will deal with this when I set out my factual findings later in this judgment.

39. JPM also rely on the statutory defence to this claim set out at section 109(4):

> "In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A —
>
> (a) from doing that thing, or
>
> (b) from doing anything of that description."

40. JPM say at paragraph 32.4 of the Defence:

> "… the Defendant took all reasonable steps to ensure that Ms Gurbax understood and applied sanctions restrictions, including the EU Deposit Restriction, correctly and accurately and in a manner which did not constitute direct or indirect discrimination, and that she did not otherwise unlawfully discriminate against clients or prospective clients."

41. JPM refers to and relies upon its various in-house policies procedures and training surrounding the EUDR and discrimination generally, and the fact that Ms Gurbax's training was up-to-date.

**The witnesses**

42. All the witnesses who gave evidence had produced witness statements.

43. Each of the Claimants gave evidence. I was impressed by all of them. I accept their evidence.

44. Mr Irwin also gave evidence for the Claimants. I accept his evidence. It was somewhat surprising that Mr Irwin did not tell Ms Gurbax at the outset of his contact with her, and with Mr Zanette, about Mr Khabibullin and Mr Waller/Ms Psareva and the fact that JP Morgan had refused to onboard Mr Khabibullin because of the EUDR. However, I accept that Mr Irwin was not aware that JPM was a German bank; he thought either that he was dealing with a London-based UK entity or that Ms Gurbax would find a solution involving a non-EU entity which would allow the Claimants to be onboarded. Mr Irwin was adamant that the approach to JPM was not a "set-up" to manufacture some sort of case against JPM, and I accept that.

45. For JPM, I heard evidence from Mr Waller, Mr Zanette and Mr Garnica. Again, I accept the evidence they gave, with some minor reservations over the evidence of Mr Garnica which I shall explain in due course. I also heard evidence from Ms Haddon which was not challenged; Mrs Haddon (at the relevant time, she was Ms Tighe) is the Global Head of Global Financial Crimes Compliance ("GFCC") for the Asset and Wealth Management ("AWM") business of the JPM Group.

46. Notably absent from the list of witnesses is Ms Gurbax. She no longer works for JPM, and as I said during the trial, the reasons for her leaving are not relevant to the matters I have to decide. Nonetheless, the fact that she was not called by JPM as a witness (and did not provide a witness statement) without an explanation as to why or any suggestion that it would not have been possible to call her led Mr Sethi to submit that I should draw an adverse inference.

47. In closing submissions, Mr Sethi said:

> "A fundamental difficulty here for the defendant is that it failed to call her. She is, of course, the key protagonist in a discrimination claim and no explanation, moreover, has been provided. So what does the court do about this? How do you approach this? We invite your Honour to make the simple and, we say, obvious adverse inference at the first stage to the extent necessary or to find that the respondent has failed to discharge its burden at the second stage, given the defendant's failure to call Ms Gurbax."

48. Mr Sethi then took me to *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863, and then said:

> "I submit, in this case, and in light of the above the fact that the defendant hasn't called her is a fact which the court is invited to draw an adverse inference of unlawful discrimination from."

49. This submission struck me as far too vague. In *Invest Bank PSC v El-Hussein* [2024] EWHC 2976 (Comm), Calver J said at [117]:

> "I do not accept this submission which is overly broad and lacks proper analysis. It brings to mind the typically pithy observation of Charles Hollander KC in his seminal work Documentary Evidence (14th edn), where he states as follows at [11-28]: 'Parties say they will ask the judge to draw adverse inferences in many circumstances where such a conclusion would be entirely unjustified. Too often the use of the expression is meaningless and is simply used as a substitute for "we will ask the judge to reject your case.' Bryan J made this very point

> in *Lakatamia v Su* [2021] EWHC 1907 (Comm) at [903], when he stated that an inference that 'witnesses have not been called because they would irremediably damage a party's case [would] be too generic.' An adverse inference, if drawn, is a factual inference, and is not to be regarded as a penalty imposed on a party for his failure to call evidence or disclose documents."

50. I pressed Mr Sethi to identify the inference he said I should draw. Mr Sethi then said:

> "Our position, given that the burden has shifted to the defendant, is that the defendant cannot possibly discharge their burden in the absence of Ms Gurbax's evidence and given in this case the contemporaneous documentation."

51. Again, it seemed to me that this was far too general an assertion.

52. Mr Sethi later submitted:

> "… we say it's obvious that the failure -- we would be inviting you to infer that the failure to call Ms Gurbax was because she would assist the -- not assist the defendant's case. We invite you to infer that she would not assist -- that she would support her reasons as stated in her -- the transcript of the call as the reasons for the refusal of the service and we invite you to infer that those were the reasons given by Mr Garnica to Ms Gurbax and she was relaying that on to Mr Irwin."

53. In *Ahuja Investments v Victorygame* [2021] EWHC 2382 (Ch), HHJ Hodge KC (as he now is) said this at [23]:

> "It is well-known that, in certain circumstances, the court may be justified in drawing adverse inferences from the absence of a witness who might have been called, and who might be expected to have material evidence to give; but the burden is on the party who invites the court to draw an adverse inference from the failure to call such a witness clearly to identify the nature of the evidence which the court is invited to infer, and to explain why the absence of evidence on the point from that witness is material to that issue."

54. At [23-25] and [31-34], the judge went on to set out the principles at play when the court is asked to draw an adverse inference from the absence of a witness, derived principally from *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm), and *Efobi*.

55. At [25], HHJ Hodge KC said:

> "In my judgment, before the discretion to draw an adverse inference or inferences can arise at all, the party inviting the court to exercise that discretion must first:
>
> (1) establish (a) that the counter-party might have called a particular person as a witness and (b) that that person had material evidence to give on that issue;
>
> (2) identify the particular inference which the court is invited to draw; and
>
> (3) explain why such inference is justified on the basis of other evidence that is before the court.

> Where those pre-conditions are satisfied, a party who has failed to call a witness whom it might reasonably have called, and who clearly has material evidence to give, may have no good reason to complain if the court decides to exercise its discretion to draw appropriate adverse inferences from such failure."

56. In *Efobi*, Lord Leggatt said at [41]:

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

57. In *Invest Bank*, Calver J summarised the legal principles at [119]-[120]:

> "(1) 'The first step must be to identify the precise inference(s) which allegedly should [be] drawn': *Efobi* at [43].
>
> (2) 'There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it': per Lord Sumption put it *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, [44]. In other words, there must be a case to answer.
>
> (3) Even if there is a case to answer, whether an adverse inference is to be drawn turns on a factual analysis of all the relevant considerations, such as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence and the significance of those points in the context of the case as a whole: *Efobi* at [41].
>
> The effect of drawing the inference is to strengthen the evidence adduced by the party seeking the inference or weaken the evidence adduced by the party resisting it."

58. The significance of all this I think goes to the question of how the decision not to onboard the Claimants was made, when, and by whom, in circumstances when Ms Gurbax said in her telephone call to Mr Irwin that it was not her decision.

59. Mr Garnica – to whom Ms Gurbax had referred the matter before going back to Mr Irwin – could not remember having had any discussion with Ms Gurbax about this, but said that if there had been such a discussion, he would have said that the EUDR – of which he was fully aware – meant that the Claimants could not be onboarded. It was somewhat surprising that Mr Garnica could not recall any conversation with Ms Gurbax, particularly where this claim was threatened so soon after 23 February 2023 which means that those individuals at JPM are likely to have been asked to set out their recollection of events around that time. On the other hand, it is often not until trial and indeed cross-examination that the detail of a case fully emerges. I have concluded that Mr Garnica was not seeking to mislead the court, and that he genuinely had no recollection of having spoken to Ms Gurbax in this regard.

60. Some of the questions at the centre of this dispute are these: why did Ms Gurbax say what she said, and did JPM in fact have a discriminatory policy of not onboarding Russians? In closing, Mr Cooper several times described Ms Gurbax as having been negligent when she said what she did to Mr Irwin.

61. All these issues and questions – and others, including whether I should draw an adverse inference – have to be resolved as part of and in the light of my factual findings, and I will do so in the relevant section of this judgment. At that point I will also set out my conclusion as to what I should do in the light of the failure to call Ms Gurbax, as it seems to me that this is in accordance with the principles set out above (particularly those set out by Calver J in *Invest Bank*).

62. I should also mention at this point the standard and burden of proof.

63. It is common ground that it is for the Claimants to establish on the balance of probabilities facts from which the Court could conclude, in the absence of any explanation, that discrimination had occurred. If that evidential threshold has been met, the burden shifts to the Defendant, who must prove that discrimination has not occurred. On this point, see *Igen v Wong* [2005] ICR 931 at [17], and *Efobi* at [30].

**The principles involved**

64. In this section of my judgment, I will look at the relevant provisions of the 2010 Act in more detail, as well as at the caselaw which sets out the guiding principles for the courts in assessing the evidence in discrimination cases.

65. The direct discrimination claim is brought solely under section 29(1), which deals with the non-provision of services. As I have set out above, the Claimants will establish direct discrimination where they have been subjected to less favourable treatment than others because of a protected characteristic, in this case their race.

66. This gives rise to two questions: first, has the treatment arisen because of a protected characteristic (usually referred to as "the reason why question"), and secondly, has the complainant been treated less favourably than others ("the less favourable treatment question"). Both questions have to be established: *Martin v Board of Governors of St Francis Xavier 6th Form College* [2024] IRLR 472, EAT.

67. The Claimants rely on three acts which they say amount to less favourable treatment, and I have set out at paragraph 34 above the particulars given.

68. I found the Claimants' position, as to whether they were – or were not – saying that the first of these particulars (the failure to contact the Claimants directly to obtain information) was of itself discriminatory, to be rather confusing. At one point I understood Mr Sethi to be saying that the Claimants' position was in fact no more than that when all these three acts are taken together, there was unlawful discrimination, and that it was not suggested that this first of the three acts is a stand-alone ground of discrimination. However, in Mr Sethi's skeleton argument, it was contended that less favourable treatment of not providing a person with a service can include the manner of how they were refused that service, relying on section 31(7).

69. Section 31(7) provides:

> "(7) A reference to a service-provider not providing a person with a service includes a reference to —
>
> (a) the service-provider not providing the person with a service of the quality that the service-provider usually provides to the public (or the section of it which includes the person), or
>
> (b) the service-provider not providing the person with the service in the manner in which, or on the terms on which, the service-provider usually provides the service to the public (or the section of it which includes the person)."

70. It is clear, in my judgment, that section 31(7) applies only where the service has actually been provided and that service differs in quality or manner from the way in which the service would be provided to others. Since this case involves, factually, only the refusal to provide a service at all, namely the refusal to onboard, section 31(7) is irrelevant to the present case and has no application.

71. Mr Cooper is in my view right to emphasise that the allegedly discriminatory act is solely the non-provision of the service. It is not open to the Claimants to complain about discrimination in any other context, for example in the arrangements JPM made for making the decision not to provide the service (see, as a contrast, the specific provisions to this effect in the context of discrimination against prospective employees in section 39(1)), as it was open to the Claimants to bring a claim for harassment and/or victimisation under sections 26 and/or 27 respectively. The present case is solely about whether the refusal to onboard the Claimants was unlawful discrimination.

72. Returning now to the two questions (see paragraph 66 above), in some cases it will be appropriate to deal with the reason why question first, and in others to deal with less favourable treatment question first.

73. In the former category are cases where the two questions are so closely intertwined that the real focus should be on the reason why question.

74. The less favourable treatment question will usually involve identifying an appropriate comparator in order to assess the treatment of the complainant against that comparator. Section 23 provides:

> "on a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

75. Mr Sethi submits that this case falls into the former category.

76. However, Mr Cooper – relying on the same authorities, but with a different result – says that this is a case where it is necessary to identify the comparator first, and focus on the latter category.

77. Whether I should deal with the reason why question first, and the identity of the appropriate comparator, seems to me to turn on my findings of fact, and what I propose doing is to set out my factual findings before returning to what is, after all on the authorities and the 2010 Act, a single question: Did the Claimants, on the proscribed ground, receive less favourable treatment than others?

78. In relation to indirect discrimination, the Claimants argue that JPM's refusal, by applying a uniform service policy, indirectly disadvantaged them as Russian nationals, engaging the test under sections 19 and 29(1).

79. It is not necessary to say any more at this stage about the indirect discrimination allegations. In opening Mr Sethi said that the main thrust of his case was direct discrimination, and in closing he said nothing about indirect discrimination at all. Nevertheless, I will return to the allegation of indirect discrimination in the latter part of this judgment.

80. I will deal with JPM's statutory defence under section 109(4) (see paragraphs 39-41 above) in the light of my factual findings.

**Findings of fact**

81. In this section of my judgment I set out my factual findings. I apologise for some repetition of matters I have already mentioned, but because I have done so earlier when I referred to the witness evidence, this section can be shorter than it might otherwise have been.

82. JPM is the London branch of a German bank. As an EU-regulated bank, it had to comply with the EUDR.

83. The three Claimants were at the material times all Russian nationals living in the UK. No EU-regulated bank could have onboarded them without that being a breach of the EUDR.

84. It follows that none of the Claimants could lawfully have been provided with the services which they say they did not get from JPM because of the onboarding refusal.

85. This does not mean that no Russian nationals could have been onboarded by JPM – this is clear because Dr Gerko, who had renounced his Russian citizenship, could have been onboarded.

86. It is for this reason that JPM formulated its policy in relation to potential new clients with a Russian connection.

87. JPM's "Russia Client Decisioning Principles" of August 2022 deal principally with existing clients only (not prospective new clients) but show that JPM was entirely cognisant of the effect of the EUDR on its clients. These Principles show that "All

Sanctioned clients", "All connected persons of Sanctioned clients" and "Restricted clients (subject to the 100K deposit restriction in EU and Switzerland)" would be subject to "Exit", in other words, they could no longer act for such persons. But in relation to the latter category, it was said it might be possible to retain "Restricted clients … if a review of the relationship indicates that the firm is sufficiently able to service the clients despite restrictions." So it may be that a client to whom the EUDR applied could nonetheless remain as a client if there was a review and no breach of the EUDR.

88. The Principles also mention onboarding: "Non-Russia domiciled clients that are not sanctioned, but with notable Russia connections [what level of connections are acceptable – dual citizenship?] are eligible for onboarding but subject to heightened scrutiny and approvals".

89. It had been JPM's policy since March 2022 that "All account opening of Russian clients will require approval from Russian Market Manager, EMEA CEO or EMEA CFO."

90. I accept the unchallenged evidence of Mrs Haddon as to JPM's policies in this regard:

> "5.4 Following publication of the EU Deposit Restriction on or around 25 February 2022, JPMSE's response to the implementation of the EU Deposit Restriction and wider sanctions regime was to adopt a framework of compliance, which I describe below. Our priority was to review the new sanctions package to understand the sanctions, and if and how they applied to our business, so that we could ensure that the Private Bank complied. From late February 2022 onwards, if an individual was in scope for the EU Deposit Restriction they could not be offered private banking services and would not be onboarded because the Private Bank only provides services to clients that deposits funds in excess of EUR 100,000.
>
> 5.5 As part of the exercise of ensuring compliance with the EU Deposit Restriction in relation to our existing clients, a process was undertaken to identify any Russian national or resident clients that may be exempt due to their EU citizenship or nationality. For any such exempt clients that were identified, no action was taken in respect to the operation of those Private Bank accounts on the basis of the EU Deposit Restriction. If a prospective client qualified for an exemption to the EU Deposit Restriction they could be considered by the Private Bank in the same way as clients not in scope of the EU Deposit Restriction, and so could be onboarded by the business if they chose to do so in or around February 2023.
>
> 5.6 We ensured compliance with the restrictions imposed by the EU Deposit Restriction equally in respect of people who were Russian nationals or passport holders, and people who were not but to whom the EU Deposit Restriction also applied – for example residents in Russia of a different nationality or citizenship."

91. Mr Waller had a clear understanding of how the EUDR and JPM's guidance worked in practice, and his evidence about this was also not challenged:

> "My understanding of the Private Bank's policy in relation to new clients who are Russian citizens was that in order for the Private Bank to be able to onboard these types of clients, they would need to have renounced their Russian citizenship or acquired an EU nexus to comply with the EU sanctions restrictions in place. This reflects my understanding of the position in and around February 2023 and at the date of this statement.
> …
> It has never been communicated to me that a more defensive or conservative approach other than compliance with EU sanctions and KYC requirements should be adopted towards clients with any links to Russia or that the Private Bank has a policy of not onboarding Russian passport holders or Russian citizens."

92. Mr Zanette's evidence was:

> "To the best of my recollection, I do not recall ever receiving a communication from the Private Bank which stated that we have a blanket rule not to onboard Russian citizens, nor do I recall ever receiving any training which said this. My understanding was that the position regarding onboarding would depend on specific factors and that the Private Bank operates in a regime of sanctions restrictions."

93. When it was suggested in cross-examination that Mr Zanette could not rule out such a rule being in place, he said that if such a policy existed, it would have been communicated.

94. I accept Mr Sethi's point that at the relevant time, February 2023, one year had passed since the EUDR and there can have been no ambiguity about its application.

95. By the time Mr Irwin spoke to Ms Gurbax, JPM had already refused to onboard Mr Khabibullin because of the EUDR. That refusal was relayed to Mr Khabibullin by Mr Waller and Ms Psareva on 3 and 15 February 2023. On 3 February 2023, Dr Gerko emailed Mr Irwin as follows:

> "Renat [Khabibullin] spoke to JPM (they approached him), but it was a german banking license bank and they said can't deal with him (but also did not provide intro to non EU branch!)"

96. It was thus clear to Dr Gerko – and to Mr Irwin once he received that email – that as a German bank JPM could not onboard Mr Khabibullin.

97. I accept that Mr Irwin was not aware that he was dealing with a German bank and that he was trying to engage with a non-EU banking entity in the UK, and that he assumed that Ms Gurbax was acting for a UK entity and was never expressly told by her that she was not. Mr Irwin was also not aware of the conversation between Mr Waller and Mr Khabibullin on 15 February, but that does not matter, because he had received the email of 3 February. Clearly it would have been far better if at the outset Mr Irwin said that he knew JPM could not onboard Russian citizens, and Ms Gurbax said that was the case because JPM was a German entity but there might be exceptions under the EUDR. Had such a conversation happened, this claim would not have been brought.

98. Similarly, there is no explanation as to why Ms Gurbax did not request further information in relation to the Claimants to see if they fell within any of the EUDR exceptions.

99. I accept that Mr Khabibullin may well have mentioned to the other quants that he had been rejected by JPM, but only at a fairly general level without much if any detail.

100. The JPM policy was not to reject all new prospective clients with a Russian connection, which was what Ms Gurbax said to Mr Irwin. There is however no way of reading the transcript of the telephone call on which the Claimants rely without concluding that the reason given by Ms Gurbax for not onboarding the Claimants was that JPM had a policy of not onboarding Russian citizens.

101. What Ms Gurbax said is not aligned with JPM's actual policy, which was that it could not onboard the Claimants because of the EUDR. Mr Garnica had not told Ms Gurbax that JPM's policy was anything other than that it had to comply with the EUDR, and he had not told her that there was a policy to refuse to onboard Russian citizens.

102. I think it is necessary to analyse what Ms Gurbax said. First, she said that there was "a collective decision that we are not onboarding any new Russian passport holder at the moment. So it's a wait and watch approach with respect to Russian passport holders." It would have been accurate to say that any Russian citizen could not be onboarded because of the EUDR but if their citizenship was renounced they could (like Dr Gerko) be considered.

103. Secondly, Ms Gurbax agreed with Mr Irwin that these were "very much self imposed JP Morgan rules" and then said that this had nothing to do with sanctions. Ms Gurbax was right. This was nothing to do with whether any of the Claimants were sanctioned individuals; it was to do with the EUDR. Ms Gurbax may have been thinking about the fact that JPM had set down its own guidelines for how to deal with prospective new clients, but these refer explicitly to considering whether the EUDR applied to each individual based on that individual's circumstances.

104. Thirdly, in the section of the conversation where Ms Gurbax says: "And the answer that came back was, no! No new Russian passport holders", one can see that this was partly accurate in that the EUDR applied to the Claimants as they were Russian citizens but it was very clumsily expressed.

105. Fourthly, Ms Gurbax said that this was all following discussions with the CEO of the EMEA business and this was an accurate and comprehensive response. She had clearly discussed this with Mr Garnica, although he had no recollection of having done so. Quite why Ms Gurbax put it in this way to Mr Irwin is not clear.

106. In my view, JPM did not have a policy which excluded onboarding Russian citizens. Ms Gurbax's views as expressed to Mr Irwin are inexplicable – she got it wholly and puzzlingly wrong. I deal with my findings in relation to Mr Garnica's evidence in the next section of this judgment.

**Application of the legal principles to the facts of this case**

107. Mr Sethi relies on the following authorities.

108. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, Lord Nicholls said this:

> "7. … In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the "less favourable treatment" issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the "reason why" issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
>
> 8. No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined. …
>
> 11. … [The Court] may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was."

109. In the same case, Lord Rodger said at [125]:

> "Although in the end the tribunal had to answer just this single question [in that case, has the applicant proved that in the relevant circumstances on the ground of her sex she was treated less favourably than a man was or would have been treated] it has been recognised that in certain cases it may be convenient, for the purpose of analysis, to split the question into two parts—less favourable treatment and the ground of sex. See, for instance, *Glasgow City Council v Zafar* [1998] ICR 120, 123 per Lord Browne-Wilkinson (dealing with section 1(1) of the Race Relations Act 1976). In practice the tribunal's view on the first issue will often go a considerable way towards answering the whole question since a finding of discrimination where there is a difference of sex will tend to point to the possibility of sex discrimination. Cf *King v Great Britain China-Centre* [1992] ICR 516, 529A, per Neill LJ. While dividing the issues up in this way may be helpful in certain cases, I respectfully agree with Lord Nicholls of Birkenhead that there are other cases—and this may be one—where the issues are so intertwined that attempting to deal with them separately may hinder rather than help a tribunal to resolve them."

110. In *London Borough of Islington v Ladele* [2009] ICR 387, Elias J said this:

> "34. Where no actual comparator is relied upon, the claimant frequently seeks to identify a hypothetical comparator. This is the idealised person who has the characteristics of the statutory comparator. As with the actual comparator, there

> is often much debate and dispute about who is the appropriate statutory comparator. However, in practice a tribunal is unlikely to be able to identify the statutory or hypothetical comparator without first answering the question why the claimant was treated as he or she was. …
>
> 37. The determination of the comparator depends upon the reason for the difference in treatment. This point is more elegantly made by Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, paras 7—11.
>
> 38. In short, the use of comparators may be of evidential value in determining the reason why the claimant was treated as he or she was. Frequently, however, they cast no useful light on that question at all. This analysis of the value of comparators is drawn from the valuable passage in the judgment of Lord Hoffmann in *Carter v Ashan* [2008] ICR 82 reproduced below (at para 40(7)).
>
> 39. Furthermore, there is a particular situation where a focus on how the comparator was or would have been treated can be positively misleading. This arises because it is now well established that there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for the act or decision. It follows that there will inevitably be circumstances where an employee has a claim for unlawful discrimination even though he would have been subject to precisely the same treatment even if there had been no discrimination, because the prohibited ground merely reinforces a decision that would have been taken for lawful reasons. In these circumstances the statutory comparator would have been treated in the same way as the claimant was treated. Therefore if a tribunal seeks to determine whether there is liability by asking whether the claimant was less favourably treated than the statutory comparator would have been, that will give the wrong answer."

111. In *Stockton on Tees Borough Council v Aylott* [2010] ICR 1278, Mummery LJ said at [43]:

> "If the evidence establishes that the reason for the treatment is the claimant's [protected characteristic], then it will usually follow that the hypothetical comparator would not have been treated in the same way and there will be discrimination."

112. In *Page v NHS Trust Development Authority* [2021] ICR 941 Underhill LJ said at [79]:

> "It is trite law that it is not necessary in every case to construct a hypothetical comparator, and that doing so is often a less straightforward route to the right result than making a finding as to the reason why the respondent did the act complained of: see the very well-known passage at paras 8 – 13 of the speech of Lord Nicholls of Birkenhead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337..."

113. Mr Cooper says that the court's approach "necessarily involves a comparison between the claimant and an actual or hypothetical comparator", relying on Shamoon at [126]. As section 23(1) provides that there is to be no material difference between the circumstances of the claimant and the comparator, and the relevant circumstances are

those which the defendant takes or would take into account when deciding on what treatment to apply to either the claimant or the comparator, it is not particularly helpful in the present case to focus on the reason why question first.

114. Mr Cooper gives the following example. Where the alleged less favourable treatment relates to an employer determining an applicant's right to work in the UK, the steps taken by the employer are necessarily shaped by the different restrictions to work placed on foreign nationals compared to UK nationals – thus the comparison must be between those to whom the same restrictions apply.

115. Support for this is found in *Dhatt v McDonalds Hamburgers Ltd* [1991] ICR 238 at 246D and 247D, and *Ice Hockey Super League Ltd v Henry* (2001) EAT/1167/99.

116. In *Dhatt* at 247D it was said:

> "I have therefore come to the conclusion that the distinction drawn in the printed form between British citizens and E.E.C. nationals on the one hand and other applicants on the other hand did not constitute unlawful discrimination. In the case of someone seeking work his nationality is a relevant circumstance because Parliament itself recognises and seeks to enforce by reference to nationality a general division between those who by reason of their nationality are free to work and those who require permission."

117. In the EAT case of *Henry*, it was said at [13-14]:

> "13. … Whilst, as Lord Justice Staughton acknowledged in the passage cited above from *Dhatt*, treating the requirement for a work permit or not as a relevant circumstance for the purpose of Section 3(4) involves treating nationality as a relevant circumstance and that nationality is discriminatory in racial terms, that is a form of discrimination sanctioned by statute. On the authority of that case, we hold that the Tribunal erred in failing to recognise the work permit requirement distinction between Group A and Group B players was a material difference precluding the comparison which the Tribunal made in this case.
>
> 14. In these circumstances it must follows, in our judgment, that the Applicant was not treated less favourably on racial grounds. He was treated in the same way as all others, of whatever racial origins, in the true pool for comparison, the Group A players. We have heard submissions from Counsel as to the course we should take, having allowed this appeal. We think that the position is clear and we think this is a proper case in which to substitute a declaration that this complaint fails and is dismissed and we so order."

118. Thus Mr Cooper contends that as in those two cases, this is a case where there are restrictions applicable to the ability to provide the denied service, and so the restrictions are material circumstances for defining the statutory comparator, who must be someone who does not share the relevant characteristic but to whom the restriction also applied.

119. Having said that, it is clear that in relation to direct discrimination the focus is not on the motive or intention of the discriminator. In *R(E) v JFS and others* [2010] 2 AC 728, Baroness Hale said at [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."

120. To similar effect, Underhill LJ in *Reynolds v CLFIS UK Ltd* [2015] ICR 1010, said at [36]:

> "… the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation."

121. Further, it is equally clear that the discriminatory reason need not be the sole or principal reason for the detrimental treatment; it need only to have been an effective cause amongst others. In *Nagarajan v London Regional Transport* [1999] ICR 877, Lord Nicholls said at p886E:

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

122. A "significant influence" is an influence which is more than trivial: *Igen v Wong* [2005] ICR 931, at [37].

123. As for the less favourable treatment question, it was said by Lord Scott in *Constable of West Yorkshire Police v Khan* [2001] ICR 1065, at [76]:

> "…there must also be a quality in the treatment that enables the complainant reasonably to complain about it. I do not think, however, that it is appropriate to pursue the treatment and its consequences down to an end result in order to try and demonstrate that the complainant is, in the end, better off, or at least no worse off, than he would have been if he had not been treated differently. I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently."

124. It is also clear that less favourable treatment carries with it the concept that the complainant has thereby suffered a detriment. Mr Cooper gave this example (which seems to have originated in the Claimants' solicitors' correspondence), namely:

> "… the case of a hypothetical 16-year-old wearing a rainbow insignia who is told 'we do not serve gay people' when attempting to buy alcohol. If that person then claims for direct discrimination in respect of not being served alcohol under EA 2010, s29(1), that claim cannot succeed because there is no less favourable treatment or detriment in respect of the non-provision of that service. The hypothetical 16-year-old could never lawfully have been served alcohol, and a

> 16-year-old who was not gay (or perceived to be gay) similarly would not (and could not) have been served."

125. Although this example possibly risks eliding the question of comparators with the issue of detriment, it struck me as a helpful one.

126. Save for what Ms Gurbax told Mr Irwin, I can see nothing in any of the documentation to which reference was made at trial, nor in any of the evidence, which supports a contention that JPM had a policy of not onboarding Russian nationals. On the contrary, the position was that each case would be looked at on its own merits – for example, it would be relevant (in the light of the EUDR) to see if an applicant fell within paragraph 3 of the EUDR. When JPM said it could not onboard Mr Khabibullin, that was not because of some blanket ban, but because of the EUDR and Mr Khabibullin not being within one of the exemptions. This was a fact known to Mr Irwin because Mr Khabibullin had told Dr Gerko, who then told Mr Irwin; Mr Shakin accepted that he knew that Mr Khabibullin had not been onboarded, and also that he was probably told why, and he also accepted that between the quants there was sharing of information about banking which included the impact of sanctions; I think that Mr Migita and Mr Podoprikhin also had the same kind of knowledge because it was part of the general conversation between the quants (as is shown for example by the email from Mr Khabibullin to Mr Waller of 13 February in which he said, "I told XTX what you told me, people at XTX replied they don't understand", and further from the fact that Mr Bedny told Mr Waller that people at XTX had been discussing all of this). In my view, this explains why Dr Gerko instructed Mr Irwin to see if he could find a way of getting the quants onboarded – although it does not explain why Mr Irwin did not say at any stage that he was aware of the refusal relating to Mr Khabibullin.

127. I also reject the suggestion that the senior management at JPMorgan Chase in the USA had a blanket ban on onboarding Russian nationals or had communicated such a ban to anyone involved at JPM. I agree with Mr Cooper that the involvement of Mr Dimon as Chairman and CEO of JPMorgan Chase was at a very high level and the detail surrounding the EUDR was being dealt with by the teams in the UK and Europe; the documents sent by the latter to others at JPMorgan Chase were by way of notification of interpretation of the EUDR and there is nothing which suggests a blanket ban. When Ms Gurbax referred to the approach being a firm-wide executive decision, I do not accept that this was in fact the case.

128. One therefore again comes back to the central puzzle in this case, which is why did Ms Gurbax say what she did? One of the issues to which I will have to return is the training which was given to JPM employees, and this included training on the EUDR. There was considerable criticism made by Mr Sethi about the very general nature of the anti-discrimination training but in my view it must have been obvious to anyone – including Ms Gurbax – that it was not acceptable to discriminate on the basis of an applicant's nationality.

129. I have concluded, and find as a fact, that Mr Garnica did not tell Ms Gurbax that there was a blanket policy of not onboarding new Russian nationals. I agree with Mr Cooper that if Mr Garnica said anything at all about the EUDR – and I very much have in mind that he could not recall his conversation – it would have been that JPM could not onboard Russian nationals unless they had dual EU nationality or residence, which would have been an exception to the EUDR. I think that although she realised that the

Claimants could not be onboarded, Ms Gurbax failed to appreciate that this was because they were not within an EUDR exception and assumed that it was because they were Russian nationals – but even this does not explain everything that she told Mr Irwin. Mr Cooper said that I should conclude that Ms Gurbax was in effect inventing things to fill in where she did not know the answers, and having thought very carefully about this, I agree – it is possibly because she appears to have been principally focussed on securing Dr Gerko as a new client. As there was as a matter of fact no blanket ban, and as no-one told Ms Gurbax that there was, as extraordinary as what she actually said was, there really is no other explanation.

130. The important point is that I also agree with Mr Cooper that as it was not JPM's policy to refuse to onboard Russian nationals, the explanation given by Ms Gurbax was in fact not the reason why the Claimants were refused as clients. I have concluded that the reason for not onboarding the Claimants was the EUDR. The reasons expressed by Ms Gurbax were not even part of the reason for refusing to onboard the Claimants. That is the answer to the "reason why" question.

131. It might also be said that, bearing in mind what Mr Irwin knew about the reason for JPM refusing to onboard Mr Khabibullin, it is another mystery why he never asked if there was a non-EU entity which could onboard without the EUDR issue being a barrier.

132. Mr Cooper submits that this is because all of this was a test of JPM, in the knowledge that as an EU entity it could not onboard any of the Claimants. This may affect other matters and I will return to this point briefly later on, but I do not think it affects the central issue of whether there was discrimination.

133. If I was wrong about the "reason why" question, then I am entirely satisfied that the Claimants did not receive less favourable treatment. The appropriate statutory comparator in my judgment is another applicant for onboarding who is also covered by the EUDR. I reject the suggestion that the comparator is someone not affected by sanctions. The EUDR is central – it is a clear restraint on JPM's ability to onboard an applicant covered by the EUDR. I do not accept that the *Ladele* case requires a different answer to the "less favourable treatment" question; Elias J seems to have said that even if a comparator and the complainant would have been treated the same way it would nonetheless be discriminatory if the prohibited ground (here, the Claimants' nationality) was a contributory factor, but this is (with respect) contrary to section 13 which requires less favourable treatment when compared with the comparator (as Elias J recognised at [40(7)] of *Ladele*). There must be both discrimination and less favourable treatment when contrasted with the statutory comparator.

134. I am also entirely satisfied that there was no detriment to the Claimants by the refusal to onboard them, because the EUDR meant that they could not be onboarded not because of the protected characteristic but because of the EUDR itself. Returning to the question of whether all of this was a test of JPM, first I do not think it was, and secondly it does not affect my conclusion on detriment. Had JPM been running a different kind of defence – that this was not an honest claim because the Claimants knew that JPM could not onboard them – the considerations may well have been different. But that is not the case which JPM have brought. Put simply, I do not see how the Claimants can have suffered a detriment if they were never entitled to get the service because of a reason which has nothing to do with their protected characteristic.

135. I said earlier that I would return to the fact that there was no evidence from Ms Gurbax. Applying the principles I have set out, I am not prepared to draw any adverse inference against the Defendant in this case. The Claimants have not identified what inference they would wish me to draw (other than the general point that Ms Gurbax, if she had given a statement, would not have supported the Defendant's case), and that is not good enough, in my judgment.

136. Returning to the single question I have earlier identified, I am satisfied that the Claimants, on the proscribed ground, did not receive less favourable treatment than others.

137. Mr Sethi spent some time trying to persuade me that the search for a hypothetical comparator might lead me to reach the wrong conclusion, but I was not persuaded that he is right about that (and it struck me that his assertion that I did have to apply a comparator resulted with respect in a rather confused position being adopted). For the reasons I have set out above, it is a statutory requirement. I think that is in fact where Mr Sethi's submissions landed, because he said that the court might want to apply both the "reason why" test and then the hypothetical comparator, but that he was primarily focussing on the former rather than the latter.

138. I accept that in the light of what Ms Gurbax said, the burden is shifted to the Defendant to prove that there was no unlawful discrimination, in other words, that race played no part in the decision making. In my judgment, the Defendant has established that it did not.

139. For the reasons I have set out, I agree with Mr Cooper that there has been no unlawful discrimination, and the claim based on direct discrimination fails.

140. As to the indirect discrimination claim, this was set out in the Claimants' skeleton argument but was not addressed at all by Mr Sethi in his closing submissions.

141. In the Claimants' skeleton argument it was asserted that the provision, criteria or practice (PCP) which was applied to the Claimants was that JPM would not onboard anyone with Russian citizenship or a Russian passport. The problem with this contention is that as a fact I have found that this was not the reason for refusing to onboard, and I agree with the Defendant's submission that in reality this is a direct discrimination claim or nothing. Further, if this was the relevant PCP it would not apply to everyone regardless of race, and the EUDR meant that the Claimants and indeed all who were caught by the EUDR could never have been offered banking facilities with JPM (which was obliged to apply the EUDR). The section 19 requirements are not met.

142. In the light of my conclusions, I can deal with two remaining matters rather more shortly than I might otherwise have done.

143. First is the statutory defence in section 109(4) (see paragraph 39 above). I have considered the training given by JPM and my conclusion is that Ms Gurbax must have realised that it was not lawful to refuse to onboard someone because of their nationality. If that had been the reason why the Claimants were refused onboarding, then it seems to me that something must have gone wrong with the training because the reason would have gone back to Mr Garnica and others.

144. I approach the statutory defence as follows. First, what steps did the employer take to prevent the employee from doing the act complained of? Secondly, were there any further steps that the employer could have taken which were reasonably practicable? See *Canniffe v East Riding of Yorkshire* [2000] IRLR 555 EAT at [14].

145. Here, the evidence was that Ms Gurbax had undergone all relevant training and her training record was up to date. I reject the criticism that the training was far too general; had I found in favour of the Claimants on the main issue, I would at this point have set out a detailed analysis of the training given, but in the circumstances I do not need to do that. What was plain is (a) it was not acceptable to discriminate on the grounds of a protected characteristic, and (b) the EUDR prevented JPM from onboarding anyone not within an exception. I do not see what else JPM could have done. I also do not see how anyone at JPM could have foreseen that Ms Gurbax would have told Mr Irwin that there was a policy of not onboarding Russian nationals – because there was not, and no-one had ever said there was.

146. Had the claims succeeded, I would have found that the statutory defence was made out.

147. Secondly is the question of remedy. The court has the power to make a declaration and an award of damages: section 119.

148. Had I found for the Claimants, I would have made a declaration that there had been wrongful discrimination.

149. As to damages, a finding of discrimination does not automatically lead to an award for injury to feelings; that has to be established on the evidence: see *Cowie v Scottish Fire and Rescue Service* [2022] ICR 1693 EAT (Sc) at [91] and *MOD v Cannock* [1994] ICR 918.

150. It is common ground that damages (for injury to feelings) are to be assessed in accordance with the guidance in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, in which the Court of Appeal categorised claims into three bands (the figures which follow are those which apply to claims issued on or after 6 April 2023 and before 6 April 2024 as in the present claims): the lower band, £1,200 to £11,200 for "less serious cases", the middle band, £11,200 to £33,700 for "cases which do not merit an award in the upper band", and the upper band, £33,700 to £56,200 for "the most serious cases." The Claimants do not suggest other than the present claims fall within the lower band.

151. The evidence about injury to feelings is as follows.

152. Mr Migita said in his witness statement:

> "I believed that, as a Russian-British citizen, I was in a unique position to push back against what I saw as banks' overcompliance and arbitrary interpretations of rules that have harmed many Russian citizens – especially those fleeing mobilisation in Russia, which was declared in autumn 2022. With Visa and Mastercard having blocked cards issued in Russia, many of these people had to flee with only small amounts of cash. Access to banking services was essential. I felt that if I did not speak up about clear-cut cases like mine, what chance would others have in less straightforward situations – which were numerous?

> Staying silent would, in my view, only empower financial and other institutions to continue violating the law with respect to Russian citizens, without any accountability. This would risk establishing a 'new normal' in society, where it is seen as acceptable to violate the Equality Act 2010 as long as it is directed at certain groups. I would not want to live in a country like that, and I felt it was my responsibility to resist the normalisation of such injustice.
>
> From a financial point of view, there was a banking crisis at the time (which ultimately led to the collapse of Credit Suisse). My intention had been to hold most of my funds with HSBC and JP Morgan, as I considered them the two most systemically important global banks and least likely to fall. I recall a lot of uncertainty then, and JP Morgan's refusal deprived me of the diversification I otherwise would have had. This financial aspect is not the reason for this lawsuit, but it existed. Had the crisis escalated further, the missed opportunity could have had significant financial consequences."

153. Mr Migita was strongly motivated in exploring a claim and then bringing it by a desire to do the right thing, as he explained in his statement. I see nothing in his statement – and there was nothing in his oral evidence – which suggests that he sustained an injury to his feelings as opposed to a moral sense that with his financial clout he should stand up for those who might not be able to do so. That is commendable but does not establish injury to feelings.

154. Mr Podoprikhin said in his statement:

> "Since the 2022 invasion, it has become harder for Russian nationals to open and operate bank accounts. I was saddened by JP Morgan's decision – it did not seem fair to refuse to provide any services to me because I am a Russian citizen. It also was frustrating because having received a good bonus, I was worried about it losing value.
>
> JP Morgan's refusal to onboard me was also very irritating and inconvenient. Working as a quantitative researcher at XTX Markets leaves me with little free time, and since JP Morgan would not open an account for me, I had to spend a lot of time exploring other options."

155. It is hard to detect any real sense of injury to feelings here. Mere irritation is, I think, not enough.

156. Mr Shakin in his statement said this:

> "My initial reaction to JP Morgan rejecting me was a feeling of deep frustration as I felt that it was extremely unfair to me as a person who lived in the UK for a long time and who had a UK passport. I felt I had not deserved at all such treatment solely because I happened to have a Russian passport. JP Morgan representatives never said that the decision was based on restrictions due to the sanctions, they just plainly said that the reason is our Russian passports. On top of this I felt that there were some investment opportunities which were immediately lost for me after this rejection. After thinking about this more, I started being worried about potential similar unjust rejections from other financial institutions (and any organisations in general) which was probably one

> of the reasons why I started to look to open investment accounts less than before and potentially lost some other valuable investment options."

157. There was no evidence that Mr Shakin had in fact lost any other options, and again I think that "a feeling of deep frustration" is not enough.

158. I take into account the fact that none of the Claimants approached JPM themselves to be taken on as clients, would not have contacted JPM had Dr Gerko not suggested it to them in a general message to XTX employees asking whether they were interested in becoming a JPM client, had nothing to do with the onboarding process itself and were not aware of the outcome until after the conversation between Ms Gurbax and Mr Irwin. The tenor of their evidence is that they would have liked to have a JPM account but it was not a strong desire, and there was no evidence that any of them had sustained any economic loss or any other issues because of the onboarding refusal.

159. I have concluded that had the claims succeeded, I would not have made an award of damages for any of the Claimants. This is not for the reasons set out in the preceding paragraph but because there is no evidence of injury to feelings. I agree with Mr Cooper that the Claimants' sense of grievance – even a justified one – which falls short of actual hurt feelings is not a basis for an award.

160. If I was wrong about that, then the award for each Claimant would have been £1,200 each, which is the minimum amount in the lower *Vento* band.

**Disposal**

161. For all of these reasons, each of the claims fail.

*(End of judgment)*