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Judgment: approved by the Court for handing down | *Delivered:* **30/06/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF BELFAST

BETWEEN:

H MEGAHEAD

Plaintiff/Appellant;

and

QUEEN'S UNIVERSITY BELFAST

Defendant/Respondent.

McCLOSKEY J

I INTRODUCTION

[1] These are Civil Bill proceedings brought by H Megahead, a postgraduate student and Egyptian national, against Queen's University Belfast ("*the University*"). The appellant is an unrepresented litigant. He appeals to the High Court against the decision of Her Honour Judge Kennedy who, acceding to the University's application for a direction of no case to answer, dismissed his claim for damages which, per the Civil Bill (dated 28th December 2006) was based on allegations of:

(a) Unparticularised breach of statutory duty.

(b) Breach of contract.

(c) Negligence.

(d) "*Lack of equal treatment and racial equality under the Race Relations (NI) Order 1997*".

In presentation, both written and oral, and in his evidence to this court, the centrepiece of the appellant's case was a complaint of discrimination against him on the ground of his Egyptian race/nationality. This eclipsed and dominated, by some measure, the other causes of action identified by him on paper.

[2] Following a hearing of over three days duration, the University renews its application to this court for a direction of no case to answer. It is appropriate to observe, at the outset, that having regard to the presentation of the appellant's case and the methodology of his cross-examination, the court has received and has fully considered the totality of both parties' documents. The only evidence missing from the framework within which this judgment is provided is the sworn testimony of the University personnel against whom the appellant's allegations, in particular those of race discrimination, are made. It is clear to the court that the relationship between the parties and the material events are heavily documented, particularly through the medium of electronic communications. The result is that, with the exception noted, the evidential matrix before the court is of substantial dimensions. This was a feature of the hearing at first instance also, as recorded by Judge Kennedy in paragraph [28] of her judgment:

> "*I have carefully considered the evidence provided by the e-mails, which give an indication of each party's point of view at the various stages. I have considered documentary evidence together with the oral evidence given by the Plaintiff and his witnesses. I have not heard from the Defendant but have been able to consider the documentary evidence which has been submitted by both parties. In my opinion, it would not normally be appropriate to grant a direction in this type of case without hearing an explanation from the Defendant of the matters raised by the Plaintiff. In this case however the Plaintiff's case is answered by the computer records and other documents before the court which allow me to consider the granting of a direction without hearing from the Defendant*".

This assessment applies to the same effect to the evidential framework within which this judgment is written.

II THE APPELLANT'S CASE

[3] It is common case that the appellant was accepted by the University as a postgraduate student intending to study for the degree of Ph.D. This required him to "differentiate" successfully, having completed some initial research, culminating in a "Proposal". The process of "differentiation" is explained in paragraph 8.2 of the "Guidelines for Research Students" [October 2004] in the following terms:

> "*You will normally register initially as an undifferentiated research student. Differentiation is the subsequent process of deciding whether you should proceed towards a Ph.D or an MPhil…*
>
> *It is not possible to register directly for the degree of Ph.D. You will be informed in advance of the deadline for your differentiation and of the detailed arrangements. If you are full time, it will normally take place within nine months of the start of your research … All full time students must go through differentiation within the first sixteen months and part time students within the first thirty months*".

The Guidelines continue:

> "*Differentiation is conducted by a panel, normally comprising three academics, including one of your supervisors. You will be required to submit written work … and to attend an interview. The panel will also consider your research plan … and your training record and will make a recommendation to the Faculty Postgraduate Research Committee …*
>
> *You may be allowed one further attempt at differentiation if your first attempt is unsuccessful. You have the right to appeal to the Postgraduate Appeals Committee if you are dissatisfied with the outcome of the differentiation procedure*".

In the "Differentiation Proposal" prepared by him, the appellant described his research project as:

> "*An Examination of the Current Practice of Long Term Family Foster Care in Egypt and an Appraisal Informed by Current Practice in Northern Ireland*".

His was, therefore, a comparative research study, concerning a topic of obvious interest and importance. The appellant failed the differentiation procedure. The decision was that he was a suitable candidate to study for the degree of M.Phil, but not Ph.D. His subsequent, successive appeals to the Postgraduate Appeals Committee and the Board of Visitors were unsuccessful. This is the context in which the present litigation unfolds.

[4] Belonging to the cast of *dramatis personae,* in addition to the appellant, are the following protagonists:

(a) Dr. Dominic McSherry, described in the papers as the "Principal Supervisor, Institute of Child Care Research".

(b) Mr. Gregory Kelly, described as the "Second Supervisor, Institute of Child Care Research".

(c) Dr. Rosemary Kilpatrick, "Internal Examiner" and Director of the Institute.

(d) Dr. Campbell, the second "Internal Examiner".

(e) Professor David Berridge of the University of Luton.

(f) Dr. Sharidd Booley, a member of the University teaching staff.

In his pleaded case, the appellant alleged that the first four members of this group had practised discrimination against him. It appears to be common case that at the County Court hearing, he directed this discrete (though fundamental) complaint against Professor Berridge also, for the first time. He suggested, in terms, that Professor Berridge had conspired with Messrs. McSherry and Kelly against him from around early 2006, coinciding with a visit by the professor to the University. The appellant makes the case that the discrimination of which he complains was latent during 2005 and surfaced progressively during 2006.

[5] At the stage of the unsuccessful appeal to the Board of Visitors, the University produced the following chronology, which (subject to the qualification noted below) was not disputed by the appellant before this court:

(a) **September 2004**: Enrolment of [the appellant] as a full time undifferentiated research student in the Institute of Child Care Research ("*the Institute*").

(b) **June 2005**: Submission by [the appellant] of his first draft differentiation proposal. [I interpose that the appellant did not concur with this characterisation of what was submitted by him at this time].

(c) **January 2006**: Submission of [the appellant's] second draft differentiation proposal.

(d) **June 2006**: Submission of [the appellant's] final differentiation proposal.

(e) **29th June 2006**: Meeting of the Differentiation Panel (followed by the first and principal impugned decision, noted in paragraph [3] above).

(f) **22nd August 2006**: Decision of the School Postgraduate Research Committee, concurring with the Panel's recommendation.

(g) **1st September 2006**: [The appellant's] appeal against the latter decision.

(h) **9th October 2006**: Decision of the University Postgraduate Appeals Committee, dismissing the appeal.

(i) **18th April 2007**: Appeal to the Board of Visitors.

[I add the following, based on the evidence adduced].

(j) **5th October 2007**: The appellant's written submission to the University Board of Visitors.

(k) **November 2007**: Board of Visitors' decision, dismissing the appellant's appeal.

(l) **28th December 2006**: Civil Bill.

While the reasons for the rather tardy progress of this litigation are not entirely clear, the course of the proceedings in the County Court, which I have reviewed, would suggest that they are strongly related to delayed prosecution and a change of solicitor, followed by the outright withdrawal of the appellant's legal representation.

[6] The appellant's replies to the University's Notice for Further and Better Particulars were compiled by the legal representatives then acting for him. In this pleading, those alleged to have discriminated against the appellant are identified as Dr. McSherry, Mr. Kelly, Dr. Kilpatrick and Dr. Campbell. In particular, the pleading asserts that from December 2005, Dr. McSherry –

> "*… became insistent that the Plaintiff extend his research project on foster care in Egypt by including material on 'women's issues' which Dr. McSherry perceived as contentious. The Plaintiff was reluctant to extend the parameters of his research project previously agreed with his supervisors. There was limited other research in the area. Dr. McSherry however became determined and even hostile on the issue and persisted in wrongly attributing the Plaintiff's reticence in the matter to the Plaintiff's religious, racial and cultural beliefs which the Plaintiff felt was discriminatory*".

The pleading further alleges that Dr. McSherry was negative and unprofessional in certain respects. There is also an allegation that Dr. Kilpatrick treated Egyptians as

racially inferior, based on her written assessment of the appellant's work. There are no pleaded allegations against any of the other alleged discriminators. The other matters pleaded complain in general terms that the appellant received inadequate supervision, guidance and support, particularly from Dr. McSherry, whose experience in the supervision of Ph.D students is questioned.

[7] Some elaboration and augmentation of the pleaded allegations outlined above is found in the written submission presented by the appellant in promoting his appeal and which formed the basis of his evidence and representations to the court. In particular, this asserts (in terms) that the appellant received inappropriate and misleading guidance from his supervisors. It further complains of an inadequate number of meetings with supervisors and the frequent cancellation of such meetings. Once again, his allegations are focussed mainly on Dr. McSherry. In opening his appeal to this court, the appellant distinguished his status of ethnic Egyptian from that of other white postgraduate students (with whom he compares himself). He further complained that he had been the victim of sarcasm, humiliation, negativity, unprofessional conduct and harsh treatment generally.

[8] In his written submission, the appellant couches his complaint of discrimination on the ground of race in the following terms:

> "*I am Egyptian … the subject of direct racial discrimination contrary to the* [1997 Order] …
>
> *I was less favourably treated than other postgraduate research students who successfully differentiated in that I was not even given Master Degree…*
>
> *There is a difference in race: the other postgraduate research students were white. I am not …*
>
> *Dr. McSherry failed to guide me to conduct the research and to be successfully differentiated. When I sought to arrange formal meetings, sarcastic response was received. Dominic said 'his nibs' to his colleague. It resulted in my feeling humiliated. By contrast, [XY] (who is white – Dr. McSherry was her second supervisor) was treated differently and with respect and given all the support she required. She was successfully differentiated after 36.37 months. The difference between [XY] and myself was 15 months. Dr. McSherry had made all his comments throughout the drafts of my differentiation documents in an unprofessional and negative manner. Dr. McSherry's unprofessional and negative manner was a harsh treatment. Dr. McSherry engaged me in an academic discourse about women's issues in a harsh treatment.*

From this harsh treatment, I was less favourably treated than other research students."

The appellant also alleges that the differentiation criteria were altered, to his disadvantage, on the ground of his race. He further alleges discrimination against him on the ground of his command of the English language. He also asserts inappropriate contact between University personnel and representatives of Lancaster University.

University Regulations and Guidelines

[9] I have already highlighted, in paragraph [3] above, the "Guidelines for Research Students" in force at the time of the appellant's admission to the University. In presenting his appeal, the appellant highlights in particular two other instruments of this nature:

(a) In paragraph 2 of the "Regulations for the Degree of Ph.D", it is stated that in order to qualify for the award of the degree of Ph.D, candidates must satisfy the examiners that "*their thesis and their defence of the thesis in a compulsory oral examination*" satisfy the following criteria:

> "*A satisfactory thesis must:*
>
> *(a) embody the results of research which make a distinct contribution to scholarship and afford evidence of originality as shown by the discovery of new facts, the development of new theory or insight or by the exercise of independent critical powers; and*
>
> *(b) contain an acceptable amount of original work by the candidate. This work must be of a standard which could be published, either in the form of articles in appropriate refereed journals or as the basis of a book or research monograph which could meet the standards of an established academic publisher; and*
>
> *(c) provide evidence that the candidate is capable of pursuing independent research in the field of study and of exercising critical judgment; and*
>
> *(d) be written to a standard acceptable for academic and professional communication. Normally the language of the thesis will be English*".

The appellant testified that the University informed him that his adverse differentiation decision was based on a failure to satisfy criteria (c) and (d).

(b) Paragraph 4 of the "Postgraduate Research Handbook" [September 2004] lists the responsibilities of the "*primary supervisor*". These are, in summary, the provision of guidance about certain aspects of the student's project; the maintenance of communication through regular meetings of a frequency which accommodates the student's needs; being accessible to students; giving detailed advice on completion dates; providing constructive criticism of written work within a reasonable time; and alerting students to inadequacies in their progress or standards of work. Paragraph 5 of this publication lists the responsibilities of the "*second supervisor*" in broadly comparable terms. In paragraph 5 of Appendix A, it is stated:

> "*The University wishes to ensure that its research students receive appropriate support to enable them to complete their research successfully and on time. It undertakes to ensure the following …*
>
> *That one or more supervisors with appropriate knowledge of the student's field of study will be appointed* [and] *that the supervisor meets the criteria for eligibility to supervise as set out in the regulations for the degree*".

The appellant relied particularly on the last-mentioned passage, in asserting that his supervisors did not possess the necessary expertise or qualifications, given the highly specialised field to which, he claimed, his research belonged.

SUPPORTING WITNESSES

Ms Flett

[10] Evidence was given by Ms Flett of the Northern Ireland Council for Ethnic Minorities. The court enquired of Ms Flett the purpose underlying the evidence she was proposing to give. She replied that her evidence was designed to outline the assistance given by her organisation to the appellant, his problems and the impact thereof on his family. Ms Flett's evidence adopted two letters written by her, dated 27th January and 14th April 2010. The first of these concerns her observations and opinion regarding the questioning of the appellant by counsel for the University at the County Court hearing. I consider that this letter has no bearing on the issues to be determined by this court. Ms Flett's second letter, duly elaborated in her evidence, records that the appellant first contacted her organisation on 9th November 2006. At this stage, the appellant expressed the belief that the University was discriminating against him. The letter contains the following material passage:

> "*[The appellant] had received guidance from several sources regarding his research and they all reflected positively on the work he had been doing for his Ph.D. It was therefore difficult for [the appellant] to understand*

> *why his supervisors at Queen's had discontinued his research. It was his conclusion that he was being discriminated against and he felt he must appeal the decision*".

This letter must be juxtaposed with one from the University Counselling Services, dated 20 September 2006, which identifies **only** unspecified " … *personal difficulties and changes…over the last academic year…."* in support of his case.

[11] In support of the appellant's appeal to the Board of Visitors, Ms Flett provided a further letter, dated 15th August 2007, which stated, *inter alia*:

> "*As his research progressed his supervisors at Queen's brought up disagreement …*
>
> *[The appellant] appreciates that this is part of the process that one goes through as a Ph.D student. However, the resulting discontinuation of his studies has led him to believe that other factors were at play …*
>
> *[The appellant] chose not to change the direction of his research as he felt that his thesis was supported. [The appellant] feels this chain of events was started because of truths that were uncovered in his research that he chose to uphold. [The appellant] believes that he was discriminated against because he chose to speak out on these issues …*
>
> *The reasons his supervisors have brought forward for discontinuing his research must be called into question.*"

Ms Flett testified that this letter was reviewed by her with the appellant and approved by him prior to transmission. I observe that while this letter expresses the appellant's belief about discrimination, it does not rehearse any of the other extensive complaints about his supervisors which materialised subsequently. Of at least equal importance, neither of these letters asserts unequivocally the appellant's belief that he had been the victim of unlawful discrimination on the ground of his racial or ethnic origin or nationality. I decline to spell out a complaint in these terms from the tepid assertions of "*being discriminated against*", without any particulars and being "*discriminated against because he chose to speak out on these issues*". I consider that neither of these vague assertions falls within the ambit of the 1997 Order. I find that Ms Flett's evidence did not advance the appellant's case.

Dr. William McCarney

[12] Dr. McCarney is an eminently qualified, experienced and respected member of Northern Ireland society. His impressive portfolio includes the former

chairmanship of the Northern Ireland Youth and Family Courts Association. His specialism appears to lie in the realm of psychology (which occupied thirteen years of his career, in secondary schools) and teacher training (at St. Mary's College, for twenty-one years). The evidence received by the court included his written critique of the Differentiation Panel's assessment of the appellant's command of the English language and the adequacy and quality of Dr. McSherry's supervision of the student. This critique was evidently based mainly on certain documents, including particular e-mails. It embodies the following conclusion:

> "*It is clearly my view that [the appellant] would have fared much better had he been working with an experienced supervisor*".

[13] Dr. McCarney confirmed to the court that he had no personal involvement in the events giving rise to these proceedings. He testified that he befriended the appellant in 2008. While he accepted that his written critique (and, hence, his evidence in the County Court) was based on selected, incomplete materials he asserted that he had now read the totality of the documents and adhered to his original view. Given that he was providing pure opinion evidence, the court enquired whether he possessed any experience or expertise (a) in the appellant's chosen field of study, (b) in the supervision of Ph.D students or (c) in the functions and activities of Differentiation Panels. Dr. McCarney replied in the negative. One can appreciate why, at a human level, Dr. McCarney has provided support and friendship to the appellant. However, as he has no credentials as an expert witness and given the court's assessment of the relevant documentary materials (*infra*), I conclude that his evidence did not advance the appellant's case in any way.

Aber Wafdy (The Appellant's Spouse)

[14] I distil from the evidence of the appellant's spouse (who did not testify at first instance) the following main assertions, claims and beliefs:

(a) The appellant's English language ability did not become an issue until the Differentiation Panel stage.

(b) The term "*his nibs*" was offensive.

(c) The appellant's supervisors had no knowledge of Egyptian society.

(d) The supervisors introduced the new topic of single mothers in Egypt, which was bereft of research material.

(e) The supervisors failed to make any comments on the appellant's final differentiation report before its submission, in contrast with their conduct vis-à-vis other Ph.D students.

(f) The Differentiation Panel meeting should have been deferred.

(g) Professor Berridge, out of frustration caused by the Plaintiff's failure to stay "*with him*" in Luton, encouraged Drs. McSherry, Kilpatrick and Campbell to discriminate against the appellant.

(h) The ill disposition of the University towards the appellant is reinforced by their alleged present attempts to influence Lancaster University to impose a permanent suspension.

(i) The appellant has now succeeded in having three articles published, and a fourth accepted for publication, in international journals.

This witness's evidence consisted of much hearsay, was based on her subjective interpretation of the extensive documentary materials before the court and also included elements of pure, inexpert opinion. Furthermore, it contained much unparticularised and unsubstantiated assertion. Ms. Wafdy impressed me as an articulate, intelligent and well qualified person. However, I find that her evidence did not advance the appellant's case.

Other Evidence

[15] The appellant's bundle includes a written statement of Dr. Sharhidd Booley, who is a University academic. It is dated 11th July 2007 and seems to have been prepared in support of the appeal to the Board of Visitors. It contains a very positive endorsement of the appellant's academic and intellectual abilities. It also describes his oral and written competence in the English language as good. It concludes:

> "*I should therefore wish to recommend [the appellant] as a doctoral student within the upper ranks of a relevant doctoral studies cohort*".

In addition, there is a written statement of Dr. El-Tuhamy, a consultant obstetrician and gynaecologist based at Antrim Hospital. The doctor asserts that he attended the Board of Visitors appeal hearing on 5th October 2007 and continues:

> "*I pointed to the Board members that study of single mothers social model is not feasible in Egyptian culture. Also I mentioned that Egyptian population is not largely Bedouin. In fact, Bedouin is represented small percentage of Egyptian population. I suggested to have opinion from an independent sociologist to evaluate [the appellant] work but unfortunately did not happen.*"

Dr. El-Tuhamy further asserts that, in the Board of Visitors proceedings, the appellant alleged discrimination and humiliation in the comments of Dr. Campbell, a member of the Differentiation Panel.

[16] With a view to avoiding still further disruptions in this heavily delayed litigation and taking into account the appellant's status as an unrepresented litigant, I admitted each of the aforementioned written statements as evidence, without any forceful objection on behalf of the University. I have taken both into account accordingly. Essentially, Dr. Booley's statement challenges the assessment of the appellant by the Differentiation Panel, while Dr. El-Tuhamy questions the wisdom of the supervisors' view that the appellant's research should incorporate some study of the single mother's social status and role in Egyptian society. Having juxtaposed these statements with the extensive documentary materials bearing on the events, judgments and decisions to which they are directed, and according reasonable deference to the decision making and appellate agencies involved, I consider that they do not present any serious challenge to the relevant conduct of the academics concerned and I find that they do not advance the appellant's case.

The appellant's Differentiation Proposals

[17] According to the University, the appellant submitted three versions of his differentiation proposal:

(a) A first draft, in June 2005.

(b) A second draft, in January 2006.

(c) A final version, in June 2006.

The appellant, supported by his spouse, disputed the suggestion that he had submitted a first draft differentiation proposal in June 2005. His case is that he did so several months later. Although the appellant labelled this document "Differentiation Proposal" and it was described in his e-mail and the e-mails of others as a "differentiation report", the appellant contested this characterisation, contending that what he submitted in June 2005 was simply three research chapters prepared by him, dealing with aspects of foster care of children in Egypt, rather than a differentiation report. I find this difference between the parties to be of no moment. For present purposes, the most significant consideration is that the first draft differentiation proposal contains a series of manuscript comments and annotations which the appellant accepts are framed in Dr. McSherry's handwriting. Secondly, the appellant accepts that he received this annotated version of his proposal from Dr. McSherry. Further, the appellant agrees that he and Dr. McSherry then discussed the comments and suggestions during a subsequent

meeting. **These** are the relevant considerations in this discrete context and they clearly undermine many of the appellant's claims and assertions.

[18] The appellant was not disposed to acknowledge that Dr. McSherry's extensive comments and suggestions constituted helpful and constructive criticism, advice and guidance. The court disagrees. Any considered and objective evaluation of these comments impels inexorably to the conclusion that they were both helpful and constructive, containing also words of caution, advice, guidance, exhortation and encouragement. One short quotation assists to illustrate this conclusion:

> "*You are still refusing to move your thinking and discussion to a more critical and sophisticated level – we know this is difficult, we all experience this* – **but** *it is essential that you begin to do this …*
>
> *It is very important that you start to take this on board and move forward with your writing*".

This passage also embodies a theme which became recurrent, as events progressed. The concerns here expressed about the appellant's skills and, in particular, the necessary tools of critical analysis and comment were repeated subsequently and, ultimately, formed the basis of the adverse decision of the Differentiation Panel.

[19] The parties are agreed that the final version of the appellant's "Differentiation Proposal" was generated and submitted by him in June 2006. The copy in the evidence before the court contains a relatively small number of manuscript comments. These are critical in character and were plainly designed to alert the appellant to perceived weaknesses and deficiencies in the text. The appellant asserted that he provided this final version to his supervisors one week before the Differentiation Panel met, on 29th June 2006. This was not disputed (cf. the University's chronology of events). It appears, therefore, that for the purpose of this meeting (which he attended) the appellant was equipped with that copy of his proposal upon which his supervisor/s had made the aforementioned comments.

The E-Mails

[20] The voluminous documentary materials in evidence before the court contain a veritable proliferation of e-mails. It will suffice to draw attention to some of the more important contents of these communications which, in the main, were transacted between the appellant and Dr. McSherry. The e-mails span a protracted period, beginning in September 2004 and extending to the end of June 2006. I preface the outline which follows below with two passages from the judgment of Judge Kennedy:

> "[13] *There is in this case a mass of documentary evidence in the form of e-mails between Dr. McSherry and the Plaintiff. The 140 pages of e-mails before the court show*

> *that Dr. McSherry was most encouraging in the early days of the Plaintiff's research. His suggestions on how to approach the content of the report show an interest in the subject matter with helpful suggestions and references to other academic papers. This is quite contrary to the Plaintiff's assertion that everything possible was being done to sabotage his chances of differentiating successfully. In early 2006 it is clear that the tone of the e-mails changes because the Plaintiff had failed to take on board valid criticism and constructive suggestions …*
>
> [14] *…These e-mails indicate that at the stage when the Plaintiff alleges that things went badly wrong it is apparent that Dr. McSherry was still endeavouring to help the Plaintiff to overcome his problems as best he could. He was advised consistently of the need to demonstrate in his written work a critical approach and further advised about the need to achieve an appropriate standard of English*".

In determining this appeal, I find no reason to differ in any way from Judge Kennedy's evaluation of this discrete segment of the documentary evidence.

[21] The following excerpts from the extensive e-mail traffic belonging to the period under scrutiny are illustrative of the key relationship in this affair, namely the professional supervisory relationship between Dr. McSherry and the appellant. These materials also enhance the court's ability to review dispassionately and objectively the events giving rise to this litigation.

(a) On 1st October 2004, Dr. McSherry advised [the appellant] of the jointly held supervisors' view that his research "*… should focus primarily upon foster care in Egypt*", while treating the Northern Irish context as "*a guide to how issues that you detect in Egypt might best be dealt with and how those issues would be dealt with from a UK perspective, perhaps through group interviews with social work staff in Northern Ireland …* [which] *… would allow you to develop potential new models of foster care for application in an Egyptian context*".

(b) On 14th December 2004, Dr. McSherry emphasized the importance of [the appellant] submitting written work, with a view to assessing his English language competence.

(c) On 20th February 2005, [the appellant] acknowledged both the "*kind reply*" and "*genuine co-operation*" received from Dr. McSherry.

(d) On 28th February 2005, Dr. McSherry made inquisitive and instructive observations and enquiries about the research data being collected by [the appellant].

(e) On 10th March 2005, Dr. McSherry noted the outcome of [the appellant's] field trip to Cairo and his identification of "*six or seven pieces of research on foster care in Egypt which he is going to write up for us*", commenting:

> "*I have to say I am relieved and delighted with what [the appellant] told me today and I think he should be congratulated on a job well done*".

(f) On 5th May 2005, [the appellant] thanked both supervisors for their "*countless support*".

(g) On 13th May 2005, Dr. McSherry gave [the appellant] specific advice about the length and format of differentiation reports.

(h) On 16th May 2005, [the appellant] thanked Dr. McSherry for his "*kind and supportive meeting*".

(i) The e-mails of mid-June 2005 demonstrate that both supervisors were actively considering [the appellant's] first draft differentiation report and amendments thereto, undertaking "*a thorough review*".

(j) On 5th July 2005, Dr. McSherry communicated with Mr. Kelly in these terms:

> "*I am going to give* [the report] *a real thorough going over as I think it is important that we set a particular standard for [the appellant] at this stage in terms of his writing, which needs to be at the highest level within a year or two. I think we need to be really thorough with his work at this stage and try to pick up on as much as we can that needs to be improved, rephrased, explained further etc. If we don't I think he'll struggle at differentiation. In light of this, I think we are going to need at least a good few hours with him on Wednesday afternoon and maybe I'll need to spend some further time with him after that.*"

(k) Dr. McSherry's further e-mail of 5th July 2005, addressed to [the appellant], emphasized the shortcomings in the latter's English language abilities and the need for significant improvement in his "*English writing style*". The content of the report was described as "*sound*".

(l) On 8th July 2005, Dr. McSherry expressed pastoral concerns for [the appellant] and his family, emphasizing the importance of devoting time to help the family settle in.

(m) On 25th July 2005, the central message of a further e-mail from Dr. McSherry was "*go to Dublin with your family and enjoy yourself*".

(n) On 19th August 2005, Dr. McSherry transmitted a potentially useful paper to [the appellant].

(o) In an e-mail dated 22nd August 2005, concerning computer data collection, Dr. McSherry stated:

> "*I told you that this can take some time, this is the reality of the research process. It is better to be slow and correct, than fast and incorrect. Keep up the good work, it will be worth it in the end*".

(p) On 26th October 2005, Dr. McSherry compiled and forwarded to [the appellant] a summary of his research project.

(q) On 28th October 2005, [the appellant] replied:

> "*Thanks a lot for your kind support …*
>
> *I am really appreciating your kind help. I think this project summary seems relevant …*".

(r) A further e-mail from Dr. McSherry, dated 9th December 2005, demonstrates arrangements initiated by him to meet [the appellant] and the family's newly born daughter.

(s) On 12th January 2006, Dr. McSherry forwarded a sample differentiation report to [the appellant], exhorting that he note "*… the way that the work is presented, the level of critical discussion and fluency in writing. This is the level that you want to be aiming for i.e. more critical discussion of the key issues*".

(t) By an e-mail dated 17th January 2006, Dr. McSherry advised [the appellant]:

> "*There is still a bit of work to be done before we can send your report out, particularly in terms of making it clearer and easier to understand …*
>
> *You will need a bit more time to work on your writing style.*"

[The appellant] replied "*Thanks a lot for all*".

(u) By further e-mail dated 23rd January 2006, Dr. McSherry advised [the appellant]:

> "*Essentially, we feel that the biggest issue for you, and this is very common with Ph.D students, is your level of discussion and critical analysis …*
>
> *On several occasions throughout your document you have very large sections which describe the literature, but then only write three or four lines discussing any of the key issues that emerge from this work. It is essential that you begin to increase your willingness to examine this work more critically and be prepared to think a little more deeply what the key issues are and develop these in your text. This is what an examiner will be looking for …*
>
> *From my experience, most students overcome their initial reluctance in this regard and go on to develop the type of sophisticated thinking and writing that is required at this level. Both myself and Greg are confident that you can do this. You have shown evidence that you can do this, particularly in your research methods paper. However, it is essential that you begin to translate this into your differentiation report …*
>
> *I believe you can do this, but I feel that it is important that you acknowledge that you have not been doing this to date and that you urgently need to begin to. Anyhow, I've written some detailed comments on these issues within the report and you can think about this before we meet.*"

This e-mail finishes with constructive and practical advice about a suggested way forward for [the appellant] and wishes him good luck.

(v) Shortly afterwards, the supervisors expressed, internally, their reservations about the quality of [the appellant's] research project. Dr. McSherry then conducted an Internet search for [the appellant] and, on 9th February 2006, forwarded the results to him, again wishing him good fortune.

(w) By e-mail dated 10th February 2006, Dr. McSherry provided [the appellant] with extensive critical advice and guidance about the content and format of his differentiation proposal, re-emphasizing the need for "*a fair degree of depth, discussion and critical analysis*" and

warning that enduring shortcomings could result in "*moving to an M.Phil*". It concluded:

> "*Whether or not this happens is completely in your own hands. You need to show that you can produce the goods at Ph.D level. Myself and Greg are sure you can. But you need to demonstrate this in writing.*"

(x) By e-mail dated 5th April 2006, with specific reference to the contents of [the appellant's] research paper, Dr. McSherry raised a series of questions which could be posed by a Differentiation Panel and stated "*… I want to see how you can put together a coherent response to them … this will be good practice for you … try to imagine that you are trying to explain these questions to someone who has never heard of Egyptian foster care before. This will be the case when we select a panel to review your report. I look forward to reading your response.*"

(y) By e-mail dated 5th April 2006 to [the appellant], Dr. McSherry stated:

> "*As you know, the two of us have been meeting much more frequently than two times a month for the last number of months, given the additional support you have needed with your differentiation report …*
>
> *If you have any concerns regarding the level of supervision that you have been receiving, please be sure to raise this …*".

By e-mail dated 11th April 2006, Dr. McSherry transmitted a potentially interesting article to [the appellant].

(z) By e-mail dated 12th April 2006, with specific reference to some of the contents of [the appellant's] research, Dr. McSherry observed that his apparent attitude and views –

> "*... might suggest to an examiner that you are not capable of thinking objectively and critically. As Greg mentioned to you at our last meeting, you don't have to pass a judgment on these processes, but you certainly will need to explain them …*
>
> *We have spent an inordinate amount of time talking with you about how it is essential that you deal with these issues, without passing judgment. It is difficult to see how you could continue this work without addressing this issue …*

I think it is vitally important for me to emphasize to you again that you need to be extremely wary of coming across as defensive and lacking in objectivity. These are opposite to the key characteristics required to do a Ph.D i.e. openness and objectivity …

I strongly recommend that you follow my advice on these matters."

(aa) Next, by e-mail dated 13th April 2006, Dr. McSherry provided some commentary on a relevant research paper and advised [the appellant] accordingly.

(bb) A further e-mail dated 9th May 2006 from Dr. McSherry to [the appellant] embodied various tips and advices on the content of his final paper, concluding:

"*It was good to hear that you handled your presentation at the postgraduate conference very well. Now let's translate this success into your differentiation. It's up to you, you know what is required. Good luck.*"

(cc) Other e-mails belonging to this period demonstrate concerted efforts by Dr. McSherry to collate relevant information and data for [the appellant].

(dd) By e-mail dated 22nd May 2006 to Dr. McSherry, regarding his admission to a forthcoming course in Cambridge University, [the appellant] stated, *inter alia*:

"*Thanks a lot for your countless support …*".

(ee) Other e-mails from Dr. McSherry to [the appellant] in May and June 2006 contained repeated advice and guidance and recorded a process of reading the updated versions of the differentiation report and endorsing written comments and suggestions. This is encapsulated in the following passage extracted from Dr. McSherry's e-mail of 15th June 2006 to [the appellant]:

"*I still think that you need to develop the critical and theoretical aspects much more …*

I have taken considerable time to read this again and make comments on this …

I would urge you to consider my suggestions and make amendments …

> *I hope that you will attend very carefully to my recommendations …*
>
> *I would strongly advise that you do so, since without greater critical and theoretical analysis I doubt very much whether you would be successful in proceeding on to Ph.D study*".

The Differentiation Panel Decision

[22] This decision is contained in two separate reports of the Differentiation Panel members, Dr. Campbell and Dr. Kilpatrick. The essence of Dr. Campbell's report is captured in the following excerpt:

> "*This is a very interesting topic of research, worthy of postgraduate study …*
>
> *There were, however, a number of substantial weaknesses: the rather uncritical and limited nature of the literature review; the lack of justification for the methodological approach; the limited analysis of preliminary findings; and the fairly widespread spelling and grammatical errors*".

Notably, Dr. Campbell comments that the appellant "*… appears to have also received much support from his supervisors*". Lack of critical analysis was a key finding. Dr. Campbell concludes:

> "*In the discussion which followed the candidate's presentation, I agreed with the co-examiner that there was insufficient evidence to justify further Ph.D studies, but thought it an option that an opportunity could be offered for M.Phil study, but conditional on whether the candidate could demonstrate better usage of written and oral English*".

[23] In her report, Dr. Kilpatrick states, *inter alia*:

> "*It … was disappointing to find that [the appellant's] differentiation paper gave rise for major concern on two counts. Firstly, the level of written English was poor …*
>
> *Secondly, the material presented was extremely descriptive in nature resulting in little indication of the complexity of the literature reviewed and a lack of critical analysis of foster care and the routes to it in Egypt. Additionally, the*

> *paper did not contain any critical discussion of the research methodology or the difficulties that might be encountered in exploring such a sensitive topic in Egypt.*"

Dr. Kilpatrick concludes:

> "*Unfortunately, on the basis of both the oral and written evidence I do not feel that I can recommend [the appellant] should progress to Ph.D study at this point in time. However, I do believe he is engaged in a valuable piece of research and would encourage him to consider the M.Phil option once his written English has been raised to the standard required. When that has been achieved it may be possible that [the appellant] would be more able to engage in critical analysis and if this were the case the situation could then be reviewed*".

Dr. Kilpatrick's report also acknowledged the disappointment which this conclusion would inflict on the appellant and emphasizes that "*… it is not a decision that I have taken lightly*".

Postgraduate Research Committee Decision

[24] A meeting of this Committee was convened on 22nd August 2006 and, in accordance with University regulations, the appellant was permitted to attend and to make representations. In response to questions, he confirmed that he had been apprised of the differentiation process from the beginning of his research project. Furthermore, he "*… did not feel that the document was affected by time pressures*". It was noted that the appellant had not ventilated any concerns about his supervision. The Committee also received contributions from Dr. McSherry and Mr. Kelly. The minutes of the meeting record their concerns about his English language competence and his ability "*to engage in independent critical analysis*". It notes further:

> "*Both supervisors felt that* [the appellant's] *concerns over supervision were only being voiced now because of the difficulties over differentiation*".

The Committee concluded, apparently unanimously, that the decision of the Differentiation Panel should be upheld.

Postgraduate Appeals Committee Decision

[25] At the beginning of September 2006, the appellant initiated an appeal against the last-mentioned decision. The central thrust of his written appeal submission consisted of dissatisfaction with his supervisors, encapsulated in the words "*poor support, guidance and help*". The submission further states:

> "*This appeal is further motivated by several factors which had negatively impacted on my performance as postgraduate student and which, ultimately, disadvantaged me in preparing for the differentiation meeting of 29th June 2006*".

This process culminated in a meeting of the Appeals Committee on 9th October 2006, attended by the appellant. Strikingly, neither the appellant's written appeal submission nor the minutes of the ensuing meeting reflect any complaint of race discrimination. The centrepiece of his representations was a complaint of inadequate supervision. The Committee decided:

> "*The Committee discussed the various points raised by [the appellant] at length. It was clear that there had been a breakdown in communication regarding the direction and focus of [the appellant's] research project during the second year of his studies and, despite a number of attempts by his supervisors to guide him, there was a failure on his behalf to adequately address the advice given to him.*
>
> *The Committee was satisfied that the School Postgraduate Research Committee did not make any errors in its interpretation of the regulations and that there were no procedural irregularities. It was further satisfied that the School Postgraduate Research Committee considered all the available evidence relating to [the appellant's] progress and abilities and its decision was based on sound academic grounds and was reasonable in the circumstances. [The appellant] failed to identify any new extenuating circumstances of which the School Postgraduate Research Committee was unaware.*
>
> *The Committee therefore decided to dismiss the appeal*".

University Board of Visitors Decision

[26] The appellant then appealed to the Board of Visitors. He pursued three grounds of appeal, each of which focussed in one way or another on the standards and adequacy of his supervision. The Board considered various written materials and submissions, including oral representations from the appellant and Dr. El-Tuhamy, on his behalf. It concluded:

(a) The criticism of inadequate supervision was not justified.

(b) The appellant had received appropriate advice and direction.

(c) With reference to the third ground of appeal:

> "*Our conclusion is that this complaint has not been substantiated. It is apparent that the emphasis by the supervisors, as well as by the Differentiation Panel, was on the need for critical analysis by [the appellant]. The concerns expressed by the supervisors about the first two differentiation proposals were that they were overly descriptive and insufficiently critical and it was in order to provide guidance about critical analysis that Dr. McSherry suggested a particular contextual framework. There is no basis for concluding that this framework was* ***imposed*** *on [the appellant].*"

The appeal was, therefore, dismissed.

Summary

[27] Within the University framework, therefore, the appellant has been unsuccessful at four levels. A fifth layer is added by the initiation of these proceedings and the decision at first instance, which was adverse to him. The appeal to this court represents the sixth layer. The framework within which this appeal falls to be determined is shaped by the appellant's pleaded case, his written submissions (including the closing submission furnished after the final day of hearing), his representations to the court and all of the evidence, both oral and documentary, generated by this appeal and summarised above. The appellant being an unrepresented litigant, his case has at times been unfocussed and diffuse. However, his central complaints and allegations have emerged with some clarity from the matrix just outlined and I do not propose to rehearse them further or *in extenso* at this juncture. They are outlined particularly in paragraphs [6] – [9] above and in the summary of the evidence, both oral and documentary, adduced on his behalf, contained in the succeeding paragraphs. I refer also to the appellant's final written submission where, interestingly, he canvasses as a possibility that his English language competence is "*a real reason behind the discontinuing and depriving me of registration to any degree …*". The submission continues:

> "*The various reasons given for the failure to differentiate were both* ***racial*** *and not personal reasons …*
>
> *The mentioned individuals have made discrimination against me …*
>
> *Applying the final Ph.D rules on my case and not the differentiation rules* [was done] *in order to* ***just disadvantage me ...***
>
> *Depriving me of having a second chance confirmed the racial discrimination in this case …*

> *There is agreement between Lancaster* [University] *and Queen's that I will not be allowed to get my Ph.D from Lancaster, because I am still in the court against Queen's …*
>
> *I have established three individuals in relation to less favourable treatment in this case…* [IDENTIFIED]*… I was treated less favourable than these three individuals. The reason of this less favourable treatment is because I am Egyptian…*
>
> *The meetings were informal and without advanced planning. The guidance was wrong. This guidance was not helpful and caused problems in the research project …*
>
> *There is evidence of contractual failure on the part of the University in the form of supervision.*"

The appellant claims that two of his comparators received more favourable treatment than him, essentially in the form of better standards of supervision and (in one case) a change of supervisor, while the third enjoyed the advantage of a longer period than that accorded to him to overcome differentiation.

III RACE DISCRIMINATION - THE LEGAL FRAMEWORK

[28] Article 5(1) of the Race Relations (Northern Ireland) Order 1997, as amended ("*the 1997 Order*"), defines "*racial grounds*" as "*any of the following grounds, namely colour, race, nationality or ethnic or national origins*". The term "*racial group*" is defined as "*a group of persons defined by reference to colour, race, nationality or ethnic or national origins and references to a person's racial group refer to any racial group into which he falls*". By Article 3(1) of the 1997 Order:

> "*A person discriminates against another in any circumstances relevant for the provisions of this Order if –*
>
> *(a) on racial grounds he treats that other less favourably than he treats or would treat other persons*".

This is the direct discrimination provision in the legislation. The indirect discrimination provision is framed, in familiar terms, in Article 3(1)(b). Article 3(3) continues:

> "*A comparison of the case of a person of a particular racial group with that of a person not of that group under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other*".

Articles 18 and 20 are of potential relevance in the present context. Article 18 is concerned with discrimination by the management bodies of "*educational establishments*", which include universities. It provides, in material part:

> "*It is unlawful, in relation to an educational establishment … for a* [governing body] *… to discriminate against a person - …*
>
> *(b) by refusing or deliberately omitting to accept an application for his admission to the establishment as a pupil …*".

By Article 20(1), which also extends to universities, it is provided:

> "*Without prejudice to its obligations to comply with any other provision of this Order, a body to which this paragraph applies shall be under a general duty to secure that facilities for education provided by it, and any ancillary benefits or services, are provided without racial discrimination*".

[29] By virtue of Article 54 of the 1997 Order, as amended, discrimination proceedings based on any of the specified outlawed acts are brought in the County Court, "*in like manner as any other claim in tort for breach of statutory duty*". Article 54B applies to, *inter alia*, proceedings alleging discrimination under Articles 18 and 20 (set out above). Article 54B(2) provides:

> "*Where, on the hearing of the claim, the claimant proves facts from which the court could, apart from this Article, conclude in the balance of an adequate explanation that the respondent –*
>
> *(a) has committed such an act of discrimination or harassment against the claimant, or*
>
> *(b) is by virtue of Article 32 or 33 to be treated as having committed such an act of discrimination or harassment against the claimant,*
>
> *the court shall uphold the claim unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act*".

In simple terms, a *prima facie* case of unlawful discrimination contrary to the 1997 Order *shall be* transformed into a proven case, unless the Respondent discharges the burden of proving that he did not commit the alleged offending act. This statutory burden of proof provision is a reflection of the special considerations which arise in discrimination cases. It is a truism that in contemporary society discrimination is very rarely overt or admitted, a consideration reflected in the following observation

of Lowry LCJ in ***Wallace –v- South Eastern Education and Library Board*** [1980] IRLR 193 and[1982] NIJB (a sex discrimination case), at p. 195:

> "*Only rarely in cases under the Order will direct evidence be available of discrimination on the grounds of sex; one is more often left to infer discrimination from the circumstances. If this could not be done, the object of the legislation would be largely defeated, so long as the authority alleged to be guilty of discrimination made no expressly discriminatory statements and did not attempt to justify its actions by evidence*".

The statutory reform enshrined in Article 54B (and other equivalent provisions in the field of discrimination legislation) may be considered in the context of judicial pronouncements of this kind and decisions such as ***Fair Employment Agency –v- Craigavon Borough Council*** [1980] 7 NIJB (another landmark judgment of Lowry LCJ in this field).

[30] The decision of the English Court of Appeal in ***Wong –v- Igen*** [2005] IRLR 258 and [2005] EWCA. Civ 142 is concerned with comparable provisions in Section 63A of the Sex Discrimination Act 1975, Section 54A of the Race Relations Act 1976 and Section 17A of the Disability Discrimination Act 1995. The court's consideration of the impact of these provisions is prefaced by the observation of Gibson LJ in paragraph [6]:

> "*It has long been recognised that proving discrimination claims may pose great difficulties for claimants*".

The judgment then traces the evolution of the relevant case law and Council Directive 97/80/EC (the Burden of Proof Directive). Significantly, the judgment endorses the so-called "Barton Guidance", contained in ***Barton –v- Investec Securities*** [2003] IRLR 332:

> *"[25] We therefore consider it necessary to set out fresh guidance in the light of the statutory changes:*
>
> *(1) Pursuant to s.63A of the Sex Discrimination Act 1975, it is for the applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondents have committed an act of discrimination against the applicant which is unlawful by virtue of Part II or which by virtue of s.41 or 42 SDA is to be treated as having been committed against the applicant. These are referred to below as 'such facts'.*
>
> *(2) If the applicant does not prove such facts he or she will fail.*

(3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word is 'could'. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the Sex Discrimination Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the Sex Discrimination Act: see Hinks v Riva Systems EAT/501/96.

(7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts pursuant to s.56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the applicant has proved facts from which inferences could be drawn that the respondents have treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.

(9) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act.

(10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

> *(11) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.*
>
> *(12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice".*

As noted by Gibson LJ in paragraph [15], this guidance has been consistently applied by tribunals in the spheres of sex, race and disability discrimination. The judgment continues:

> ***"[17]*** *The statutory amendments clearly require the ET to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."*

I can discern no reason to apply a different approach to Article 54B of the 1997 Order**.**

[31] In ***Madarassy –v- Nomura International plc*** [2007] IRLR 246, the English Court of Appeal considered the meaning of the statutory words "*could … conclude*". Mummery LJ stated, firstly, in paragraph [56]:

> *"The court in* ***Igen v Wong*** *expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

The judgment continues, in paragraph [57]:

> *"'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."*

In summary, it is for the claimant to establish a *prima facie* case, in order to traverse the boundaries of the first stage. At this initial stage, the absence of an adequate explanation from the respondent for any apparent differential treatment is of no moment. This factor becomes relevant only if the claimant overcomes the first stage, by establishing a *prima facie* case. If the claimant does so, then, adopting the language of Mummery LJ:

> *"[58] The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

There is no discernible reason for applying a different approach to Article 54B of the 1997 Order.

[32] Some reflection on the essence of discrimination is also instructive. In ***Armagh District Council –v- Fair Employment Agency*** [1983] NI 346, Lowry LCJ stated, at p. 354f/g:

> "*It must not be forgotten that when the Act uses the word 'discrimination' or 'discriminate' it is referring to an employer who makes a choice between one candidate and another* ***on the ground*** *of religious belief or political opinion; it is not speaking of an incidental disadvantage which is due to a difference between the religion of the employer and of the candidate but of* ***a deliberate, intentional action on the part of the appointing body or individual ...***

> *An action may be deliberate without being malicious. Most acts of discrimination are both, but the only* ***essential*** *quality is deliberation*".

[Emphasis partly supplied].

The Lord Chief Justice continued (at p. 355b):

> "*Accordingly, it can be stated that, although malice (while often present) is not essential, deliberate intention to differentiate on the ground of religion, politics, sex, colour or nationality* [**or race**] *(whatever is aimed at by the legislation)is an indispensable element in the concept of discrimination*".

[The words inserted are mine].

[33] As appears from the language of the 1997 Order (and other statutes in the discrimination field), *less favourable treatment* of the complainant lies at the heart of unlawful discrimination. This, in turn, conjures up the notion of disadvantage or disbenefit and frequently stimulates detailed (and sometimes complex) enquiries into so-called "*comparators*". In ***Shamoon –v- Chief Constable of the Royal Ulster Constabulary*** [2003] UKHL 11, the existence of this phenomenon and its potential to generate "*needless problems*" were noted by Lord Nicholls in paragraph [8]. Adverting to the practice whereby tribunals frequently consider, firstly, the issue of whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was on the relevant proscribed ground, his Lordship observed:

> "*[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***?"

[My emphasis].

In his Lordship's view, the "*reason why*" issue lies at the heart of the enquiry to be conducted by the court or tribunal. He continues:

> *"[11 This analysis seems to me to point to the conclusion that employment tribunals 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. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be*

> *no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.]*".

Notably, in the context of discrimination under Article 14 ECHR, the House of Lords has advocated a similarly simplified approach. See ***R –v- Secretary of State for Work and Pensions, ex parte Carson and Reynolds*** [2005] UKHL 37 – per Lord Nicholls, paragraph [1]; Lord Rodger, paragraphs [43] – [44]; and Lord Carswell, paragraph [97], in a passage which contains the following general observation:

> "*Many discrimination cases resolve themselves into a dispute, which can often seem more than a little arid, about comparisons and identifying comparators, where a broader approach might more readily yield a serviceable answer which corresponds with one's instincts for justice …*
>
> *Much of the problem stems from focussing too closely on finding comparisons …*".

This is the doctrinal framework within which the race discrimination complaint falls to be determined in this appeal.

IV CONCLUSIONS

Breach of Statutory Duty

[34] I have noted, in paragraph [1] above, the four causes of action promoted by the appellant in these proceedings and the manifest dominance of his complaint under the 1997 Order. I shall address, firstly, the other three causes of action. As already observed, this is an unparticularised complaint. It was formulated in the appellant's pleaded case at a time when he had legal representation. Its inclusion might possibly be referable to Article 54(1) of the 1997 Order, by reason whereof discrimination claims under this legislation proceed "*in like manner as any other claim in tort for breach of statutory duty*". The appellant did not seek to identify any *other* statutory duty as being in play. I conclude, therefore, that this adds nothing of substance to his case.

Negligence

[35] The issue of whether the appellant can, in principle, formulate a claim in negligence against the University arising out of the events culminating in this litigation and, in particular, the content of any such duty gives rise to potentially complex questions of law. The appellant, unsurprisingly, did not develop any considered argument in this respect, while counsel for the University (Mr. Hamill), equally understandably, approached his submissions on the footing that this litigation entails, fundamentally, a complaint under the 1997 Order. For present purposes and for completeness, I shall *assume*, without deciding, that the University

owed the appellant a common law duty to exercise reasonable care in the provision of supervision and guidance to him, as a postgraduate student and in the decision making processes detailed in paragraphs [17] – [26] above. Making this assumption, I conclude without hesitation that there was no breach of this duty. In my view, the appellant was treated with commendable care, professionalism, courtesy and respect and was supervised in a reasonably planned and structured fashion by all concerned at all times.

Breach of Contract

[36] Again, it is not entirely clear that there was a contractual relationship between the appellant and the University and there was no detailed argument on this issue. I shall assume, without deciding, that such a relationship existed and that the governing contract contained express or implied terms to the effect outlined in paragraph [35] *and* requiring the University to adhere to all relevant regulations, standards and instruments of guidance. Making this assumption, I conclude that the appellant has failed to demonstrate any breach of any of these contractual terms. In particular, I reject his claim that the published differentiation criteria were altered in the making of the impugned decisions. It seems to me inconceivable that the Differentiation Panel and the other agencies involved subsequently would not have given consideration to the appellant's ability to qualify for the degree of Ph.D and, hence, the requisite governing standards and criteria, in making the differentiation determination. I refer to the relevant provisions set out in paragraphs [3] and [9] above. The fallacy inherent in the contrary contention is, in my view, inescapable.

Race Discrimination

[37] The centrepiece of the appellant's complaint of discrimination is that he was treated less favourably than other identified postgraduate students on the ground of his colour, race, nationality or ethnic or national origins, given that he is of Egyptian race and nationality. The court's determination of this complaint requires consideration of the "reason why" question and identification of the relevant treatment. The *treatment* to which this question must be applied is, bearing in mind the breadth of the appellant's case, the conduct of his supervisors during the pre-differentiation decision phase; the decision making of the Differentiation Panel members, which belongs to the core of the discrimination complaint; and the conduct and decisions of the other relevant agencies thereafter. The question to be determined is whether the appellant has established a *prima facie* case of discrimination, in any of these respects. I answer this question unhesitatingly in the negative. I find that the proscribed ground did not feature at all in any of the material events and decisions under scrutiny. I find that the appellant's colour, race, nationality or ethnic or national origins had nothing whatsoever to do with the acts of which he complains. Fundamentally, I find that the offending acts were motivated by a mixture of genuine attempts to guide and advise the appellant in his research project and, particularly during the latter stages, successive and consistent assessments on the part of those concerned that the appellant's performance as a

postgraduate student aspiring to be admitted to study for the qualification of Ph.D suffered from specified deficiencies. I find that no proscribed reason, intention or motivation was in play at any time. The evidence impelling to these findings is, in my view, consistent and compelling. From the court's perspective, neither the appellant's allegations nor any aspect of the formidable volume of evidence amassed has given rise to any reservation or suspicion regarding the proscribed ground. In simple terms, bearing in mind the legal framework to which this complaints belongs, nothing untoward or suspect has occurred in this saga. I conclude that the case presented by the appellant falls measurably short of overcoming the threshold enshrined in article 54B of the 1997 Order. It is long distant from amounting to a *prima facie* case.

[38] Without prejudice to the findings and conclusions expressed in the immediately preceding paragraph, I add the following:

(a) I reject the appellant's assertion that Dr. McSherry asked him why he was not studying in some Arab University. I consider this assertion, of late advent, either imaginary or mistaken.

(b) The conduct of all of the alleged discriminators is without blemish.

(c) The fundamental misconception relating to each of the asserted comparators is that their circumstances were materially different from those of the appellant, the principal point of distinction being that their performance as postgraduate students was assessed as having attained the necessary standards, whereas the appellant's did not. This is the elementary reason why they differentiated successfully and why the asserted comparison with them is fallacious. Further, in the particular case of [XY], the extenuating personal circumstances put to the appellant in cross-examination were not disputed by him and reinforce the distinguishing features of her particular circumstances.

(d) The term "*his nibs*" has no racial overtones of any kind in the particular circumstances of this case.

(e) There is no conspiracy or illicit arrangement or agreement of any kind between the University and Lancaster University.

(f) The appellant's allegations of sarcasm, humiliation, negativity, unprofessionalism and harsh treatment are entirely unsubstantiated.

(g) The alleged conspiracy between Professor Berridge and the University is simply fictitious.

(h) The proscribed ground played no part in Dr McSherry's contact with the "Sure Start" organisation.

(i) Any comments by the supervisors about Egyptian culture and foster care were innocuous and entirely unrelated to the proscribed ground.

(j) All of the appellant's complaints in these proceedings are of late advent, in the context of the underlying events. He has advanced no convincing explanation for failing to ventilate them proactively and timeously.

[39] In common with Judge Kennedy, I acknowledge that a ruling of no case to answer in a discrimination claim may be unconventional. However, I consider that the evidence impelling to this conclusion is overwhelming. I have no reason to suspect that the appellant's allegations of discrimination were either spurious or ill motivated. Indeed, the entire history of this affair, coupled with the conduct of these proceedings, demonstrates the strength of the belief which he entertains in this respect, fully shared by his wife. However, allegations of discrimination are a matter of particular gravity, carrying a special stigma and stand apart from other litigation contexts. Pending completion of the litigation, a shadow is cast on the alleged discriminators. It is appropriate, therefore, for this court to record that Dr. McSherry, Mr. Kelly, Dr. Kilpatrick, Dr. Campbell and Professor Berridge are absolved and acquitted of all the allegations levelled against them in these proceedings. Their exoneration is unqualified and total.

[40] Finally, I trust that the appellant and his family will be able to banish and emerge from the suspicions and beliefs which have shackled them and dominated their lives during the past three/four years. The appellant's qualifications are impressive and the papers are littered with positive comments about his attributes and abilities, both personal and intellectual. In particular, it was unequivocally acknowledged, in the early stages, that the appellant produced "*high quality work in the paper he had submitted for Research Methods and therefore appeared to be making good progress*". Similarly, at one stage Dr. McSherry expressed his "*delight*" at the appellant's progress, to such extent that congratulations were extended. I sincerely hope that the appellant will draw solace, encouragement and inspiration from these and other comparable endorsements of his abilities. Furthermore, his research project has been unambiguously described as very interesting, worthy of postgraduate study and capable of making a valuable contribution to the understanding of foster care in Egypt. Moreover, it has a Northern Irish dimension. I trust that the appellant, described as "*an extremely hardworking and committed student*", will be able to draw on these positives. Hopefully, any University with which the appellant has enduring relations will be able to view his case sympathetically and positively. The appellant and his family are welcome visitors to the Northern Ireland community and one trusts that they will be able to realise their ambition of settling permanently in the United Kingdom.

[41] In the result, I dismiss the appeal and affirm the order of the County Court in all respects. I shall deal separately with the issue of costs.