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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **17/1/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED FROM A DECISION OF A DISTRICT JUDGE

BRIGID MCDONAGH
THOMAS MCDONAGH
MARGARET MCDONAGH
EILEEN MCDONAGH
MICHAEL MCDONAGH
ELLEN MCDONAGH
MARTIN MCDONAGH

Plaintiffs/Appellants;

-and-

SAMUEL JOHN HAMILTON THOM
TRADING AS THE ROYAL HOTEL COOKSTOWN

Defendant/Respondent.

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an appeal by way of case stated from a decision of a district judge sitting in the County Court division of Fermanagh and Tyrone on 1 August 2005. The opinion of this court is sought as to whether the district judge was correct in holding that: -

1. The occurrence of acts of extreme violence by members of the Irish travelling community at functions organised by those or other members of that community on or about the defendant's licensed premises entitled the defendant to refuse to host any further such functions for any and all members of the Irish travelling community, including the plaintiffs;

2. The cancellation by the defendant of the plaintiffs' functions was not discriminatory contrary to Article 21 of the Race Relations (Northern Ireland) Order 1997; and

3. The cancellation by the defendant of all functions organised by members of the Irish travelling community was not discriminatory contrary to Article 21 of the Race Relations (Northern Ireland) Order 1997.

Factual Background

[2] The respondent, Mr Samuel Thom, is the proprietor of the Royal Hotel in Coagh Street, Cookstown, County Tyrone. All of the appellants are members of the Irish travelling community.

[3] On 29 January 2004 Brigid McDonagh, the first named appellant, made a reservation at the respondent's hotel for two events, namely a birthday party for her mother to take place on 6 April 2004 and a post wedding function for her brother's wedding to take place on the 1 September 2004. A deposit of £150 was paid at that time to reserve the dates for these functions.

[4] On 15 October 2003, Michael and Ellen McDonagh, the fifth and sixth appellants, booked the function room at the respondent's premises for an event to mark the anniversary of the death of their infant daughter. This was to take place on 18 February 2004. They paid a deposit of £100 for this function. On 7 January 2004 Thomas McDonagh, Margaret McDonagh, Eileen McDonagh, Michael McDonagh, Ellen McDonagh and Martin McDonagh went together to the hotel and booked the function room for 4 March 2004 to celebrate the engagement of Eileen McDonagh to Martin McDonagh. A deposit of £100 for this booking was paid by Thomas McDonagh and Martin McDonagh.

[5] On 29 January 2004, at an event at the hotel attended by members of the travelling community there was an outbreak of considerable and frightening violence. In the case stated the district judge described this and the reaction of the hotel staff in the following passages: -

> "(v) On the evening of 29th January 2004 (into early hours of 30th) at a traveller function in the defendant's premises, there had been an outbreak of severe and sustained violence which had

> started as a mass brawl within the premises and which spilled out into the street. Between 50 and 100 Travellers were involved and weapons were seen including machetes, wheelbraces, axes and knives. A number of Travellers were observed to be injured, including facial and head injuries, and the police apprehended one of the weapons, namely a blood-stained machete. The ferocity of the violence and the fighting was such that the Defendant's staff were put in actual fear. The Defendant's doormen were completely overwhelmed and outnumbered and they, together with the rest of the staff, were driven to hide.
>
> (vi) The next day, the Defendant's staff held a meeting at which it was decided that they would collectively refuse to work any further Traveller functions, for fear of their own personal safety. They informed the Defendant the same day. He had not been present at the meeting but he and his wife accepted that someone could get killed if such violence continued. Both the Defendant and his staff were quite shaken by what they had witnessed".

[6] On 2 February 2004 the sister of the respondent, who was employed by him, telephoned Brigid McDonagh and then Michael McDonagh to cancel their bookings and in each conversation referred to the trouble of 29 January 2004. Each was sent a cheque refunding their deposits.

[7] The approach taken by the respondent to the events of 29 January 2004 and the measures which he ought to have taken were the subject of lively dispute in the hearing before the district judge and she made the following findings of fact in relation to them: -

> "(xiv) After the events of 29th January 2004 the Defendant had tried to persuade his staff to work the upcoming Traveller functions but they had made it very clear that if forced to work, they would have felt compelled to resign.
>
> (xv) The Defendant reluctantly accepted the ultimatum given by his staff and as a result instructed his sister Jennifer Henry to cancel all

> Traveller functions…He did not take any advice before doing so.
>
> (xvi) The Defendant did not take any steps to discipline his staff for threatening to withdraw their labour or resign.
>
> (xvii) The Defendant did not explore such measures as installing CCTV, employing extra doormen, recruiting alternative or extra staff for Traveller functions, taking safety deposits, seeking guest-lists in advance for screening purposes, seeking names and addresses of organisers and insisting that there be no subsequent change-over of booking name.
>
> (xviii) The Defendant did not meet with the Plaintiffs to discuss these matters and his concerns, in advance of their functions, the first of which was due to be held on 18th February 2004. Nor did the Plaintiffs request a meeting.
> …
>
> (xxi) The Defendant did not, at the time of cancellation, try to ascertain whether the Plaintiffs were involved in the events of two nights previously, namely 29/30th January".

[8] Another issue explored in the hearing before the district judge was what was alleged by the respondent to be a pattern of escalating violence and trouble at traveller functions in the hotel and whether this differed from violence at events organised by the settled community. It emerged that the police had been contacted and advised of a number of violent incidents at the hotel involving members of the travelling community during 2003 and early 2004 but no formal complaint was made by Mr Thom or by his members of staff. Some members of staff had been threatened or assaulted but did not formally complain because, they claimed, they were in fear of intimidation and retribution. An ancillary issue was whether any of the appellants or members of their immediate family were involved in any of the earlier incidents. The judge made the following factual findings in relation to these issues: -

> "(viii) The first Plaintiff had in the past availed of function facilities at the Defendant's premises, as had the fifth and sixth Plaintiffs. It was not clear whether these events had been trouble free but

during 2003 into 2004 there was a pattern emerging of escalating violence and trouble at Traveller functions in the hotel. A number of bookings had been subject to change of name between the initial booking and the date of the function, including bookings made in the past by Brigid McDonagh.

(ix) The fifth and sixth plaintiffs had booked and used the Defendant's hotel in the year before, over three days in February 2003, for the anniversary of their four year old daughter. These events were incident free.

(x) Close family members of the Plaintiffs had been involved in incidents of violence at previous events and were likely by virtue of family connection to be present at the functions the subject of these proceedings.

…

(xiii) Functions organised by members of the settled community had occasionally been marred by trouble but the violence had been much lesser in degree and had not been gradually escalating in severity in the way the Traveller functions had.

…

(xix) Brigid McDonagh's husband, John McDonagh, (not a party to the proceedings) and the seventh Plaintiff, Martin McDonagh, were identified as being involved in the violent events of 29th January. Other members of the Plaintiffs' families were identified as being involved in other incidents of violence in the hotel in 2003 and early 2004, which incidents occurred during the functions organised by members of the Irish Traveller community.

(xx) The functions the subject of these proceedings were all intended to be family functions and would include their family members".

[9] Although the respondent cancelled the appellants' functions, the judge found that members of the Irish travelling community were not banned from using all other facilities offered by the hotel: -

> "(xxii) The Defendant only cancelled functions. Irish Travellers were not banned from using all other facilities offered by the hotel and in fact, continued to attend lunches, Sunday carveries and discos up to the present day".

The trial judge's conclusions

[10] On 1 August 2005 the learned trial judge gave an *ex tempore* judgment. The conclusions expressed in that judgment that are relevant to the present appeal were set out in paragraph 6 of the case stated as follows: -

> "(d) That the Defendant ran a small family business and would not have had the resources to install such high security measures as automated exclusion zones, drop-down steel-bar screens or panic rooms – sufficient to protect staff from the threat presented by drunken aggressors whose weaponry of choice included machetes, wheelbraces, axes and knives. Such measures would have been prohibitively expensive and those having the protection of anti-discrimination laws can only use those laws as a shield, not a sword to compel potential Defendants effectively to underwrite such Plaintiff's own dysfunctional behaviour.
>
> (e) That CCTV installations were helpful in later identification but of little use in preventing actual violence, particularly violence fuelled by alcohol.
>
> …
>
> (i) That each of the Plaintiffs had close family members who were connected with those incidents of violence and since each of the Plaintiffs accepted that their guests would be made up of their family members, it was therefore reasonable to conclude that the mischief was likely to be repeated.

> (j) That the Plaintiffs' claims were contaminated by reason of their connection to the perpetrators of violence, three of whom were immediate family members and one of whom was a Plaintiff, namely Martin McDonagh and that their Civil Bills were accordingly dismissed".

The relevant statutory provisions

[11] Article 3(1)(a) of the Race Relations (Northern Ireland) Order 1997 defines discrimination, as follows: -

> "(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if—
>
> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons…".

Article 5(2) of the Order specifically includes the Irish traveller community as a racial group.

[12] In relation to the provision of goods, facilities and services, where these include access to and use of any place which members of the public are permitted to enter and facilities for entertainment, recreation and refreshment, article 21(1) of the 1997 Order provides: -

> "(1) It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services—
>
> (a) by refusing or deliberately omitting to provide him with any of them; or
>
> (b) by refusing or deliberately omitting to provide him with goods, facilities or services of the same quality, in the same manner and on the same terms as are normal in his case in relation to other members of the public or (where the person so seeking belongs to a section of the public) to other members of that section".

[13] Under article 32(1), anything done by a person in the course of his employment shall be treated for the purposes of the Order as having been done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval. Article 32(5) provides a defence for such an employer, as follows: -

> "(5) In proceedings brought under this Order against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from—
>
> (a) doing that act, or
>
> (b) doing, in the course of his employment, acts of that description".

[14] The 1997 Order must be interpreted in accordance with the provisions of Council Directive 2000/43/EC of June 2000 which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin. Article 8 of the Directive requires changes to the burden of proof in race discrimination cases, as follows: -

> "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".

[15] To comply with this provision, regulation 43 of the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 amended the 1997 Order by the insertion of article 54B in respect of the burden of proof, as follows: -

> "54B. - (1) This Article applies where a claim is brought under Article 54 and the claim is that the respondent –

(a) has committed an act of discrimination, on grounds of race or ethnic or national origins which is unlawful by virtue of any provision referred to in Article 3(1B)(b) to (d), or Part IV in its application to those provisions, or

(b) has committed an act of harassment.

(2) Where, on the hearing of the claim, the claimant proves facts from which the court could, apart from this Article, conclude in the absence 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".

The appellants' arguments

[16] Five principal arguments were made on behalf of the appellants. They may be summarised as follows: -

1. The learned trial judge adopted the wrong approach to the burden of proof and wrongly imported into her consideration of the case the concept of reasonableness of the respondent's actions;

2. The judge ought to have constructed a hypothetical comparator and to have tested the validity of the respondent's actions in cancelling the reservations against that benchmark;

3. The respondent's blanket ban on all functions organised by Irish travellers involved a discriminatory stereotypical assumption concerning the travelling community which the judge failed to recognise;

4. The judge's conclusions set out in paragraph (x) of the case stated were not supported by evidence and therefore constituted perverse findings of fact;

5. The judge misdirected herself in law by concluding that an issue of vicarious liability arose in the present case.

The arguments on the first three of these issues were presented by Ms Higgins QC and on the latter two by Mr Patterson.

The correct approach to the burden of proof and the need for a hypothetical comparator

[17] In *Igen v Wong* [2005] 3 All ER 812 the English Court of Appeal considered equivalent provisions to article 54B of the 1997 Order that had been inserted, as a result of the Directive, in the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995. These are in broadly the same terms as article 54B. The Court of Appeal held that the English statutory amendments required the tribunal to go through a two-stage decision-making process if the complaint was to be upheld. The first stage required the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination against the complainant. The second stage, (which only came into effect if the complainant had proved those facts) required 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.

[18] In an Annex to its judgment the Court of Appeal provided guidance as to the correct approach to be taken to the incidence of the burden of proof in the sex discrimination context. This is referred to as an amendment to the *Barton* guidance and is so described because it modified guidance given by the Employment Appeals Tribunal in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 at 337–338. Since we consider that the guidance provided in the Annex can be applied *mutatis mutandis* to all forms of discrimination we shall set it out in full: -

> "(1) Pursuant to s 63A of the SDA, it is for the claimant 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 respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Pt II or which by virtue of s 41 or s 42 of the SDA is to be treated as having been committed against the

claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant 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 claimant 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 'could' in s 63A (2). 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 before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) 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 SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA.

(8) 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) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) 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.
>
> (11) 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.
>
> (12) 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 a ground for the treatment in question.
>
> (13) 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."

[19] The judge in the present case has not set out her reasoning in the manner contemplated by the guidance in *Igen* and we would commend to future tribunals close adherence to this. For the purposes of the present case the first question that the judge should have articulated was, 'Have the plaintiffs proved on the balance of probabilities facts from which I could conclude, in the absence of an adequate explanation, that the respondent has committed

an act of discrimination against them?'. In addressing this question, it would be necessary for the judge to bear a number of ancillary issues in mind. First, that it is unusual to find direct evidence of discrimination. Secondly, that the conclusion on the preliminary issue will usually be a matter of inference to be drawn from the primary facts. Thirdly, it must be clearly understood that the plaintiffs do not have to discharge a final burden, merely whether on the facts as found, it is possible to draw the inference of discrimination and finally it must be assumed at this stage that no adequate explanation for the discrimination exists.

[20] Posing the question in the manner suggested in the preceding paragraph inevitably prompts consideration of whether it can be dealt with as a composite issue or whether it must be dealt with in its component parts. Committing an act of discrimination involves not only treating the plaintiffs less favourably; it must also be shown (albeit, at this stage, only to the limited extent explained in *Igen*) that the decision was taken on racial grounds. Ms Higgins contended that, in order to follow the *Igen* approach correctly, the judge was bound to construct a hypothetical comparator and to test the case against that benchmark. To fail to do so incurred the risk of neglecting the first part of the question (*viz* whether there had been less favourable treatment) by going directly to the second part – whether, if there had been, this had been on racial grounds.

[21] Whether the two component parts of the first question must always be dealt with separately was considered by the House of Lords in *Shamoon v Chief Constable* [2003] UKHL 11. On this subject Lord Nicholls of Birkenhead said: -

> "[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."

[22] In the present case no actual comparator for the plaintiffs was identified for the district judge. Indeed, it seems at best doubtful that the issue of comparators was directly addressed at all. Notwithstanding this, Ms Higgins argued that the judge should have identified some group from the settled community which had made reservations with the Royal Hotel and ought to have examined the question whether a blanket ban would have been imposed on this group if some members of the group or their relatives had been identified as being involved in incidents of violence at earlier events in the hotel. If she had done so, Ms Higgins argued, the judge would have concluded that a blanket ban would not have been imposed by the respondent on such a comparator group.

[23] Quite apart from the difficulties that such an exercise would have posed for the judge since this issue had never been canvassed before her, we do not consider that this was required in order to properly address the first question. The essential issue in this case was whether the cancellation of the functions was made on racial grounds or whether it was because of the apprehension of violence such as had occurred on 29 January 2004 and earlier occasions.

[24] Ms Higgins argued that the effect of Peter Gibson LJ's judgment in *Igen* was that a comparator would be required in all but exceptional instances and that these were essentially confined to cases where the unlawful treatment was beyond dispute. In support of this claim she referred to paragraph 34 of his judgment where he said: -

> "[34]…That a comparison must be made is explicit in the language of the definition of discrimination…In s 1(1) (a) of the RRA one finds 'he treats that other less favourably than he treats or would treat other persons'. The comparison must be such that the relevant circumstances of

> the complainant must be the same as or not materially different from those of the comparator. It is trite law that the complainant need not point to an actual comparator. A hypothetical one with the relevant attributes may do. Our attention was drawn to what was said by Elias J, giving the judgment of the EAT in *The Law Society v Bahl* [2003] IRLR 640 at 660 (paras 162, 163). There it was held that it is not obligatory for ETs formally to construct a hypothetical comparator, though it was pointed out that it might be prudent to do so and that the ET might more readily avoid errors in its reasoning if it did so. Similarly, when *Bahl*'s case went to appeal, this court said ([2004] EWCA Civ 1070 at [156], [2004] IRLR 799 AT [156]) that it was not an error of law for an ET to fail to identify a hypothetical comparator where no actual comparator can be found. However, this court also said that not to identify the characteristics of the comparator might cause the ET not to focus correctly on what Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at [7], [2003] 2 ALL ER 26 AT [7], [2003] ICR 337 called 'the less favourable treatment issue' (*viz* whether the complainant received less favourable treatment than the appropriate comparator) and 'the reason why issue' (*viz* whether the less favourable treatment was on the relevant proscribed ground). The importance of a failure to identify a comparator or the characteristics of the comparator may vary from case to case…".

[25] In our judgment, Peter Gibson LJ was not addressing in this passage the question whether a hypothetical comparator will in all but exceptional circumstances be required in order to address the compendious question whether there has been discrimination on the grounds of race. The emphasis that he placed on the need for a comparator related to the circumstances where the first part of the question (*viz* whether the complainant received less favourable treatment) required to be dealt with separately. One can quite see that, where it has been concluded that the two parts of the question must be addressed separately, the 'construction' of a hypothetical comparator where no actual comparator exists will usually be helpful in exposing the arguments as to whether there has been less favourable treatment. That is a very different matter from saying that the exercise of constructing a hypothetical

comparator will invariably be required in order to deal with the question in its comprehensive form.

[26] Before deciding whether a comparator is required, in suitable cases it will be appropriate to address the anterior issue, 'should the matter be dealt with as a single issue or is it necessary to examine each of its component parts separately?'. Indeed, there will be cases where the answer to the question, was the complainant treated in the way that she was on grounds of race, sex or disability is so obviously 'No' that it will be unnecessary to address at all the issue of whether the treatment was less favourable. This is, no doubt, what Lord Hope of Craighead had in mind when he referred in paragraph [49] of his opinion in *Shamoon* to the issue as to whether the treatment which the appellant received was on the ground of her sex as "the primary question".

[27] Unfortunately, the learned trial judge did not deal with the matter in this way and it is difficult to be certain that, if she had done so, she would have concluded that the plaintiffs had not proved on the balance of probabilities facts from which she could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination.

[28] At the close of the case for the plaintiffs the judge ought to have addressed this question and if she had then decided that the matters proved by the appellants could have allowed her to conclude that the respondent had committed an unlawful act of discrimination on racial grounds, the burden of proof would have moved to the respondent. It would be for him to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

[29] Consistent with the second part of the guidance contained in the Annex to *Igen* the judge ought to have approached the second question (*viz* whether the respondent had discharged the burden of proof) on the basis that it was necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatever on the grounds of race, since 'no discrimination whatsoever' is compatible with the burden of proof Directive. She would also require to keep in mind that, since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would expect cogent evidence to discharge that burden of proof. In this context the words of the Employment Appeal Tribunal in *Piperdy v UBM Parker Glass* (1978, unreported), as recorded in *Owen & Briggs v James* [1981] ICR 377, 383 and endorsed by this court in *The Belfast Port Employers Association v Fair Employment Agency* [1994] NIJB are pertinent: -

> "It is the job of the tribunal, not just to accept the denial of discrimination and not just to accept the

> reasons which are put forward by an employer without question, but to see whether behind what is said there has been, in truth, discrimination of the kind which the Act now makes unlawful. This really is not an easy task. It does require careful consideration of the relevant material."

[30] The appellants argued that, before the judge could conclude that the burden of proof cast on the respondent had been discharged, a detailed examination of the violent events of 29 January 2004 would have been required. A close and searching scrutiny of the claims that some of the plaintiffs and members of their families were involved would have to be undertaken in order "to justify the assumption that any members of the travelling community who regularly used the hotel for functions and were involved in the violence on that night were likely to engage in further violence". It was suggested that closed circuit television footage (which had been referred to during the hearing but had not been produced in court) would have to be inspected to test the allegation that Martin McDonagh and Brigid McDonagh's husband had been involved in the violent events of 29 January. It was submitted that, absent such evidence, the judge simply could not have been satisfied to the requisite degree that the cancellation of the functions had been made for a race neutral reason.

[31] Ms Higgins submitted that any such claim was in any event fatally undermined by the availability to the respondent of other measures that would have allowed the reservations to be held, notwithstanding the avowed reluctance of his employees to staff them. These included checking guests for offensive weapons, barring individual members of the travelling community who had been identified as having been involved in violent incidents at functions or ensuring that guests were not served excess alcohol. Moreover, Ms Higgins suggested, the failure of the respondent to take the steps outlined in paragraph (xvii) of the case stated gave rise to the inference that the respondent's decision was in fact based on racial grounds.

[32] We do not accept these submissions. As we have said, the essential issue in this case was whether the cancellation of the functions was made on racial grounds or whether it was because of the apprehension of further violence such as had occurred on 29 January 2004 and earlier occasions. That issue does not necessarily depend on whether any of the plaintiffs or members of their families were *actually* involved in violence. Their participation in violence or their complete innocence of involvement in any of the earlier incidents is only relevant in so far as it sheds light on the motivation of the respondent in cancelling the reservations and the reasons that the employees refused to staff events that were due to be attended by members of the Irish travelling community. In our judgment there was, in the facts found by the judge, ample material on which she could reach a conclusion as to whether

the respondent had discharged the onus of showing that the cancellation of the reservations was not made with a racial motive.

[33] The judge should have addressed that question directly rather than becoming distracted by a discussion of what it was reasonable for the respondent, given his limited resources, to do. What could or could not be fairly expected of the respondent was again only relevant in so far as it impinged on the question, 'Why were the reservations cancelled'.

[34] Subject to the arguments on the perversity of her factual findings (which we shall deal with below), we are satisfied that if the judge had confronted this question directly, on the findings that she had made, there is only one conceivable answer that she could have reached and that was that the cancellations had occurred because of the fear of future violence and that they were entirely unrelated to the fact that the appellants were members of the travelling community. The judge found that an extremely violent incident took place involving the respondent's staff; that the entire staff had been put in fear; that the doormen were overwhelmed; and that all of the staff collectively decided not to work at any further traveller functions because they were in fear for their personal safety. These findings, allied to the fact that until 29 January 2004 members of the travelling community had, despite incidents of violence, been permitted to make reservations at the hotel and that they had been permitted to frequent the hotel after the cancellations, albeit not on foot of any reservation for an organised event, make it unthinkable, in our opinion, that the decision to cancel these reservations or to permit further reservations to be made was taken on racial grounds.

Stereotypical assumptions

[35] Ms Higgins claimed that the respondent's blanket ban on all functions organised by Irish travellers involved a discriminatory stereotypical assumption concerning the travelling community, namely that they had a greater propensity to outbursts of extreme violence and posed a greater threat to the safety of staff than members of the settled community. In advancing this claim she relied on *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] IRLR 115 HL in which there was a challenge to the policy of scrutinising visitors from the Czech Republic. In that case it was alleged that immigration officers brought a greater degree of scepticism to bear on applications from the Roma for leave to enter the United Kingdom than on applications from other persons and that they consequently tended to question the Roma for longer periods and more intensively. Ms Higgins suggested that this approach was mirrored by the respondent's stereotypical assumption that members of the Irish travelling community were more prone to violence than members of the settled community. She referred us to the observations on stereotyping made by Baroness Hale (with whom the rest of the House of Lords agreed): -

"74…The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.

…

82 On the factual premises adopted by the Court of Appeal, this conclusion must be correct as a matter of law. The Roma were being treated more sceptically than the non-Roma. There was a good reason for this. How did the immigration officers know to treat them more sceptically? Because they were Roma. That is acting on racial grounds. If a person acts on racial grounds, the reason why he does so is irrelevant…But it goes further than this. The person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But 'what may be true of a group may not be true of a significant number of individuals within that group' (see Hartmann J in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690, paragraph 86, High Court of Hong Kong). The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. As Laws LJ observed, at paragraph 108:

> 'The mistake that might arise in relation to stereotyping would be a supposition that the stereotype is only vicious if it is *untrue*. But

> that cannot be right. If it were, it would imply that direct discrimination can be justified ...'"

[36] We do not consider that the facts in the *Roma* case are in any way analogous to those that arise in the present appeal. Unlike the position of the Roma who were subject to more stringent and sceptical treatment simply because they were Roma, here the members of the travelling community were refused reservations because of the well founded fear that if events which had been reserved by them took place, staff would once more be put in peril. As we have said members of the travelling community were permitted to use the hotel's facilities both before and after the cancellation of the reservations. There is simply no evidence that the cancellations came about because either the proprietor or the staff of the hotel had made any assumptions about the travelling community. On the contrary, those decisions were based on what had occurred and what they anticipated would happen again, not on any perception about the propensity of members of the travelling community to violence.

Perversity of factual findings and vicarious liability

[37] We can deal with these arguments briefly. The claims that the judge had made perverse findings of fact or that she had wrongly considered that an issue of vicarious liability arose were not raised in the requisition to state a case. The hearing before the district judge was not recorded and we have no means of assessing the averment that the evidence did not support the finding made by the judge. In an appeal by way of case stated we must accept what the judge has found as a fact unless there is material that would demonstrate its non-viability. The unsupported statement of counsel to that effect cannot suffice.

[38] Likewise, the claim made that the judge was wrong to deal with the issue of vicarious liability can only be considered by us if that matter featured in the case stated. The judge was not asked to deal with that issue by the requisition that was presented to her. We cannot now entertain it.

Conclusions

[39] Although the judge did not approach the question whether the respondent discriminated against the appellants in the correct way, we have concluded that, on the facts as found, only one conclusion was open to her and that was that the decision to cancel the appellants' reservations and not to take further reservations was not taken for reasons associated with the appellants' membership of a particular racial group.

[40] We do not consider that the first question posed in the case stated is germane to the issues as we have discussed them in this judgment and we do not propose, therefore, to answer it. We answer the second and third questions 'Yes' and dismiss the appeal.