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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

_____

SURESH DEMAN

Appellant

-and-

QUEEN'S UNIVERSITY BELFAST

Respondent

_____

Before: McCloskey LJ, McFarland J and Rooney J

_____

Representation

Appellant: unrepresented
Respondent: Mr Barry Mulqueen, of counsel, instructed by Pinsent Masons Solicitors

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McCLOSKEY LJ (*delivering the judgment of the court*)

Preface

This is the unanimous judgment of the court to which all members have contributed.

Introduction

[1] The Appellant describes himself as an academic expert in the broad field of economics and finance. He is a citizen of India, now aged 67 years. He holds a doctorate and other qualifications. He appears to have been involved in academia during all of his professional life. He has worked in several countries. He was first employed by the Respondent in February 1994. He has made multiple publications. He has evident extensive undergraduate and postgraduate teaching experience. He has engaged in various types of research. All of the foregoing, a mere snapshot of the Appellant's career, is described in the voluminous papers before this court, which the judicial panel has considered in full.

[2] In September 2017 the Appellant instituted proceedings against Queen's University Belfast (*"the Respondent")* for alleged breaches of:

a. Articles 3 and 4 of the Race Relations (NI) Order 1997 (discrimination on the ground of race and discrimination by victimisation - *"the 1997 Order"));* and

b. Article 3 of the Fair Employment and Treatment (NI) Order 1998 (discrimination on the ground of religion – the "*1998 Order*").

[3] On 18 October 2019 the Fair Employment Tribunal (*"FET")* unanimously decided:

(a) Whereas the Appellant's complaints had been lodged out of time an extension would be granted.

(b) The Appellant had not been treated less favourably on the grounds of:

ii. His race or his religion
iii. A protected act for the purposes of the 1997 Order;
iv. A protected act for the purposes of the 1998 Order.

The Appellant appeals to this court against the decision of the FET.

Some History

[4] During a number of years the Appellant has engaged in various forms of litigation against his former employer, the Respondent. These have given rise to a series of employment tribunal claims. One of these generated the decision of a different constitution of this court in *Deman v Association of University Teachers and Officers at Queen's University and Others* [2009] NICA 29. This was an appeal by case stated against the decision of the Fair Employment Tribunal dismissing the Appellant's case of discrimination on the grounds of sex, religion and political opinion and unlawful victimisation. According to the judgement of this court the Appellant is of Indian origin and is perceived to be a Hindu. His employment with the Respondent, initially as a lecturer, dates from February 1994. One of his grounds of appeal alleged bias against the Tribunal. Para [6] of the unanimous judgment of the Court of Appeal records:

> "The appellant complained of an institutionalised culture of general and global bias existing in tribunals in Northern Ireland and the judiciary was no exception. He made allegations of bias against the former President and Vice-President of the Tribunals and the current President and other full time members of the panel of Chairmen. He made 30 allegations of apparent bias against the Chairman."

Rejecting this ground the court stated at [11]:

> "The appellant's generic attack on the independence and impartiality of the tribunals in Northern Ireland is not one which a fair-minded and informed observer would conclude established that there was a real possibility of bias in the Tribunal. Rather a fair-minded and informed observer would conclude that it represented a view indicating an inability on his part of the appellant to take a fair and dispassionate view on the fairness of the Tribunal procedural system which is subject to rules and practices designed to achieve a fair system of adjudication. In the result a fair-minded observer would view the more specific allegations made by the appellant with considerable scepticism. The appellant's generic criticism is so lacking in justification and expressed in such unfairly trenchant terms that it seriously calls into the question the balance and fairness of his other criticisms. In any event, on a case stated this court is bound by the findings of fact of the Tribunal as set out in the case stated. Unless the conclusions are manifestly perverse, illogical and against the weight of the evidence there is no material on the case stated on which to conclude that the Tribunal erred in law in refusing the recusal application."

[5] By a decision of the United Kingdom Employment Appeal Tribunal (the "*EAT*") promulgated on 01 September 2006 the Appellant became the subject of a restriction of proceedings order. The judgment of the President records that the Appellant had brought 40 claims for (mainly) race discrimination against higher education institutions, trade unions and others, had engaged in over 40 appeals to the EAT and had been repeatedly criticised for the manner of his conduct of those proceedings. It further notes that his period of employment with the Respondent was between February 1994 and October 1995, as a lecturer, continuing, at para [2]:

> "In the course of his employment there and following its termination he brought proceedings against a number of parties, including the University itself, in the Fair Employment Tribunal and the Industrial Tribunal: as at March 2003 there had been a total of 19 complaints to the [FET] (naming 79 respondents) and 21 complaints to the [IT] (naming 68 respondents)."

His Tribunal litigation activity in England spanned the period 1996 to 2005.

[6] In making its order the Tribunal concluded that the statutory test, namely that in bringing the relevant proceedings the Appellant had acted vexatiously and had done so habitually and persistently, was satisfied. Its judgment adds at para [172]:

> "We believe that it is in fact right to go rather further. We believe that in making the applications in question for posts at the respondent institutions Mr Deman was decreasingly concerned actually with achieving appointment and

> increasingly concerned with pursuing a campaign to demonstrate what he believed was discrimination in the world of higher education …
>
> No doubt in principle Mr Deman wanted to be employed, but in practice that goal was becoming increasingly secondary to other goals that he believed could be achieved through litigation. At a general level those goals are the exposure of bias and discrimination in the world of higher education and in the Tribunal system …
>
> It seems to us that litigation has to a considerable extent become an end in itself."

The Tribunal adopted the following passage from the judgment of Lord Bingham LCJ in *Attorney General v Barker* [2000] 1 FLR 759 at para [19]:

> "'Vexatious' is a familiar term in legal parlance. The hallmark of a vexatious proceedings is in my judgement that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to submit the Defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different form the ordinary and proper use of the court process."

[7] The judgment of the EAT then provides four specific illustrations of vexatious applications made by the Appellant in both first instance and appeal proceedings, at para [183]:

> "First, we are satisfied that Mr Deman has persistently and habitually made vexatious applications for adjournments to proceedings in both the Employment Tribunal and the Appeal Tribunal. The applications have been vexatious because they have been made on grounds which were inadequate, confusing and sometimes spurious or disingenuous and because they have caused serious delay and disruption to the cases in which they have occurred."

The instances which follow include mainly adjournment applications based on no, or no adequate, medical evidence. Two of the other three illustrations of vexatious applications were applications for witness orders and applications for review or reconsideration: see paras [184] and [186]. The final illustration is described at para [185]:

> "Thirdly, we regard Mr Deman's applications to a large number of Tribunals (both Employment Tribunals and Appeal

> Tribunals) to recuse themselves …. on grounds of bias as vexatious …
>
> The applications were in our view invariably ill-founded, as indeed in many of the cases the Appeal Tribunal held. Mr Deman would typically allege bias either on the basis simply that the Chairman or Tribunal in question had ruled against him or on the basis of a suspected association with the protagonists in the supposed campaign against him or of racial origins."

[8] The Appellant's attempt to appeal against this order failed: see *Deman v HM Attorney General* [2007] EWCA Civ 257. Much of the judgment of the EAT resonates powerfully in the present case.

The Appeal Proceedings

[9] It is appropriate to preface this section of the judgment by recalling what was stated in the recent decision of this court in *Taylor v Department for Communities and the Department for Work and Pensions* [2022 NICA 8 at para [23]:

> "It is convenient to summarise the main duties of every claimant in every form of civil litigation (and, indeed, in other litigation spheres). They are: to comply with rules of court; to observe all court orders; to apply timeously for relaxation where time limits cannot be observed for good reason; to assemble all material evidence in admissible form; to be fully candid; to cooperate fully with the court at all times; and to actively facilitate the furtherance of the overriding objective. Contemporary litigation is based on a partnership between litigant and court."

These duties derive from a combination of the common law and the overriding objective. We would add to the *Taylor* list another duty (which did not arise in that case), namely the duty of every litigant to treat court and tribunal staff and judicial officers courteously. Where there are egregious breaches of any of the aforementioned duties, individually or collectively, recourse to the power to dismiss proceedings on the ground of abuse of process or to stay proceedings or to make appropriate costs orders may be appropriate.

[10] The management of this appeal posed many challenges for the court. A snapshot of these can be gained from perusing one of the earlier case management orders of this court, dated 06 May 2021 (reproduced at Appendix 1) and its recent ruling (Appendix 2). In brief, the Appellant, who had the assistance of a supporter in both the proliferation of electronic communications with the court and the other party and each of the remote video listings arranged by the court from time to time, did not appear particularly interested in pursuing his appeal, expeditiously or at all, from its inception.

[11] The court is of the clear view that following service of his Notice of Appeal the Appellant engaged in delaying and diversionary tactics. Three illustrations will suffice. The first is his threat to challenge a pure case management order of this court by appealing to the United Kingdom Supreme Court, rather than simply complying with the order, which was routine in nature. The Appellant at no time withdrew this threat. At the time of writing this judgment it has not materialised.

[12] The second illustration relates to substantive listings of the appeal in this court. The lifetime of this appeal exceeds 28 months. During that period it has been listed for substantive hearing four times. Every substantive listing, in common with every attempt by the court to list the appeal for hearing on other dates, was frustrated by the Appellant. The two recurring themes in this respect were (a) his lengthy absences from the United Kingdom in India and (b) his asserted health. This is amply – though only partly-demonstrated by the terms of the order of the court dated 06 May 2021 (at Appendix 2). As appears from this order, the court invited the parties' representations on the issue of determining the appeal on paper. The Respondent agreed to this course. However, the response of the Appellant was predictable, opposing it vehemently. In the most recent phase of the appeal proceedings the court, by its order dated 15 October 2021, offered the parties a total of 28 possible substantive hearing dates in January and February 2022. This order stated that "*… the hearing of this appeal will not be delayed beyond February 2022*". Following the parties' responses, by its further order dated 21 October 2021, the substantive hearing date of 02 March 2022, with a preceding review listing on 16 February 2022, was confirmed. As before, both listings were of the hybrid variety. The Respondent's legal representatives attended on both dates. The Appellant did not attend either physically or remotely, nor did any representative on his behalf. This gave rise to the ruling of the court at Appendix 2 and an associated order. Once again, the Respondent agreed to the suggested paper determination of the appeal.

[13] The Appellant's response was, in substance, a replica of his earlier rejection of this suggestion. In the span of 17 pages he made no attempt to address the relative merits and disadvantages of oral hearing and paper adjudication. Rather, once again, he concentrated his efforts on allegations of institutional bias and race discrimination by the judiciary and Tribunal and court administration in Northern Ireland. This is illustrated in the following passage:

> "It is important to shade [sic] some light on the history of the Claimant's claim against the institutionally religious and racist public bodies and its agents who are engaged in procedural wrangling in collusion with the Roman Catholic members of the judiciary to deny the Claimant legal representation and a hearing on merit of his claim …
>
> Polarisation along the religious lines could be gleaned by the fact that so far all the Defendants in Claimant's appeal are white, Roman Catholic who subjected him consciously and subconsciously religious and racial discrimination and victimisation since they had nothing to fear due to big clout they have as the actors of the State who overtly put in place

> people a Regime of Roman Catholics persuasion in top legal and administrative positions by way of positive discrimination."

In a later passage he alleges:

> "It would appear to an independent observer that LJ McCloskey has pecuniary and non-pecuniary interest in this appeal and that's why he is in great rush to decide the appeal on paper by a panel consisted of former QUB alumni."

[14] A third illustration is provided by the Appellant's application for the recusal of the writer of this judgment. The Appellant chose to invest much time and energy in this strategy rather than getting on with prosecuting his appeal. The Appellant composed a detailed skeleton argument (15 pages) in support of this application. Its thrust and tenor can be gleaned from certain of its contents. First, he asserted that all of the Respondent's witnesses at first instance, the tribunal president, the tribunal chairman, the court staff and "*… the members of the judiciary involved at various stages of the judicial process …*" with one exception, together with the Respondent's legal team members, are of Roman Catholic persuasion. Second, he accused the writer of "*tainted mindset*" without particulars. Third, he made the bizarre accusation that a case management order in another case, entirely in his favour, was in some unspecified way "*oppressive*". Fourth, he alleged bias on the basis of this court's description of "*… a veritable proliferation, indeed a bombardment, of emails to the court from Dr Deman …"*, in the other case. Fifth, he described the hearing giving rise to the aforementioned order in his favour as [sic] "*… worse than any du-bay Hearing in the Military Courts …*", followed by another unparticularised allegation that the outcome (entirely in his favour) was somehow "*adverse to*" him. Finally, the ultimate object of this application was expressed to be the setting aside of this court's entirely routine case management order dated 14 January 2021, simply devised an orthodox timetable requiring both parties to take specified pre-hearing steps which is mentioned in summary terms in the recital to the lengthy later order reproduced in Appendix 1.

[16] The Appellant has repeatedly alleged that the court has failed to adjudicate on his recusal application. This is incorrect. As recited in its order of 06 May 2021 (Appendix 1):

> "… The judicial panel considers that the Appellant's recusal application is devoid of merit and refuses it accordingly."

We shall, notwithstanding, treat the Appellant as renewing this application. It is the unanimous decision of the court that it be refused.

[17] The unanimous decision of the court is that the recusal application must be refused. It is refused because it does not possess a scintilla of merit. It is replete with bare and unparticularised assertion and pure conjecture. It is characterised by its offensive and intemperate language. It is advanced in an essentially fictitious vacuum which overlooks the basic material facts. It rehearses the governing legal principles without any serious attempt to apply these to the relevant factual matrix. It resolves to a regrettable diversion which has given rise to the unnecessary investment of limited public funds by the judicial

panel, the court administration and the Respondent. We conclude, without hesitation, that the hypothetical independent, fair minded and properly informed observer would not entail the slightest rational reservation that this judicial panel would be, in the correct legal sense, biased against the Appellant in the determination of his substantive appeal. The Appellant's recusal application is dismissed accordingly. These reasons mirror those underpinning the refusal decision of May 2021.

Determining this Appeal: Process

[18] Given the history recited above the question which the court has had to confront squarely at this stage is whether to decide this appeal as a paper exercise. In determining this question we have taken as our starting point that the Appellant has no statutory right to an oral hearing. Nor can he invoke an absolute common law right to this effect. See De Smith's Judicial Review (8th Edition), para 7-065 and the cases cited therein. The overarching test is whether fairness requires an oral hearing. This will invariably be an intensely contextual question. Emerging from the reported cases are touchstones such as whether there are disputed factual issues. In a Parole Board context: see *R v Parole Board, ex parte Smith and West* [2005] UKHL 1. Valuable guidance can be derived from certain passages in the judgment of Lord Bingham of Cornhill, with whom all other members of the judicial panel concurred:

> "[27] The Parole Board's acceptance of a public law duty to act in a procedurally fair manner when resolving challenges to license revocations prompts the inevitable question: what does fairness in this context require? [After quoting from Lord Muscill in Doody] …
>
> [28] Further guidance was given by Mason J in **Kioa v West** [1985] 60 ALJR 113, 127:
>
> > 'In this respect the expression 'procedural fairness' more abruptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual concerned in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations ….'
>
> …….
>
> [31] While an oral hearing is most obviously necessary to achieve a just decision in a case where facts are in issue which

> may affect the outcome, there are other cases in which an oral hearing may well contribute to achieving a just decision. …
>
> Although ruling in a very different legal context, the Supreme Court of the United States …. In *Goldberg v Kelly* 297 US 254, 269 (1970) helpfully described the value of an oral hearing:
>
> > 'Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mould his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.'"

On the particular facts of the two appeals, the absence of an oral hearing was found to be unfair.

[19] In *R v Secretary of State for Trade and Industry, ex parte Lonrho* [1989] 1 WLR 525, where the legal challenge centred on the Secretary of State's delay in publishing a report of an investigation into a proposed acquisition of companies in a context where Lonrho was urging swift publication, Lord Keith, delivering the decision of the House of Lords, stated at 535G/H:

> "Lonrho's arguments that early publication would have no adverse effect and that there were overwhelming public interest reasons in favour of early publication could be and were fully set forth in written submissions of inordinate length to which oral representations added nothing."

In *R (Osborn) v Parole Board* [2014] AC 1115 the Supreme Court reiterated the general rule that exhaustive definition of the circumstances in which an oral hearing is required at common law is not possible. The court repeated some of the familiar illustrations.

[20] In determining this question we consider the following features of the present appeal to be significant. First, neither the Appellant nor any other person will be giving oral evidence to this court. Second, it will not be the function of this court to engage in any fact finding. Third, as set out more fully *infra*, the jurisdiction of this court is delineated by the umbrella statutory question of whether the first instance tribunal has erred in law in any of the respects advanced: this is a pure error of law appeal. Fourth, the Appellant has assembled voluminous written submissions in support of his appeal. Fifth, the appeal is neither factually nor legally complex.

[21] Generally, where an appeal has all of the foregoing features it will *prima facie* be a strong candidate for paper determination by the court. However, this cannot be an absolute rule. The question for this court is whether this appeal, having the features noted, can be determined in a manner fair to both parties by the adoption of the paper

mechanism. We ask ourselves whether this will deprive the Appellant of his common law right to a fair appellate process. The court has no hesitation in supplying a negative answer to this question. Furthermore, reflecting another of the touchstones sometimes applied, we consider that there is no identifiable aspect of an oral hearing which would enhance the quality of our decision on the merits. For these reasons the court has determined to adjudicate on this appeal on the basis of the parties' written submissions, considered in tandem with all other papers.

[22] For these reasons we have decided that this appeal can be fairly decided by a paper exercise.

The Underlying Proceedings

[23] The Appellant initiated tribunal proceedings against the Respondent in the following circumstances. In brief compass, in 2017 the Respondent advertised the post of "*Professor in Finance Queen's Management School*". The Appellant applied for this post. In May/June 2017 the Respondent's selection panel considered his application. By an electronic communication dated 05 June 2017 a member of the Respondent's Personnel Department (Mrs Short) informed the Appellant that his application had been unsuccessful:

> "Thank you for your recent application in relation to the above post. After due consideration by the Appointment Panel, I regret to inform you that your application was not successful on this occasion."

[24] The key averments in the witness statement compiled and signed by Mrs Short in the Tribunal proceedings are these:

> "… my main role [was] to ensure that the procedure is properly followed …
>
> The Claimant submitted his application on 09 May 2017 …
>
> Following the closing date for applications I sent to each Panel member the relevant recruitment documentation …
>
> [The Claimant's] application was processed as with every other applicant …
>
> The shortlisting meeting was chaired by Professor Adrian Scullion … each candidate was assessed against the criteria … as with all academic recruitment exercises the main discussion centred on their research activity, ie quality and outputs (publications and income) and whether CVs reflected profile of a Chair …

> I attended the shortlisting meeting …
>
> The Claimant states that his publications between 1991–2000 show a sustained publication record. I can confirm that the assessment of the Panel was that the Claimant's research output between 1991–2000 and subsequent research outputs did not represent a sustained track record of publication of international excellence expected for a Chair appointment. The Claimant stated that his research output was rated as four stars by Nottingham University but the Panel agreed that the evidence in his application did not support this assertion …
>
> The Claimant states that he has published three books. I can confirm the Panel considered reference to the books, none of which was known by the subject experts or rated highly in terms of quality and therefore did not demonstrate a sustained publication record of international excellence expected for a Chair appointment …
>
> The Claimant makes reference to the fact that he has attended many conferences and been a keynote speaker. I can confirm that the Panel considered this evidence but this in itself does not demonstrate a sustained publication record of publication of international excellence …
>
> The Panel noted he had not published any papers within the current Research Excellent Framework (REF) period … an internationally recognised system for assessing the quality of research …
>
> Furthermore, the Panel agreed that the quality of the Claimant's research, in its entirety, was not at the quality required for appointment to a Professor post in Queen's University. The Claimant's reference to his roles on editorial boards and as a referee for academic journals do not demonstrate a sustained publication record of international excellence in this field of specialisation."

[25] The evidence before the Tribunal, in addition to the foregoing, included witness statements of the Pro Vice Chancellor (Faculty of Arts, Humanities and Social Sciences), who was the chair of the selection panel, the several other members of this panel and the oral testimony of these deponents. Each vehemently denied the Appellant's central allegations. In addition there was voluminous documentary evidence. This court has considered all of the foregoing material.

[26] In response to the Appellant's request for feedback the Respondent informed him that he had failed to satisfy two essential criteria namely:

a) A sustained publication record of international excellence in the field of specialisation; and

b) A record of securing external research funding[1].

[27] The Appellant was initially informed, incorrectly, that no candidate had been shortlisted. In fact the Respondent had shortlisted three candidates, two white males and one male of Chinese origin. No appointment to the post in question was made by the Respondent. The Appellant deployed the two Christian males as comparators, claiming that they were not as suitable under the appointment criteria as him[2]. He claimed that he should have been shortlisted and should have been appointed to the post. The Appellant's case before the FET alleged he had not been shortlisted and appointed on the grounds of his religion and/or race. The Appellant further asserted that his successful claims against the Respondent for wrongly failing to confirm him in previously in another post was a reason for the Respondent's failure to shortlist him[3].

The Tribunal's Findings and Conclusions

[28] What follows from this point to para [41] is distilled from the text of the impugned decision. The FET noted that the Appellant's evidence and cross examination of Respondent witnesses showed he believed people who were from a white Christian background were predisposed to discriminate against him on the grounds of race and/or religion. The Appellant believed the shortlisting panel had an inherent tendency, rooted in the background of those members of the panel, to discriminate against him for his race and/or religion. The Appellant criticised the Respondent's legal team and the members of the FET panel in the same terms. No evidence was adduced to connect any of these claims to the Appellant's case[4].

[29] The application form was clear and stated that each candidate had to provide specific information to satisfy each of the 18 criteria. Failure to satisfy the essential criteria would result in a candidate not being shortlisted for interview[5]. The first four essential criteria were:

(a) A PhD in finance (satisfied by the appellant).

(b) Recognised excellence and reputation in the subject specialism.

(c) Sustained publication record of international excellence in field of specialism.

(d) Record of securing external research funding[6].

[1] FET decision of 18/10/19, paragraphs 1 and 2

[2] FET decision of 18/10/19, paragraphs 17 and 76

[3] FET decision of 18/10/19, paragraphs 4, 5, 7 and 12

[4] FET decision of 18/10/19, paragraphs 10, 11, 14 and 16

[5] FET decision of 18/10/19, paragraph 19 and 20

[6] FET decision of 18/10/19, paragraph 18

[30] In relation to criterion (c), the Appellant's evidence stopped in the year 2000. There were some papers in revision but they stopped in 2010. The selection panel found this did not satisfy the criterion. There was no reason for the lack of academic productivity. Further, the selection panel opined that papers in revision were not in journals with sufficient prestige and were lesser than other candidates much more recent, peer reviewed work[7].

[31] In relation to criterion (d), the Appellant's last funding had been obtained in 2000. The selection panel found this fell well short of the shortlisting criteria. There was no evidence of any funding applications pending[8].

[32] The Appellant contended before the FET that one of his comparators had a gap in publishing of some three years. The panel found this gap was offset by the publication of seven papers since 2012 in prestigious publications which were peer reviewed. The panel also found that during the three year gap, there was evidence that the candidate was actively involved in other academic and administrative duties[9].

[33] The Appellant made the case that the panel had acted in unison to victimise him on the grounds of his previous successful legal proceedings against the Respondent. The Appellant alleged a causal connection between the previous proceedings and the failure to shortlist him[10]. The FET found that while some panel members were aware of the past proceedings only one member, Professor McKillop, had been involved in relevant direct previous dealings with the Appellant. Historically the Appellant claimed Professor McKillop was responsible for not confirming the Appellant in his post. Professor McKillop maintained that this was untrue and he had no line managerial duties towards the Appellant. The Appellant's wife claimed Professor McKillop had behaved inappropriately towards her. This claim was investigated but was found to be without basis.

[34] Professor McKillop was sent a list of candidates. He put an 'X' beside non-shortlisted applicants. In relation to the Appellant, Professor McKillop put an 'X' and wrote "research not relevant/" The FET noted there was no evidence that Professor McKillop had been in contact with any other panel member and no evidence of any discussion about previous proceedings[11].

[35] The FET set out the legislation and relevant case law at paragraphs 51 to 74 of its decision. This included *Aylott v Stockton on Tees Borough Council* [2010] IRWR 994 CA where Mummery LJ stated that rather than focusing on the characteristic of comparators the crucial question is "Did the claimant, on the proscribed ground, receive less favourable

[7] FET decision of 18/10/19, paragraphs 21, 24 and 27

[8] FET decision of 18/10/19, paragraphs 25 and 31

[9] FET decision of 18/10/19, paragraph 26

[10] FET decision of 18/10/19, paragraphs 32 and 35

[11] FET decision of 18/10/19, paragraphs 36 to 48

treatment than others?" In every case the FET has to determine why a claimant was treated as he was[12].

[36] The FET noted the two stage test set out in *Igen Ltd v Wong* [2005] IRLR 258 by which the claimant must firstly establish a prima facie case of discrimination by relying on evidence of direct or inferred discrimination. If this test was satisfied the tribunal had to proceed to the second stage of the test; the employer had to prove on the balance of probabilities that the treatment was not on a prohibited ground. If the employer failed to discharge this burden, the FET would have to find there had been discrimination.

[37] The FET observed that it was not necessary for a Tribunal to apply the two-stage test in every case. In some cases it may be appropriate to focus on the reason given by the employer for the impugned act and, if satisfied that this discloses no discrimination; there is no need to undergo the two stage test noted above; *Brown v Croydon LBC* [2007] IRLR 259 at paragraphs 28 to 39. The FET further observed that the entire context of the surrounding evidence must be considered in deciding whether the employer has committed an act of discrimination[13].

[38] The FET described as the "*main strand*" of the Appellant's case his contention that –

> "… the two white, Christian comparators he identified were not as suitable under the established essential criteria for interview as he was."

There were 18 appointment criteria altogether. The first four were (a) a PHD in Finance, (b) recognised excellence and reputation in the subject specialism, (c) a sustained publication record of international excellence in the applicant's field of specialisation and (d) a record of securing external research funding. It was common case that the Appellant satisfied the first of these. In the appointment materials it was stated *inter alia*:

> "Applicants who do not meet the essential criteria must not be shortlisted."

The FET described the second, third and fourth of the essential criteria as "*core*" criteria.

[39] With particular reference to the aforementioned criteria the FET recorded:

(i) The most recent of the Appellant's publications had occurred in 2000. Other papers upon which he purported to rely were effectively works in progress. In contrast, the candidates shortlisted for interview had considerably more recent publications, peer-reviewed.

[12] FET decision of 18/10/19, paragraph 58 citing London Borough of Islington v Ladele and Liberty EAT [2009] IRLR 154 at paragraphs 40 and 41.

[13] FET decision of 18/10/19, paragraph 74, citing Nelson v Newry and Mourne District Council [2009] NICA 24 at paragraph 24

(ii) While the Appellant claimed that he had certain further publications in the pipeline, the relevant journals identified by him were not considered to be of sufficient standing.

(iii) The most recent funding for academic research secured by the Appellant had occurred in 2000 and there was no evidence of any pending funding applications. In contrast the shortlisted candidates all produced evidence of recent successful or pending funding applications.

[40] While much of the tribunal's decision is devoted to a recitation of the evidence received, the following specific findings of note are identifiable:

(i) The incorrect intimation to the Appellant that none of the Applicants had been shortlisted was the product of a genuine mistake. In any event given its timing, this "*… played no part in the acts complained of.*"

(ii) One of the shortlisting panel members (Professor McKillop) had not had any material involvement in the events giving rise to the Plaintiff's earlier legal proceedings.

(iii) The earlier legal proceedings played no part in the impugned decision of the Respondent.

(iv) Professor McKillop's involvement in the impugned decision consisted of a "*paper-scoring exercise*" and entailed no contact between him and the other two panel members. Without any such communication or collusion, all three had formed the view that the Appellant's application failed to satisfy the core criteria.

(v) Professor McKillop's conduct overall confounded the Appellant's allegations of discrimination and victimisation.

(vi) The other two panel members' previous knowledge of the Appellant was limited and gave no cause for concern.

(v) Neither of the other two panel members had any knowledge of a previous complaint by the Appellant's spouse against Professor McKillop.

[41] The FET concluded:

(a) There was no compelling evidential or inferential evidence that the past proceedings brought by the appellant against the respondent influenced the shortlisting panel[14].

(b) The Appellant had failed to demonstrate his treatment was in any way connected to his race or religion[15].

[14] FET decision of 18/10/19, paragraphs 81 to 91

[15] FET decision of 18/10/19, paragraph 93

(c) Neither the ethnicity nor the religious beliefs of the three candidates selected for interview provided any "*sound basis upon which any bias might be inferred sufficient to require explanation*".

(d) In any event "*… the ethnic and religious make-up of the shortlisted candidates is ….diluted almost to irrelevance because none of them was appointed*".

(e) There was no tangible, inferential or cogent evidence that the recruitment exercise was abandoned because the appellant was the best person for the job[16].

(f) The criteria identified by the shortlisting panel was entirely appropriate. The panel applied the criteria conscientiously to all candidates. The evidence revealed an unbridgeable gulf between what was reasonable required and what the appellant was able to provide[17].

(g) The panel was justified in not shortlisting the appellant[18].

(h) The appellant's case fell well short of even the modest threshold required by legislation in order to conclude discrimination or victimisation[19].

Grounds of Appeal

[42] The Notice of Appeal consists of 51 numbered paragraphs occupying some 17 pages. It formulates four grounds of appeal, each particularised, which we reproduce verbatim:

> (i) "The Tribunal was predisposed against the claimant and failed to keep the party's N [sic] equal footing, he appeared bias [sic]."
>
> (ii) "Respondent's procedure was not only unfair but it was not applied fairly - direct discrimination."
>
> (iii) "Relying on ineligibility condition was discriminatory and was introduced to victimise the claimant for an extended period of time and victimisation in shortlisting."
>
> (iv) "Failure draw inference [sic] without giving reasons is an Erred [sic] of law."

[16] FET decision of 18/10/19, paragraph 96

[17] FET decision of 18/10/19, paragraph 99

[18] FET decision of 18/10/19, paragraph 100

[19] FET decision of 18/10/19, paragraph 101

[43] In addition to the detailed grounds of appeal the court, pursuant to its case management directions, has received from the Appellant the following:

(a) A skeleton argument (32 paragraphs, 12 pages).

(b) "*Written speaking notes*" (36 paragraphs, 17 pages).

(c) "*Draft issues*" and "*core propositions*".

The court has also considered the Appellant's "Issues for the Court of Appeal to determine" and "Core Propositions". In the latter document the Appellant cites a string of reported cases, some with an accompanying brief summary. The court has, in addition, received and considered the Respondent's two skeleton arguments, speaking note and core propositions. All of the materials identified in this paragraph have been fully considered by the court.

Appeal: the Statutory Provision

[44] Provision is made for an appeal from the Industrial and Fair Employment Tribunals to the Court of Appeal by Article 22 of The Industrial Tribunals (Northern Ireland) Order 1996 (NI 18) SI 1996/1921 (NI 18). This provides:

> "…**22. - Appeals from industrial tribunals**
>
> (1) A party to proceedings before an industrial tribunal who is dissatisfied **in** point of law with a decision of the tribunal may, according as rules of court may provide, either-
>
> (a) appeal therefrom to the Court of Appeal, [see RsCJ Order 60B] or
>
> (b) require the tribunal to state and sign a case for the opinion of the Court of Appeal [see RsCJ Order. 94 r.2]."

Appeals from Tribunals to this Court: General Principles

[45] These are summarised in *Nesbitt v The Pallet Centre* [2019] NICA 67 at paras [56] – [61]:

> "[56] What is the correct test to be applied in determining this second ground of appeal? The starting point is the statute which makes provision for appeals from Industrial Tribunals to the Court of Appeal. Article 22 of the Industrial Tribunals (NI) Order 1996 (the "1996 Order") provides:
>
> "(1) A party to proceedings before an industrial tribunal who is dissatisfied **in point of law** with a decision of the tribunal may, according as rules of court may provide, either –

(a) appeal there from the Court of Appeal, or

(b) require the tribunal to state and sign a case for the opinion of the Court of Appeal.

(2) Rules of court may provide for authorising or requiring the tribunal to state, in the form of a special case for the decision of the Court of Appeal, any question of law arising in the proceedings."
[Emphasis added.]

The wording of this provision is uncomplicated. It conveys that in appeals of this species, the question for the Court of Appeal is whether the tribunal, within the confines of the grounds of appeal, erred in law in some material respect or respects.

[57] Of what does the error of law threshold consist? The decision in Belfast Port Employer's Association v Fair Employment Commission for Northern Ireland [1994] NIJB 36 concerned an appeal by case stated from a decision of the county court that the appellant had discriminated on the ground of religious belief or political opinion contrary to the Fair Employment (NI) Act 1976. The appeal was brought under Article 61 of the County Courts (NI) Order 1980 which provides in material part:

> "Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal …"

The county court judge upheld the employer's appeal against a decision of the Fair Employment Agency that the employer had discriminated against the complainant, ruling that there was no case to answer. The test which the judge formulated was whether the respondent to the appeal, the Fair Employment Commission for Northern Ireland (the "FEC"), had discharged the onus of establishing the alleged discrimination. Carswell LJ stated at p 6:

> "… The judge seems to have apprehended that where evidence has been given on both sides, the complainant must ultimately prove that he was discriminated against on grounds of religion. He does not appear to have appreciated the correct

> application of the well-established principle that where one finds a person or group treated less favourably in circumstances which are consistent with that treatment being based on religious grounds it is generally right to draw an inference that that was the reason for it."

The judge's basic error was his failure to regard the circumstances as prima facie proof of discrimination which called for an explanation, compounded by his disregard of the principle that a holding that there is no case to answer should be restricted to exceptional or frivolous cases only.

[58] One of the reformulated questions which the Court of Appeal had to determine was:

> "Whether on the facts which I found my conclusion that the employers did not discriminate against the complainants on the ground of religion was one which a tribunal properly directing itself could reasonably have reached."

The Court of Appeal determined this question by the application of the well-known principles in Edwards v Bairstow [1956] AC 14. Lord Radcliffe stated at page 36:

> 'When the case comes before the [appellate] court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase

> propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.'

The formulation of Viscount Simonds, at page 29, was the following:

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."

Carswell LJ also cited with approval the approach of Philips J in Watling v William Baird Contractors [1976] 11 ITR (at pages 71 – 72) equating the same test with a finding that the tribunal's conclusion was "plainly wrong" or, in the legal sense, perverse.

[59] The Edwards v Bairstow principles have been applied by the Northern Ireland Court of Appeal in a variety of contexts. These include an appeal by case stated from a decision of the Lands Tribunal (Wilson v The Commissioner of Evaluation [2009] NICA 30, at [34] and [38]), an appeal against a decision of an industrial tribunal in an unfair dismissal case (Connelly v Western Health and Social Care Trust [2017] NICA

61 at [17] – [19]) and a similar appeal in a constructive dismissal case (Telford v New Look Retailers Limited [2011] NICA 26 at [8] – [10]). The correct approach for this court was stated unequivocally in Mihail v Lloyds Banking Group [2014] NICA 24 at [27]:

> 'This is an appeal from an industrial tribunal with a statutory jurisdiction. On appeal, this court does not conduct a rehearing and, unless the factual findings made by the tribunal are plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court.'

[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in Chief Constable of the Royal Ulster Constabulary v Sergeant A [2000] NI 261 at 273:

> 'Before we turn to the evidence we wish to make a number of observations about the way in which tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.
> ……..
>
> 4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.
>
> 5. A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—
>
> (a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (Fire Brigades Union v Fraser [1998] IRLR 697 at 699, per Lord Sutherland); or
>
> (b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: Edwards (Inspector of Taxes) v Bairstow [1956] AC 14,

per Viscount Simonds at 29 and Lord Radcliffe at 36."

This approach is of long standing, being traceable to decisions of this court such as McConnell v Police Authority for Northern Ireland [1997] NI 253.

[61] Thus in appeals to this court in which the Edwards v Bairstow principles apply, the threshold to be overcome is an elevated one. It reflects the distinctive roles of first instance tribunal and appellate court. It is also harmonious with another, discrete stream of jurisprudence involving the well-established principle noted in the recent judgment of this court in Kerr v Jamison [2019] NICA 48 at [35]:

> "Where invited to review findings of primary fact or inferences, the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility …….. the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently ….."

Next the judgment refers to Heaney v McAvoy [2018] NICA 4 at [17] – [19], as applied in another recent decision of this court, Herron v Bank of Scotland [2018] NICA 11 at [24], concluding at [37]:

> "To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses."

[46] In *Nesbitt*, this court also addressed the principles regarding procedural fairness, at [47] – [48]:

> "[47] It is instructive to reflect on the principles formulated by Bingham LJ in R v Chief Constable of Thames Valley Police, ex parte Cotton [1990] IRLR 344 at [60]:
>
> > "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:

> 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
>
> 2. As memorably pointed out by Megarry J in John v Rees [1970] Ch ---345 at p.402, experience shows that that which is confidently expected is by no means always that which happens.
>
> 3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
>
> 4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
>
> 5. This is a field in which appearances are generally thought to matter.
>
> 6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied. Accordingly if, in the present case, I had concluded that Mr Cotton had been treated unfairly in being denied an adequate opportunity to put his case to the acting chief constable, I would not for my part have been willing to dismiss this appeal on the basis that it would have made no difference if he had had such an opportunity (although the court's discretion as to what, if any, relief it should grant would of course have remained)."

Bingham LJ added at [65]:

> "I think it important that decision-makers and judges should fix their gaze on the fairness of the procedure adopted rather than on the observance of rigid rules."

The main relevance of this code of principles in this appeal is that the Appellant was given no notice of the Tribunal's procedural intentions following the six days of hearing and,

> hence, had no opportunity to make representations on the issue of engagement of an independent expert by the Tribunal or, indeed, retaining her own expert witness.
>
> [48] In every case where, on appeal, it is contended that the decision making process of the court, tribunal or authority concerned is vitiated by procedural impropriety or unfairness the question for the appellate court is whether the avoidance of the vitiating factor/s concerned could have resulted in a different outcome. In this case the Tribunal failed to address the mandatory statutory question of whether to instruct an independent expert witness in a context involving a substantial dispute concerning the roles, demands and responsibilities of the Appellant's four chosen comparator employees, none of whom gave direct evidence. The Respondent's evidence bearing on these issues had elements of the second hand and hearsay, together with the subjective. Furthermore, the Appellant was unrepresented and no expert witness testified on her behalf. In these circumstances we consider that the error of law which the court has diagnosed cannot be dismissed as trivial or technical. It was, rather, a matter of substance. Its avoidance could have given rise to an outcome favourable to the Appellant in respect of her equal pay claim. Beyond this assessment it is inappropriate for this appellate court to venture. The Appellant's hearing was, further, unfair in consequence, in the sense explained in [47]. The first ground of appeal succeeds accordingly."

[47] Discrimination on racial grounds is governed by Article 3 of the Race Relations (NI) Order 1997 (the "*1997 Order*"). Article 4 regulates discrimination by victimisation. The definitions of "*discrimination*" and "*unlawful discrimination*" respectively are contained in Article 3 of the Fair Employment and Treatment (NI) Order 1998 (the "*1998 Order*"). The Tribunal reproduced all of the foregoing statutory provisions in [51] – [53] of its decision. They can be found in Appendix 4 to this judgment for convenience.

[48] Generally, the task for the tribunal is to determine whether a significant measure of discrimination, has defined, has occurred in the manner alleged by the claimant. See for example *Igen v Wong* [2005] IRLR 258 at [37]. A specially devised approach to the burden of proof must be applied in accordance with Directive 97/80/EEC (commonly known as the "Burden of Proof Directive"). At the first stage, the question for the tribunal is whether the claimant has established a *prima facie* case of discrimination on the prohibited ground by direct evidence or inference of a combination of both. If the claimant discharges this burden, there arises a second stage at which the respondent has the burden of proving that discrimination on the relevant proscribed ground did not occur. If the respondent fails to discharge this burden the tribunal must find that the alleged discrimination occurred. At the second stage the enquiry for the tribunal is directed towards whether a satisfactory non-discriminatory explanation has been demonstrated.

[49] There is ample guidance in the case law of this court. One salient illustration is found in *Nelson v Newry and Mourne DC* [2009] NICA 24 where Girvan LJ stated at [24]:

> "This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In Curley v Chief Constable [2009] NICA 8 Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."

The strong exhortation of Coghlin LJ in *Curley v Chief Constable* [2009] NICA 8 that the tribunal focus firmly on the allegation of unlawful discrimination from beginning to end is a faithful reflection of Lord Nicholls' espousal of the simple, compendious question of why the impugned act or conduct occurred, in *Shamoon v Chief Constable* [2003] UKHL 11 at para [8].

[50] The aforementioned two stage approach applies equally in cases of alleged victimisation: *Nagarajan v London Regional Transport* [1999] IRLR 572 (House of Lords). Furthermore the impugned motivation on the part of the respondent need not be conscious: subconscious motivation will suffice. As the decision of the House of Lords in *Zaffer v Glasgow Council* [1997] IRLR 229 makes clear, a finding that the relevant conduct of the respondent was unfair or incompetent or otherwise questionable or worthy of criticism does not automatically impel to the conclusion that, by inference, discriminatory treatment had occurred.

Ground One: Consideration and Conclusions

[51] The legal test for bias is whether the fair minded and informed observer ("*the reasonable observer*"), having considered the facts, would conclude that there was a real possibility that the tribunal was biased: *Porter v Magill* [2002] 2 AC 357. It is well established that the hypothetical reasonable observer is neither complacent or unduly sensitive or suspicious. Furthermore he/she is presumed to have full knowledge of the material facts and to be of fair disposition: *William v Young* [2007] NICA 32 at [6].

[52] Turning to the present appeal, the reasonable observer would be cognisant of various features, both legal and factual, of the context under scrutiny. These include several aspects of the judicial function: the need to manage the tribunal hearing with authority; drawing lines and establishing boundaries in respect of the reception of evidence and the questioning of witnesses; making appropriate interventions and

observations; making *ad hoc* rulings where considered appropriate and seeking to further the requirements of fairness and the overriding objective at all times. The reasonable observer would also be aware of the relative informality of tribunal hearings and the inapplicability of the strict rules of evidence. In addition the reasonable observer would take into account that where (as here) a party to the proceedings is unrepresented this can sometimes present particular challenges to the tribunal. Finally the reasonable observer would be conscious that in all of the foregoing matters and respects a generous measure of discretion is accorded to the chairman.

[53] The Appellant's bias ground of appeal is accompanied by detailed particulars. These descend to the minutiae of things allegedly said and done by the presiding tribunal judge from time to time in the course of the hearing, which occupied five successive days. They include alleged interventions by the presiding judge, the terms in which certain questions were put by respondent's counsel, references by witnesses to documents which were or were not in the hearing bundles, the willingness of witnesses for the respondent to answer questions, the repetition of questions, the visible reactions of the respondent's witnesses and *ad hoc* tribunal rulings on the relevance and fairness of certain questions put by the Appellant to such witnesses.

[54] The court has considered these particulars in their totality and together. Each and every one of them is correctly described as bare and unsubstantiated assertion on the part of the Appellant. There is no supporting evidence. There is no agreement between the parties about any of them. Nor is there any application to this court to admit evidence, for example sworn affidavit evidence, purporting to substantiate any of them. Nor has there been any attempt to agree an account based on contemporaneous notes made by the parties and their representatives during the course of the hearing. Finally, there is no reliable evidence from which these allegations can be substantiated by inference.

[55] An allegation of bias against a judicial officer who, by virtue of the statutory judicial oath of office, is obliged to act impartially at all times is a serious matter. The onus rests on the party alleging bias to prove it. It must be proved to the civil standard ie the balance of probabilities. Given the gravity of the charge of bias a court will normally look for cogent evidence to determine whether it has been established. Where an allegation of bias consists only of bare, unsubstantiated assertion this will not automatically be fatal. However, it will represent an unpromising starting point for the party levelling the charge. This is to be contrasted with a situation in which independent supporting evidence is adduced. In the latter situation the case will inevitably be stronger, though still not guaranteed to succeed. In every case where bias is alleged the court will consider all available evidence capable of touching on the charge. Its determination of whether the allegation is established will be a matter of overall evaluative judgement.

[56] This court considers that, at their zenith, the Appellant's allegations of bias against the FET chairman concern what was described as "*… the stuff of everyday ad hoc assessments that a judge is called on to make in the course of many forms of litigation*" in *Director of Assets Recovery v Lovell* [2009] NICA 27 at para [23]. They are the very essence of the judicial function in a typical tribunal case, particularly where one of the parties has no legal representation. This court considers that this would be the assessment of the reasonable observer.

[57] This court, based on a careful consideration of the tribunal's decision and the voluminous documentary evidence assembled, in tandem with everything identified above, is satisfied that the reasonable observer would not identify any basis for concluding that any of the assertions making up the Appellant's charge of bias against the FET chairman is correct. The reasonable observer's assessment would be that the Appellant has identified a series of instances of how the hearing was conducted by the tribunal in the reasonable exercise of its expansive case management discretion, in furtherance of the overriding objective and in a context where it is well established that the strict rules of evidence do not apply. The reasonable observer would further note that the Appellant's illustrations are isolated in the further sense that they are divorced from any surrounding context. We consider that the reasonable observer would be further reassured about the fairness and impartiality of the tribunal from a careful reading of its decision as a whole. To summarise, in our view the reasonable observer would entertain no reservations about the fairness and impartiality of the FET chairman or panel or the proceedings as a whole.

[58] Finally, this court considers it appropriate to adopt what was stated in the judgement of a different constitution of this court in the Appellant's earlier tribunal case, *Deman v Association of University and Officers at Queen's University* [2009] NICA 29 at [10] – [11]:

> "Any court or tribunal properly carrying out its functions, particularly in light of the overriding objectives, is bound to control the proceedings and to seek to do so in a manner which is just to both parties and which takes rulings on evidence, on how witnesses should deal with questions posed, and the formulation of questions posed by the opposing party and the conduct of the witnesses and their representatives. Any fair-minded observer would not draw inferences against a court or tribunal when it is conscientiously seeking to fulfil its adjudicatory duties give adverse directions against a party. In approaching the question of apparent bias it is necessary to bear in mind the classic test as formulated in Porter v. Magill [2002] 2 AC 357:
>
> > "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[59] The Appellant's generic attack on the independence and impartiality of the tribunals in Northern Ireland is not one which a fair-minded and informed observer would conclude established that there was a real possibility of bias in the Tribunal. Rather a fair-minded and informed observer would conclude that it represented a view indicating an inability on his part of the appellant to take a fair and dispassionate view on the fairness of the Tribunal procedural system which is subject to rules and practices designed to achieve a fair system of adjudication. In the result a fair-minded observer would view the more specific allegations made by the appellant with considerable scepticism. The

appellant's generic criticism is so lacking in justification and expressed in such unfairly trenchant terms that it seriously calls into the question the balance and fairness of his other criticisms. In any event, on a case stated this court is bound by the findings of fact of the Tribunal as set out in the case stated. Unless the conclusions are manifestly perverse, illogical and against the weight of the evidence there is no material on the case stated on which to conclude that the Tribunal erred in law in refusing the recusal application

[60] In *William v. Young* [2007] NICA 32, having referred to that statement, this court said at para [6]:

> "The notional observer must therefore be presumed to have two characteristics, full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision maker was biased. In this context it is pertinent to recall Lord Steyn's observation in Lawal v. Northern Spirit Limited [2003] UKHL 35 quoting with approval Kirby J's comment in Johnston v. Johnston [2000] 201 CLR 488 at 509 that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.'"

The notional observer would appreciate that the type of decision making which the Tribunal has to carry out in the conduct of a hearing was, in the words of Kerr LCJ in Director of Assets Recovery Agency v Lovell "the stuff of everyday ad hoc assessments that a judge is called on to make in the course of many forms of litigation." He further observed:

> "The observer would also be required to bear in mind that judges are well accustomed to reaching adverse views about a witness but in the same proceedings finding in their favour on other issues where the evidence warrants it."

[61] The parallels between the Appellant's allegations and conduct of his appeal in the two cases are unmistakable. The reasonable observer, in our view, would inevitably be struck by the strong similarities in the Appellant's allegations in the two tribunal contexts and would be inclined to think that the Appellant is a person driven to make unfounded allegations of the present kind.

[62] For the reasons given we conclude that the first ground of appeal has no merit.

Ground Two: Consideration and Conclusions

[63] The complaint in the second ground of appeal is that the Respondent's procedure was directly discriminatory of the Appellant in that it was intrinsically unfair and, further, was not applied fairly.

[64] The court's analysis of the 19 particulars supporting this ground is the following:

(a) It lay comfortably within the tribunal's margin of appreciation to identify those provisions of the appointment procedure which it considered most important (the first particular).

(b) The second particular is not a properly formulated ground of appeal.

(c) There is no remotely arguable error of law in the tribunal's assessment that four of the appointment criteria stood out as the most important ("*core*") or in its references to three core criteria, having first noted that the Appellant by virtue of his academic qualifications satisfied the first of the four (the third to sixth particulars).

(d) There is no remotely arguable error of law in the tribunal's construction of the core selection criteria or its evaluation of the evidence pertaining thereto (the seventh to tenth particulars).

(e) The Appellant distorts the actual words used by the tribunal in paragraph [28] of its decision and follows this with pure commentary, rather than a properly formulated ground of appeal (the eleventh particular).

(f) It lay comfortably within the tribunal's margin of appreciation to attribute such weight as it considered appropriate to all elements of the material evidence (the twelfth particular).

(g) The 13th particular: the court repeats (f) above.

(h) The fourteenth particular is not a properly formulated ground of appeal.

(i) The fifteenth particular: the court repeats (f) above.

(j) The sixteenth particular: this is a commentary and not a properly formulated ground of appeal.

(k) The seventeenth to nineteenth particulars: the court repeats (f) above.

[65] As the above analysis demonstrates, many of the particulars of this ground of appeal cannot be readily related to the umbrella complaint ie an allegedly unfair procedure which was allegedly unfairly applied. Furthermore, all of the particulars are overshadowed and eclipsed by the tribunal's robust and unequivocal findings and conclusions that the Appellant's assertions of racial discrimination and victimisation were entirely devoid of substance and merit.

[66] For the reasons given we conclude that this ground of appeal must be rejected.

Ground Three: Consideration and Conclusions

[67] Within the extensive particulars supporting this ground there are multiple distortions of the text of the tribunal's decision, paragraphs [8] and [9] being prime illustrations. Next, the Plaintiff's attack on paragraphs [32] – [35] of the tribunal's decision

fails to recognise that these are, in the main, a mere rehearsal of the contours of the Appellant's victimisation case and an acknowledgement in his favour on the "*protected acts*" issue. His attack on paragraphs [36] – [39] fails to recognise the first of the foregoing comments and, further, does not come remotely close to establishing an arguable error of law on the part of the tribunal. The remaining particulars invite the same analysis. These 24 paragraphs (7 pages), in their totality, relate exclusively to factual matters and the tribunal's evaluation of the evidence pertaining thereto thereby engaging in particular the legal principles rehearsed in para [45] above. This court is unable to detect any arguable error of law in any of the passages under challenge in this ground of appeal.

[68] For the reasons given in paras [64] – [65], which we adopt, we conclude that this ground of appeal must be rejected.

Ground Four: Conclusions

[69] For the reasons summarised in paras [64] – [65], which we adopt, we conclude that this ground is manifestly without foundation.

Generally

[71] Having examined in detail, and rejected, all of the Appellant's grounds of appeal in their entirety, it is appropriate to recall what is stated in paras [10] – [12] of the tribunal's decision:

> 1. "It was apparent from the claimant's evidence and in his cross-examination of the respondent's witnesses that a prominent issue for him was his belief that people from Roman Catholic backgrounds were more likely than not predisposed to discriminate against him on the grounds of race and religion. He later in his evidence expanded this theory to white people, Protestants, and other Christians generally.
>
> 2. He appeared also to impute the respondent's counsel and solicitor with the same discriminatory characteristics, based upon their religious and ethnic backgrounds, alleging, without producing evidence, that they consequently were prepared to compromise their professional ethics and obligations, in order to undermine his case.
>
> 3. The claimant also sought to impute the independence of the Tribunal panel on the basis of his guessed perception as to its "tainted" religious composition."

In this context we also refer to, but do not repeat, all that was said by Girvan LJ about this Appellant in 2009: see [4] above.

[72] It is also appropriate to recall what Weir LJ stated in the decision of this court in *Stadnick - Borowiec [Southern Health and Social Care Trust]* [2016] NICA 1 at [50]:

> "We therefore remind ourselves of the principles governing the role of this court when the factual findings of a Tribunal are criticised. These were conveniently drawn together by Coghlin LJ in the appeal to this court in Mihail v Lloyds Banking Group [2014] NICA 24 at paragraph [27]:
>
> > "This is an appeal from an Industrial Tribunal with a statutory jurisdiction. On appeal, this court does not conduct a re-hearing and, unless the factual findings made by the Tribunal are plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court. (McConnell v Police Authority for Northern Ireland [1997] NI 253 per Carswell LCJ; Carlson Wagonlit Travel Limited v Connor [2007] NICA 55 per Girvan LJ at paragraph [25]. In Crofton v Yeboah [2002] IRLR 634 Mummery LJ said at paragraph [93] with reference to an appeal based upon the ground of perversity:
> >
> > > 'Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in the cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", British Telecommunications PLC v Sheridan [1990] IRLR 27 at para [34].'"

We consider this passage to be tailor made for the present appeal.

[73] This court notes from the voluminous papers that the Appellant's unevidenced assertions that the Respondent's legal representatives were "*… prepared to compromise their professional ethics and obligations in order to undermine his case*" included, *inter alia*, allegations that the replies to the statutory questionnaires were forged by the Respondent's solicitor and counsel. This is but one example of multiple instances of allegations by the Appellant of professional misconduct of the most egregious kind, levelled blithely and gratuitously against judicial office holders, tribunal members and legal practitioners. This court, being an independent and impartial tribunal, considers it appropriate, in common with Girvan LJ, to stand back and adopt a panoramic view of the landscape of this appeal. There are many descriptions which could legitimately be applied to the formulation and presentation of the Appellant's case. Venom, acrimony, distortion, invention and bare unsubstantiated assertion are its main hallmarks.

[74] Finally, it is appropriate to add the following. In this jurisdiction appeals to the Court of Appeal in non-criminal matters do not have to overcome a leave/permission to appeal threshold. This is in marked contrast to the long-standing position in the jurisdiction of England and Wales. There is a respectable view that the absence of this threshold in Northern Ireland is anomalous. In those contexts were leave to appeal is required – criminal cases and extradition cases being the paradigm examples – by well - established principle the applicable test is whether the putative appellant has made out an arguable case. If this threshold had been applicable in the present case, with its multiple, manifest and incurable frailties, we consider it inconceivable that leave to appeal would have been granted.

Order

[75] The appeal is dismissed for the reasons given. If the Appellant wishes to contend that the ordinary rule of costs following the event should not apply the court will consider any written submission to this effect provided within seven days of handing down this judgement.

Postscript

Having considered the Appellant's written representations and no basis for displacement of the general rule having been demonstrated, the costs of this appeal are awarded to the Respondent. The Appellant has signified an intention to appeal to the Supreme Court. Leave to do so is refused as this decision is the product of the application of uncontroversial statutory provisions and well-established legal rules and principles to its fact sensitive context and does not involve any point of law of general public importance.

APPENDIX 1: Case Management Order dated the 6th day of May 2021

HM COURT OF APPEAL IN NORTHERN IRELAND

Thursday the 6th day of May 2021

THE RIGHT HONOURABLE LORD JUSTICE MCCLOSKEY

THE HONOURABLE MR JUSTICE MCFARLAND
THE HONOURABLE MR JUSTICE ROONEY

Between

DR SURESH DEMAN

Claimant/Appellant

And

QUEEN'S UNIVERSITY BELFAST

Respondent

WHEREAS by Notice of Appeal dated 13 November 2019 the Appellant is challenging a decision of the Industrial Tribunal dated 18 October 2019 whereby it dismissed his claim against the Respondent,

AND WHEREAS the parties were consulted by the court about the prosecution and listing of this appeal for hearing in the months of December 2019, February, March, May, December 2020,

AND WHEREAS following the foregoing process the parties were informed by the court on 8 December 2020 that this appeal would be listed for hearing on 25 February 2021,

AND WHEREAS THE COURT, in the wake of an inter—partes listing on 14 January 2021 before McCloskey LJ and McFarland J ("the judicial panel") at which the court affirmed the substantive hearing date of 25 February 2021, by its case management order dated 19 January 2021, made with a view to the forthcoming scheduled hearing, devised a conventional timetable whereby both parties were required to take specified steps,

AND WHEREAS by the said order the appellant was required to lodge and serve his skeleton argument, core propositions and draft issues for the determination of the court by 25 January 2021 at latest,

AND WHEREAS the appellant did not challenge the said order or apply for or request its discharge or any modification of its provisions subsequently,

AND WHEREAS the appellant has still made no such request or application,

AND WHEREAS the appellant instead, on 19 January 2021, informed the court that he was considering an appeal to the Supreme Court,

AND WHEREAS the appellant, on 21 January 2021, lodged an application for the recusal of McCloskey LJ,

AND WHEREAS the court was informed on 28 January 2021 by the respondent's solicitors that the appellant had failed to comply with the aforementioned order of 19 January 2021,

AND WHEREAS the court was and remains satisfied that the judicial panel should continue the case management of this appeal pending determination of the aforesaid recusal application,

AND WHEREAS this is the same judicial panel which conducted the above-mentioned review listing on 14 January 2021 followed by the said order of 19 January 2021,

AND WHEREAS on 01 February 2021 that the following further order issued:

1) *Unless the Appellant fails to [belatedly] comply with the Order of the Court of 25/01/21, by 16:00 hours on 03 February 2021 at the latest, he will be at risk of any or all of the following courses:*

   (a) dismissal of his appeal for non-compliance with the order of the court;

   (b) dismissal of his appeal for want of prosecution;

   (c) adverse costs orders;

   (d) an order requiring him to make security for the Respondent's costs.

2) *Notwithstanding and irrespective of any further default on the part of the Appellant, the Respondent will ensure compliance with its obligations under the order of the court by 11 February 2021 at latest.*

AND WHEREAS the court was subsequently vacated the hearing date of 21 February 2021 on the application of the appellant and in order to facilitate his personal convenience,

AND WHEREAS the direction of the court dated 24 February 2021 gave ample opportunity to both parties regarding a relisting of the hearing not later than May 2021,

AND WHEREAS the court was obliged to issue further directions regarding listing subsequently,

AND WHEREAS by its direction dated 26th of April 2021 the court relisted the appeal for hearing on 10 May 2021 and, subsequently, on 24th of May 2021,

AND WHEREAS, in response, the appellant protested that these dates were unsuitable to him,

AND WHEREAS the court's endeavours to relist the appeal for hearing have, as before, been frustrated by the appellant's continuing protestations of unavailability on a series of proposed dates,

AND WHEREAS the judicial panel considers that the appellant's recusal application is devoid of merit and refuses it accordingly,

AND WHEREAS the judicial panel, following a full review of the case papers and the protracted history of this litigation, is proposing to determine this appeal on paper,

THE COURT ORDERS that both parties shall respond in writing to the aforementioned proposal, by 14th May 2021, following which it shall promulgate its ruling on this issue.

AND costs are reserved.

Alan Dunn
Proper Officer

06 May 2021

APPENDIX 2

McCLOSKEY LJ (delivering the judgment of the court, *ex Tempore)*

[1] Having considered Mr Mulqueen's application, our unanimous ruling is as follows. The court has had the opportunity to confer in advance because in light of the developments in recent days and, more particularly, the electronic communication from Dr Deman yesterday, we were able to foresee as a matter of high probability what the state of affairs would be this morning, namely that only one party, the Respondent, via solicitor and counsel, with a representative of the Respondent, has attended the hearing by a combination of physical and remote attendance while the Appellant is neither physically nor remotely in attendance, nor is any person on his behalf physically or remotely in attendance.

[2] This has given rise to an application on behalf of the Respondent that the appeal be dismissed. Standing back, the options which the court has identified in conferring in advance of this morning's listing were and remain the following, in no particular hierarchical order we emphasise. First, in anticipation of the application that has now been made an order dismissing the appeal on its merits. Second, to proceed with the hearing of the appeal in the Appellant's absence. That, in effect, does not differ very much from option 1 except that under option 2 the court could, of course, chose to raise a series of questions with counsel for the Respondent and invite submissions on particular issues.

[3] The third option identified is to accede to the application made in writing on behalf of the Appellant, whether it has been stated expressly or only impliedly or a mixture of both, namely in substance to adjourn the hearing of the appeal. If that course were taken it would take one of two forms, namely an adjournment *sine die* or an adjournment to a new fixed concrete hearing date. The fourth option which the court has identified is that of taking no course of a final nature today, rather proceeding to the alternative of determining the appeal finally on paper: that would entail proceeding no further today but moving to the preparation and promulgation of a final judgment.

[4] In accordance with procedural fairness requirements, the latter option has already been canvassed with both parties some considerable time ago and both parties accepted the court's offer to make representations upon it. On behalf of the Appellant it was opposed. On behalf of the Respondent it was accepted. The court will now reconsider that course and if we determine to decide the appeal on paper we will notify the parties and, subject to any further intervening events, we would then finalise our judgment and promulgate it. The court will first give both parties the opportunity to make further representations in writing, as our order will make clear.

[5] In identifying that final option as a continuing live and viable one we have reflected further and carefully on the governing legal principles which are rooted in common law procedural fairness to both parties. If we were to form the view that this course would not be procedurally unfair to the Appellant this would follow from having regard in particular to a series of factors: inexhaustively and in no particular order, the entirety of the history; the nature of the appeal; the absence of any live *viva voce* evidence with the result that there would be no examination-in-chief or cross-examination; no fact finding function to be carried out by the court; the nature of the issues raised by the appeal; and, finally, the voluminous nature of the written submissions which we have received from the Appellant, addressing every issue exhaustively. The court would also weigh the well settled common law principle that no litigant has an absolute right to an oral hearing (see De Smith's Judicial Review, 8th ed, para 7-065). Harmoniously with this principle there is ample precedent for the paper determination of appeals in this court in carefully selected cases.

[6] If we should opt for the paper determination course it would be only on the basis of an anterior conclusion that to do so would be compatible with the Appellant's common law right to a fair hearing and, if and insofar as Article 6 of the Human Rights Convention applies, which is not entirely clear (the court having given this discrete issue some consideration) any additional rights thereunder, in furtherance this court's duty as a public authority under s 6 of the Human Rights Act 1998.

[7] Costs are reserved and there shall be liberty to apply in the usual way.

APPENDIX 3

Race Relations (NI) Order 1997 (NI 6)

Racial discrimination

3. - (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; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but-

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in paragraph (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but-

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;

(b) which puts or would put that other at that disadvantage [am. 11 Jan 2010]; and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim.

(1B) The provisions mentioned in paragraph (1A) are-

(a) Part II;

(b) Articles 18 and 19;

(c) Article 20A;

(d) Articles 21 to 24;

(e) Article 26;

(f) Article 72 ZA; and

(g) Part IV in its application to the provisions referred to in sub-paragraphs (a) to (f).

(1C) Where, by virtue of paragraph (1A), a person discriminates against another, paragraph (1)(b) does not apply to him.

(2) For the purposes of this Order segregating a person from other persons on racial grounds is treating him less favourably than they are treated.

(3) 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) or (1A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

4.-(1) A person ("A") discriminates against another person ("B") in any circumstances relevant for the purposes of any provision of this Order if-

(a) he treats B less favourably than he treats or would treat other persons in those circumstances; and

(b) he does so for a reason mentioned in paragraph (2).

(2) The reasons are that-

(a) B has-

(i) brought proceedings against A or any other person under this Order; or

(ii) given evidence or information in connection with such proceedings brought by any person; or

(iii) otherwise done anything under this Order in relation to A or any other person; or

(iv) alleged that A or any other person has (whether or not the allegation so states) contravened this Order; or

(b) A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

(3) Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

Harassment

4A.-(1) A person ("A") subjects another person ("B") to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(1B) where, on grounds of race or ethnic or national origins, A engages in unwanted conduct which has the purpose or effect of-

(a) violating B's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in sub-paragraphs (a) and (b) of paragraph (1) only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect.

Fair Employment and Treatment (NI) Order 1998 (NI 21) Art.3

"Discrimination" and "unlawful discrimination"

3.-(1) In this Order "discrimination" means-

(a) discrimination on the ground of religious belief or political opinion; or

(b) discrimination by way of victimisation;

and "discriminate" shall be construed accordingly.

(2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of a provision of this Order, other than a provision to which paragraph (2A) applies, if-

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but-

(i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

(2A) A person also discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of any provision referred to in paragraph (2B) if-

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but-

(i) which puts or would put persons of the same religious belief or of the same political opinion as that other at a particular disadvantage when compared with other persons;

(ii) which puts that other at that disadvantage; and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.

(2B) The provisions mentioned in paragraph (2A) are-

(a) Part III;

(b) Article 27, so far as it applies to vocational training or vocational guidance;

(c) Article 32; and

(d) Part V, in its application to the provisions referred to in sub-paragraphs (a) to (c).

(3) A comparison of the cases of persons of different religious belief or political opinion under paragraph (2) or (2A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(4) A person ("A") discriminates by way of victimisation against another person ("B") in any circumstances relevant for the purposes of this Order if-

(a) he treats B less favourably than he treats or would treat other persons in those circumstances; and

(b) he does so for a reason mentioned in paragraph (5).

(5) The reasons are that-

(a) B has-

(i) brought proceedings against A or any other person under this Order; or

(ii) given evidence or information in connection with such proceedings brought by any person or any investigation under this Order; or

(iii) alleged that A or any other person has (whether or not the allegation so states) contravened this Order; or

(iv) otherwise done anything under or by reference to this Order in relation to A or any other person; or

(b) A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

(6) Paragraph (4) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

(7) For the purposes of this Order a person commits unlawful discrimination against another if-

(a) he does an act other than an act of harassment in relation to that other which is unlawful by virtue of any provision of Part III or IV; or

(b) he is treated by virtue of any provision of Part V as doing such an act.

"Harassment" and "unlawful harassment"

3A.-(1) A person ("A") subjects another person ("B") to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(2B) where, on the ground of religious belief or political opinion, A engages in unwanted conduct which has the purpose or effect of-

(a) violating B's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in sub-paragraphs (a) and (b) of paragraph (1) only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect.

(3) For the purposes of this Order a person subjects another to unlawful harassment if he engages in conduct in relation to that other which is unlawful by virtue of any provision mentioned in Article 3(2B).

APPENDIX 4

Appellant's Submission 17th May 2021

A LEGAL BASIS OF CLAIM

1. Pursuant to the LJ McCloskey's direction parties have fully complied with them except he has not addressed the Appellant's complaints about the failure of the Court through Summons backed by witness statements and skeleton arguments. The defendant's solicitor has gone beyond Court's directions by making unsolicited comments on appellants' skeleton arguments. LJ McCloskey allowed him go with impunity.

2. In the claim of racial discrimination and victimisation those who gave evidence include one very senior lay member of the tribunal were all Roman Catholics and the claim was heard by a Roman Catholic Employment Tribunal Chairman who set with another Roman Catholic wing member. A Roman Catholic Chief Justice, LCJ Declan Morgan once again allocated this appeal to the same Court of Appeal Judge LJ McCloskey who is also Roman Catholic who is a subject of judicial complaint.

3. Appellant believe the Court of Appeal panel is consisted of two High Court judges namely, Mr. Justice McFarland and Mr. Justice Rooney as opposed to having all the Court Appeal judges. Panel has been constituted in breach of procedure laid down in NI Judicature for the appointment of Court of Appeal panel as no explanation has been provided what were the exceptional circumstances to constitute with two High Court judges except that LF McCloskey could have the last word on the appeal.

4. An investigation revealed that Mr. Justice was appointed as the High Court judge on 2nd March 2021 at the recommendation of LCJ Declan Morgan. Mr Justice Rooney graduated from Queen's University, Belfast in 1982. He was then appointed full-time law lecturer at Queen's, specialising in public law, evidence and EU law. Besides he has no specialisation on discrimination matters since as a QC his practice was in the area of representing government departments, public authorities, health boards and individual clients in several high profile cases. Other legal roles have included tenures as an independent assessor for claims involving miscarriages of justice and Chairman of the Personal Injuries Bar Association. He was previously the external examiner for admissions to the Institute of Professional Legal Studies and the external facilitator to the Clinical Negligence IPLS Course. Therefore, Mr Justice has pecuniary and non-pecuniary interests in adjudicating appeal

against his former & present employer (as an external examiner who receives) therefore should recuse himself from the panel.

5. The Relevant Statutory Provisions are out in particulars of claims. The applicant's claim under the Race Relations (Northern Ireland) Order 1997 ("the 1997 Order") is based on Article 21 contained within Part III of the Order.

> "21.-(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."

6. Article 54 of the 1997 Order prescribes the nature of such proceedings and how they may be commenced.

> "54.-(1) A claim by any person ("the claimant") that another person ("the respondent")-
>
> (a) h
> as committed an act against the claimant which is unlawful by virtue of Part III …
>
> may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.
>
> (2) Proceedings under paragraph (1) shall be brought only in a county court; but all such remedies shall be obtainable in such proceedings as, apart from this paragraph and Article 51(1), would be obtainable in the High Court."

7. Article 28 in Part IV of the Fair Employment and Treatment (Northern Ireland) Order 1978 provides the basis for the claim under that statute as set out in particulars of the claim.

> "28.-(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."

8. Article 40 of the 1998 Order provides for the commencement of proceedings.

> "40.-(1) A claim by any person ("the claimant") that another person ("the respondent")-
>
> (a) has committed an act against the claimant which is unlawful by virtue of any provision of Part IV ….
>
> may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.
>
> (2) Proceedings under paragraph (1) shall be brought only in a county court; but all such remedies shall be obtainable in such proceedings as, apart from this paragraph and Article 37, would be obtainable in the High Court."

9. After Article 54A of the Race Relations Order insert-Burden of proof: county court:

> "Article 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."

8. The claim against the Defendants is one of direct Race discrimination and Religious Discrimination and victimisation pursuant to relevant articles of NI Orders. The applicant's claim under the Race Relations (Northern Ireland) Order 1997 ("the 1997 Order") and the Fair Employment and Treatment (Northern Ireland) Order 1998.

BACKGROUND GROUND

9. It is important to shade some light on the history of the claimant's claim against the institutionally religious and racist public bodies and its agents who are engaged in procedural wrangling in collusion with the some members of the judiciary to deny the claimant legal representation and a hearing on merit of his claim.

10. Polarisation along the religious lines could be gleaned by the fact that so far all the defendants in combined appeal are white Roman Catholic who subjected the claimant consciously and unconsciously religious and racial discrimination and victimisation since they had nothing to fear due to big clout they have as the actors of the State who overtly put in place people Roman Catholics persuasion in top legal and administrative positions by way of positive discrimination as indicated in a report by Cassidy & Cassidy commissioned by

the Queen's University of Belfast. Incidentally, the legal team of the defendants as well as not so surprisingly the members of the judiciary involved in the above cases, namely; Master McCory, LJ Higgins, LCJ, Girvan LJ and Coghlin LJ, McCloskey LJ and Sir Declan Morgan LCJ with the exception of Mr Justice McAlinden happen to come from Roman Catholic persuasion who appeared predisposed and biased.

11. It is a matter of fact that serious issue of unprofessional conduct as well as religious and racial bias have been raised against above member of the judiciary, In particular, Sir Declan Morgan LCJ who was made aware of such complaints by a series of emails which included a threat of defamation and was also informed at a Review Hearing held on 10th February 2020 that there was an outstanding complaint against him and claimant would seek his recusal as he has been predisposed against the claimant and casing him detriment ever since he was appointed as Chief Justice on 3rd April 2009. Above emails are attached herewith.

12. In view of repeated objections to Sir Declan Morgan LCJ involvement, on 12th March 2020 Mr Alan Dunn informed the claimant that he would no longer be involved in his appeal. However, in spite of being recused he continues to push this particular appeal against Roman Catholic defendants although both the claimant and the defendants expressed no urgency in a duly completed pro-forma. It is also practice of the Courts in United Kingdom to deal with only urgent matters. Clearly, LCJ Sir Declan Morgan has pecuniary or non-pecuniary interest in the appeal or bias against the claimant. The above email is also attached herewith.

13. Claimant has been asking Mr Alan Dunn, a clerk of the Court to provide the name of the Lord Justice who threatened him of strike out his appeal in Deman v QUB (present appeal) as set out in his letter of 15th May 2020 and also wrote to Mr McWilliams (refer to his email of 30th July 2020) to let him know the name of the Court's staff member and the Equality Commission officer and a copy of the reply as to the status of his application for assistance and their denial. To date, no answer is forthcoming although Sir Declan Morgan LCJ told claimant on 17th August 2020 in open court that the Equality Commission, a defendant, has no record of receiving claimant's application for assistance. They have also not responded to claimant's request for an extension of time to send reply submissions although they were not slow in getting an extension to defendants' counsel. Mr Alan Dunn & Mr Williams email are attached herewith.

14. Having recused himself from the claimant's appeal it was not appropriate for Sir Declan Morgan LCJ to involve in claimant's appeals as there are four other Court of Appeal Lord Justices were readily available. However, LCJ did not

even have trust in his own colleagues that they could set the tone of the appeal to deny a hearing on merit by employing a treacherous shortcut so decided to do it himself. At the last Review hearing on 17 August 2020 he assured the claimant that he would invite him to make submissions in support of his recusal. Claimant wishes to do just that once he was given an opportunity to do so. To date LCJ Declan Morgan is sitting on the parties submissions since 14 September 2020 but no decision yet been made. Rather than deciding the parties' submission he is involved in causing further detriments to appellant by orchestrating panels of appeals to get the desired results in favour of Roman Catholic defendants.

15. The chronology provided in the Order of 6th May 2021 is inaccurate and biased against the appellant. Appellant wish to deal with them paragraph by paragraph. Paragraphs 1 & 2 are accurate as to dates. However, hearing did not take place in December 2019, February & March 2020 due to the fact the appellant was recuperating from the cancer for which medical certificates were provided, but has not been mentioned.

16. Paragraph 3 is accurate about the date of hearing on 25th February 2021. As to paragraph 4 of the Order of 6th May 2021 although it is correct as to the facts but what is missing is appellant complaint about this Panel's failure to disclose its names and a failure to adjudicate on all issues outlined in Summons backed by a witness statement and skeleton arguments.

17. As to paragraph 5 of the Order, on 14th January 2021 Appellant wrote to the defendant's solicitor that, "... hard copies of Core bundle, appeal books 1 & 2 are yet to be received which you have been directed to send today". And contrary to LJ McCloskey's suggestions in paragraph 7 & 8 of his order on 18th January 2021 appellant wrote that "Now we got feedback from Mr Kumar who was an observer on14th January Review Hearing. Mr Kumar tells us following Dr Deman's submissions to the Panel of Judges he was cut off and could not link to the hearing. However, it is shocking that although in view of your refusal to disclose the names of Court panel Dr Deman specifically requested the panel to disclose their names no response was forthcoming. Further, Dr Deman believes the pane l has not ruled on a number of issues outlined in his summons. In the meantime, we are awaiting for new directions to which Chair of the panel referred on14th January 2021."

18. Paragraph 9 is correct and did not go the Supreme Court as it was a Case Management issue on which SC would not interfere and appellant thought that wisdom will be dawn on LJ McCLoskey and will change his biased and vindictive mindset. However, rather than changing his mindset LJ McCloskey in cahoots with LCJ Declan Morgan and court staff has orchestrated a different plan of defeating the appeal by taking a full control so that he could do

whatever like with two junior judges who are on the panel notionally and will remain mute. In view of LJ McCloskey's ongoing conduct on 21 January 2021 appellant lodged a formal application for his recusal on which to date no hearing has been scheduled.

19. In paragraph 10 of the Order it is correct that on 28th January the defendant's solicitor complained that appellant failed to comply with the court's directions of 19th January 2021 although he has not fully complied either. However, as set out above in appellant's email of 14th January to revise the directions, "we are awaiting for new directions to which Chair of the panel referred on14th January 2021". On 19th January 2021 appellant wrote that, "It is shocking that LJ McClosky who is a subject of judicial complaint of Roman Religious & Racial bias, once again assigned to hear appeal against the QUB without addressing the outlined issues in the Summons backed by a witness statement. Now we know why he has not disclosed the name of the panel on 14th January 2021. One could infer other panel who sat with him was Mr Justice Maguire who was also subject of complaint in 2017. Once again he has put a Roman Catholic legal team on the driving seat. This confirms appellant's worst fear that LCJ Sir Declan Morgan has put in place an institutionally Racist Roman Catholic Regime against Dr Deman. Further, he has not yet confirmed his judgment in Deman v Sunday Life, John Cassidy and Sullivan which speaks volumes about his overt bias. Clearly, an application for his recusal will be forthcoming".

20. As to paragraph 11 it is correct that the judicial panel should continue to deal with the case management issues but in fact they did not do so in spite of repeated reminders as set out in various emails. However, it is also incumbent upon the judicial panel to do issue judiciously and quickly adjudicate on recusal application as the case management sets the tone of the merit hearing where appellant's civil right will be determined. LJ McCloskey failed to do so even before in another appeal in Deman v Sunday Life & other Roman Catholics.

21. Paragraph 12 is correct but it was not disclosed until today as the directions order drawn on 19 January 2021 any delay if any as to the compliance can be waived as the order was drawn was made available late. Rather than addressing the various issues of the summons and request to issue new directions LJ McCloskey decided to retaliate against the appellant and on 1st February 2021 made a draconian "Unless Order" which is correctly set out in paragraph 13 of the Order. In view of LJ McCloskey's threat of unless order, on 1st February 2021 appellant wrote to the Court that, "Enclosed find Dr Deman's Summons to set aside the directions of 21st January and 1st February 2021. Although we had already sent the skeleton arguments with outlined factual matrix we will be happy to send you an update version shortly with a witness an additional witness statement. Clearly Roman Catholic Defendants get

precedence over Ethnic Minority Litigant in person at the Roman Catholic Justices". Further appellant wrote to Mr McWilliam on the same day, "Further to our summons sent today pleas enclosed find Dr Deman's witness statement and skeleton arguments seeking LJ McCloskey is immediate recusal ..."

22. In view of threat of draconian "Unless Order" and on the advice of Council for Ethnic Minority appellant complied with the above order as follows: "Pursuant to oppressive & retaliatory "Unless Order" of LJ McCloskey we advised Dr Deman decided not to fall into Roman Catholic trap and comply with the order. However, we are concerned that there has been no response to his summons backed by witness statement and skeleton arguments for orders and recusal. Enclose please find following attachments:

    1. Skeleton arguments

    2. Draft Issue and Core

    3. Dr Deman's affidavit in support of bias in the absence of transcript.

    4. Submission on Law which sent to the Brown Tribunal and the Respondent's solicitor on 18 April 2018 in support of submissions but business as usual Mr Gillen failed to enclosed in his Core bundle. Hopefully, he would put this document in the bundle.

    Now Dr Deman will correspond directly with the court and the Council for Ethnic Minority would organise a picketing of to expose Roam Catholic Racist control of the legal institutions to carry out their racist agenda against the BAME community.

23. To facilitate and make lot easier for LJH McCloskey's task to recuse himself appellant also enclosed a recent decision of EJ Greene who sets out the Law of Recusal very well and recuse himself from appellant case. Shockingly, on 4th February 2021 Mr McWilliams sent an email response that, "Thank you for your email of 13 January 2021 (17:58). The names of the judiciary are not published in any public lists or disclosed in advance of the hearing, this is in accordance with long-standing custom and practice. I am afraid I am not aware of the circumstances under which Judge McAlinden's name was previously disclosed, however it may well be that the Judge gave a direction to do so".

24. On 5th February 2021 Appellant responded to his email as follows: "Longstanding practice in NI has been discrimination on religious grounds about which once Roman Catholics protested for quarter of a century that role has been taken more aggressively by those who once claimed to be victims, particularly in legal profession and instruments of the state. Unfortunately, Courts and tribunals are not expected to run by longstanding practices but have to be run by NI Judicature Practice Direction updated and Mr Dunn and you will be named in my next claim. I in response the Council for Ethnic

Minority wrote to Mr McWilliam as follows: have instructed the CEM to issue RR44 ad FE28 questionnaire."

25. Since Mr McWilliams became speechless therefore he responded that, Correspondence on the above case will be carried on only with Dr Deman as he is the personal litigant", meaning thereby even his litigant friend can't write from his email ID although that would mean emails were coming from the appellant". In response the Council for Ethnic Minority wrote as follows: "Thank you for enlightening us with your Roman Catholic racial bias. Perhaps, you should know any email sent by anyone from Dr Deman's email ID are deemed as coming from him regardless of who sent them. This has been confirmed by LJ Baker in 2019. You were told this previously but our email fell on deaf ears. In any event, CEM will deal with NI Courts Tribunals and judiciary's conduct from their own email. However, in order to get record straight we would keep sending you from his email ID and get an order of court as we don't give Adam about what you say for being in cahoots with Roman Catholic defendants and judiciary".

26. Further, in response to Mr McWilliams's threat of 10th February 2021, the Council for Ethnic Minority wrote as follows: "Any that is being said is also said in written submissions and hence part if judicial proceedings. If any judicial officer feels offended including LCJ who threatened of defamation they could also hold Dr Deman and the Council for Ethnic Minority for defamation and could start criminal proceedings like they did to a Police officer who approached LJ Girvan who we believe now retired. Any event, if you continue to fail to answer questions Dr Deman will continue to ask them loud and clear. As to complaints procedure we have already asked another Roman Catholic Mrs Scullion who has not responded. So don't you worry, we will issue the proceedings under The NI FE and RR orders and Mr Dunn and our names will be there".

27. On 11th February 2021 Mr Gillen, Respondent's solicitor wrote as follows: "Please see attached: 1. Respondent's Core Propositions; 2. Respondent's reply to the Appellant's skeleton argument, core propositions and draft issues. In response to Mr Gillen's email appellant wrote, "We acknowledge a receipt of Mr Gillen's two attachments purported to comply with the Court's directions of 19th January 2021. Section 3 of the directions refers to Respondent to reply to Claimant's Core issues in 2(iii) and nothing about reply to skeleton arguments. Clearly, R's counsel, Barry Macqueen for being a Roman Catholic unprofessional chose to amend the directions on his own volition. In response to Core issues, Counsel claims to have added pages 777A- 777D in the Appeal book sent in compliance with the order of 19 January 2021, but these pages are not in the appeal books which claimant has received. In view of overstepping the Court's directions Mulqueen of counsel should not be allowed go with

impunity and should be referred to Bar Council for action and this document should truck off the court record without seeing it. However, this panel is incapable of so doing given its biased conduct".

28. On 12th February 2021 Appellant wrote to the Court for Respondent's failure to include certain documents as follows: "Further to our email please enclosed find C's documents to be added in the appeal after p. 31 from 31(a)-(u) which were include in the Browne Tribunal's bundle at the hearing and were also sent to Respondent's solicitor on 23rd March 2019 but have not been included in the Appeal Book 1 (see email below). These have been referred at the hearing and also in C'S submissions, grounds of appeal".

29. In paragraph 14 the date of hearing is incorrect as it should be 25th February and not 21 February 2021. Appellant fully complied with the Court's directions in spite of LJ McCloskey's oppressive directions and failure to amend the directions and address other issues out lined in the Summons backed by a witness statement and skeleton arguments. Appellant was ready to go ahead for a hearing on 25th February 2021 as a litigant in person. However, appellant suffered bereavement in family and sought a short adjournment and provide medical certificate of an experienced GP but LJ McCloskey did not leave any stone unturned to refuse the application. He sought Respondent's solicitor's opposition to adjournment by way of Summons backed by an affidavit to which even Respondent's solicitor did not respond. LJ McCloskey had no choice but to adjourn the hearing on 24th February 2021.

30. As to paragraph 15 & 16 of the order as to listing it is correct but during the pandemic only urgent cases is being listed as per the LCJ guidelines. Both the Appellant and the Respondent's solicitor agreed to the listing after week of 11th May except appellant had a hearing on that date in London so that date was taken off. In fact, on 13th April 2021 Mr Gillen repeated appellant's email in his response to the Court as follows: "On 24 February my colleague, Craig Patterson, wrote to the Court (copying in Dr Deman) stating "the Respondent has no dates to avoid in the first two weeks of the Trinity Term or in week commencing 11 May 2021 and would appreciate the relisting of this matter on the first available date". See attached email. On 26 February Dr Deman wrote to Mr Patterson confirming that "Any date after 11th May is fine except-23-25 May 2021". Please see that email attached. We are assuming that Dr Deman also liaised with the Court office as directed". One wonders why the hearing was listed on the 10th May 2021 at first place as this was not the date parties mentioned above,

31. Paragraphs 16, 17 & 18 are correct but reference to 24 May escapes appellant's mind as he does not find any offer of that date and it could not have been as the appellant made it clear his unavailability in his email of 26th February 2021. In

paragraph 19 LJ McCloskey's unreasonably appears to blame the appellant for the Court's endure to list this appeal was frustrated. If there is frustration on the part of the court only the court itself to be blamed and no one else. In fact, the appeal should not have been listed first place on 10th May and subsequently appellant provided a medical certificate that he could not do his appeal on 10th due to cervical problem and also provide the X-Ray ordered by his GP.

32. In the foregoing background and chronology it would appear to an independent observer that LJ McCloskey has pecuniary and non-pecuniary interest in this appeal and that's why he is in great rush to decide the appeal on paper by a panel consisted of former QUB alumni. In paragraph 20 Appellant finds LJ McCloskey's belated decision to refuse application to recuse himself without a hearing is another example of his bias as he has done before without addressing the summons and pending judicial complaints. It is unfair decide on Recusal application without a proper hearing in an open court.

33. Bias is a breach of rules of natural justice. In an impartial and fair court there is no room even for apparent bias. Hence, Bias is a freestanding point of appeal and amounts to an error of law in that it is a breach of the rules of natural justice and contravenes Article 6 ECHR. Application is generally made for appearance of bias, the conduct and demeanour of the Judge which can't be seen in a paper exercise.

34. It is no longer sufficient to just say that justice has been done or will be done; "justice must be seen to be done". The overriding objectives require the Tribunal, above all, to deal with cases "justly" and "fairly". The overriding objectives are widely regarded as implementing the intentions of Article 6 of Schedule 1 of the Human Rights Act 1998, which ensures RIGHT TO A FAIR TRIAL and states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest or morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

35. Therefore, appellant does not agree to LJ McCloskey's proposal to determine the appeal in paragraph 21 of his order which involves appellant's Civil Rights.

On Behalf of the Claimant 14.05.2021

Prof. S. Deman B.Sc., M.A. (India), M.A. & DBA (US), M.Phil (UK), Ph.D. (Japan)