***R (Z and another) v (1) Hackney LBC and (2) Agudas Israel Housing Association* [2020] UKSC 40**

UK Supreme Court, 16 October 2020

Lord Reed, Lord Kerr, Lady Arden, Lord Kitchin and Lord Sales

The Supreme Court has upheld the decisions of the Divisional Court ([2019] EWHC 139 (Admin)) and the Court of Appeal ([2019] EWCA Civ 1099) that it was lawful under the Equality Act 2010 for a small, charitable Orthodox Jewish housing association to operate a housing allocation policy in circumstances which had the effect of restricting tenancies of its properties to members of the Orthodox Jewish Community.

Christopher Baker and Rea Murray of 4-5 Gray's Inn Square acted for Agudas Israel Housing Association throughout the case, appearing in the Supreme Court with Sam Grodzinski QC.

Background

AIHA is a charitable housing association and a private registered provider of social housing. Its charitable objects provide for its activities to be carried out primarily for the benefit of the Orthodox Jewish Community (OJC). The majority of its properties are in Hackney and particularly in the Stamford Hill area where the OJC is concentrated. Stamford Hill is one of the largest Orthodox Jewish communities in Europe and most members of the OJC are unwilling to live outside that area.

AIHA's allocation policy and housing stock

AIHA's allocation policy stated that its primary aim was to house members of the OJC. Because the demand for housing from the OJC was far greater than the supply, the effect of the operation of AIHA's policy was to preclude anyone who was not a member of the OJC from becoming a tenant of AIHA's properties.

AIHA had fewer than 1,000 social housing units and was accordingly classified by the Regulator of Social Housing as a smaller provider. Between 2011 and 2018, it had averaged only 12-13 lettings per year. Over 40% of its properties, however, had

4 or more bedrooms, reflecting the overcrowding and large family size common throughout the OJC. In 2017-2018, 50% of all 4-bedroom properties let in Hackney had been let by AIHA; and the figure rose to 100% for all such properties in Stamford Hill.

The accommodation developed by AIHA also had special features to facilitate following the tenets of the Orthodox Jewish faith, such kosher kitchens, and the rules relating to observance of the Sabbath, such as automated household equipment.

Hackney's position

Under a nominations agreement, Hackney were generally entitled to nominate applicants on their housing register for many of AIHA's properties. Applicants nominated by Hackney, however, had to satisfy AIHA's own selection criteria; and advertisements for available properties on a portal on the Council's website accordingly stated: "Consideration only to the Orthodox Jewish community". In the Supreme Court, the appeal proceeded on the basis that the lawfulness of Hackney's approach was entirely dependent on AIHA having established a defence under the Equality Act 2010.

The appellants

The appellants were a family consisting of a mother with 4 young children, one of whom was diagnosed with autism spectrum disorder. She had lived in Stamford Hill her whole life but was not a member of the OJC. The High Court had previously ordered Hackney to rehouse the family and in 2017 Hackney had agreed in a consent order to offer the next suitable accommodation which became available. Hackney also agreed the family required a 4-bedroom property, among various other features resulting from their needs. No suitable offer had been made by the time of the hearing before the Divisional Court, but in the intervening period a number of 4-bedroom properties owned by AIHA, which fitted the family's criteria, had become available for letting and had been let to other applicants. By the time of the hearing in the Court of Appeal, however, the family had been allocated suitable accommodation by Hackney.

The allegations, issues and procedural history

The appellants alleged that AIHA's policy involved unlawful religious, racial and other discrimination contrary to s29 Equality Act 2010, *ie* in respect of the provision of services. AIHA accepted that its arrangements constituted direct discrimination on the grounds of religion, but not race. The Divisional Court dismissed all the claims against AIHA and Hackney, holding principally that AIHA's action fell within the exclusions from unlawfulness in ss158 (positive action) and 193 (the charities exception) and that AIHA's policy was proportionate. The Court of Appeal dismissed the appellants' appeal on all grounds.

In the Supreme Court, in relation to the interpretation of s193, the appellants sought to rely additionally on Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("the Race Directive"). They argued that the Race Directive should be applied in accordance with European case law relating to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ("the Equal Treatment Directive").

AIHA's defences: positive action and the charities exception

Section 158 provides:

> "(1) This section applies if a person (P) reasonably thinks that—
>
> (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
>
> (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
>
> (c) participation in an activity by persons who share a protected characteristic is disproportionately low.

(2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—

(a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,

(b) meeting those needs, or

(c) enabling or encouraging persons who share the protected characteristic to participate in that activity."

Section 193 provides:

"(1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if—

(a) the person acts in pursuance of a charitable instrument, and

(b) the provision of the benefits is within subsection (2).

(2) The provision of benefits is within this subsection if it is—

(a) a proportionate means of achieving a legitimate aim, or

(b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic."

Supreme Court decision

The appeal was unanimously dismissed on all grounds.

The proper approach to proportionality on appeal

(1) The proper approach for an appellate court when reviewing a finding of proportionality or disproportionality of a measure such as AIHA's allocation policy was that it was not enough simply to demonstrate an error or flaw in reasoning. It had to be such as to undermine the cogency of the conclusion. Accordingly, if there was no such error or flaw, the appeal court should not make its own assessment of proportionality. It would be a recipe for confusion if the Supreme Court applied a different standard of review on appeal than that applied by the Court of Appeal.

The proportionality test to be applied under ss158 and 193

(2) Parliament contemplated that the proportionality of measures falling within ss158 and 193 should be assessed on a group basis, by comparing the advantages for groups covered by the measure in question with the disadvantages for groups falling outside it. It was for the public benefit that private benevolence should be encouraged for projects which supplemented welfare and other benefits provided by the state, even though those projects did not confer benefits across the board.

(3) In this context, the proportionality assessment would be distorted by simply taking the worst affected individual who was not covered by the measure and comparing her with the most favourably affected individual who was covered by it. That was in effect what the appellants sought to do by comparing themselves with a member of the OJC, out of the many in need, who happened to be fortunate in having one of AIHA's properties assigned to them in the relevant period.

(4) It was generally a legitimate approach and in accordance with the principle of proportionality for the state to use bright line criteria to govern the availability of welfare benefits. This applied *a fortiori* in relation to a proportionality assessment in respect of a measure taken by a charity, such as AIHA's allocation policy: a charity was a private body which did not have the same responsibility as the state for ensuring equal treatment of citizens; and charities did not have the same resources as the state; so if the state was entitled to use bright line criteria for distribution of benefits, still more would that be true for a charity.

(5) It was in the public interest that charities should be able to minimise their costs of administration. That was in order to ensure that maximum resources were made available to address the problems which charities sought to alleviate and since otherwise charitable giving might be deterred, if donors felt excessive amounts of what they gave would be spent on administration rather than actually helping people in need. The aims of minimising wastage of resources on administration and encouraging charitable giving were themselves legitimate objectives to be brought into account in the assessment of proportionality.

The assessment of proportionality by the Divisional Court

(6) The Divisional Court directed itself correctly as to the proportionality test to be applied. It made appropriate findings on the evidence before it regarding the needs of the OJC connected to their religion and the disadvantages to which they were

subject on grounds of their religion. It found that AIHA's allocation policy was a legitimate and proportionate means of meeting those needs and of seeking to correct for those disadvantages and operated as a direct counter to discrimination suffered by the OJC in seeking to obtain housing in the private sector. The Divisional Court properly weighed up the effect of the policy in addressing needs of the Orthodox Jewish community connected with their religion and in correcting for disadvantages suffered by that community.

(7) The Divisional Court and Court of Appeal rightly rejected the argument that AIHA's allocation policy was an illegitimate "blanket policy". There was some flexibility in the policy as formulated, in that it allowed for AIHA to allocate properties to non-members of the OJC if AIHA had properties surplus to the demand from that community. However, in circumstances in which demand from that community far exceeded supply, allocation to non-members was not a realistic prospect in the foreseeable future. The market circumstances were such that AIHA's allocation policy, in combination with the limited number of properties AIHA owned, did not achieve the aim of meeting the needs of the OJC in Hackney, but only went some way towards achieving that aim. There were still many Orthodox Jews in Hackney whom AIHA could not accommodate and who still suffered the disadvantages associated with the relevant protected characteristic. Unless and until the aim of elimination of such disadvantages was achieved, it would be proportionate for AIHA to operate a simple "blanket policy" to allocate its properties to members of the OJC as a means of promoting that legitimate aim. So, even though market circumstances gave AIHA's policy, in practice, a "blanket" effect, that did not show that it was a measure which was disproportionate to that aim.

(8) The Divisional Court and the Court of Appeal rightly took account of the small impact of AIHA's allocation policy on the group of persons outside the OJC when assessing its proportionality with reference to its aim. It was proportionate for AIHA to adopt an allocation policy which aimed to meet the particular needs and alleviate the particular disadvantages experienced by members of the OJC, as a group, in connection with their religion. In assessing the proportionality of the policy in the light of that aim, the courts below were entitled to weigh the benefits for that community as a group as compared with the disadvantages experienced by other groups as a result, rather than by comparing the benefits for that community with the

disadvantage suffered by one person drawn from those other groups falling outside the policy.

(9) In light of the unmet need for social housing for the OJC and the small impact on other groups, the Divisional Court was entitled to conclude that it was proportionate for AIHA to focus its efforts on that community without diluting its beneficial impact for that community in the way for which the appellants contended.

Proportionality under ss158 and 193(2)(a) and EU law

(10) The EU case law relied on by the appellants addressed the specific requirements arising under legislative instruments which were not applicable in the present case, in particular the Equal Treatment Directive. There was no general doctrine of positive discrimination in EU law which was subject to the limitations for which the appellants contended, *ie* that

- positive discrimination was only permissible under EU law if its object was equality of opportunity for a disadvantaged group rather than equality of outcome;
- the relevant characteristic of a disadvantaged person could be taken into account only as a tie-break at the end of the process, where an objective assessment had been carried out to compare their position with that of a person who did not share the relevant characteristic and the positions were found to be equivalent; and
- there had to be a safety valve to allow priority in exceptional cases for a person who did not share the relevant characteristic.

(11) What was significant about the Equal Treatment Directive was that art 2(4) identified the aim which was to be regarded as a legitimate basis for departing from the general obligation of equal treatment imposed by art 2(1), namely promotion of equality of opportunity in employment rather than equality of outcome. In the judgments referred to, rules of national law were held to be compatible with the Directive if limited to securing equality of opportunity but were held to be incompatible if they went beyond promotion of equality of opportunity and sought to achieve equality of outcome in terms of equal representation of men and women in the workforce. This told one nothing of any significance about the proper approach to proportionality in the context of s158 and s193(2)(a) of the 2010 Act. In fact, separate

provision was made in the 2010 Act, in s159, governing positive action in relation to employment.

(12) In each of s158 and s193(2)(a), the range of permissible legitimate aims was wider than the legitimate aim specified in art 2(4) of the Equal Treatment Directive and included seeking to achieve particular outcomes, *ie*: in s158, enabling persons who shared the protected characteristic to overcome or minimise disadvantages they suffered which were connected to the characteristic or to meet needs particular to persons with the protected characteristic; or, in s193(2)(a), any legitimate aim, which included aims recognised as legitimate under s158.

(13) Accordingly, the correct question, as the Divisional Court and the Court of Appeal rightly appreciated, was whether AIHA's allocation policy was a measure which was proportionate to promoting such aims in relation to ameliorating the position of members of the OJC. Those aims related to improving outcomes for that community, not merely equality of opportunity of the more limited kind discussed in the cases on the Equal Treatment Directive.

Race discrimination

(14) AIHA's allocation policy involved differentiation on grounds of religious observance, which was not prohibited by the Race Directive; it did not involve discrimination on grounds of race or ethnic origin; AIHA did not make its selection on the grounds of a person's Jewish matrilineal descent, but on the grounds of whether they engaged in Orthodox Jewish religious observance. No right of the appellant was engaged under the Race Directive.

Construction of s193(2)(b) under ECHR and EU law

(15) The proper approach to construction was that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person who was affected by it could show that this would be incompatible with their Convention rights under the HRA or some provision of EU law as applied to their case. Only then did the special interpretive obligations under s3(1) Human Rights Act 1998 or under the EU *Marleasing* principle come into play to authorise the court to search for a conforming interpretation at variance with the ordinary meaning of the legislation. This meant that the same legislative provision might be given a different interpretation in different cases, depending on whether Convention rights or EU law were applicable in the case or not. This reflected the fact that in the one case

circumstances were such that an additional interpretive obligation had to be taken into account, but in the other case no such obligation was in play.

(16) While it was true that other people in other circumstances might have rights under the Race Directive which were affected by a charity's actions taken in reliance on s193(2)(b), that did not assist the appellants in this case (see above).

(17) By s193(1) read with s193(2)(b), Parliament had itself established a regime which was proportionate and compatible with ECHR art 14. In the context of general anti-discrimination legislation as contained in the 2010 Act, it was abundantly obvious that issues would arise under both EU law and ECHR art 14 in relation to activities falling within section 193. Parliament, acting with the benefit of explanation from the government during the passage of the legislation, had to be taken to have made the assessment that by the combination of conditions the regime it enacted in the 2010 Act satisfied the requirement of proportionality for the purposes of EU law. Parliament had equally to be taken to have considered that the regime satisfied the requirement of proportionality for the purposes of the ECHR, in particular as it arose under art 14.

(18) S193(2)(b) was not an absurdity; it helped to ensure that the scarce resources of charities were channelled through to those who needed them, rather than being diverted to meet costs of administration, legal proceedings and threats of legal proceedings. Where charities relied on s193(2)(b), they did not have to produce a separate proportionality justification of their own if challenged. This meant that their resources would not have to be used up in this way in meeting challenges which might be brought against them; and since s193(2)(b) provided a defence with bright line characteristics, it was likely to protect them from challenges being brought which could be seen would not succeed.

(19) The relevant margin of appreciation to be applied to Parliament in the context of the exemption for charities from the general anti-discrimination rules in the 2010 Act was wide. Its judgment was to be respected unless manifestly without reasonable foundation. The underlying issue, of allocation of scarce resources to meet a range of needs, was similar to that which was relevant in the context of welfare benefits provided by the state. The degree to which charities were given freedom to pursue objectives which their donors regarded as important affected the extent to which donors would provide private resources to supplement provision by the state. If donors were not given reasonable assurance that what they gave would reach the

persons they intended to benefit, they would not give at all. It was a legitimate policy choice by Parliament to fashion the exemption for charities under s193(2)(b) in the way it did, as a relatively bright line rule which would give that assurance to donors.

(20) Accordingly, s193(2)(b) satisfied the proportionality requirement across the range of cases in which it applied and there was clearly no basis on which it would be appropriate for the court to seek to imply into s193(2)(b) an additional requirement that proportionality should be demonstrated separately by a charity in every, or any, case falling within it.

(21) In any event, it was not "possible", as that term was used in s3(1) Human Rights Act 1998, to read and give effect to s193(2)(b) by implying into it an additional proportionality requirement. To do so would make s193(2)(b) redundant, since then a charity could always in a case covered by that provision rely on s193(2)(a). That point was strongly reinforced by consideration of the legislative history, from which it was clear that Parliament intended the two limbs to be separate and distinct and that there should be no additional proportionality requirement in s193(2)(b); and by the fact that where Parliament intended a proportionality requirement to apply in any provision of the 2010 Act it clearly said so: see also the express provisions setting out a proportionality requirement in ss 13(2), 19(2), 158(2) and 159. The omission of such a requirement from s193(2)(b) was a deliberate choice by Parliament which constituted a fundamental feature of the legislation. To import such a requirement would undermine a fundamental feature of that provision and would go against the grain of what Parliament intended.

(22) The same reasoning prevented the court from interpreting s193(2)(b) as including a proportionality requirement by reason of the *Marleasing* interpretive obligation in EU law.

Comment

- This was one of the first decisions by the higher courts on the provisions in ss158 and 193. It will accordingly have particular significance for many organisations looking to undertake forms of positive action, and for charities seeking to restrict the benefits they provide, in favour of only certain limited descriptions of people with any protected characteristic. It will be especially

relevant in circumstances where limited and scarce resources are being shared out.

- Sections 158 and 193 are of general application to all forms of discrimination claims under the Equality Act 2010. The analysis in the present case is accordingly relevant whatever the alleged ground or form of discrimination, or the functional context (whether services, premises, employment or whatever) in which it occurs.
- The case demonstrates how, even on judicial review, the preparation and presentation of the factual evidence adduced in the court at first instance (here, the Divisional Court) carries particular significance. Here there was very extensive evidence about the needs and disadvantages of the OJC which featured heavily in the reasoning of the Divisional Court and the appellate courts.
- The restriction of circumstances in which an appellant court may interfere with an assessment of proportionality at first instance underlines how important it is to persuade the latter court on that issue, including through the evidence. Applications for permission to appeal, and appeals, from a decision at first instance will need to identify a sufficiently important error of approach which undermines the cogency of the conclusion on proportionality.
- The approach and conclusion of the Supreme Court are likely to serve to make it more difficult to succeed in challenging allocation policies for social housing on grounds of unlawful discrimination, particularly where need and demand exceed supply. The provider will be able to rely significantly in such circumstances on unmet demand among the people it is seeking to target and the dilution of its objectives if any different people are prioritised.
- The Supreme Court has signalled a group-based approach, rather than an individual-based approach, when addressing proportionality under s158 and s193. This chimes with, and was drawn from, the general approach to the rationality of housing allocation schemes adopted by the House of Lords in *R (Ahmad) v Newham LBC* [2009] UKHL 14; [2009] PTSR 632, which emphasised the danger of testing the lawfulness of the balance struck by the decision-maker in framing policies by reference to the circumstances of an individual claimant.

- Charities generally, as well as housing charities, will welcome the protection which the Supreme Court has self-consciously provided to them, especially the recognition that s193(2)(b) provides a discrete and complete defence to claims of unlawful discrimination under the Equality Act 2010 without any requirement of proportionality.
- The Supreme Court deliberately left open the important and difficult question as to the ambit of ECHR art 8 in the field of housing allocation, to be decided in a case where that issue would be decisive. Article 14 cannot operate unless the subject-matter of the case falls within the ambit of another Convention right. Most housing-related cases could be said to fall within the ambit of art 8, even though the latter does not in terms provide a right to housing as opposed to a right to respect for (among other things) the home and family life.
- The Supreme Court noted in passing but was not called on to consider the far-reaching question as to whether housing associations and other private registered providers of social housing exercise relevant functions of a public nature for the purposes of s6 Human Rights Act 1998: see *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] WLR 363.

The complete judgment can be found at:
https://www.supremecourt.uk/cases/docs/uksc-2019-0162-judgment.pdf

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