



Discrimination Law Association

Briefings 884-896

EA exemption for charities and positive action meant no unlawful discrimination

R (Z and others) v (1) Hackney LBC and (2) Agudas Israel Housing Association
[2019] EWHC 139 (Admin); Divisional Court, February 4, 2019

Implications for practitioners

This case¹ represents an important precedent for charities and small organisations which provide benefits to persons sharing a protected characteristic. In this

case, the defendant, Agudas Israel Housing Association (AIHA), successfully defended a claim of unlawful discrimination by arguing the exceptions under the Equality Act 2010 (EA) s158 (positive action) and s193 (charities).

Owing to the scarcity of case law interpreting the

1. Judgment is available here: <http://www.bailii.org/ew/cases/EWHC/Admin/2019/139.html>

exceptions under the EA, the court placed considerable reliance upon the Statutory Code of Practice issued by the Equality and Human Rights Commission, which courts are required by s15(4)(b) Equality Act 2006 to take into account where it appears relevant.

The court's decision was based on a large body of evidence as to the poverty, overcrowding, discrimination, needs and disadvantages connected to the protected characteristic of religion shared by members of the Orthodox Jewish Community (OJC). A defence based on one of the exceptions may struggle to succeed without such strong evidence. This included qualitative and quantitative data in reports, surveys and interviews.

The dividing line between positive action, which is lawful under s158, and positive discrimination which is unlawful, will depend upon the context, the wording of the positive action provision and crucially, whether the priority that is accorded to a disadvantaged group is automatic or unconditional:

In any event, [AIHA's] is not a case where "automatic and unconditional priority" has been accorded to members of the Orthodox Jewish community. AIHA's charitable objective confers only a "primary" position to such members, and, for reasons already explained at length, it is the very special market circumstances that explain why AIHA in fact allocates each of the small number of properties that become available to members of the Orthodox Jewish Community. [paras 79 – 83]

It will also depend upon the size of the organisation. AIHA was assisted by the fact that it had insufficient resources to meet its stated primary aim. Had the organisation held surplus stock, it would have been difficult to argue that it was proportionate to refuse to provide to a wider pool of people.

Facts

AIHA is a small, charitable, private registered provider of social housing. Its charitable objects stated that it would provide housing 'primarily for the benefit of the Orthodox Jewish Community'. In practice AIHA's policy precluded 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 as a smaller provider by the Regulator of Social Housing. However, over 40% of its properties had four or more bedrooms in response to the overcrowding and large family sizes common in the OJC. In 2017-2018, 50% of all four-bedroom properties let in Hackney were let by AIHA and 100% of all such properties in Stamford Hill. Accordingly AIHA's charitable benefit was centred on one of the

largest Orthodox Jewish communities in Europe.

The claimants were a family of a mother and four children who lived in Stamford Hill but were not members of the OJC. A number of properties owned by AIHA, which fitted the family's criteria, became available but were let to others. The claimants alleged that AIHA's system involved unlawful racial and religious discrimination in respect of the provision of services contrary to s29 EA.

AIHA defended its policy on the basis that it prioritised letting to members of the OJC to meet the specific needs of the community and to address disadvantages which members of the OJC experienced. AIHA's housing had special features to facilitate following the tenets of the Orthodox Jewish faith in relation to observing the Sabbath.

High Court

The claims were dismissed. AIHA's policy involved direct discrimination on the basis of the protected characteristic of religion and AIHA treated less favourably those persons who were not members of that community. However, there was no contravention of s29 because of the exception for positive action under s158 and for charities under s193.

The exception under s158

S158 EA does not prohibit a person from taking any action which is a proportionate means of achieving the aim of enabling persons who share a protected characteristic to overcome a disadvantage connected to that characteristic or from meeting their needs which are different to the needs of others.

The court held that the requirements of s158 were satisfied because, on the evidence before the court, members of the Orthodox Jewish religion shared real, substantial disadvantages connected to religion. The needs of the OJC were different from the needs of persons who did not share the protected characteristic. AIHA's services directly addressed those needs and disadvantages.

For this exception to apply, the court had to consider the action to be proportionate and followed *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] UKSC 15; [2015] AC 1399; Briefing 747:

First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? [And] ... step four ... whether the impact of the rights infringement is disproportionate to the likely

benefit of the impugned measure. [para 28]

AIHA's arrangements were proportionate. In part this was because AIHA's properties in Hackney were only 1% of general needs housing. AIHA had limited resources and did not completely satisfy its primary objective.

The exception under s193

AIHA 'acts in pursuance of a charitable instrument' for the purposes of s193(1). The court held that this phrase meant that it acted *in line with, in accordance with or authorised by* it. Its actions did not need to be *mandated* by the charitable instrument.

Final comment

Proportionality is relevant under both ss193 and 158. The court stressed that the analysis of proportionality might be different where the service provider enjoyed a large share of whatever was considered to be the relevant market for the goods, services or other resources being provided. [para 78]

Rea Murray²

4-5 Gray's Inn Square
rmurray@4-5.co.uk

2. Christopher Baker and Rea Murray of 4-5 Gray's Inn Square appeared for AIHA.