

# E-Flash

5<sup>th</sup> February 2019



Christopher Baker and Rea Murray of 4-5 Gray's Inn Square secured a landmark victory in the Divisional Court for an Orthodox Jewish, charitable housing association accused of unlawful discrimination in its housing allocation system.

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*R (Z and others) v (1) Hackney LBC and (2) Agudas Israel Housing Association* [2019] EWHC 139 (Admin)  
Divisional Court, 4 February 2019  
Lindblom LJ and Sir Kenneth Parker

**The Divisional Court has held that it was lawful under the Equality Act 2010 for a small, charitable Orthodox Jewish housing association to operate a housing allocation system 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 appeared for Agudas Israel Housing Association.**

## 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 system 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 AIHA's system 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

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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 as kosher kitchens, and the rules relating to observance of the Sabbath, such as automated household equipment.

Hackney and AIHA were parties to a generic nominations agreement under which Hackney was generally entitled to nominate applicants on their housing register for (among others) 75% of AIHA's properties with 2 bedrooms or more. The nominations agreement included provisions for dealing with nominations in relation to particular ethnic groups, and for resolving disputes about the application of criteria and policies by housing providers which limited Hackney's ability to nominate particular applicants to particular properties.

The claimants 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, 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.

The claimants alleged that AIHA's system involved unlawful racial and other discrimination contrary to s29 Equality Act 2010 (EA 2010), *ie* in respect of the provision of services. In particular, it was claimed that AIHA had let properties to people with no greater needs than the claimants and accordingly enabled those people to jump the queue for social housing in Hackney; and that Hackney had acted unlawfully in a number of respects, under EA 2010 and otherwise.

### **Decision**

The claims against AIHA and Hackney were dismissed on all grounds. The principal issue was the lawfulness of AIHA's system. That system involved direct discrimination because AIHA's conduct in primarily allocating social housing to the OJC, by reason of the protected characteristic of religion, treated less favourably those persons who sought an allocation but were not members of that community. The key questions were whether there was no contravention of s29 by reason of:

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- the saving for “positive action” under s158; and/or
- the exception for charities under s193.

The Court held that the requirements of s158 were satisfied.

1. It was plain from the evidence that the disadvantages faced by Orthodox Jews were both real and substantial; and they were connected to the religion of Orthodox Judaism.
  - a. There were very high levels of poverty and deprivation, with associated low levels of home ownership. There was a strong correlation between these and the religion, though s158 required only that the disadvantage be “connected to” the religion.
  - b. There was widespread and increasing overt anti-Semitism, including anti-Semitic crime, exposure to which was heightened by traditional Orthodox Jewish clothing which characterised the community. Unchallenged evidence credibly described the prejudice faced in trying to rent in the private sector.
2. The evidence demonstrated that the needs of the OJC were different from the needs of persons who did not share the protected characteristic.
  - a. The members of that community had a relevant need to live relatively close to each other, with a view to reducing apprehension and anxiety regarding personal security, anti-Semitic abuse and crime.
  - b. They had a relevant need for family and community facilities, such as schools, synagogue and shops, as well as the special features of the accommodation provided.
  - c. The evidence demonstrated a particular need in the OJC for property, likely to be in very short supply, that would accommodate substantially larger families and that would significantly reduce the particular and intensified risk to such families of eviction from overcrowded accommodation.

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3. The remaining question was whether AIHA's arrangements for allocating housing were proportionate in placing Orthodox Jews in a primary position, enabling them both to avoid the disadvantages and to meet the relevant needs. For this purpose, the Court adopted the general approach to proportionality explained by Baroness Hale in *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] UKSC 15; [2015] AC 1399 at [28], ie

“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.”

4. It was self-evident why in practice AIHA allocated each of the properties which became available to members of the OJC. Given the limited availability to, and pressing demand from, that community, if AIHA were to allocate any of its properties to non-members, it would seriously dilute the number of properties available to Orthodox Jews, and would fundamentally undermine its charitable objective of giving “primary” position, in a meaningful, as distinct from formalistic, sense to Orthodox Jews.
5. AIHA's arrangements were justified as proportionate under section 158, though the proportionality analysis was specific to the particular arrangements under challenge. The disadvantages and needs of the OJC were many and compelling. They were also in many instances very closely related to the matter of housing accommodation. While recognising the needs of other applicants for social housing in the particular market conditions, the Court held that AIHA's arrangements were proportionate in addressing the needs and disadvantages of the OJC, notwithstanding the fact that in those market conditions, a non-member could not realistically expect AIHA to allocate to him or her any property that became available. AIHA's properties in Hackney were only 1% of the 47,000 units of general needs housing potentially available for letting, and its lettings each year were less than 1% of social housing lettings.

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The Court similarly held that the requirements of s193 were satisfied.

1. Section 193 was not disapplied by s194(1), which provided that the former did “not apply to race, so far as relating to colour”. Although the indirect effect might be that AIHA provided benefits predominantly to white people, for a number of reasons that did not mean that s194(1) prevented AIHA from relying on s193. The natural import of s193(1) was to direct attention to the specific protected characteristic in the relevant charitable instrument. Persons who were Orthodox Jews were not defined under the relevant charitable instrument by colour.
2. The expression “acts in pursuance of a charitable instrument” in s193(1) carried the ordinary and natural meaning of those words, *ie* in line with, in accordance with or authorised by. In the present context, those words did not mean mandated or required by the charitable instrument.
3. Section 193(2)(a) referred to the provision of benefits needing to be “a proportionate means of achieving a legitimate aim”, and s193(2)(b) referred to such provision needing to be “for the purposes of preventing or compensating for a disadvantage linked to the protected characteristic”. For the reasons given in relation to section 158, AIHA had met the criteria under s193 too.

### Consequences

- 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 protected characteristics. It will be especially relevant in circumstance 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.

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- The dividing line between positive action (which is lawful within s158) and positive discrimination (which is unlawful) is highly contextual and sometimes difficult to determine. Proportionality is a necessary requirement under s158, and a sufficient component under s193. The very close evaluation of the evidence by the Divisional Court in the present case, on an application for judicial review, serves to emphasise the importance of a strong evidential basis for organisations seeking to rely on these defences to discrimination claims.
- In its decision, the Divisional Court stressed at [78] the significance of the particular circumstances of the case in the analysis of proportionality. It laid down the following marker for future cases where the scale of an organisation's activity may be much larger:

“It should not be assumed that the result of the proportionality analysis that we have conducted would be the same in a case having not dissimilar features to this, but where the service provider enjoyed a large share of whatever was considered to be the relevant market for the good, services or other resources being provided.”

- AIHA accepted that it was a service provider for the purposes of s29, but denied that it exercised any “public function” in this respect (that term being defined by reference to s6 Human Rights Act 1998). The Divisional Court found it unnecessary in the circumstances to determine whether *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] WLR 363 was distinguishable on the facts or remained good law following the substantial de-regulation of private social housing providers. The latter point accordingly remains for another day.

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