R (Z & A) v London Borough of Hackney and Agudas Israel Housing Association Ltd [2019] EWCA Civ 1099: The justification of 'positive action' under the Equality Act and exceptions for charities

By Naomi Webber

3PB Barristers

The second defendant, Agudas Israel Housing Association ("AIHA"), is a charitable housing association that owns and allocates social housing exclusively to members of the Orthodox Jewish community. The first defendant, Hackney London Borough Council ("Hackney") provides social housing to people living in the borough who are in need, which includes nominating properties owned by AIHA.

The Claimant is a single mother with four children who was assessed by Hackney in October 2017 as being in the 'highest possible need' for social housing. She was not housed until after the Divisional Court hearing. During this time, a number of suitable houses owned by AIHA were available but were not offered to her because she was not an Orthodox Jew.

It was accepted by AIHA that the policy constituted direct discrimination on the grounds of religion. The issue in this case was whether this discrimination was lawful.

Legal framework – Equality Act 2010

S 4 EA 2010 defines race and religion as protected characteristics, and **s 29** states that service providers, and persons exercising public functions are prohibited from discriminating, whether directly or indirectly. Two further provisions are key to this decision:

S 158:

"(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."

S 193:

"(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."

S 194(2) states *"[S 193] does not apply to race, so far as relating to colour."*

Divisional Court decision

The Divisional Court held that the policy was lawful on two grounds. First, under s158 EA 2010. Members of the Orthodox Jewish community share a particular disadvantage connected to their religion and way of life. This includes the need to live close to one another to reduce security fears, have community facilities (such as schools and synagogues) and

have accommodation to suit large families. The Court found the AIHA policy was a proportionate means of overcoming this, particularly as it only provided 1% of housing in the borough. Second, the policy was permitted by s 193. As the AIHA discriminated on the grounds of the religion of Orthodox Judaism, its policy was therefore made "in pursuance of" its charitable instrument. It was also a proportionate means of achieving a legitimate aim (for the same reasons as above).

Issues on appeal

On appeal, it was accepted by the Claimant that:

- S158(1) applies, i.e. that AIHA reasonably thinks that members of the Orthodox Jewish community suffer disadvantages connected to that protected characteristic and/or that they have needs that are different from those who do not share that protected characteristic.
- The express requirements of s 193(2)(b) applied. That is that the policy was for the purpose of *"preventing or compensating for a disadvantage linked to the protected characteristic."*

The issue on appeal was whether this was proportionate under both s 158(2) and s 193(2).

Court of Appeal decision

The Court of Appeal (Lewison LJ, King LJ and Sir Stephen Richards) upheld the Divisional Court's decision.

(1) Proportionality is not a requirement of s 193(2)(b)

The CoA first assessed whether a proportionality assessment is necessary under s 193(2)(b), which does not provide for one expressly.

The Claimant submitted that a proportionality assessment was required, even though it did not say so expressly for the following reasons:

(i) S 3 Human Rights Act 1998 requires legislation to be read compatibly with the European Convention on Human Rights. Section 193 (2)(b) would not be compatible with Article 14 ECHR unless read in that way.

(ii) This reading is a requirement of EU law, specifically the Race Directive.

(iii) The reading advanced by AIHA produces absurd results, which Parliament cannot have intended.

The CoA concluded that proportionality requirement was not necessary in s 193(2) because:

(i) The policy did not engage the HRA 1998. Article 14 must be linked to another Convention right, and no other Convention right was not engaged.

(ii) EU law did not apply because the Race Directive referred to by the Claimant does not forbid discrimination on the ground of religion.

(iii) The activities of a charity in fulfilling their objectives was not absurd.

(iv) As s193(2)(a) clearly provides for a proportionality assessment, if that same assessment was also read into s 193(2)(b), it would make s193(2)(a) redundant.

(2) Proportionality assessment

Despite the conclusion on s193(2)(b) being the end of the matter, the CoA also considered the issue of proportionality under s158(2). It first reiterated its role in revisiting a proportionality decision of a lower court, making clear that it is not enough simply to demonstrate an error or flaw in reasoning of the court below. The error must be such as to undermine the cogency of its conclusion.

The CoA then accepted the Divisional Court's conclusion that the policy was proportionate. The disadvantage to non-members of the Orthodox Jewish community was the withdrawal of 1% of the units of accommodation; the scale of this disadvantage was minuscule. Furthermore, the needs of the Orthodox Jewish community linked to the relevant protected characteristic were many and compelling and the allocation of properties to non-members of the Orthodox Jewish community would fundamentally undermine AIHA's charitable objectives. Thus there was not a more limited way of achieving the legitimate aim. It therefore also rejected the appeal on this basis.

Claim against Hackney

The claim against Hackney also failed, as it had been making nominations in accordance with a lawful policy. Furthermore, it was not in breach of s11 Children Act 2004, the local

authority's duty to have regard to the "need to safeguard and promote the welfare of children". This was because the AIHA policy is seen as valuable for alleviating the high levels of child poverty in the Orthodox Jewish community. Furthermore, Hackney's housing allocation policy provides for families with children in urgent need to be moved to the top of the queue, and this had happened here.

Comment

This case highlights two important parts of the Equality Act. First, it provides a clear example of how 'positive action' can lawfully be used under s158. Second, it highlights when and how charities are excepted from the general direct and indirect discrimination provisions.

It is interesting to note that the Court of Appeal dismissed the application of the Race Directive 2000/43 out of hand, perhaps because it was accepted by all parties that religion was the only protected characteristic in play. In *R (E) v Governing Body of JFS* [2009] UKSC 15, the Supreme Court accepted that there exists a 'Jewish ethnic group' for the purposes of applying the Race Relations Act 1976 (following a similar finding that Sikhs could be an ethnic group in *Mandla v Dowell Lee* [1983] 2 AC 548). On similar reasoning, it is arguable that the Race Directive applies here. Nevertheless, as Article 5 allows for positive action (effectively the application of s158), it is likely that it would not have affected the overall outcome.

Naomi Webber
Pupil
3PB Barristers
0330 332 2633
naomi.webber@3pb.co.uk