



THE COURT ORDERED that no one shall publish or reveal the names or addresses of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or of any members of their family in connection with these proceedings.

16 October 2020

PRESS SUMMARY

R (on the application Z and another) (Appellants) v Hackney London Borough Council and another (Respondents)

[2020] UKSC 40

On appeal from: [2019] EWCA Civ 1099

JUSTICES: Lord Reed (President), Lord Kerr, Lady Arden, Lord Kitchin, Lord Sales

BACKGROUND TO THE APPEAL

This appeal is about the application of anti-discrimination law to charities, where they are established to provide benefits (in this case, social housing) for particular groups which are the subject of their charitable objectives. The relevant anti-discrimination laws are contained in the Equality Act 2010 and Council Directive 2000/43/EC of 29 June 2000 (the “**Race Directive**”).

The charitable objective of Agudas Israel Housing Association Ltd (the “**Housing Charity**”) is to make social housing available primarily for members of the Orthodox Jewish community in Hackney, in particular the Haredi community. It makes properties available via an online portal operated by Hackney London Borough Council (the “**Council**”), which is open to applicants for social housing whom the Council has identified as having a priority need. The Council cannot compel the Housing Charity to take tenants who do not fall within scope of its charitable objective and its selection criteria. This, combined with a significant surplus of need for social housing on the part of the Orthodox Jewish community, means that in practice the Council only nominates and the Housing Charity only accepts members of that community for the Housing Charity’s properties. The social housing provided by the Housing Charity makes up less than 1% of the social housing available in Hackney.

The principal appellant (the appellant) is a single mother with four small children, two of whom have autism. The Council identified the appellant as having a priority need for social housing in a larger property, and she has now been housed by the Council in such a property. However, she had to wait longer to be allocated suitable housing as she is not a member of the Orthodox Jewish community and so larger properties owned by the Housing Charity which became vacant were not available to her. She issued proceedings against the Council and the Housing Charity, alleging that she had thereby suffered unlawful direct discrimination on grounds of race or religion contrary to the Equality Act 2010. The Divisional Court dismissed the claim and the Court of Appeal dismissed her appeal.

The appellant now appeals to this Court. She was given permission to add to her claim based on the Equality Act 2010 a new claim that the allocation policy of the Housing Charity contravened the Race Directive by unlawfully discriminating against her on the grounds of race or ethnic origin. The appeal turns on whether the Housing Charity acted unlawfully or not in restricting access to its stock of social housing.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sales gives the main judgment (with which Lord Reed, Lord Kerr and Lord Kitchen agree). Lady Arden gives a concurring judgment.

REASONS FOR THE JUDGMENT

Equality Act 2010

The Equality Act 2010 makes it unlawful to discriminate directly against any person on the basis of certain characteristics, known as protected characteristics. These include ‘race’ and ‘religion or belief’ [17]-[18].

However, the Act sets out exemptions where certain actions will not be considered as unlawful direct discrimination. Section 158 provides one such exemption where positive action addresses in a proportionate manner needs or disadvantages connected to a protected characteristic [19]. Section 193 sets out two further exemptions. Section 193(2)(a) permits charities to restrict benefits to those with a protected characteristic if that restriction is a proportionate means of achieving a legitimate aim and section 193(2)(b) permits charities to restrict benefits to those who share a protected characteristic if the restriction seeks to prevent or compensate for a disadvantage linked to the characteristic [21].

Lord Sales upholds the lower courts’ findings that the Housing Charity’s allocation policy is proportionate and lawful under sections 158 and 193(2)(a) of the Equality Act 2010. A proportionality assessment first requires the identification of a legitimate aim and, secondly, consideration of whether the measures taken to promote that aim are proportionate, having regard to other interests at stake [65]. The dispute in this case centres on what constitutes a legitimate aim [60]-[72]. As found by the Divisional Court and the Court of Appeal, the legitimate aims here include the minimisation of disadvantages which are connected to the Haredi community’s religious identity and counteracting discrimination which they suffer, including in the private housing market, and the fulfilment of relevant needs which are particular to that community [66]. The Housing Charity was entitled to adopt a clear and strict rule about who could and could not apply for its social housing, which meant that it was made available just for members of the Orthodox Jewish community, to ensure that its charitable activities were focused on that community, so that its activities did in fact fulfil its charitable objective to alleviate the problems of that community [76]-[87]. Lord Sales holds that the Divisional Court correctly considered the Housing Charity’s allocation policy in the light of the applicable legal framework and, accordingly, was entitled to find it to be proportionate and lawful under these statutory exemptions. Lord Sales makes his own assessment of proportionality [76]-[87], which is in agreement with that of the Divisional Court [73].

Lord Sales holds that, in any event, the Court of Appeal was right to say that the Divisional Court’s finding of proportionality could only be set aside if it had misdirected itself or reached a decision which was wrong. Applying this approach, he holds that the Divisional Court had been entitled to make this finding, with the result that its decision should be upheld on appeal [74]-[75].

In her concurring judgment, Lady Arden emphasises that an appellate court should generally not make its own assessment of proportionality in such circumstances [120], and with this caveat she agrees with the judgment of Lord Sales [121].

As regards the exemption in section 193(2)(b), the Court dismisses the argument for the appellants that the provision is subject to an implied proportionality requirement. There is no sound basis on which such a requirement could be read into the provision [97]. First, even on the assumption that the case is within the ambit of Article 8 of the European Convention on Human Rights (the “ECHR”), on the right to respect for private and family life, so that Article 14 of the ECHR (non-discrimination) is applicable, any proportionality requirement inherent in that provision is satisfied by the structure of section 193 itself; Parliament was entitled to create a clear rule applicable to charities in the interests of conserving their resources for use in fulfilling their charitable objectives, having regard, among other things, to the regulation of charities under the Charities Act 2011 to ensure they operate in the public interest and the wide margin of appreciation accorded to Parliament, as the body with democratic authority, in setting social and economic policy, including encouragement for giving to charity [97]-[110]. Secondly, on the same assumption that the case falls within the ambit of Article 8 of the ECHR, even if the structure of section 193 itself did not satisfy any relevant proportionality standard, the drafting of the provision and the policy underlying it are so clear that it would not be possible to read into it an additional proportionality requirement [111]-[115]. In the circumstances, therefore, it is not necessary to resolve the question whether the case falls within the ambit of Article 8 of the ECHR and the Court prefers to leave that issue open [96, 116]. Section 193(2)(b) should be applied according to its express terms. It is common ground that, on this basis, the requirements of section 193(2)(b) are satisfied in this case [50]. Even if a proportionality

requirement could be read into the provision, it follows from the decision regarding proportionality in relation to section 158 and section 193(2)(a) that it would have been satisfied [55, 88].

The Race Directive

The Race Directive provides that discrimination on grounds of race or ethnic origin must be unlawful, particularly in relation to housing [89]. The Court finds that the Housing Charity is not in contravention of this directive for the simple reason that its allocation policy differentiates on the basis of religious observance and not race or ethnic origin [89]-[90].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>