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.

Michaelmas Term
[2020] UKSC 40
On appeal from: [2019] EWCA Civ 1099

JUDGMENT

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

before

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

JUDGMENT GIVEN ON

16 October 2020

Heard on 29 and 30 June 2020

Appellants
Ian Wise QC
Michael Armitage
Ciar McAndrew
(Instructed by Hopkin Murray Beskine Solicitors)

Respondent (1)
Matt Hutchings QC
Andrew Lane

(Instructed by London Borough of Hackney Legal Services)

Respondent (2)
Sam Grodzinski QC
Christopher Baker
Rea Murray
(Instructed by Farrer & Co LLP)

Respondents:-

(1) London Borough of Hackney
(2) Agudas Israel Housing Association Ltd

LORD SALES: (with whom Lord Reed, Lord Kerr and Lord Kitchin agree)

1. This appeal is concerned with the obligations under the Equality Act 2010 of a charity which has been set up to provide housing in Stamford Hill in Hackney for a disadvantaged group, the observant Orthodox Jewish community comprising, in particular, the Haredi community. The charity is the second respondent, Agudas Israel Housing Association Ltd ("AIHA"). Its charitable objective is to make social housing available primarily for members of the Orthodox Jewish community. Such is the surplus of demand for social housing from the members of that community, as compared with the properties which AIHA has available, that in practice all of AIHA's properties are allocated to members of the Orthodox Jewish community.

2. The first respondent is a local housing authority, Hackney London Borough Council ("the Council"). AIHA makes properties available to the Council, as they become vacant, to house persons who have applied to the Council for social housing and who have been identified by the Council as having a priority need for such housing. The properties provided by AIHA constitute about 1% of the stock of social housing available to the Council. In relation to the Council, there is a large surplus of demand for social housing as compared with the supply available, so applicants for social housing can spend long periods waiting for suitable properties to become available. The Council does not have any right to compel AIHA to take tenants who do not fall within the scope of AIHA's charitable objective and its selection criteria. The Council therefore nominates applicants for social housing with AIHA who fall within those criteria. In practice, this means that the Council only nominates members of the Orthodox Jewish community to be housed in property owned by AIHA.

3. The principal appellant ("the appellant") is a single mother with four small children: twin daughters and two sons, both of whom have autism and one of whom is also a party to the proceedings. She was on the Council's list for social housing and had been identified by the Council as having priority need to be housed in a larger property. She is not from the Orthodox Jewish community and so has been unable to gain access to the properties let by AIHA. While the appellant was waiting to be allocated a suitable property by the Council, large properties owned by AIHA which would have been suitable for her became vacant and were allocated by AIHA to families from the Orthodox Jewish community who had also been identified by the Council as having priority needs. The appellant had to wait longer than them to be allocated a suitable property by the Council from its other social housing resources, as they became available.

4. The appellant commenced proceedings against the Council and AIHA in 2018 complaining that this involved unlawful conduct on their part in various respects. In particular, she complains that there has been unlawful direct discrimination against her on grounds of her religion and on grounds of her race. Her claim was dismissed by the Divisional Court (Lindblom LJ and Sir Kenneth Parker) in a judgment dated 4 February 2019: [2019] EWHC 139 (Admin); [2019] PTSR 985. Her appeal was dismissed by the Court of Appeal (Lewison and King LJJ and Sir Stephen Richards) in a judgment dated 27 June 2019: [2019] EWCA Civ 1099; [2019] PTSR 2272.

5. In the course of the proceedings, the appellant's claims have been somewhat refined. For the purposes of the appeal to this court, the issues to be decided relate to the lawfulness of the conduct of AIHA. The Council accepts that if AIHA engaged in unlawful discrimination against the appellant by its allocation policy, then the Council cannot lawfully maintain its nomination arrangements with AIHA. But there is no distinct legal claim against the Council which does not turn upon the underlying substantive question of whether AIHA acted lawfully or not. Accordingly, in what follows, the focus is entirely on the claims against AIHA.

6. The relevant claims brought by the appellant against AIHA were based on the prohibition of direct discrimination on grounds of race or religion by any person in the provision of services, as contained in the Equality Act 2010 ("the 2010 Act"). AIHA relied on defences set out in section 158 and section 193 of the 2010 Act. Section 158 provides for an exemption from unlawfulness for positive action to address needs or disadvantages experienced by persons which are connected to a protected characteristic. Section 193 provides an exemption for the activities of charities under defined conditions. AIHA accepts that it distinguishes between applicants for its housing on the grounds of religion and that, subject to the statutory defences, this would constitute unlawful direct discrimination contrary to the relevant provisions of the 2010 Act. AIHA denies that it discriminates between applicants on grounds of their race.

7. Mr Ian Wise QC, for the appellant, in his skeleton argument for the hearing in the Divisional Court, indicated to the court that since discrimination on grounds of religion was admitted by AIHA, it might be unnecessary to decide if AIHA discriminated on grounds of race. The Divisional Court took Mr Wise at his word and focused its analysis on the appellant's claim of unlawful discrimination on grounds of religion. It made no finding as to whether there was discrimination on grounds of race. (This is subject to one narrow point which the Divisional Court did deal with, which is no longer a live issue between the parties: the court dealt with a submission on the part of the appellant to the effect that AIHA was not entitled to rely on a defence under section 193 of the 2010 Act by reason of section 194(2) of that Act. Section 194(2) provides that a charity may not avail itself of a defence under section 193 if it discriminates on grounds of race, in the sense of colour. The

Divisional Court found that AIHA does not discriminate between applicants for housing on grounds of colour and by the time of the hearings in the Court of Appeal and in this court this was common ground.)

8. Although the Divisional Court had been invited by Mr Wise not to deal with the allegation of discrimination on grounds of race if it was unnecessary to do so and hence did not make findings about that part of the case, on the appellant's appeal to the Court of Appeal this was made into a point of criticism. Further, for the first time in his reply skeleton argument in the Court of Appeal, Mr Wise referred to 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"). At that stage, the Race Directive was relied on as a potential aid to interpretation of section 193 of the 2010 Act. This was not on the footing that the appellant had rights under it as against AIHA on the findings made by the Divisional Court (which involved only discrimination on grounds of religion, which does not fall within the scope of the Race Directive), but on the basis that others might have rights under the Directive where there was discrimination on grounds of race and that these rights ought to be reflected in the interpretation of section 193, by virtue of the principle of sympathetic construction of national legislation articulated by the European Court of Justice (now the Court of Justice of the European Union: I will refer to it as the "CJEU" in both phases of its existence) in *Marleasing SA v La Comercial Internacional De Alimentacion SA* (Case C-106/89) [1990] ECR I-4135; [1992] 1 CMLR 305 ("*Marleasing*"). The Court of Appeal rejected this argument (para 54). Since the appellant could not show that she had suffered discrimination on grounds of race within the scope of the Race Directive, she could not benefit from the special interpretive obligation arising from the *Marleasing* case. Similarly, since the appellant had not shown that her case fell within the scope of EU law, she could not rely on the right against discrimination set out in article 21 of the Charter of Fundamental Rights of the European Union ("the CFR").

9. On the appeal to this court, the appellant's position shifted again. At the hearing, Mr Wise applied to the court for permission to introduce a new argument for the appellant. According to this argument, Mr Wise invites the court to find that the appellant was in fact affected by direct discrimination by AIHA on grounds of race or ethnic origin, contrary to the Race Directive. He submits that the appellant was subject to direct discrimination on grounds of ethnic origin which was the same as that found by this court, by a majority, to have occurred in *R (E) v Governing Body of JFS (United Synagogue intervening)* [2009] UKSC 15; [2010] 2 AC 728 ("*JFS*") in the context of the application of domestic anti-discrimination legislation, and that this means that she must be taken to have been subjected to direct discrimination on grounds of race or ethnic origin for the purposes of the Race Directive. On that basis, Mr Wise submits that either section 193 must be read so as to be compatible with the appellant's rights under the Race Directive in accordance with the *Marleasing* principle of sympathetic construction or, if that cannot be done,

it should be disapplied altogether by virtue of the principle of direct effect of EU law.

10. It is very unusual for this court to grant permission for a wholly new argument to be introduced at this stage. Moreover, since it is a new argument based on a legal instrument (the Race Directive) which was not pleaded by the appellant in her grounds of claim, Mr Wise should have made an application to amend those grounds, which (if allowed) would also have led to AIHA and the Council having the right to amend their grounds of defence to meet the new claim. As it is, the court was not presented by Mr Wise with any formal or clear statement of the new claim which he wished to introduce. This was highly unsatisfactory. It only emerged from the answer given by Mr Wise to a question by the court during his submissions in reply that this new case for the appellant did not involve any complaint of indirect discrimination by AIHA on grounds of race or ethnic origin. Also, the court did not have the benefit of a formally pleaded defence to the appellant's new claim based on the Race Directive, which meant that possible defences had to be explored in submissions without a clear and proper focus. Also, to state the obvious, the court did not have the benefit of an examination of the new claim and those defences by the lower courts. Furthermore, the appellant should have made a formal application for permission to amend her grounds of claim and to raise the new argument in this court well in advance, rather than leaving it to be raised at the hearing, thereby taking up time which was set aside for the substantive arguments on the appeal.

11. Despite these points, however, Mr Sam Grodzinski QC for AIHA made no strong objection to the introduction of this new case for the appellant at this late stage. He was confident that he was in a position to meet it without difficulty. Mr Matt Hutchings QC for the Council likewise made no strong objection. Having regard to their position, the court gave provisional permission at the hearing for Mr Wise to develop the new case for the appellant. The court reserved its position as to the possibility of refusing permission if, after hearing how the argument was developed, it considered that it had been advanced in a way which was unfair to AIHA or the Council. In the event, given the narrow basis on which Mr Wise sought to develop the new claim based on the Race Directive, the court considers that it is appropriate to confirm the permission given provisionally at the hearing. I will, therefore, address the appellant's new claim based on the Race Directive along with her claim based on the 2010 Act.

12. Two final matters should be mentioned in this introduction. Although at an early stage in the proceedings AIHA disputed that it carries out functions which have a sufficient public element to make it amenable to judicial review, it now accepts that it does. But AIHA does not accept that it is a public authority by virtue of carrying out "functions of a public nature" within the meaning of section 6(3)(b) of the Human Rights Act 1998 ("the HRA"). Accordingly, AIHA does not accept that it has any obligation arising under section 6(1) of the HRA to act compatibly with

Convention rights of the appellant or other applicants for housing. In her pleaded case and in her submissions in the Divisional Court and in the Court of Appeal, the appellant did not assert any claim against AIHA under section 6(1) of the HRA on the basis that it was a public authority within the meaning of that Act, and no such issue was included in the agreed Statement of Facts and Issues for the appeal. In his printed case for the appeal in this court, Mr Wise did include an argument to that effect. However, in the event he did not make any application for permission to introduce it, so it is not necessary to say anything about it.

The EU legislative context

13. The Race Directive enshrines the principle of equal treatment, described in article 2 as meaning "that there shall be no direct or indirect discrimination based on racial or ethnic origin". Article 3 provides that the Directive applies to "to all persons, as regards both the public and private sectors" in relation to a number of matters, including at article 3(1)(h):

> "access to and supply of goods and services which are available to the public, including housing."

14. Recital (17) to the Race Directive states:

> "The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons."

15. Article 5 makes provision to allow for the objective set out in recital (17), as follows:

> "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any member state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."

16. Article 21 of the CFR prohibits any discrimination based on a number of grounds, including race, colour, ethnic or social origin and religion or belief. Article

51 of the CFR states that it applies to member states "only when they are implementing Union law".

The domestic legislative context

17. The 2010 Act makes various forms of discrimination unlawful. Direct discrimination is defined by section 13(1) of the Act:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

18. The relevant protected characteristics are set out in section 4. They include "race" and "religion or belief". The meaning of these concepts is explained in sections 9 and 10, respectively. "Race" includes colour, nationality and ethnic or national origins. By contrast with the position in relation to indirect discrimination (defined in section 19 of the 2010 Act), there is no general defence of justification in relation to direct discrimination on the basis of these protected characteristics; but so far as is relevant for present purposes, particular defences are set out in sections 158 and 193. Service providers and persons exercising public functions are prohibited from discriminating, whether directly or indirectly: section 29.

19. Section 158 is headed "Positive action: general". So far as relevant, it 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.

…

(4) This section does not apply to - (a) action within section 159(3)

…"

20. Section 159 is headed "Positive action: recruitment and promotion". It provides a defence where action is taken on the grounds of a protected characteristic to overcome disadvantages a person with that characteristic may face in obtaining employment or promotion. Section 159(3) provides:

"That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not."

21. 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."

22. The Equality and Human Rights Commission ("EHRC") has the power to issue codes of guidance. The court must take any such code into account in any way in which it appears to the court to be relevant: section 15(4)(b) of the Equality Act 2006.

23. Section 3(1) of the HRA states that "[s]o far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights". The Convention rights are those set out in the European Convention on Human Rights ("the ECHR"), as contained in Schedule 1 to the HRA. They include article 8 (right to respect for private and family life and the home), article 9 (freedom of thought, conscience and religion) and article 14 (prohibition of discrimination). Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

24. In this case, AIHA relies on defences under section 158, section 193(2)(a) and section 193(2)(b) of the 2010 Act. Success on any of these will mean that the appellant's claim fails.

Factual background

25. The Council is a local housing authority with statutory functions in relation to the allocation of social housing. As well as allocating its own stock of social housing, it also discharges its functions by nominating applicants for social housing to properties owned by independent housing associations such as AIHA. The Council assesses applications for social housing using a points-based system which is based on need.

26. AIHA is a charitable housing association, established in 1986. In order to qualify as a charity, its activities must be for the public benefit: see section 4 of the Charities Act 2011 ("the Charities Act"). It is registered with the Regulator of Social Housing of England as a private registered provider of social housing under Part 2 of the Housing and Regeneration Act 2008. It owns property in Hackney, principally in parts of the borough which are inhabited by members of the Orthodox Jewish community.

27. AIHA's charitable objects are set out in its rules, which state:

> "A2 The Association is formed for the benefit of the community. Its object shall be to carry on for the benefit of the community (and primarily for the benefit of the Orthodox Jewish Community):
>
> > A2.1 the business of providing housing, accommodation, and assistance to help house people and associated facilities and amenities for poor people or for the relief of the aged, disabled, handicapped (whether physically or mentally) or chronically sick people.
> >
> > A2.2 any other charitable object that can be carried out by an Industrial and Provident Society registered as a social landlord with the Corporation."

28. AIHA has its own "Allocations and Lettings Manual" separate from the Council's allocation scheme. The manual states that AIHA's "primary aim … is to house members of the Orthodox Jewish Community". AIHA operates its own waiting list for its properties, but pursuant to an agreement with the Council the Council has nomination rights in respect of a significant proportion of properties

owned by AIHA which become available for occupation. AIHA's criteria for selection are similar to those used by the Council, and are likewise based on need.

29. AIHA owns 470 properties in Hackney. They amount to 1% of the overall number of 47,000 units of general social needs housing in the Council's area. AIHA's lettings each year are on average less than 1% of social housing lettings arranged by the Council. The Orthodox Jewish community tend to have large families and so have a greater need, as a community, for larger properties, including those with four bedrooms. AIHA's stock of social housing has been developed with that in mind, so it has a proportionately greater share of the stock of larger properties available for social housing in Hackney.

30. Applicants nominated by the Council for a property owned by AIHA also have to satisfy AIHA's own selection criteria. Properties available for social housing are advertised on a portal on the Council's website. The advertisements on the portal in respect of properties owned by AIHA reflect AIHA's selection criteria under current market conditions and state: "Consideration only to the Orthodox Jewish community".

31. The appellant's two sons with autism, now aged nine and five, display very challenging behaviour. In July 2018, the appellant gave birth to twin girls. The appellant is not a member of the Orthodox Jewish community. She grew up and lives in Hackney and embraces the diversity of the local community.

32. The family were assessed by the Council as falling within the group having the highest need for re-housing under its scheme for the allocation of social housing in the borough. In 2017 the appellant brought judicial review proceedings against the Council, in which she claimed that she and her sons were housed in inadequate accommodation. In consequence, the appellant and her sons were re-housed in better temporary accommodation. The proceedings were settled in October 2017 on terms which included the Council agreeing to offer the appellant its next available unit of suitable social housing. Following the birth of her daughters, the appellant was moved to the offer list for a four-bedroom property.

33. Despite the Council's recognition of the family's need for suitable social housing, no offer of a suitable property was made by the time the case came before the Divisional Court. During the same period, at least six four-bedroom properties owned by AIHA became available and were advertised by the Council. However, because of AIHA's practice of only letting its properties to members of the Orthodox Jewish community, the Council did not put the appellant forward for consideration; nor did the appellant apply directly to AIHA.

34. Fortunately, between the hearing in the Divisional Court and the hearing in the Court of Appeal another four-bedroom property became available to the Council and was allocated to the appellant. Accordingly, the appellant and her family are now housed in suitable accommodation.

35. Extensive evidence about the problems faced by the Orthodox Jewish community in Hackney, and the need for it to gather together in Stamford Hill, was reviewed by the Divisional Court. It made a number of important findings relevant for the discussion below which are not challenged on this appeal:

(1) Social housing is under severe pressure in the Council's area, with demand far exceeding supply (para 19).

(2) Although the Jewish population in the United Kingdom is contracting and the average age is increasing, the strictly Orthodox Jewish Haredi community is growing at 4% per year, with 34% of Jews in Hackney aged 14 or under. Strictly Orthodox Jews are more likely to experience poverty and deprivation than other "mainstream" Jewish families. Jewish households in Hackney (which are comprised mainly of Haredi Jews) are much more likely to be in socially rented accommodation (35%) than the general Jewish population (9%). 25% of them live in overcrowded conditions, compared to 8% of the general Jewish population. Most of the Haredi community are unwilling to live outside Stamford Hill, where AIHA's properties are located, and so tend not to bid for social housing elsewhere in the Council's area. Nearly all of the Haredi community in social housing within Hackney are tenants of AIHA. Roughly 2% of applicants for social housing in Hackney self-identify as Orthodox Jews (para 31).

(3) The Orthodox Jewish community has a particular need for larger properties because of their large family sizes. Self-identifying Orthodox Jews represent an increasing proportion of housing applicants as the number of bedrooms increases. Although they are only a small proportion of the families seeking one-, two- or three-bedroom properties, in May 2018 they were 66 out of 459 families wanting four bedrooms, 32 out of 64 wanting five bedrooms, and 29 out of 35 wanting six bedrooms (para 32).

(4) Witnesses emphasised the fact that Orthodox Judaism is not a lifestyle but a way of life, and that living as a community is a central part of this. Members of the Orthodox Jewish community need to remain proximate to that community, even if it means foregoing improved living conditions, bigger houses, or proper housing at all (para 34). The Divisional Court made these comments about the community (para 64):

> "… there are very high levels of poverty and deprivation, with associated low levels of home ownership. … On the evidence before us, we are satisfied that … there is a strong correlation between the evidenced poverty and deprivation and the religion. This is explained in part by the way of life, especially affecting educational and employment opportunities, which is characteristic of the Orthodox Jewish community."

(5) The Orthodox Jewish community is subjected to anti-Semitism, including racially aggravated harassment and assaults, criminal damage to property and verbal abuse (para 33). Volunteer security patrols in Stamford Hill, known as the Shomrim, provide physical reassurance and help to deter anti-Semitic incidents, thereby fostering a sense of security within the community. The Divisional Court referred to widespread and increasing overt anti-Semitism in society and an increase in reported anti-Semitic crime; and to the way in which the traditional Orthodox Jewish clothing worn by the Haredi community "heightens the exposure to anti-Semitism and to related criminality" (para 66). The court found that the community had a need to live together in relatively close proximity "with a view to reducing apprehension and anxiety regarding personal security, anti-Semitic abuse and crime" (para 67).

(6) The Orthodox Jewish community face prejudice when trying to rent properties in the private sector, on account of their appearance, language and religion (para 66).

(7) The properties owned by AIHA are designed specifically for Orthodox Jewish religious needs whereby the tenants are able to follow the tenets of their faith and the rules relating to the Sabbath. AIHA provides facilities such as kosher kitchens, an absence of television aerials, Shabbos locks on the estate, and mezuzahs on communal doors. The Divisional Court acknowledged that these features are normative, rather than essential. At para 69 the court said, "we would accept that, standing alone, they would be unlikely to be sufficient to justify the challenged discrimination. However, we do not believe that they should be entirely discounted."

(8) The Orthodox Jewish community has a particular need to live close to community facilities, such as schools, synagogues and suitable shops (paras 34 and 68).

(9) The Orthodox Jewish community in Hackney faces particular problems of overcrowding. The Divisional Court said (para 70):

> "… there was evidence in data from 2015 which showed that the average number of occupants of Orthodox Jewish households in Stamford Hill was 6.3, in contrast to the average for the whole of Hackney of 2.43, and for the UK of 2.38. In our view, this evidence demonstrates a particular need in the Orthodox Jewish community for property, which is 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."

36. The evidence shows that, if a situation arose in which AIHA had a surplus of properties as against the needs of the Orthodox Jewish community for social housing, it would allocate the surplus properties to families from outside that community. It is in this sense that AIHA has as its charitable objective and the purpose of its allocation policy the aim of "primarily" meeting the needs of the Orthodox Jewish community. However, there is no surplus of supply of properties as against the needs of that community at present, nor is there likely to be one in the foreseeable future.

37. As regards the question whether AIHA discriminates on grounds of race, although the Divisional Court made no relevant finding for present purposes, in the context of its discussion of section 194(2) of the 2010 Act (at para 86) it accepted the evidence of the principal witness for AIHA, as follows:

> "In her evidence Mrs Cymerman-Symons MBE stated that AIHA did not discriminate according to ethnic background. AIHA's housing applicants come from a variety of ethnic backgrounds. She continued at para 28 of her second witness statement:
>
> > '… Our sole criterion is that the applicants are of the Orthodox Jewish faith. This is certainly not an issue of race; it is purely about religious observance. We respond to people from many ethnic backgrounds. The common factor is a commitment to the Orthodox Jewish way of life.'"

38. This evidence has not been challenged. It is corroborated by the relevant documents produced by AIHA. The application form used by AIHA simply asks, in a box marked "Personal circumstances", "Would you describe yourself as Orthodox Jewish, strictly observant of Shabbath and Kashrut?" and for details of which

synagogue is attended and the school attended by children of the family. The application pack also includes a section for provision of details of ethnic origin which is stated to be solely for monitoring purposes, as is common form, and to assist AIHA in the development of its equal opportunities policy.

The judgment of the Divisional Court

39. The Divisional Court considered section 158 and section 193 of the 2010 Act in turn, in the light of the findings it had made. As to section 158, the court reasoned in a series of steps which are not now disputed, as follows:

(i) The disadvantages faced by Orthodox Jews are real and substantial;

(ii) Those disadvantages are "connected with" the religion of Orthodox Judaism;

(iii) The needs of members of the Orthodox Jewish community are different from those who are not members of it. They have 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. They also have a need for community facilities, including schools, synagogues and shops, as well as special features of accommodation. They also have a need for property that will accommodate substantially larger families; and

(iv) AIHA's arrangements for allocating housing, which place Orthodox Jews in a primary position, enable them both to avoid the disadvantages and to meet the needs referred to.

40. The remaining question in relation to section 158 was whether AIHA's arrangements for allocating housing enabled members of the Orthodox Jewish community to avoid the identified disadvantages and meet the identified needs in a proportionate manner. On this, the Divisional Court directed itself by reference to the guidance given by Baroness Hale of Richmond in *Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone* [2015] UKSC 15; [2015] AC 1399, at para 28. The case concerned a complaint of discrimination on grounds of disability, contrary to section 15 of the 2010 Act. Under section 15(1)(b), a person does not act unlawfully if he can show that the treatment in question is a proportionate means of achieving a legitimate aim: this is similar to the defence in section 158(2) and identical to the defence in section 193(2)(a) of the 2010 Act, which are at issue in the present appeal. Baroness Hale explained that the concept of proportionality as used in domestic anti-discrimination law is derived from EU

law. It requires application of a structured approach in relation to the measure in question, involving four stages:

> "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, fourth:

> "As the Court of Justice of the European Communities put it in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR 1-4023, para 13, 'the disadvantages caused must not be disproportionate to the aims pursued': or as Lord Reed JSC … put it in the *Bank Mellat* case [*Bank Mellat v HM Treasury (No 2)*] [2014] AC 700, 791, para 74, 'In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure'."

41. The Divisional Court observed that this approach to the question of proportionality in section 158 was reinforced by the explanatory notes for that provision and the relevant guidance given in the statutory code of practice promulgated by the EHRC ("the EHRC code of practice"). The explanatory notes to section 158 state (paragraph 512):

> "The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them. This provision will need to be interpreted in accordance with European law which limits the extent to which the kind of action it permits will be allowed."

Paragraph 10.22 of the EHRC code of practice states:

> "The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced

> against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups."

At paragraph 5.32, the EHRC code of practice also refers to the derivation in EU law of the concept of proportionality in section 158.

42. Applying this approach, the Divisional Court held that the allocation policy of AIHA was a proportionate means to achieve aims falling within section 158(2)(a) and (b). At para 73 the court rejected the submission of Mr Wise that AIHA's allocation policy was to be regarded as an illegitimate and disproportionate blanket prohibition against letting properties to persons from outside the Orthodox Jewish community. The court referred to the fact that the policy allowed for allocation to persons from outside the community, should circumstances permit. It said:

> "AIHA's charitable objectives permit and oblige it to accord 'primary' benefit to members of the Orthodox Jewish community. There is no unqualified restriction of benefits to members of that community, nor absolute exclusion of non-members. AIHA currently has over 700 applicants on its waiting list. It has a total housing stock of 470 homes in Hackney, but the crucial consideration in this context is that, over the seven-year period from 2011 to 2018, only 89 general needs properties became available for allocation, a marginal availability of only about 12 to 13 properties each year, with a huge imbalance between supply and demand. There is no evidence that that imbalance is likely to decrease markedly in the foreseeable future. At the same time there is an acute imbalance between supply and demand for social housing in Hackney generally. About 13,000 households are currently registered under [the Council's] scheme for the allocation of social housing. In 2016, [the Council] allocated only 1,229 properties for social housing. Again, there is no evidence that the imbalance is likely to decrease markedly in the foreseeable future."

43. The Divisional Court found (para 74) that the reason why, in practice, AIHA allocated its properties to members of the Orthodox Jewish community was clear. 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.

44. At para 75 the Divisional Court said:

> "We also conclude that AIHA's arrangements are justified as proportionate under section 158. For the reasons we have already given, the disadvantages and needs of the Orthodox Jewish community are many and compelling. They are also in many instances very closely related to the matter of housing accommodation. We recognise the needs of other applicants for social housing, but, in the particular market conditions to which we have referred, AIHA's arrangements are proportionate in addressing the needs and disadvantages of the Orthodox Jewish community, notwithstanding the fact that in those market conditions, a non-member cannot realistically expect AIHA to allocate to him or her any property that becomes available."

45. At para 76 the court referred back to its finding that members of the Orthodox Jewish community in Hackney have a particular need for larger accommodation and observed that "given the acute scarcity of such accommodation, it is readily understandable, and proportionate, that such properties are allocated to members of the Orthodox Jewish community who have need of the accommodation".

46. At para 77 the court rejected a further submission by Mr Wise, that AIHA's allocation policy constituted unlawful "positive discrimination" rather than legitimate "positive action" falling within section 158. For this distinction, Mr Wise referred to paragraph 10.7 of the EHRC code of practice. The court pointed out that the EHRC code of practice stated that positive action in favour of a preferred group might well cause disadvantage to persons outside that group, but that the advantages to the preferred group might well outweigh the disadvantages, and thus be proportionate. The court added:

> "In this case it is self-evident that the allocation of particular accommodation to a member of the Orthodox Jewish community may well disadvantage an individual non-member who may have a priority need for such accommodation. However, the relevant question, which we have dealt with above, is whether the arrangements, viewed as a whole and in the light of relevant market circumstances, address the disadvantages and needs of the Orthodox Jewish community in a manner that outweighs the disadvantage to non-members of that community."

47. The Divisional Court emphasised, at para 78, that its conclusion was reached in the context of AIHA being a small provider of social housing with only 1% of the general needs housing in the Council's area and its lettings running at less than 1% of social housing lettings in the Council's area each year (see para 29 above). The court said that it could not be assumed that the same conclusion would be reached in the case of a service provider with a large share of the available properties.

48. At paras 79 to 83 the court addressed a further argument of Mr Wise, in which he sought to draw an analogy with the judgment of the CJEU in *Briheche v Ministre de l'Intérieur* (Case C-319/03) [2004] ECR I-8807; [2005] 1 CMLR 4 ("*Briheche*"). That case was concerned with application of 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"). Article 2(4) of that Directive allows a member state to engage in forms of positive discrimination in the area of employment in relation to recruitment and promotion, but in *Briheche* and other authorities the CJEU laid down restrictive conditions for the application of that provision. I discuss *Briheche* and the Equal Treatment Directive below. Here it suffices to say that the Divisional Court held (para 83) that the text, context and object of article 2(4) of that Directive were different from section 158 of the 2010 Act and that *Briheche* does not provide relevant guidance in relation to the application of section 158 or section 193 of the 2010 Act.

49. As regards section 193 of the 2010 Act, the Divisional Court reasoned as follows:

> (1) AIHA did not discriminate on the ground of colour (hence section 194(2) of the 2010 Act had no application);
>
> (2) The specific protected characteristic, on the basis of which AIHA discriminated, was the religion of Orthodox Judaism;
>
> (3) AIHA's arrangements for allocating housing were "authorised by" or "in line with" its charitable instrument; and were therefore made "in pursuance of" it within the meaning of section 193(1)(a) (paras 93 to 101). This is now common ground;
>
> (4) For the same reasons as underpinned its conclusion in relation to section 158, AIHA's arrangements were a proportionate means of achieving a legitimate aim (section 193(2)(a)) and were for the purpose of preventing

or compensating for disadvantages linked to the protected characteristic (section 193(2)(b)) (paras 103 and 104).

The judgment of the Court of Appeal

50. In the Court of Appeal, Mr Wise for the appellant submitted that the Divisional Court had erred in its proportionality assessment under section 158 and section 193 of the 2010 Act. Since, as was then common ground, the express requirements of section 193(2)(b) were satisfied and that provision is capable of providing a complete defence for AIHA and does not in terms depend upon a proportionality assessment, a new question arose for debate which had not been considered by the Divisional Court, namely whether section 193(2)(b) contained any requirement of proportionality. Mr Wise submitted that it did, for three reasons: (i) in the present context, article 14 of the ECHR, read with article 8 or article 9 of the ECHR, means that any positive action which involves discrimination has to be justified as being proportionate to some legitimate aim, and section 3(1) of the HRA means that section 193(2)(b) must be read and given effect in a way which is compatible with the appellant's rights and those of her family under article 14; (ii) in some cases covered by section 193(2)(b) the Race Directive would apply; in those cases a proportionality requirement would be applicable as a matter of general EU law; and as a result of the interpretive obligation set out in *Marleasing*, section 193(2)(b) should be construed as containing such a requirement; and (iii) to interpret section 193(2)(b) as not containing a proportionality requirement would produce absurd consequences.

51. Lewison LJ gave the substantive judgment, with which King LJ and Sir Stephen Richards agreed. Lewison LJ summarised the findings and analysis of the Divisional Court. At paras 34 to 62 he rejected Mr Wise's submissions for the implication of a proportionality test into section 193(2)(b). This meant that the appellant's appeal could not succeed.

52. As to Mr Wise's submission (i), Lewison LJ held by reference to domestic authority including, in particular, *R (H) v Ealing London Borough Council* [2017] EWCA Civ 1127; [2018] PTSR 541, that AIHA's allocation policy did not fall within the ambit of article 8 of the ECHR, nor did it fall within the ambit of article 9, so article 14 had no application (paras 44-52). Even if article 14 did apply, it was not "possible" to read a proportionality requirement into section 193(2)(b) by virtue of section 3(1) of the HRA. Section 193(2)(b) had to be read in the context of the scheme of the 2010 Act and in light of its juxtaposition with section 193(2)(a). To read a proportionality requirement into sub-paragraph (b) of section 193(2) would make it redundant and hence, in effect, would disapply it, which would not be permissible under section 3(1) of the HRA. This was explained at para 53, where Lewison LJ said:

> "The reason is a simple one. Section 193(2)(a) permits discrimination where it is a proportionate means of achieving a legitimate aim. Section 193(2)(b) does not contain the proportionality assessment required under section 193(2)(a). It is a necessary part of Mr Wise's argument in support of the imposition of a proportionality requirement in section 193(2)(b) that preventing or compensating for a disadvantage linked to a protected characteristic might *not* be a legitimate aim. If it were a legitimate aim, it would already be covered by section 193(2)(a). So section 193(2)(b), read as Mr Wise proposes, would be entirely redundant. In the course of the argument Mr Wise accepted this; and also agreed that preventing or compensating for a disadvantage linked to a protected characteristic *would* be a legitimate aim. So he accepted that his interpretation made section 193(2)(b) redundant. That, to my mind, is a powerful reason why that interpretation cannot be right."

53. As regards Mr Wise's submission (ii), Lewison LJ held (para 54) that since the case had proceeded on the footing that AIHA had discriminated against the appellant on grounds of religion, which did not fall within the Race Directive, the appellant was not able to show that the *Marleasing* principle of sympathetic construction was applicable to allow or require any change to the ordinary meaning of section 193(2)(b). It was not open to the appellant to say that in some case other than her own there might be a conflict between section 193(2)(b) and rights under the Race Directive, where EU law might trump the domestic provision (either in the sense of requiring a conforming interpretation to be adopted pursuant to the *Marleasing* principle or in the sense of requiring the disapplication of the domestic provision by giving direct effect to rights under the Directive), and then indirectly to seek to take the benefit of EU law in her case, although no relevant rights of hers under EU law were in issue.

54. Lewison LJ also rejected Mr Wise's submission (iii) (paras 55-61). There was no absurdity in construing section 193(2)(b) as bearing its ordinary meaning, with no proportionality requirement. It could not be said to be absurd that section 193(1), read with section 193(2)(b), provided a defence for a charitable institution in fulfilling its charitable objects which, *ex hypothesi* (by virtue of the Charities Act), must be for the public benefit. The contrast between section 193(2)(a) (which incorporates a proportionality test) and section 193(2)(b) (which does not) is striking and deliberate. Where the 2010 Act requires a proportionality requirement, as it does in a number of provisions, it says so in terms. The absence of such a requirement from section 193(2)(b) must be taken to be a deliberate policy choice by Parliament, and was well within the legislature's margin of appreciation. The explanatory notes for the 2010 Act and the EHRC code of practice supported this conclusion.

55. Lewison LJ also held (para 52) that even if section 193(2)(b) were interpreted as importing a proportionality requirement, then for reasons given later in his judgment in relation to section 158 and section 193(2)(a) of the 2010 Act, that requirement was satisfied. In relation to all these provisions, the Divisional Court was entitled to find that AIHA's allocation policy was a proportionate means of achieving a legitimate aim.

56. Although by reason of his conclusion regarding the interpretation of section 193(2)(b) Lewison LJ held that the appeal should be dismissed, he also went on to consider Mr Wise's submission that AIHA's allocation policy could not be regarded as proportionate for the purposes of sections 158 and 193 of the 2010 Act. At paras 63-68 Lewison LJ referred to the leading authorities on the role of an appeal court in considering a proportionality assessment by a lower court. This passage merits quotation in full:

> "63. In *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, the Supreme Court considered the role of an appeal court in an appeal which involves a challenge to a lower court's appraisal of proportionality. Lord Neuberger of Abbotsbury said at para 88:
>
> > 'If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere. If, on the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless).'
>
> 64. He added that an appeal court should only interfere where the lower court's assessment of proportionality was 'wrong'; and then went on to explain what he meant by that. Lord Wilson and Lord Clarke of Stone-cum-Ebony agreed with Lord Neuberger.

65. In *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079, the Supreme Court added a qualification to this approach. Lord Carnwath (with whom the other Justices agreed) said at para 64:

> 'In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle - whether of law, policy or practice - which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR rule 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34:
>
> > "the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong …"'

66. It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. Accordingly, if there is no such error or flaw, the appeal court should not make its own assessment of proportionality.

67. There are two further points that I should make, in view of some of Mr Wise's criticisms of the Divisional Court. First, an appeal court is bound, unless there is compelling reason to the contrary, to assume that the lower court has taken the whole

of the evidence into its consideration: *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600, para 48; *ACLBDD Holdings Ltd v Staechelin* [2019] EWCA Civ 817; [2019] 3 All ER 429, para 31. Second, an appeal court should be reluctant to interfere with a lower court's findings of fact, even where those findings are based on written rather than oral evidence. Having referred to earlier cases dealing with findings of fact made at trial after hearing oral evidence, Lord Kerr of Tonaghmore explained in *In re DB's Application for Judicial Review* [2017] UKSC 7; [2017] NI 301, para 80:

> 'The statements in all of these cases and, of course, in *McGraddie* itself [*McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477, paras 1-3 per Lord Reed] were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in *Anderson* [*Anderson v City of Bessemer* (1985) 470 US 564, 574-575] that the first instance trial should be seen as the "main event" rather than a "try out on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent. In the present appeal, I consider that the Court of Appeal should have evinced a greater reluctance in reversing the judge's findings than they appear to have done.'

68. Those observations have particular force in the present case, where the Divisional Court were presented with a mass of

> demographic and sociological evidence from multiple reputable sources."

57. In the following section of his judgment (paras 69-88), Lewison LJ followed this approach. He rejected Mr Wise's submissions that the Divisional Court had failed to conduct a proper balancing exercise, comparing the detriments of AIHA's allocations policy for non-members of the Orthodox Jewish community with the benefits sought to be achieved for that community. The Divisional Court had correctly directed itself by reference to the judgment of Baroness Hale in the *Akerman-Livingstone* case. It analysed the position in accordance with propositions to be drawn from the judgment of Baroness Hale in *R (Coll) v Secretary of State for Justice* [2017] UKSC 40; [2017] 1 WLR 2093, at para 42, by assessing whether there was a disadvantage for non-members of the Orthodox Jewish community, considering how significant that disadvantage was and considering what might be done to meet that disadvantage. At para 87 Lewison LJ summarised the analysis of the Divisional Court:

> "(i) The disadvantage to non-members of the Orthodox Jewish community was the withdrawal of 1% of the potentially available units of accommodation.
>
> (ii) The scale of that disadvantage was minuscule.
>
> (iii) The needs of the Orthodox Jewish community linked to the relevant protected characteristic were many and compelling.
>
> (iv) The allocation of properties to non-members of the Orthodox Jewish community would fundamentally undermine AIHA's charitable objectives. Thus there was no more limited way of achieving the legitimate aim.
>
> (v) Weighing these factors together, AIHA's allocation policy was proportionate."

In Lewison LJ's judgment, there was no flaw in this analysis which would entitle an appeal court to intervene. Accordingly, the appeal in relation to AIHA was dismissed for these reasons as well.

The issues on the appeal to this court

58. The parties identified the following issues for determination on the appeal:

(1) In order for AIHA to be able to rely on section 193(2)(b) of the 2010 Act, does it have to show that its arrangements are proportionate, whether pursuant to EU law or the HRA?

(2) In so far as is relevant to issue (1) above, is the allocation of social housing a matter that falls within the ambit of article 8 of the ECHR for the purposes of a discrimination claim under article 14 of the ECHR?

(3) Do AIHA's arrangements amount to impermissible positive discrimination as opposed to permissible positive action for the purposes of section 158 and/or section 193 of the 2010 Act?

(4) Were the courts below entitled to conclude that AIHA's arrangements are a proportionate means of achieving the aims referred to in either section 158(2) or section 193(2) of the 2010 Act?

To these must now be added a fifth issue:

(5) Did AIHA's allocation policy involve direct discrimination on grounds of race or ethnic origin, contrary to the Race Directive? This may have implications for issue (1) above. Mr Wise also submits that the appellant has rights under the Race Directive which would require that section 193(2)(b) of the 2010 Act should be disapplied if it conflicts with the requirements of that Directive.

59. Since the outcome of the appeal depends on whether the Divisional Court's holding regarding the proportionality of AIHA's allocation policy for the purposes of sections 158 and 193(2)(a) of the 2010 Act should be overruled, I will consider issues (3) and (4) first. Issue (3) is a dimension of the general question of proportionality raised in issue (4), so I will address them together. Then it is convenient to address issue (5). Finally, I will turn to issues (1) and (2).

Issues (3) and (4): the proportionality of AIHA's allocation policy

60. Mr Wise submits that, as explained in the *Akerman-Livingstone* case, the relevant test of proportionality is that to be found in EU law and says that the Divisional Court erred in discounting the *Briheche* judgment as relevant guidance. On this appeal, Mr Wise relies on *Briheche* and a number of other judgments of the CJEU which he submits show that positive discrimination is only permissible under EU law if its object is equality of opportunity for a disadvantaged group rather than equality of outcome; where a disadvantaged person is given priority only in circumstances where an objective assessment has been carried out to compare their position with that of a person who does not share the relevant characteristic and the positions are found to be equivalent, so that the relevant characteristic is taken into account only as a tie-break at the end of that process; and where the policy in question has a safety valve to allow priority in exceptional cases for a person who does not share the relevant characteristic. In this case, however, the Divisional Court did not assess proportionality in this way. Mr Wise submits that AIHA's policy on allocation cannot be regarded as proportionate according to this standard. It is concerned with equality of outcome rather than equality of opportunity; AIHA does not conduct assessments of the needs of non-members of the Orthodox Jewish community who might apply for social housing to compare them with the needs of members of that community; AIHA does not treat membership of the Orthodox Jewish community as a final tie-break, where an assessment of the needs of an applicant for social housing who is not a member of the community as compared with those of an applicant who is a member shows that they are broadly equivalent; and AIHA's policy does not include a safety-valve to allow a property to be allocated to a non-member of the Orthodox Jewish community in preference to members of the community in exceptional circumstances.

61. The judgments of the CJEU relied on by Mr Wise are those in *Kalanke v Freie Hansestadt Bremen* (Case C-450/93) [1996] All ER (EC) 66 ("*Kalanke*"); *Marschall v Land Nordrhein-Westfalen* (Case C-409/95) [1997] All ER (EC) 865 ("*Marschall*"); *In re Badeck* (Case C-158/97) [2000] All ER (EC) 289 ("*Badeck*"); *Abrahamsson v Fogelqvist* (Case C-407/98) [2002] ICR 932 ("*Abrahamsson*"); *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* (Case C-476/99) [2004] 2 CMLR 49 ("*Lommers*"); *Briheche*; and *Cresco Investigation GmbH v Achatzi* (Case C-193/17) [2019] 2 CMLR 20, Grand Chamber ("*Cresco*"). He also relies on the judgment of the EFTA Court in *EFTA Surveillance Authority v Norway* (Case E-1/02) [2003] 1 CMLR 23 ("the *EFTA Surveillance* case").

62. I do not accept Mr Wise's submission based on these cases. There is no general doctrine of positive discrimination in EU law, which is subject to the limitations for which Mr Wise contends. The judgments in these cases addressed the specific requirements arising under legislative instruments which are not applicable in the present case, in particular the Equal Treatment Directive.

63. Article 2(1) of the Equal Treatment Directive states that the principle of equal treatment means that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly". Article 2(4) provides that the Directive: "shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities."

64. In *Kalanke* the CJEU held that German legislation which provided for the automatic promotion of a woman who had the same qualifications as a man, where there was under-representation of women, was incompatible with the Equal Treatment Directive. National rules which guaranteed women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and fall outside what is permitted by article 2(4): para 22. This was confirmed by the CJEU in *Marschall* (para 32), but the court held there that such a national rule which contained a saving clause which guaranteed that male candidates would be the subject of an objective assessment which would take account of all relevant criteria and would override the priority accorded to female candidates where the assessment indicated the male candidate was better would be acceptable under article 2(4): paras 33 and 35. The under-represented sex could thus only be given priority by a national rule where there was an objective assessment of the respective relevant qualities of male and female candidates and the rule operated as a tie-breaker where that assessment showed that they were equally qualified to do the job: see also *Badeck*, paras 15-23; *Abrahamsson*, paras 60-62; *Lommers*, paras 38-39; *Briheche*, para 23; and the *EFTA Surveillance* case, para 45. As the CJEU pointed out in *Briheche* at para 24 (reiterating a point made in *Lommers*, para 39):

> "Those conditions are guided by the fact that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued."

65. This is a conventional approach to the proportionality principle. As the statement of the principle in *Akerman-Livingstone* makes clear, proportionality analysis requires identification of a legitimate aim and then an assessment whether a measure taken to promote that aim is proportionate in its effects in pursuing it, having regard to other interests at stake. For present purposes, what is significant about the Equal Treatment Directive is that article 2(4) identifies the aim which is to be regarded as a legitimate basis for departing from the general obligation of equal treatment imposed by article 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 tells one nothing of any significance about the proper approach to proportionality in the context of section 158 and section 193(2)(a) of the 2010 Act. In fact, separate provision is made in the 2010 Act, in section 159, governing positive action in relation to employment.

66. In each of section 158 and section 193(2)(a), the range of permissible legitimate aims is wider than the legitimate aim specified in article 2(4) of the Equal Treatment Directive and includes seeking to achieve particular outcomes, ie enabling persons who share the protected characteristic to overcome or minimise disadvantages they suffer which are connected to the characteristic or to meet needs particular to persons with the protected characteristic, in the case of section 158; or any legitimate aim in the case of section 193(2)(a) (which includes aims recognised as legitimate under section 158). Accordingly, the correct question, as the Divisional Court and the Court of Appeal rightly appreciated, is whether AIHA's allocation policy is a measure which is proportionate to promoting such aims in relation to ameliorating the position of members of the Orthodox Jewish community. Those aims relate 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.

67. The judgment of the Grand Chamber of the CJEU in *Cresco* is more relevant. That addressed the application of article 21 of the CFR and Directive 2000/78 establishing a general framework for equal treatment in employment and occupation ("the Framework Directive"). Article 2 of the Framework Directive states that the principle of equal treatment shall mean that there shall be no direct or indirect discrimination as regards employment and occupation on a range of grounds referred to in article 1, including religion or belief. Article 7, headed "Positive action", provides in para 1:

> "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any member state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in article 1."

The terms of article 7(1) are materially different from those of article 2(4) of the Equal Treatment Directive, and are closer to section 158 and section 193 of the 2010 Act.

68. *Cresco* concerned Austrian legislation which provided that for members of specified Christian churches Good Friday was a public holiday, with the result that if they worked on that day they should be paid a supplement. Non-Christians were not entitled to treat Good Friday as a day of holiday and were not entitled to any supplement for working that day; nor were any religious days of other religions treated as public holidays for them. A non-Christian who worked for a private company complained that this was incompatible with article 21 of the CFR and with the Framework Directive. At paras 62-68 the Grand Chamber dealt with an argument by the Austrian Government that the law treating Good Friday as a public holiday for members of Christian churches was justified pursuant to article 7(1) of the Framework Directive, and rejected it.

69. The Grand Chamber observed (para 63) that, in light of article 7(1), the principle of equal treatment in the Directive "does not prevent a member state from retaining or adopting, in order to ensure full equality in practice, specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in article 1". The Grand Chamber also noted (para 64) that article 7(1) is "designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society". The objectives of ensuring "full equality in practice" and the elimination or reduction of instances of inequality are very different from the more limited objective of securing equality of opportunity referred to in article 2(4) of the Equal Treatment Directive. They are objectives which can include efforts to achieve equality of outcomes as well as equality of opportunity, to use the distinction urged on us by Mr Wise.

70. At para 65, the Grand Chamber affirmed that a conventional proportionality analysis applies in relation to such aims (referring in that regard to *Lommers*, para 39):

> "… in determining the scope of any derogation from an individual right such as equal treatment, due regard must be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued …"

71. Applying the principle of proportionality, the Grand Chamber held (paras 66-68) that since there was no corresponding designation of important festivals of other religions as public holidays the law in issue went further than was necessary to compensate for the alleged disadvantage suffered by employees who are members of Christian churches and subject to a religious duty not to work on Good Friday.

72. Accordingly, the Grand Chamber in *Cresco* confirmed at para 65 the point made above about the conventional operation of the proportionality principle in the context of anti-discrimination legislation. The guidance in *Cresco* is relevant in relation to the analogous provisions in section 158 and section 193 of the 2010 Act. It confirms that the conventional approach adopted by the Divisional Court and the Court of Appeal on the question of proportionality was correct.

73. 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 Orthodox Jewish community connected to their religion and the disadvantages to which they were subject on grounds of their religion. It found that the AIHA allocation policy was a legitimate and proportionate means of meeting those needs and of seeking to correct for those disadvantages.

74. I would endorse the observations of Lewison LJ at paras 63-68 (quoted at para 56 above) about the proper approach for an appellate court when reviewing a finding of proportionality or disproportionality of a measure such as AIHA's allocation policy. Mr Wise did not suggest this approach was wrong. Since the Divisional Court gave itself a correct self-direction as to the test to be applied, its conclusion that AIHA's allocation policy is a proportionate means of pursuing the legitimate aims identified can only be set aside if the appeal court comes to the view that its conclusion was wrong in the relevant sense. It is not sufficient that an appellate court might think it would have arrived at a different conclusion had it been considering the matter for the first time. Although the word "wrong" is taken from what is now CPR Part 52.21, which is concerned with the powers of the Court of Appeal and certain other appellate courts, but not the Supreme Court, the arguments for a limited role for an appellate court are of general application and the same approach applies at this level. It would be a recipe for confusion if this court applied a different standard of review on appeal than that applied by the Court of Appeal.

75. It is for that reason that I have dealt with the Divisional Court's judgment on the question of proportionality at some length. I agree with Lewison LJ's assessment at paras 69-88 (see para 57 above) that there is no proper basis on which an appellate court could interfere with the Divisional Court's conclusion that AIHA's allocation policy is a measure which is proportionate to legitimate aims. Not only was that a conclusion which the Divisional Court was entitled to reach, I agree with it.

76. Two particular points should be mentioned. First, AIHA's allocation policy operates as a direct counter to discrimination suffered by the Orthodox Jewish community 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. Lewison LJ forcefully made this point at para 79 when rejecting criticisms made by Mr Wise:

> "It is, with respect, obvious why discrimination against the Orthodox Jewish community in accessing private sector housing is ameliorated by a housing association that gives members of that community preference. The extent of the amelioration may be impossible to assess with any precision, but that does not cast doubt on the fact that amelioration there is. Nor do I accept the criticism that the Divisional Court failed to assess the disadvantage occasioned to other groups who did not share the relevant protected characteristic. On the basis of the Divisional Court's findings, the effect of AIHA's allocation policy (taken at its most restrictive) is to withdraw from the pool of potentially available properties for letting 1% of units. The remaining 99% are potentially available to persons who do not share the relevant protected characteristic. Thus the disadvantage to those persons is minuscule. Even if one concentrates on larger units, where AIHA has a larger share of units, Orthodox Jews are disproportionately represented among applicants for such units. As far as the smaller units are concerned, the evidence is that many of them are also used to house large families. I do not regard this criticism as well-founded."

77. Secondly, Lewison LJ rightly rejected (at paras 84-85) a further criticism made by Mr Wise, that the Divisional Court was wrong to dismiss his argument that AIHA's allocation policy was an illegitimate "blanket policy". There is some flexibility in the policy as it is formulated, in that it allows for AIHA to allocate properties to non-members of the Orthodox Jewish community if AIHA has properties surplus to the demand from that community. However, in circumstances in which demand from that community far exceeds supply, allocation to non-members is not a realistic prospect in the foreseeable future. As Lewison LJ pointed out, the market circumstances are such that AIHA's allocation policy (in combination with the limited number of properties AIHA owns) does not achieve the aim of meeting the needs of the Orthodox Jewish community in Hackney, but only goes some way towards achieving that aim. There are still many Orthodox Jews in Hackney whom AIHA cannot accommodate and who still suffer the disadvantages associated with the relevant protected characteristic. Unless and until the aim of elimination of such disadvantages is achieved, it would be proportionate for AIHA to operate a simple "blanket policy" to allocate its properties to members of the Orthodox Jewish community as a means of promoting that legitimate aim. So even though market circumstances give AIHA's policy, in practice, a "blanket" effect, that does not show that it is a measure which is disproportionate to that aim.

78. Mr Wise criticised the Divisional Court and the Court of Appeal for their focus on the "minuscule" impact of AIHA's allocation policy. He said that the impact on the appellant could not be so described, since she had had to wait almost 18 months for a suitable property while at least six four-bedroom properties owned by AIHA became available and were advertised by the Council for members of the Orthodox Jewish community. In my view, there is nothing in this criticism.

79. 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 Orthodox Jewish community 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 Orthodox Jewish community, 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.

80. Positive action pursuant to section 158 has to address needs or disadvantages experienced in connection with a protected characteristic, and so contemplates that a group-based approach may be adopted, defined by reference to one of the protected characteristics as shared with others (such as gender, disability or religion). Similarly, in the context of section 193, charities typically focus the benefits they aim to provide on defined groups. Charitable status is a way of recruiting private benevolence for the public good (subject to the public benefit test in the Charities Act), and charities focus on providing for particular groups since that is what motivates private individuals to give money, where they feel a particular link to or concern for the groups in question. It is for the public benefit that private benevolence should be encouraged for projects which supplement welfare and other benefits provided by the state, even though those projects do not confer benefits across the board. Accordingly, Parliament contemplated that the proportionality of measures falling within section 158 and section 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.

81. This point is reinforced by the guidance on the question of proportionality under section 158 of the 2010 Act contained in the EHRC code of practice at para 10.22:

> "The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced

> against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups."

82. In this context, the proportionality assessment would be distorted by simply taking the worst affected individual who is not covered by the measure and comparing her with the most favourably affected individual who is covered by it. That is in effect what Mr Wise seeks to do by comparing the appellant with a member of the Orthodox Jewish community, 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.

83. The House of Lords in *R (Ahmad) v Newham London Borough Council* [2009] UKHL 14; [2009] PTSR 632 considered a broadly analogous context when assessing whether a local housing authority's scheme made under section 167(2) of the Housing Act 1996 (as amended) for determining priority for allocation of social housing based on placing individuals within broad need-based categories rather than on individualised, fine-grained comparative assessment of needs was irrational, and held that it was not. Baroness Hale and Lord Neuberger of Abbotsbury, who gave the principal speeches, emphasised the dangers of distorting the analysis by seeking to compare the situation and needs of the claimant with those of a general category, in circumstances where it was legitimate for the authority to adopt a group-based approach to allocation of housing: see paras 15 (Baroness Hale) and 46-48 and 60-62 (Lord Neuberger).

84. In *R (XC) v Southwark London Borough Council* [2017] EWHC 736 (Admin); [2017] HLR 24 Garnham J relied on these observations in deciding that a particular category-based feature of a local housing authority's housing priority scheme (to award additional points to persons in working households or who provide community services) was a proportionate means of achieving legitimate objectives (the creation of sustainable and balanced communities and encouraging residents to make a contribution to the local community), so as to provide a defence to a claim of indirect discrimination under section 19 of the 2010 Act. The claimant suffered from disabilities which meant that she could not work. Having regard to the observations in *Ahmad*, Garnham J held that the priority scheme in issue was the least intrusive measure which could be used without unacceptably compromising the chosen objectives and that it struck a fair balance between securing the objectives and its effects on the claimant's rights: paras 85-99. As he pointed out (para 92):

> "Determining those matters in the context of housing allocation schemes is especially difficult. Every tweak to the scheme to benefit one individual or one class of applicant is likely to have an adverse effect on another; every exception to the operation

> of a preference may damage the achievement of the objective. The court inevitably concentrates on the circumstances of the claimant in front of it and it is easy to recognise the disadvantage that a claimant may suffer. But the local authority has to consider the position of all applicants and the court can have only the most attenuated understanding of their position."

At para 98 he said:

> "I can see no measure less intrusive, less likely to be detrimental to the claimant, which would not undermine the legitimate objective identified by the council and to which I have referred above. To extend the class of volunteers to include all those who, like the claimant, provide some measure of care for others living in other accommodation would inevitably reduce the ability of the council to cater for those who benefit from the reasonable preferences provided for by the scheme. To extend the class of working households to include those who cannot work because of the type of disabilities suffered by the claimant would inevitably conflict with the legitimate preference to be given to those in work. The wider the class the less valuable the benefit of being within it."

So also in the present case, if AIHA changed its allocation policy to bring in people who are not members of the Orthodox Jewish community, that would inevitably dilute the impact it could have on addressing the needs and disadvantages experienced by that community in connection with their faith. In light of the unmet need for social housing for that community 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 Mr Wise contends.

85. In the context of state provision of social welfare benefits, it is well established that it is generally a legitimate approach and in accordance with the principle of proportionality for the state to use bright line criteria to govern their availability: see eg *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] UKHL 63; [2009] 1 AC 311; *Carson v United Kingdom* (2010) 51 EHRR 13, para 62; and *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening)* [2015] UKSC 57; [2015] 1 WLR 3820. That is to say, the state is entitled to focus provision of social welfare benefits on a particular group, and hence exclude other groups, even though there may be little or no difference at the margins in terms of need between some particular individual in the first group and another particular

individual in the excluded groups. Use of bright line criteria in this way is justified because it minimises the costs of administration of a social welfare scheme; it may be the best way of ensuring that resources are efficiently directed to the group which, overall, needs them most; it can reduce delay in the provision of benefits; and it provides clear and transparent rules which can be applied accurately and consistently, thereby eliminating the need for invidious comparisons of individual cases in all their variety, with the risk of arbitrariness in outcomes which that may involve. Lord Sumption and Lord Reed explained these points in *Tigere*, which concerned a challenge to the proportionality of rules which restricted the availability of student loans in the case of non-nationals to those who had settled immigration status, in a general discussion of proportionality and bright line rules at paras 88-91 (albeit in their conclusion on the facts of that case they were in a minority):

> "88. Those who criticise rules of general application commonly refer to them as 'blanket rules' as if that were self-evidently bad. However, all rules of general application to some prescribed category are 'blanket rules' as applied to that category. The question is whether the categorisation is justifiable. If, as we think clear, it is legitimate to discriminate between those who do and those who do not have a sufficient connection with the United Kingdom, it may be not only justifiable but necessary to make the distinction by reference to a rule of general application, notwithstanding that this will leave little or no room for the consideration of individual cases. In a case involving the distribution of state benefits, there are generally two main reasons for this.
>
> 89. One is a purely practical one. In some contexts, including this one, the circumstances in which people may have a claim on the resources of the state are too varied to be accommodated by a set of rules. There is therefore no realistic half-way house between selecting on the basis of general rules and categories, and doing so on the basis of a case-by-case discretion. The case law of the Strasbourg court [the European Court of Human Rights] is sensitive to considerations of practicality, especially in a case where the Convention [the ECHR] confers no right to financial support and the question turns simply on the justification for discrimination. In *Carson v United Kingdom* (2010) 51 EHRR 369 [51 EHRR 13], which concerned discrimination in the provision of pensions according to the pensioner's country of residence, the Grand Chamber observed, at para 62:

> ‘as with all complaints of alleged discrimination in a welfare or pensions system, it is concerned with the compatibility with article 14 of the system, not with the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation. Much is made in the applicants’ submissions and in those of the third party intervener of the extreme financial hardship which may result from the policy. … However, the court is not in a position to make an assessment of the effects, if any, on the many thousands in the same position as the applicants and nor should it try to do so. Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need … the court’s role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation.’

This important statement of principle has since been applied by the European Court of Human Rights to an allegation of discrimination in the distribution of other welfare benefits such as social housing: *Bah v United Kingdom* [(2011) 54 EHRR 21] at para 49. And by this court to an allegation of discrimination in the formulation of rules governing the benefit cap: *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449, para 15 (Lord Reed JSC).

90. The second reason for proceeding by way of general rules is the principle of legality. There is no single principle for determining when the principle of legality justifies resort to rules of general application and when discretionary exceptions are required. But the case law of the Strasbourg court has always recognised that the certainty associated with rules of general application is in many cases an advantage and may be a decisive one. It serves ‘to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis’: *Evans v United Kingdom* (2007) 46 EHRR 728, at para 89. The Court of Justice of the European Union has for many years adopted the same approach to discrimination cases, and has more than once held that where a residence test is appropriate as a test of eligibility for state financial benefits, it must be clear and its application must be

> capable of being predicted by those affected: *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] QB 145, para 72, *Förster v Hoofddirectie van de Informatie Beheer Groep* (Case C-158/07) [2009] All ER (EC) 399, para 56. As Advocate General Geelhoed acknowledged in considering these very Regulations in *Bidar* [*R (Bidar) v Ealing London Borough Council* (Case C-209/03) [2005] QB 812], para 61:
>
> > 'Obviously a member state must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In that respect, and as the court recognised in *Collins*, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection.'
>
> 91. The advantages of a clear rule in a case like this are significant. It can be applied accurately and consistently, and without the element of arbitrariness inherent in the discretionary decision of individual cases. By simplifying administration it enables speedy decisions to be made and a larger proportion of the available resources to be applied to supporting students. …"

86. These points apply *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 is a private body which does not have the same responsibility as the state for ensuring equal treatment of citizens, so if the state is entitled to use bright line criteria for distribution of social welfare benefits still more will that be true for a charity. Moreover, charities do not have the same resources as the state, so if the state is entitled to use bright line criteria for distribution of benefits, still more will that be true for a charity. It is in the public interest that charities should be able to minimise their costs of administration. That is in order to ensure that maximum resources are made available to address the problems which charities seek to alleviate and since otherwise charitable giving may be deterred, if donors feel excessive amounts of what they give will be spent on administration rather than actually helping people in need. The aims of minimising wastage of resources on administration and encouraging charitable giving are themselves legitimate objectives to be brought into account in the assessment of proportionality.

87. Mr Wise maintained that there are examples of other faith- or ethnicity-based housing associations (he cited three) having allocation policies which do not require them to provide housing exclusively to members of the relevant religious or ethnic community, and that there is no evidence that the aims or essential nature of these housing associations, "which are presumably operating in similarly demanding market conditions to AIHA", have been unacceptably compromised thereby. However, there was no evidence about how these housing associations manage the tension between their faith- or ethnicity-based focus for provision of social housing and provision for other groups, no evidence that these three examples were in any way representative of the sector as a whole, and no evidence that the problems faced by the groups they seek to help or the market conditions in their areas are equivalent to those which AIHA has to address. Therefore, I did not find Mr Wise's attempt to rely on these examples at all persuasive. Each case must depend on its own facts. The Divisional Court was entitled to make the assessment that if AIHA relaxed its allocation criteria it would dilute its ability to address the problems faced by the Orthodox Jewish community to an unacceptable degree. Mr Wise made vague references to the possibility that AIHA could allocate more properties to non-members of that community whilst still maintaining assistance for the community, but he did not propose any concrete solution, let alone a viable one, to resolve that dilemma.

88. In my judgment, for the reasons given above, the appellant's grounds of appeal in relation to issues (3) and (4) fail. The consequence is that her appeal as a whole should be dismissed.

Issue (5): The Race Directive

89. The Race Directive requires discrimination on grounds of race or ethnic origin to be made unlawful, including in particular in relation to housing. Mr Wise submits that the *JFS* case shows that AIHA's allocation policy involved direct discrimination on grounds of ethnic origin. Mr Grodzinski has a short response to this new claim by the appellant: AIHA's allocation policy involves differentiation on grounds of religious observance, which is not prohibited by the Race Directive; it does not involve discrimination on grounds of race or ethnic origin; the facts in the *JFS* case were materially different.

90. In my view, Mr Grodzinski is right about this. The *JFS* case concerned a complaint that the admissions criteria adopted by the Jewish Free School involved unlawful direct discrimination on grounds of ethnic origin contrary to the Race Relations Act 1976, one of the pieces of anti-discrimination legislation which was replaced by the 2010 Act. Only children who were recognised as Jewish according to the Office of the Chief Rabbi could be admitted, such recognition being based on matrilineal descent from a Jewish mother or one who had been converted in

accordance with the tenets of Orthodox Judaism. There was no requirement of practice of the Jewish faith. The school refused to accept a child whose mother had undergone conversion to non-Orthodox Judaism, which was not recognised by the Office of the Chief Rabbi. By a majority, this court held that the test of matrilineal descent applied by the school was a test of ethnic origin and that therefore the school's policy involved direct discrimination on racial grounds contrary to the 1976 Act, which defined such grounds to include "ethnic or national origins". As Lord Phillips of Worth Matravers explained at para 13, "[i]n deciding what were the grounds for discrimination it is necessary to address simply the question of the factual criteria that determined the decision made by the discriminator." The motive of the discriminator for the discrimination in issue is irrelevant.

91. In *JFS* the court considered and affirmed the guidance given by Lord Fraser of Tullybelton in *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548, 562 regarding the meaning of an ethnic group in this context, as set out by Lord Phillips at para 28. The criteria set out by Lord Fraser include two essential conditions (that the group should have a long shared history and a cultural tradition of its own) and a number of other relevant factors; and he stated, "[p]rovided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of [the 1976 Act], a member." In *JFS* this court recognised that one could define Jews as an ethnic group by reference to these general criteria without reference to matrilineal descent, but it was concerned with the particular question whether the matrilineal test applied by the school involved discrimination on grounds of ethnic origins, including as against persons who regarded themselves as Jews (as the mother and father of the child did): see, eg, paras 30-31, 33, and 43-46, where Lord Phillips, in the majority, distinguishes the criterion of matrilineal ethnic origin at issue in the case from whether someone is a member of what he describes as "a *Mandla* Jewish ethnic group". Lord Phillips and the majority held that the application of that criterion by the school (as distinct from a criterion by reference to a *Mandla* Jewish ethnic group) involved direct discrimination on grounds of ethnic origin. Baroness Hale, also in the majority, emphasised at para 66 that the child was not excluded from the school by reason of his religious beliefs, but by reason of his ethnic origins, because his mother was not recognised as Jewish by the Office of the Chief Rabbi.

92. For the new claim based on the Race Directive, Mr Wise submits that the *JFS* decision establishes that the criterion used by AIHA that an applicant for its properties should be a member of the Orthodox Jewish community involves discrimination on grounds of ethnic origin, and that this holds true for the concept of ethnic origin in the Race Directive itself. In my view, however, this submission cannot be sustained on the facts of this case. Unlike in the *JFS* case, AIHA did not make its selection on the grounds of a person's Jewish matrilineal descent, but on the grounds of whether they engage in Orthodox Jewish religious observance: see

paras 37-38 above. Discrimination on grounds of religious belief or religious observance is not prohibited by the Race Directive.

93. Since the new claim was introduced so late in the day, there has been no evidence put forward and no examination by the courts below regarding whether persons who engage in Orthodox Jewish religious observance might, by virtue of that, be regarded as part of some wider and differently constituted *Mandla* Jewish ethnic group according to Lord Fraser's guidelines. It is possible that they might, but the question is not a straightforward one. Evidence would be required in relation to it, for instance to explore the extent that such persons would be accepted by other Jews (Orthodox or non-Orthodox) to be part of their ethnic group or might be perceived as such by non-Jews. Mr Wise was not given permission to introduce such a case.

94. A range of legal issues would arise if an attempt were made to present such a case in future. These would include whether the concept of ethnic origin in the Race Directive is the same as in the 1976 Act and, now, the 2010 Act; whether a defence existed under article 5 of the Race Directive which, by contrast with the more limited positive discrimination provision in the Equal Treatment Directive, is in similar wide terms to the positive discrimination provision in the Framework Directive considered in *Cresco* and discussed above (and, for the reasons given above, it is likely that AIHA would have a good defence under article 5); whether the Race Directive can have horizontal effect in relation to a private body like AIHA (see *Cresco*, paras 72-73); whether it is possible to interpret provisions of domestic legislation compatibly with the Directive pursuant to the *Marleasing* interpretive obligation (see *Cresco*, para 74); and whether article 21 of the CFR might create rights on which a claimant could rely (see *Cresco*, paras 75-78). It is not appropriate to say anything further about these issues in this judgment.

Issues (1) and (2): interpretation of section 193(2)(b) and the ambit of article 8

95. As mentioned above, it is common ground that in applying its allocation policy AIHA acts in pursuance of its charitable instrument, so that section 193(1)(a) of the 2010 Act is satisfied, and also that it provides benefits to persons who shared a protected characteristic (ie religion) "for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic", in the language of section 193(2)(b). The Court of Appeal held that there is no implied additional requirement in section 193(2)(b) that a charity should have to persuade a court that the measures it takes within section 193(2)(b) are proportionate.

96. Although it is my view that the appeal should be dismissed for the reasons given above in relation to issues (3)-(5), we should also address the interpretation of

section 193(2)(b), which was the main ground on which the Court of Appeal dismissed the appellant's appeal. In my opinion, this does not require us to reach a concluded view on the ambit of article 8 of the ECHR in the present context, for the purposes of application of article 14. That is because, even if article 14 is applicable, I consider that the Court of Appeal was right to construe section 193(2)(b) in the way it did, as not being dependent on a proportionality assessment to be conducted by the court.

97. There are two reasons for this. For the purposes of analysis, I will make the assumption that AIHA's allocation policy falls within the ambit of article 8 so that article 14 is applicable. First, I accept Mr Grodzinski's submission that by section 193(1) read with section 193(2)(b), Parliament has itself established a regime which is proportionate and compatible with article 14. Secondly, even if that is not the case, I agree with Lewison LJ that it is not possible under section 3(1) of the HRA to read an additional proportionality requirement into section 193(2)(b). In relation to both arguments it is relevant to trace the legislative history.

98. Charities have been subject to legal regulation for a very long time. In particular, charitable status is limited to bodies which provide public benefits of specified kinds. By virtue of section 2(1) of the Charities Act, to be charitable a purpose has to fall within section 3(1) of the Act and has to be for the public benefit, as set out in section 4 of the Act. Charitable purposes include "the prevention or relief of poverty", "the advancement of religion" and "the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage": sub-paragraphs (a), (c) and (j) of section 3(1), respectively. The Charity Commission exercises regulatory oversight in relation to the activities of charities, to ensure, among other things, that the public benefit requirement is satisfied: see the discussion in *R (Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC); [2012] Ch 214. The public benefit requirement will not be satisfied if a charity's activities have unduly detrimental wider effects in society: see the *Independent Schools Council* case, in particular at paras 64 and 105-106.

99. The Sex Discrimination Act 1975 made forms of discrimination on grounds of sex unlawful, but section 43(1) set out an exemption for charities in relation to an act which was done to give effect to a provision in a charitable instrument for conferring benefits on persons of one sex only. The Race Relations Act 1976, which made forms of discrimination on grounds of race unlawful, contained a similar exemption. In 2008, section 43 of the 1975 Act was amended by the Sex Discrimination (Amendment of Legislation) Regulations 2008 (SI 2008/963) by the addition of subsection (2A), which provided that subsection (1) should not apply to specified types of discrimination "unless the conferral of benefits is - (a) a proportionate means of achieving a legitimate aim, or (b) for the purpose of preventing or compensating for a disadvantage linked to sex". This was the

forerunner of what became section 193(2) of the 2010 Act. The Explanatory Memorandum for the Regulations stated that this provision was introduced to give effect in domestic law to Council Directive 2004/113/EC, implementing the principle of equal treatment between men and women in the access to and supply of goods and services ("the Gender Directive"). The amendment was introduced while consultation on the terms of what became the 2010 Act was in progress.

100. Recital (16) to the Gender Directive states:

> "Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities."

In terms similar to those of article 7 of the Framework Directive and article 5 of the Race Directive, article 6 of the Gender Directive provides:

> "With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any member state from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex."

101. While the 2010 Act was a Bill, Parliament's Joint Committee on Human Rights sent a letter to the Government dated 2 June 2009 raising a number of queries about the Bill, including about the clause which became section 193. The Government's response by letter dated 19 June 2009 explained that the exemptions from anti-discrimination law for charities were to be tightened up in the new provision in line with the model already adopted in relation to sex discrimination, so that it would no longer be sufficient for them to discriminate if their charitable instrument allowed for this; now "a charity would also need to show that it was justified in discriminating". This would be achieved if it could show that such

discrimination "is objectively justified" (ie under section 193(2)(a)) or is "intended to prevent or compensate for disadvantage linked to the protected characteristic in question" (ie under section 193(2)(b)). It is clear from this that in proposing the provision in section 193(2) the government intended sub-paragraphs (a) and (b) to serve as distinct conditions for the operation of the charitable exemption and that it considered that satisfaction of either of them would constitute justification for discrimination which would meet the requirements of EU law under the Race Directive and the Gender Directive.

102. Under the Race Directive (see recital (17) and article 5) and the Gender Directive (see recital (16) and article 6) it is contemplated that positive action to help disadvantaged sections of the population may be taken by bodies created for that purpose. In the English context, these obviously include charities.

103. The general regime for regulation of charities in English law limits charitable status by reference to defined public goods as set out in section 3 of the Charities Act and, by application of the public benefit test in section 4, ensures that the benefits to be provided by a charity are balanced against any detriment from its activities. Thus, as a result of this regulatory regime, the requirement in section 193(1)(a) of the 2010 Act that the person seeking to benefit from the exemption in section 193 has to act "in pursuance of a charitable instrument" imposes substantive requirements that the acts in question promote the public interest. This point is emphasised in the guidance on section 193 in the EHRC code of practice, at para 13.35:

> "The 'public benefit test' that all charities must satisfy to gain charitable status may assist, but it will not guarantee that any such restriction meets either of the tests specified in the Act. The Charity Commission for England and Wales and the Scottish Charity Regulator will consider the likely impact of any restriction on beneficiaries in the charitable instrument, and whether such restriction can be justified, in assessing whether the aims of a charity meet the 'public benefit' test."

The effect of subsection (2)(b) is to ensure in addition that, in order to be exempt, the provision of benefits is "for the purpose of preventing or compensating for a disadvantage linked to" the relevant protected characteristic.

104. 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 article 14 of the ECHR in relation to activities falling within section 193. Parliament, acting with the benefit of the explanation from the government referred to above,

must be taken to have made the assessment that by this combination of conditions the regime it enacted in the 2010 Act satisfied the requirement of proportionality for the purposes of EU law. It must equally be taken to have considered that the regime satisfied the requirement of proportionality for the purposes of the ECHR, in particular as it arises under article 14.

105. This has the benefit for charities that, where they rely on the section 193(2)(b) limb of the exemption, they do not have to produce a separate proportionality justification of their own if challenged. This means that their resources will not have to be used up in this way in meeting challenges which might be brought against them, and since section 193(2)(b) provides a defence with bright line characteristics it is likely to protect them from challenges being brought which can be seen will not succeed. In this way, this limb of the exemption in section 193, as framed, helps to ensure that the scarce resources of charities are channelled through to those who need them, rather than being diverted to meet costs of administration, legal proceedings and threats of legal proceedings.

106. It is also relevant that this is achieved against the background that it is the state's, not charities', responsibility to provide essential welfare benefits for all who need them. It is easier to say that Parliament has struck a fair and proportionate balance between the needs of charities (and, more particularly, those who benefit from their activities) and the general interests of the sections of the public who do not so benefit, where those general interests are met out of state resources where there is pressing need.

107. The margin of appreciation to be afforded to Parliament when it has sought to strike a balance between competing interests varies depending on context. Where, as here, Parliament has had its attention directed to the competing interests and to the need for the regime it enacts to strike a balance which is fair and proportionate and has plainly legislated with a view to satisfying that requirement, the margin of appreciation will tend to be wider. A court should accord weight to the judgment made by the democratic legislature on a subject where different views regarding what constitutes a fair balance can reasonably be entertained.

108. The context here is provision of social benefits of various kinds, to be provided by charities out of the scarce resources available to them. When the state provides social welfare benefits, the margin of appreciation afforded to Parliament is wide. Its judgment will be respected in relation to general measures of economic or social strategy unless manifestly without reasonable foundation: see eg *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18; [2012] 1 WLR 1545, para 19 (Baroness Hale); *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group and Another intervening)* [2015] UKSC 16; [2015] 1 WLR

1449, para 11 (Lord Reed); *Gilham v Ministry of Justice* [2019] UKSC 44; [2019] 1 WLR 5905, para 34 (Baroness Hale).

109. I accept Mr Grodzinski's submission that this is also the relevant margin of appreciation to be applied in the context of the exemption for charities from the general anti-discrimination rules in the 2010 Act. The underlying issue, of allocation of scarce resources to meet a range of needs, is similar to that which is relevant in the context of welfare benefits provided by the state. Allowing the state a wide margin of appreciation in the latter context recognises the legitimacy of such decisions of social and economic policy being taken by a body which has democratic authority and the responsibility for raising taxes and deciding how they are spent. It is also a matter of social and economic policy for Parliament to decide how best to stimulate private benevolence which will allow charities to supplement state provision of welfare benefits. The degree to which charities are given freedom to pursue objectives which their donors regard as important affects the extent to which donors will provide private resources to supplement provision by the state. If donors are not given reasonable assurance that what they give will reach the persons they intend to benefit, they will not give at all. It was a legitimate policy choice by Parliament to fashion the exemption for charities under the section 193(2)(b) limb of section 193 in the way it did, as a relatively bright line rule which would give that assurance to donors.

110. In my judgment, having regard to the relevant margin of appreciation, the fact that charitable provision supplements basic social welfare provision by the state, the general regulation of charities to ensure they provide public benefits, the desirability of ensuring that the resources of charities are not diverted from being used to meet social needs and the way in which Parliament has carefully and deliberately framed the section 193(2)(b) limb of the exemption to meet the proportionality tests in EU law and under the ECHR, that limb of the exemption satisfies the proportionality requirement across the range of cases in which it applies. There is, therefore, clearly no basis on which it would be appropriate for the court to seek to imply into that provision an additional requirement that proportionality should be demonstrated separately by a charity in every, or any, case falling within it.

111. Even if I were wrong in that conclusion, I agree with Lewison LJ (para 53) that it is not "possible", as that term is used in section 3(1) of the HRA, to read and give effect to section 193(2)(b) by implying into it an additional proportionality requirement. To do so would make section 193(2)(b) redundant, since then a charity could always in a case covered by that provision rely on the section 193(2)(a) limb of the exemption. The point made by Lewison LJ is strongly reinforced by consideration of the legislative history, set out above. It is clear from the terms of section 193(2) and from that history that Parliament intended the two limbs to be separate and distinct, and that there should be no additional proportionality

requirement in section 193(2)(b). To import such a requirement would undermine a fundamental feature of that provision and would go against the grain of what Parliament intended; therefore, section 3(1) of the HRA does not allow section 193(2)(b) to be read and given effect in this way: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, in particular at para 33 (Lord Nicholls of Birkenhead) and paras 113-114 and 121-124 (Lord Rodger of Earlsferry). This point is reinforced 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 sections 13(2), 19(2), 158(2) and 159. The omission of such a requirement from section 193(2)(b) was a deliberate choice by Parliament which constituted a fundamental feature of the legislation.

112. The same reasoning prevents the court from interpreting section 193(2)(b) as including a proportionality requirement by reason of the *Marleasing* interpretive obligation in EU law. As with section 3(1) of the HRA, that obligation only requires and permits a sympathetic construction of national legislation to be adopted so as to produce compatibility with EU law when it is possible for the national legislation to be interpreted in that way. The analogy with section 3(1) of the HRA is a close one and the boundaries of the interpretive obligation are essentially the same: see *Ghaidan v Godin-Mendoza*, paras 45 (Lord Steyn), 122 (Lord Rodger) and 145 (Baroness Hale).

113. In any event, to the extent that Mr Wise sought to rely on the Race Directive and the *Marleasing* interpretive obligation, his submission fails for the reasons alluded to by Lewison LJ at para 54. No right of the appellant was engaged under the Race Directive, as I have also concluded under issue (5) above. It is true that, as Lewison LJ noted, other people in other circumstances might have rights under that Directive which are affected by a charity's actions taken in reliance on section 193(2)(b); but that does not assist the appellant in her case.

114. The proper approach to construction is that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person who is affected by it can 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 do the special interpretive obligations under section 3(1) of the HRA or under the *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 means that the same legislative provision might be given a different interpretation in different cases, depending on whether Convention rights or EU law are applicable in the case or not. Although at first glance this might seem odd, in fact it is not. It simply reflects the fact that in the one case circumstances are such that an additional interpretive obligation has to be taken into account, but in the other case no such obligation is in play: see *R (Hurst) v London Northern District Coroner*

[2007] UKHL 13; [2007] 2 AC 189, para 1 (Lord Bingham of Cornhill), paras 9 and 12-15 (Lord Rodger) and para 52 (Lord Brown of Eaton-under-Heywood); and *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685; [2002] 1 CMLR 20, paras 41-47 per Arden LJ (as she then was). If the position were otherwise, Convention rights and rights under EU law would be given disproportionate effect in domestic law, and statutory interpretation would become an exercise in the imaginative construction of theoretical cases in which such rights might be in issue in order to change the interpretation of legislation in cases where they are not.

115. Like Lewison LJ, I have no hesitation in rejecting Mr Wise's further argument that it is necessary to imply a proportionality requirement into section 193(2)(b) to avoid absurdity. As explained above, there is nothing absurd about the way in which Parliament has framed the section 193(2)(b) limb of the exemption for charities.

116. Having reached the conclusion that the interpretation of section 193(2)(b) is clear whether or not article 14 of the ECHR is applicable, it is not necessary to reach a view on issue (2) (whether the current circumstances fall within the ambit of article 8). It has often been observed that the question of what falls within the ambit of article 8 and other Convention rights so as to bring article 14 into operation is a difficult and rather opaque area: see the review of the authorities in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, paras 97-111 (Hickinbottom LJ). I think this question should be left to be decided in another case where it may be determinative. We were not taken to all the relevant authorities and there was little debate before us on this issue, so I do not think we should venture to try to make any definitive statement about it. However, this should not be taken as endorsement of the conclusion of the Court of Appeal that the present case falls outside the ambit of article 8. A number of factors might be relevant in relation to that issue. The fact that the appellant and her children were already housed, on which the Court of Appeal placed weight, is one. But I have reservations whether that factor is necessarily determinative in circumstances where the adequacy of the living accommodation available to them as a family, as compared with others, is in issue. On the other hand, it is also potentially relevant that AIHA is not part of the state and that no case has been made out that it is a public authority within the meaning of section 6 of the HRA, so that what is in issue is the ambit of article 8 so far as concerns positive obligations of the state under that provision to intervene in relationships between private persons. It might be argued that this makes the connection with article 8 more tenuous, and that such a tenuous connection is not sufficient. I think that we should leave the point open in this case.

Conclusion

117. For the reasons given above, I would dismiss the appeal. In summary, the judgment of the Divisional Court on the issue of proportionality, in so far as it is relevant to the statutory defences in sections 158 and 193 of the 2010 Act, cannot be faulted. Accordingly, those defences have rightly been found to apply in relation to AIHA. Further and in any event, the Court of Appeal was right to conclude that, on its proper interpretation, the statutory defence based on section 193(2)(b) of the 2010 Act does not include an implied requirement of proportionality. Accordingly, the Court of Appeal was right to conclude that AIHA benefited from that defence, whatever the position on the issue of proportionality. The appellant's new claim based on the Race Directive fails.

LADY ARDEN:

118. The Court of Appeal in this case was careful to hold that in relation to the issue as to the proportionality of AIHA's allocation policy the Divisional Court was entitled to make its evaluation of the relevant factors and that there was no basis on which its evaluation could be set aside (per Lewison LJ at paras 63 to 68) for the reasons which Lewison LJ gave. Lord Sales, giving the first judgment in this case, endorses that conclusion, as do I.

119. Lord Sales then sets out the reasons why he agrees with the Divisional Court at paras 76 to 88. What falls from my Lord is illuminating and valuable, but it does not in my judgment diminish the importance of the point made by Lewison LJ that the evaluation made by the Divisional Court was one which they were entitled to make and could not be set aside on appeal. The point made by Lewison LJ is not changed by the fact that the appellate court might have reached some other conclusion, nor yet by the fact that the appellate court would have reached the same conclusion. The function of the appellate court is simply one of review. It follows that it is not necessary for this court to express its own view, nor can its view alter the conclusion arrived at by the Divisional Court.

120. Indeed, I would at least in the generality of cases, agree with Lewison LJ at para 66 of his judgment that if the court at first instance makes no error and there is no flaw in its judgment, the appellate court should not make its own assessment of proportionality. There may be exceptional circumstances when it is necessary to do so but for my part it has not been suggested that this case was one of them.

121. On that basis, I agree with the judgment of Lord Sales.