

Discriminatory housing allocation policy upheld as being justified and proportionate (R (on the application of Z and others) v Hackney London Borough Council)

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Local Government analysis: The Court of Appeal refused to disturb findings of the Divisional Court, on a wealth of evidence, that an Orthodox Jewish housing association's policy of not housing non-Orthodox Jewish seekers of social housing, was both justified and proportionate. The court also made clear that it is not easily persuaded to interfere with such first instance findings, without an undermining error of law or of reasoning first being established, and no such error was found to exist in this case. Very good reasons for restricting only 1% of the social housing stock in Hackney to Orthodox Jews were established, which were held to far outweigh the disadvantage to persons such as the claimant, who as a non-Orthodox Jew, who cannot access that housing stock. Written by Adam Heppinstall, barrister, at Henderson Chambers.

R (on the application of Z and another) v Hackney London Borough Council and another
[\[2019\] EWCA Civ 1099](#)

What are the practical implications of this case?

The merits of the claim for judicial review are hard to discern as the claimant accepted on the evidence that the discriminatory policy was justified on the statutory ground under [section 193](#) of the Equality Act 2010 ([EqA 2010](#)) of being for the purpose of preventing or compensating for a disadvantage linked to being an Orthodox Jew, not least the need to foster a safe community to combat anti-Semitism. The interest in the judgment, is found, however, in how the Court of Appeal robustly defended the decision of the Divisional Court below (composed of two experienced judges, including, as is usual, one taken from the Court of Appeal). The court makes it clear that it is not in the business of rehearing cases a second time and will only intervene in relation to findings on questions such as proportionality on an error of law or an undermining error of approach. For those considering trying to assail a finding of proportionality made by a first instance court, they should pay heed to this judgment, before launching their appeal.

What was the background?

Where the A10 (the old Roman Ermine Street) crosses Hackney Brook, at what used to be a ford, on the southern edge of a hill, there is a community known as Stamford Hill, which since the 18th century has had a significant Jewish population. It is now the home to the largest Hasidic Orthodox community in Europe. There is a housing association, Agudas Israel (AIHA), an exempt charity, which has as a primary object, providing housing 'for the benefit of the Orthodox Jewish community.' The local authority will nominate those on the housing list to AIHA who are not Orthodox Jewish but given that AIHA only has 12 to 13 properties per year to offer to its 700 strong waiting list, it is inevitable that those who are not Orthodox Jewish, are unlikely to ever be housed by AIHA. The claimant, a single mother with 4 children, one of whom has autism but none of whom are Orthodox Jewish, unsuccessfully sought such a property. The family therefore sought judicial review of AIHA's policy on the basis that it was discriminatory against those not of the Orthodox Jewish religion. The Divisional Court (Lindblom LJ and Sir Kenneth Parker) rejected that claim and it came before the Court of Appeal (Lewison and King LJJ and Sir Stephen Richards).

What did the court decide?

[EqA 2010, s 193](#) provides an exemption to the prohibition against direct discrimination (save for discrimination on the ground of colour) where pursuant to a charitable instrument a person provides benefits to other persons who share a protected characteristic if that provision is either (1) a

proportionate means of achieving a legitimate aim, or (2) is for the purpose of 'preventing or compensating for a disadvantage linked to the protected characteristic.'

The claimant accepted that the last requirement was satisfied but argued that it should nevertheless be subject to a proportionality assessment, which it could not fulfil. The Court of Appeal rejected that submission for the simple reason that [EqA 2010, s 193](#) provided two alternative routes to exemption, one requiring the demonstration of proportionality, and the other requiring something else ('preventing or compensating for a disadvantage linked to the protected characteristic') and if you overlaid the later with a proportionality requirement, you would render it nugatory given that the other alternative was itself a proportionality requirement. They would effectively cease to be alternatives and would be merged. That cannot have been what Parliament intended.

Nevertheless, with an eye to perhaps the Supreme Court disagreeing, if the case gets that far, the court went on to consider the question of whether AIHA's policy of not (primarily) providing housing to non-Orthodox Jews is proportionate. The court refused to interfere with the findings of the Divisional Court, that it was so proportionate. The court made it clear that it will always be slow to interfere with a finding of proportionality made by the court below.

It said that (1) an appeal court is bound to assume that the lower court has taken the whole of the evidence into consideration, and (2) will be reluctant to interfere with findings of fact, even when they are based on written as opposed to oral evidence (para [67]). The court also made clear that it will only interfere where there has been an error of law (para [63]) or where there is some error or flaw in reasoning which is such as to undermine the cogency of the court below's conclusion (para [66]). In other words the Court of Appeal will not retake the decision or reassess the evidence, unless there is an error of law or serious error of reasoning which undermines the cogency of the decision. The court could find no such error in this case, as the Divisional Court had carefully come to the correct conclusion that as the policy only withdrew 1% of the local housing stock from general availability, and as the needs of the Orthodox Jewish community were 'compelling' (not least the fostering of a secure community in order to combat anti-Semitism) and that the allocation of housing to non-Orthodox Jewish families would undermine that aim, of which there was no less invasive means of fulfilment, the policy was proportionate (para [87]). The appeal was thus dismissed.

Case details

- Court: Court of Appeal, Civil Division
- Judge: Lewison, King LJ and Sir Stephen Richards
- Date of judgment: 27/06/2019

[Adam Heppinstall](#) is a barrister at Henderson Chambers, and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact caseanalysis@lexisnexis.co.uk

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