



## Ten years of the Equality Act in housing: Where next? Part 2

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# Positive action in housing

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# Positive action and disability

- **Section 13(3)** "If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."
- **The duty to make reasonable adjustments** may require treating a disabled person more favourably than a person not having that disability: *Archibald v Fife Council* [2004] ICR 954

# Part I I: the advancement of equality

## 158 Positive action: general

- (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**.

# Part I I: the advancement of equality

(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.**

(6) This section does not enable P to do anything that is prohibited by or under an enactment other than this Act

# Part I I: the advancement of equality

- Section 158 should be read in conjunction with section 149:  
*R (South West Care Homes Limited v Devon County Council* [2012]  
EWHC 2967 para 17
- **Section 149: The Public sector equality duty**  
“(1) A public authority must, in the exercise of its functions, have due regard to the need to [...] (b) **advance equality of opportunity** between persons who share a relevant protected characteristic and persons who do not share it...”

# Part I I: the advancement of equality

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic that are **connected to that characteristic**;

(b) take steps to **meet the needs of persons who share a relevant protected characteristic that are different** from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to **participate in public life or in any other activity in which participation by such persons is disproportionately low**.

# Part I I: the advancement of equality

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

[...]

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is **not to be taken as permitting conduct that would otherwise be prohibited** by or under this Act.



# Part I I: the advancement of equality

- Section 149(6) is clear that the PSED cannot justify or permit so-called ‘positive discrimination’ which is prohibited under the Act
- *R (Adath Yisroel Burial Society) v Inner North London Senior Coroner* [2019] Q.B. 251 “Section 158 of that Act permits what is called in the side note “positive action” in certain circumstances... [It] does not concern what is sometimes called “positive discrimination”; it is more limited and concerns only what the legislation calls “positive action”. In general “positive discrimination” is unlawful under the 2010 Act”
- See also *R. (TW) v Hillingdon BC (No.2)* [2019] H.L.R. 23

# Part I I: the advancement of equality

## Removing or minimizing disadvantage connected to the characteristic

- Section 149(3)(a): Due regard to the need to **remove or minimise disadvantages** suffered by persons who share a relevant protected characteristic that are **connected to that characteristic**
- Section 158(1)(a): If P reasonably thinks that persons who share a protected characteristic suffer a **disadvantage connected to the characteristic** then ...
- Section 158(2)(a): Not prohibited from taking steps enabling or encouraging persons who share the protected characteristic to **overcome or minimise that disadvantage**

# Part I I: the advancement of equality

## Meeting shared needs that are different

- Section 149(3)(b): due regard to the need to take steps to **meet the needs of persons who share a relevant protected characteristic that are different**
- Section 158(1)(b): If P reasonably thinks that persons who share a protected characteristic have **needs that are different from the needs of persons who do not share it** then ...
- Section 158(2)(b): P not prohibited from taking any action which is a proportionate means of achieving the aim of **meeting those needs**

# Part I I: the advancement of equality

## Encouraging participation in public life and other activities

- Section 149(c): Due regard to the need to encourage persons who share a relevant protected characteristic to **participate in public life or in any other activity in which participation by such persons is disproportionately low.**
- Section 158(1)(c): If P reasonably things participation in an activity by persons who share a protected characteristic is **disproportionately low then ...**
- Section 158(2)(c): **P not prohibited from** taking any action which is a proportionate means of achieving the aim of **enabling or encouraging persons who share the protected characteristic to participate in that activity.**

# A duty to take positive action?

- Section 149(6) recognizes that “compliance with the duties in this section *may* involve treating some persons more favourably than others” so long as actions are not prohibited (i.e. within s. 158)
- Whether compliance with section 149 *does* involve treating some persons more favourably will depend on the circumstances: see e.g. *Dacorum v Powell* [2019] H.L.R. 21
- But the case law on the PSED is going in the other direction

# A duty to take positive action?

- Indirect discrimination: section 19 Equality Act 2010
- Thlimmenos v Greece (2000) 31 EHRR 15, para 44,:  
*“The [Article 14] right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification **fail to treat differently persons whose situations are significantly different.**”*
- See also AM (Somalia) v Entry Clearance Officer [2009] UKHRR 1073 , para 34 per Elias LJ; R (MA) v Secretary of State for Work and Pensions [2013] PTSR 1521 and others

# A duty to take positive action?

## R (Adath Yisroel Burial Society) v Inner North London Senior Coroner [2019] Q.B. 251

- Concerned the coroner's policy that no death would be prioritised in any way over any other because of the religion of the deceased or family
- Jewish and Muslim people have a need to be buried as soon as possible, a **need which is different** from the needs of non-Jews and non-Muslims.
- The policy was unlawful. It amounted to (a) a fetter on discretion, (b) a breach of Article 9, (c) a breach of Article 14 (Thlimmenos discrimination; and, (d) a breach of s. 19 Equality Act 2010.

# A duty to take positive action?

**Headnote recording C's submissions:** *The senior coroners contention that it would be positively unlawful for her to prioritise release of Jewish and Muslim bodies over those of the general population, since it would involve unlawfully discriminating against others contrary to the Equality Act 2010, is wrong. The criteria in section 158 of the 2010 Act are met in the present context. Jews and Muslims have a need for early burial which will often **be different from those who do not share their protected characteristic** (i.e. based on religion); and there are clearly **proportionate steps** which can be taken to meet those needs, by having a flexible non-blanket policy which takes religious beliefs into account. There was no legal obligation on the senior coroner to have adopted the policy: **quite the contrary.**"*

Accepted at paras 108/109



# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- The Cs challenged nomination arrangements between Hackney and the Agudas Israel Housing Association, amounting to 1% of social housing stock.
- The HA's 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 as compared with the properties which it has available, that all of its properties are allocated to members of the Orthodox Jewish community.
- Hackney did not have any right to compel AIHA to take tenants who do not fall within the scope of its charitable objective and its selection criteria. In practice, therefore Hackney only nominates members of the Orthodox Jewish community.

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- The claimants, a mother and her three-year-old son, had been given the highest priority rating for rehousing by the authority but they were not allocated any of the association's properties because they were not members of the Orthodox Jewish community.
- The Claimants argued that the nomination arrangements unlawfully discriminated against the claimants as non-members of the Orthodox Jewish community, contrary to section 13(1) of the Equality Act 2010.

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- It was common ground that the association's relevant arrangements did involve direct discrimination as defined in section 13(1) of the 2010 Act, but the association contended that its discriminatory conduct was rendered lawful by section 158 and/or section 193 of the Act.
- The CA had held that such discrimination was lawful pursuant to section 158 and/or section 193 of the Act.
- The Claimants appealed on the basis that the approach to proportionality was wrong, and that Article 14 required a proportionality assessment under s. 193

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

## **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.*

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- The Divisional Court's finding that the Orthodox Jewish / Haredi community suffered disadvantages and problems connected to their religion was not disputed.
- As to section 158 , the Divisional Court reasoned (and it was not disputed) that (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; and, (iv) AIHA's arrangements for allocating housing enable them both to **avoid the disadvantages** and to **meet the needs** referred to.
- The issue was proportionality [40]

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

## **The approach to proportionality**

- The Cs argued that the assessment of proportionality under s. 158 could (following European law) only be used as a ‘tie breaker’ to promote equality of opportunity, not outcome
- However, the SC held that much of the European case law relied on *“tells one nothing of any significance about the proper approach to proportionality in the context of section 158”* [65] because they were based on directives which expressly limited positive action to equality of opportunity and not equality of outcome.

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- The decision of the Grand Chamber of the CJEU in Cresco [2019] 2 CMLR 20 was considered more relevant
- That addressed the application of Council Directive 2000/78/EC of 27 November 2000 (“the Framework Directive”), Article 7 of the which provided, headed “Positive action”:

*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 .” (para 1)*

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- In Cresco the Grand Chamber held 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*”. [64]
- The Supreme Court considered that “*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*” [69]



# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- Further *Cresco* confirms that the conventional approach adopted by the Divisional Court and the Court of Appeal on the question of proportionality was correct [72]
- *“the correct question, ... 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.”* [66]

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

## **The assessment of proportionality**

- The LA said that the disadvantage to non-Jews was ‘miniscule’
- However, the Cs had been excluded from and missed out on six 4-bedroom properties. The impact on her was not miniscule:
- *“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.” [79]*

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- 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). [...]*
- 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.*

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- Does s. 193(2)(b) require proportionality? The Cs contended that it did relying on the Marleasing principle and the Race Directive. The CA held that it did not.
- Firstly, the Claimants were not entitled to rely on the Directive, which concerned race and not religion.
- Second, “[The section 193(2)(b) 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. [110]

# ***R (Z) v Hackney and Agudas Israel Housing Association Ltd [2020] I WLR 4327***

- Thirdly, *“Even if I were wrong in that conclusion, I agree with Lewison LJ that it is not “possible”, ... to read and give effect to section 193(2)(b) by implying into it an additional proportionality requirement. [111]*

# Where next?

- Positive action will only apply to group or systemic disadvantage, lack of representation or to needs that are connected to a protected characteristic
- There will only be a duty to take steps where there would otherwise be some form discrimination
- Occasions when it might arise in housing:
  - Challenges to procurement strategies or allocations schemes
  - Challenges to funding / management decisions, e.g. to cut floating support
  - Challenges to homelessness policy decisions



# Questions and contributions