Neutral Citation Number: [2019] EWCA Civ 1099

Case No: C1/2019/0398

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION DIVISIONAL COURT
LORD JUSTICE LINDBLOM; SIR KENNETH PARKER
CO/667/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th June 2019

Before :

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
SIR STEPHEN RICHARDS

- -

Between :

THE QUEEN **(on the application of Z and Another)**	**Appellants**
- and -	
(1) LONDON BOROUGH OF HACKNEY **(2) AGUDAS ISRAEL HOUSING ASSOCIATION LIMITED**	**Respondents**

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- -

MR IAN WISE QC & MR MICHAEL ARMITAGE (instructed by **Hopkin Murray Beskine**) for the **Appellants**
MR MATT HUTCHINGS QC (instructed by **Hackney Legal Services**) for the **First Respondent**
MR CHRISTOPHER BAKER & MS REA MURRAY (instructed by **Asserson Law Offices**) for the **Second Respondent**

Hearing dates : 12th and 13th June 2019

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Approved Judgment

Lord Justice Lewison:

Introduction

1. The Agudas Israel Housing Association ("AIHA") is a charitable housing association, registered as a smaller private provider of social housing. It owns property in Hackney, principally in parts of the borough which are inhabited by members of the Orthodox Jewish (Haredi) community. Its 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."

2. AIHA's arrangements for the allocation of social housing in accordance with its objects are such that, in current circumstances, properties owned or controlled by AIHA are allocated only to members of the Orthodox Jewish community. The Appellants challenge those arrangements. Hackney LBC has nomination rights to property owned by AIHA. In making its nominations, Hackney nominates applicants who fall within AIHA's criteria for allocating property. In practice, this means that Hackney only nominates members of the Orthodox Jewish community. In consequence, the Appellants challenge Hackney's policy. Although in form the challenge is one to Hackney's housing allocation policy, in substance it is primarily a challenge to AHIA's allocation policy.

3. It is common ground that AIHA's arrangements for allocating housing amount to direct discrimination on the ground of religion; because they treat less favourably those who are not members of the Orthodox Jewish community seeking housing, than those who are. The question on this appeal is whether that discrimination is lawful. The Divisional Court (Lindblom LJ and Sir Kenneth Parker) held that it was. They based their decision on two grounds. First, the arrangements were a proportionate means of overcoming a disadvantage shared by members of the Orthodox Jewish community, and hence permitted by section 158 of the Equality Act 2010. Second, the arrangements were made pursuant to a charitable instrument, and were either a proportionate means of achieving a legitimate aim; or were for the purpose of compensating for a disadvantage linked to a protected characteristic. Thus, they were permitted by section 193 of the Act. Since that discrimination was lawful, Hackney's allocation policy was also lawful. The Divisional Court's judgment is at [2019]

EWHC 139 (Admin). The Divisional Court gave judgment on 4 February 2019; and the appeal was heard in this court less than five months later.

The EU background

4. Directive 2000/43 (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:

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

5. Article 5 provides:

> "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."

6. Article 21 of the Charter of Fundamental Rights of the European Union prohibits any discrimination based on a number of grounds, including race, colour, ethnic or social origin and religion or belief. Article 51 of the Charter confines its application to member states "only when they are implementing Union law".

The domestic legislative framework

7. Direct discrimination is defined by section 13 of the Equality Act 2010. The definition excludes discrimination on the ground of age (but not on the ground of religion), if it is a proportionate means of achieving a legitimate aim. Indirect discrimination is defined by section 19. Indirect discrimination may be justified if it is a proportionate means of achieving a legitimate aim. Service providers, and persons exercising public functions are prohibited from discriminating, whether directly or indirectly: section 29.

8. Section 158 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."

9. 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."

10. Religion and race are protected characteristics. Section 194 (2) provides:

> "(2) That section [i.e. section 193] does not apply to race, so far as relating to colour."

11. Success under either of these sections would be enough for AIHA.

12. The Equality and Human Rights Commission 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: Equality Act 2006, s 15 (4)(b).

The facts

13. Z is a single mother with four children, including RS, who has autism. They are not members of the Orthodox Jewish community. Z grew up and lives in Hackney; and embraces the diversity of the local community. The family were assessed by Hackney as having the highest possible need for re-housing under its scheme for the allocation of social housing in the borough. In October 2017 Hackney agreed to make Z a 'direct offer' of its next available unit of suitable social housing. Following the birth of her twin daughters in July 2018, Z was moved to the direct offer list for a four-bedroom property. Despite Hackney's recognition of the family's need for suitable social housing, no direct 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 Hackney. However, because of AIHA's practice of only letting its properties to members of the Orthodox Jewish community, Hackney did not put Z forward for consideration; although they expressed a willingness to do so.

14. Fortunately, since the hearing in the Divisional Court Z and her family have been satisfactorily housed.

15. Alongside details of housing and income, AIHA's housing application form asks, solely for monitoring purposes, whether applicants would describe themselves as "Orthodox Jewish – strictly observant of Shabbath and Kashrut" as well as for details of their synagogue and their children's schools. The form also asks applicants to choose between "Orthodox Jewish Ashkenazy" and "Orthodox Jewish Sephardic" under the heading "Ethnic Origin", and whether they are white, black, mixed, or other under "Colour". Some of AIHA's lettings are made through Hackney's nomination arrangements; but they maintain their own separate waiting list as well. So far as the former are concerned, where a property is advertised on Hackney's portal it is accompanied by the rubric:

> "Consideration only to the Orthodox Jewish community."

16. AIHA owns 470 properties in Hackney. They amount to 1 per cent of the overall number of 47,000 units of general needs housing in Hackney; and its lettings each year are on average less than 1 per cent of social housing lettings.

17. The Jewish population in the United Kingdom is contracting and the average age is increasing. At the same time, the strictly Orthodox Jewish community (Haredim) is growing at 4 per cent per year, with 34 per cent 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) were much more likely to be in socially rented accommodation (35 per cent) than the general Jewish population (9 per cent). 25 per cent of them live in overcrowded conditions, compared to 8 per cent of the general Jewish population. Most of the Haredi community are unwilling to live outside Stamford Hill, where AIHA is located; so tend not to bid elsewhere in the borough. Nearly all of the Haredi community in social housing within Hackney are tenants of AIHA. Roughly 2 per cent of applicants for social housing in Hackney self-identify as Orthodox Jews.

18. 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.

19. A number of 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.

20. The Divisional Court commented on this evidence at [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, applying that approach, 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."

21. The Divisional Court set out a good deal of evidence about incidents of anti-Semitism, including racially aggravated intentional harassment and common assault, criminal damage to property; and verbal abuse. There was also evidence of volunteer security patrols in Stamford Hill (the Shomrim) which provide physical and manifest deterrence of anti-Semitism to add to the sense of security within the community. The Divisional Court said at [66]:

> "We refer again, in particular, to the widespread and increasing overt anti-Semitism in our society, and to the 44.5% increase in reported anti-Semitic crime between 2014 and 2016, with 10% of such crimes involving violence. The traditional Orthodox Jewish clothing, which characterises the community, heightens the exposure to anti-Semitism and to related criminality. In particular, Ms Cymerman-Symons MBE stated in evidence that in 40 years working in the Orthodox Jewish Community in Hackney she had heard "countless accounts from housing applicants whom AIHA has housed from the private sector about the prejudice they have faced in trying to rent in the private sector on account of their appearance, their language and their religion". This evidence was not challenged, and we believe that it credibly describes the position that members of the Orthodox Jewish community are likely to face in seeking accommodation."

22. 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 follow the rules relating to the Sabbath. As such AIHA therefore provides the following facilities: kosher kitchens, succahs (area exposed to the elements for the temporary erection of a booth during the festival of Succot), Shabbos booster pumps, an absence of television aerials, Shabbos locks on the estate, Shabbos timers in individual flats, mezuzahs on communal doors. But as the Divisional Court acknowledged, these physical features of the dwelling are not *necessary* to enable Orthodox Jews to observe their religion. They are normative, rather than essential. At [68] to [69] the Divisional Court said:

> "There was also evidence before us of the relevant need for family and community facilities, such as schools, synagogue and shops, as well as the special features of the accommodation already mentioned….
>
> As for the particular characteristics of the housing, such as kosher kitchens, 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."

23. As far as overcrowding is concerned, the Divisional Court said at [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."

The Divisional Court's reasoning

24. The Divisional Court began by addressing section 158, before turning to section 193. The Divisional Court reasoned in relation to section 158 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, antisemitic abuse and crime. They also have a need for family and community facilities, including schools, synagogues and shops, as well as special features of accommodation. They also have a need for property that would accommodate substantially larger families.

25. At [71] the court held:

> "We are satisfied, for these reasons, that 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 to which we have referred. The remaining question is whether they do so in a "proportionate" manner."

26. None of this is now challenged. The court went on to consider whether those arrangements were proportionate. At [73] they 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 Hackney's scheme for the allocation of social housing. In 2016, Hackney 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."

27. It followed from this 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.

28. They held at [75]:

> "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."

29. They repeated their conclusion that members of the Orthodox Jewish community had a particular need for larger accommodation; and that given the acute scarcity of such accommodation, it was readily understandable, and proportionate, that such properties were allocated to members of the Orthodox Jewish community who have need of the accommodation.

30. They pointed out at [77] 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. They 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."

31. They emphasised, however at [78], that their conclusion was reached in the context of AHIA being a small provider of social housing with only 1 per cent of the general needs housing in the borough; and that their conclusion would not necessarily have been the same in the case of a service provider with a large share of the available properties.

32. As far as section 193 was concerned, the Divisional Court reasoned as follows:

    i) AHIA did not discriminate on the ground of colour.

    ii) The specific protected characteristic, on the basis of which AHIA discriminated, was the religion of Orthodox Judaism.

    iii) AHIA's arrangements for allocating housing were "authorised by" or "in line with" its charitable instrument; and were therefore made "in pursuance of" it.

    iv) For the same reasons as underpinned its conclusion in relation to section 158, AHIA's arrangements were a proportionate means of achieving a legitimate aim.

33. Mr Wise QC, on behalf of Z, accepts that section 158 (1) of the Act applies. In other words, it is accepted that AIHA reasonably thinks that members of the Orthodox Jewish community suffer disadvantages connected to that protected characteristic and/or that they have needs that are different from those who do not share that protected characteristic. Accordingly, the principal attack on the judgment of the Divisional Court is the argument that they misconducted the assessment of proportionality required by section 158 (2). He also contends, for the same reasons, that the Divisional Court misconducted the assessment of proportionality required by section 193 (2).

Is proportionality a requirement of section 193 (2) (b)?

34. Although the Divisional Court considered section 158 before section 193 (as did Mr Wise's grounds of appeal and skeleton argument) I consider that the logical place to begin is section 193. That is because, unless section 193 requires a proportionality assessment, Mr Wise's criticisms of the Divisional Court lead nowhere. Section 193 (2) (b), in contrast to section 193 (2) (a) does not expressly require a proportionality assessment. It is accepted that the express requirements of section 193 (2) (b) are satisfied on the facts of this case. In this connection, it must not be forgotten that section 193 applies only to charities; and that in order to amount to a charity an organisation's activities, taken as a whole, must be for the public benefit: Charities Act 2006 s 3.

35. Mr Wise argues, however, that there are three reasons why section 193 (2) (b) requires a proportionality assessment even though it does not provide for one expressly. First, section 3 of the Human Rights Act 1998 requires legislation to be read compatibly with the European Convention on Human Rights. Section 193 (2) (b) would not be compatible with article 14 of the Convention unless read in that way.

Second, this reading is a requirement of EU law. Third, the reading advanced by AIHA produces absurd results, which Parliament cannot have intended.

36. Mr Wise referred us to two decisions relating to Catholic Care. The first was a decision of Briggs J in the Chancery Division of the High Court, and the second was a decision of Sales J in the Upper Tribunal. Both have since soared into the judicial stratosphere, so their judgements are worthy of great respect, even though they do not bind us.

37. The first of the two cases is *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] EWHC 520 (Ch), [2010] 4 All ER 1041. Catholic Care was an adoption agency which was a charity. It carried out its charitable activities in accordance with the tenets of the Catholic faith. Those tenets precluded the provision of adoption services to same-sex couples. Regulations outlawed discrimination on the grounds of sexual orientation. However, regulation 18 made an exception in the case of charities where the restriction of benefits to persons of a particular sexual orientation was imposed by the charitable instrument. It contained no express proportionality requirement. Catholic Care wished to change its objects to introduce such a provision. The Charity Commission refused to approve the change. Catholic Care's appeal failed in the Charity Tribunal. Briggs J heard the appeal from the Tribunal.

38. Briggs J noted that the legislative antecedent to regulation 18 was section 43 of the Sex Discrimination Act 1975 which provided:

> "(1) Nothing in Parts II to IV shall—(a) be construed as affecting a provision to which this subsection applies, or (b) render unlawful an act which is done in order to give effect to such a provision [i.e. a provision in a charitable instrument].
>
> (2) Subsection (1) applies to a provision for conferring benefits on persons of one sex only (disregarding any benefits to persons of the opposite sex which are exceptional or are relatively insignificant), being a provision which is contained in a charitable instrument."

39. Section 43 was amended by adding the following sub-section:

> "(2A) But subsection (1) does not apply to discrimination under section 1 or 2A in its application to sections 29 to 31 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"

40. This two-pronged test bears a remarkable similarity to section 193 (2). Briggs J commented:

> "[51] … I infer … that at least sub-s (2A)(a) was introduced so as to bring the express terms of s 43 into compatibility with convention rights, and with art 14 in particular. Even before this amendment came into force, it would in my judgment have

> been necessary to construe s 43 as containing that limitation by implication, pursuant to s 3 of the 1998 Act, because of its undoubted effect upon the interpretation of antecedent legislation.
>
> [52] It is also to be noted that s 43(2A) necessarily contemplates that sex discrimination in the conferring of benefits by a charity may be a proportionate means of achieving a legitimate aim even if for a purpose which does not consist of meeting the special needs of the protected class. That conclusion is necessitated by the use of the word 'or' at the end of sub-s (2A)(a). There may of course be a large overlap in practice between sub-ss (2A)(a) and (b)."

41. At [96] he said:

> "The third and remaining question is how none the less reg 18 is to be confined by way of interpretation so as to avoid it transgressing the real restrictions imposed by the requirement to construe it compatibly with convention rights, and in particular with the jurisprudence about art 14. In my judgment the answer is to be found in three elements of reg 18. The first is the restriction (unique to reg 18 among these regulations), that it applies only to charities. The second lies in the fact that, as expressly contemplated by reg 18(2), the practical effect of reg 18 is controlled by a public authority, namely the commission, as regulator. The third is, as I have described in relation to s 43 of the 1975 Act, that even without an express reference to the need for the proportionate pursuit of a legitimate aim, a convention-right compatible interpretation of reg 18 requires that limitation to be implied."

42. I do not consider that those observations will bear the weight that Mr Wise ascribes to them. First, in so far as Briggs J said that section 43 in its original form would implicitly have required a proportionality assessment, that was because in its original form it did not prescribe any limitations on what might be contained in a charitable instrument. After the amendment, the section contained two such limitations. Second, Briggs J's observations about section 43 (2A) (a) would lead one to conclude that it was that paragraph which made section 43 compliant with the ECHR. He said nothing about section 43 (2A) (b). Still less did he suggest either that section 43 (2A) (b) was non-compliant; or that a proportionality assessment had to be made under that paragraph. Third, as he pointed out, the purposes contemplated by section 43 (2A) (a) go far wider than meeting the needs of the protected class. It thus makes sense for a proportionality assessment to be required in order to place some limit on the breadth of that paragraph. Fourth, it is significant that in his discussion of regulation 18 Briggs J emphasised the importance of the regulatory framework applicable to charities. If a proportionality assessment was the be-all-and-end-all, it is difficult to see why that regulatory framework would be relevant. In the present case, although AIHA is an exempt charity, it is regulated by the Regulator of Social Housing.

43. The second case is *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2012] UKUT 395 (TCC), [2013] 2 All ER 1114. By the time that Sales J heard this appeal section 193 had replaced the regulations considered by Briggs J. However, it was common ground before Sales J that section 193 should be interpreted in the same way; and Sales J agreed to proceed on that basis. The point was not argued; and Sales J gave no express reasons indicating that he agreed with that interpretation. I do not consider that this case adds anything of substance to the present debate.

44. Article 14 of the ECHR does not operate in a vacuum. It applies only to those rights which are protected Convention rights. Thus, in order for the argument under the Human Rights Act to succeed, it is necessary to show that the impugned activity falls within the ambit of one or more of the protected Convention rights. While it is not necessary to show an actual violation of a Convention right, it is necessary to show that a personal interest close to the core of such a right is infringed. A tenuous link is not enough: *R (H) v Ealing LBC* [2017] EWCA Civ 1127, [2018] PTSR 541 at [93].

45. Neither in his skeleton argument nor in opening the appeal did Mr Wise address any argument in support of the proposition that AIHA's allocation policy fell within the ambit of any protected Convention right. In the course of his reply, he identified two possible Convention rights. The first was article 8 which protects a person's right "to respect for his private and family life, his home, and his correspondence". The second was article 9 which protects a person's right "to manifest his religion or belief". However, these articles were mentioned only in passing, Mr Wise made no detailed submissions to develop his argument.

46. There is no doubt that as a matter of domestic law, a local authority has no obligation to provide someone with a home: *R (Ahmad) v Newham LBC* [2009] UKHL 14, [2009] PTSR 632. Nor does article 8 itself entitle someone to be provided with a home.

47. Whether a housing allocation policy falls within the ambit of article 8 was considered by this court in *R (H) v Ealing LBC*. That case concerned two of Ealing's housing allocation policies. The first was the priority given to working households (the "WHPS") and the second was priority given to model tenants (the "MTPS"). 20 per cent of Ealing's available housing was allocated to groups within these priority schemes: 15 per cent to WHPS and 5 per cent to MTPS.

48. All three members of the court (Sir Terence Etherton MR; and Davis and Underhill LJJ) agreed that the MTPS did not fall within the ambit of article 8. It was concerned with tenants who were already housed transferring from one property to another. Sir Terence considered that the WHPS did fall within the ambit of article 8. As I read his judgment, the principal reason was that so far as concerns single parents with children who were not already in secure accommodation, or not accommodated by Ealing at all, "their right to permanent accommodation falls within the scope of family life protected by article 8": [101]. The effect of the policy was to preclude the claimant from applying for a suitable property on a secure tenancy. But, he held, the WHPS was justified. Part of Sir Terence's reasoning was based on an obiter statement by Goss J in *R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin), [2016] PTSR 16. That case concerned a residence requirement which had to be satisfied before a person was eligible to join the housing register at all. The requirement was said to discriminate

against female victims of domestic violence. That in turn was said to engage article 14, read together with article 8. Goss J said:

> "There is no enshrined right to a physical home; the right is to the enjoyment of a family life. However, this can, in reality, only be enjoyed in settled accommodation. Accordingly, I am satisfied there is a sufficient link."

49. Davis LJ did not accept that there was a right to settled or permanent accommodation protected by or within the reach of article 8; and said that Goss J had put the matter too broadly. Underhill LJ was of the same view. Moreover, Goss J does not appear to have been referred to the decision of Mr Michael Supperstone QC to the contrary effect in *R (Dixon) v Wandsworth LBC* [2007] EWHC 3075 (Admin). Nor was the Court of Appeal. Mr Dixon unsuccessfully applied for permission to appeal. In refusing permission, Dyson LJ said that, assuming that article 8 was engaged at all, Part 6 of the Housing Act 1996 itself struck the balance required by article 8: see *Dixon v United Kingdom* [2011] ECHR 809 at [23].

50. In the present case, what we are concerned with is, in effect, the ability of a person in Z's position to move home. She is already housed (if not entirely satisfactorily) by Hackney; and wants to move to a larger property. Taking the judgment of the Master of the Rolls as the high point of Z's case, the situation in our case is analogous to the MTPS rather than the WHPS. All three judges agreed that the MTPS fell outside the ambit of article 8. So, in my judgment, does AIHA's allocation policy.

51. As far as article 9 is concerned, the possibility of being housed in a property owned by AIHA is far removed from the "core value" protected by that article. Any connection is at best tenuous, if indeed there is any connection at all.

52. I do not therefore consider that either article is engaged. But assuming for the sake of argument that one or other article was engaged, the question would then arise whether the discrimination was justified. That raises the same questions on proportionality that I consider in a later section of this judgment. For the reasons that will appear, I consider that the Divisional Court were entitled to find that AIHA's allocation policy was a proportionate means of achieving a legitimate aim.

53. Assuming that the second hurdle could have been overcome, it must still be "possible" to read section 193 (2) (b) in the way that Mr Wise urges. Although the court may adopt a strained interpretation of legislation in order to bring it into conformity with protected Convention rights, it cannot simply disapply legislation. I agree with Mr Baker that the effect of Mr Wise's reading of section 193 (2) (b) is to make it redundant; hence effectively disapplying it. 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.

54. The second way in which Mr Wise put the argument was by reference to the Race Directive. He accepted that the Race Directive does not forbid discrimination on the ground of religion. Thus, it follows that the particular discrimination found in the present case does not fall within the Directive. On the face of it, therefore, in applying section 193 to the facts of the present case, the court is not applying EU law. Mr Wise sought to meet this point by arguing that section 193 might, on different facts, permit discrimination on grounds outlawed by the Directive. It was therefore *capable* of contravening EU law; and therefore article 21 of the Charter of Fundamental Rights applied. I reject that argument. It is possible to conceive of cases in which what is apparently permitted by section 193 might fall foul of the Race Directive. In such a case it may well be that EU law would trump the domestic provisions. But this case is not one of them.

55. The third argument was based on the allegedly absurd consequences. The particular example that Mr Wise gave was ill-chosen, as it postulated discrimination on the ground of colour; which is expressly excluded from the scope of section 193 by section 194 (2). But in principle, I do not consider that it is possible to dismiss as absurd the activities of a charitable institution in fulfilling its charitable objects which, *ex hypothesi*, must be for the public benefit.

56. Mr Baker, on behalf of AIHA, contends that section 193 (2) (b) does not contain a requirement of proportionality. Although that is expressly required by section 193 (2) (a), section 193 (2) (b) is an alternative means of justifying discrimination which does not contain a proportionality requirement. The contrast between the two is striking and deliberate. In order for section 193 (2) (b) to be satisfied, there are only two requirements. First, the benefits must be provided to the protected group in pursuance of a charitable instrument. There is no longer any dispute that the benefits provided by AIHA to members of the Orthodox Jewish community satisfy this test. Second, the benefits must be provided for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic. The only question under this head relates to the *purpose* of providing the benefits. No balancing is required. On the findings of the Divisional Court, this requirement is also satisfied.

57. Where the Act requires a proportionality assessment, it says so in terms. There are many examples of this. While direct discrimination because of a protected characteristic is generally prohibited, there is an exception in relation to discrimination on the ground of age if that is "a proportionate means of achieving a legitimate aim": section 13 (2). Indirect discrimination may be justified if it is "a proportionate means of achieving a legitimate aim": section 19 (2). Section 158 (2) itself contains this formula, as does section 159 which concerns positive action in employment. The fact that section 193 (2) (b), which is clearly an alternative test to that in section 193 (2) (a) does not contain this requirement must be taken to be a deliberate policy choice by parliament, well within the legislature's margin of appreciation.

58. Mr Baker supports his interpretation by reference to the Explanatory Notes accompanying the Act; and by reference to the Statutory Code of Practice issued by the Commission. Paragraph 608 of the former states:

> "This section allows charities to provide benefits only to people who share the same protected characteristic… if this in line with their charitable instrument and it is objectively justified or to prevent or compensate for disadvantage."

59. Objective justification refers to section 193 (2) (a); and compensating for disadvantage refers to section 193 (2) (b). They are presented as alternative tests. Any further doubt is dispelled by the Code of Practice. Paragraph 13.31 states:

> "A charity will not breach the Act by providing benefits only to people who share a particular protected characteristic if this is in accordance with the charitable instrument that establishes or governs the charity, and is either:
>
> a proportionate means of achieving a legitimate aim; or
>
> for the purpose of preventing or compensating for a disadvantage linked to that protected characteristic."

60. The tests are, again, presented as alternatives, reinforced by paragraph 13.34 which states that whether restricting benefits "meets either of the Act's two tests in 13.31 is initially a matter for the charity and its trustees to consider." The two tests are separately discussed in the Code at paragraphs 13.36 and 13.37. In relation to the second test (compensating for disadvantage) paragraph 13.38 states:

> "There is no requirement that a charity must provide benefits to the most disadvantaged group, or assess the relative disadvantage of different groups. The Act only requires that, if a charity provides benefits to a group of people with the same protected characteristic to the exclusion of others, it must be able to show that the purpose of restricting benefits in this way is to prevent or compensate for disadvantage experienced by members of the selected group or groups."

61. If a proportionality assessment were required, it would be necessary to assess the relative disadvantage of different groups. The fact that such an assessment is specifically excluded demonstrates that a proportionality assessment is not required.

62. I accept Mr Baker's submissions; and, for the reasons I have given, I reject those of Mr Wise. I would hold, therefore, that AIHA's allocation policy is permitted by section 193 (1) and section 193 (2) (b) of the Equality Act 2010. That is enough to lead to the dismissal of the appeal. However, since the points on proportionality were fully argued, I will deal with them.

The role of an appeal court

63. In *Re B (A Child) (Care Proceedings: Appeal)* [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 said at [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 agreed with Lord Neuberger.

65. In *R (R) v Chief Constable of Greater Manchester* [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:

> "[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 r 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 at [48]; *ACLBDD Holdings Ltd v Staechelin* [2019] EWCA Civ 817 at [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 explained in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, [2017] NI 301 at [80]:

> "The statements in all of these cases and, of course, in *McGraddie* itself 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* that the first instance trial should be seen as the "main event" rather than a "tryout 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.

Failure to balance?

69. In *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15, [2015] AC 1399 Lady Hale at [28] approved Mummery LJ's explanation of the relevant questions:

> "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?"

70. But she went on to say that:

> "… this concept of proportionality, which has found its way into both the law of the European Union and the European Convention on Human Rights, has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them."

71. There is no doubt that the Divisional Court had this guidance well in mind: they quoted it at [72].

72. Mr Wise also referred us to the decision of the Supreme Court in *R (Coll) v Secretary of State for Justice* [2017] UKSC 40 | [2017] 1 WLR 2093. That was a case about the applicability of an exemption from the prohibition on direct discrimination on the ground of sex, if (a) a joint service for persons of both sexes would be less effective, and (b) the limited provision is a proportionate means of achieving a legitimate aim. The Supreme Court held, on the facts, that the discrimination had not been justified. Lady Hale said at [42]:

> "But it is for the Secretary of State to show that the discrimination is justified. Given that the Ministry has not addressed the possible impacts upon women, assessed whether there is a disadvantage, how significant it is and what might be done to mitigate it or to meet the particular circumstances of women offenders, it cannot show that the present distribution of APs for women is a proportionate means of achieving a legitimate aim."

73. Mr Wise draws from this the proposition that an evaluation of proportionality must:

    i) Assess whether there is a disadvantage;

    ii) If so, consider how significant it is;

    iii) Consider what might be done to mitigate that disadvantage, or to meet the particular circumstances of the persons in relation to whom the discrimination takes place.

74. The first criticism of the Divisional Court that Mr Wise advances is that although the court identified the needs and disadvantages of the Orthodox Jewish community that AIHA's allocation policy sought to overcome, they did not balance the benefits conferred on that community against the detriment caused to others who were not members of the Orthodox Jewish community. Nor did they consider the extent to which AIHA's allocation policy mitigated or overcame those needs and disadvantages. The carrying out of that balancing exercise was a necessary part of deciding whether a discriminatory rule is justified under the 2010 Act. Mr Wise's criticisms were made under three broad heads.

75. First, Mr Wise accepts that the Divisional Court were entitled to accept the evidence of anti-Semitism, including anti-Semitism in access to private sector housing. There was some debate about whether the Divisional Court were entitled to refer to

increasing anti-Semitism; but I do not regard that debate as significant. Whether increasing or not, anti-Semitism was at an unacceptable level. But, Mr Wise says, the court did not consider the extent to which AIHA's arrangements for the allocation of social housing actually contribute to ameliorating anti-Semitism and other problems, and hence made no attempt to weigh such matters against the detriment occasioned to Z by AIHA's arrangements.

76. Second, he also submitted that the court failed to consider (i) the evidence before it of other groups who faced similar prejudice and discrimination, including in relation to access to housing; (ii) the evidence of other groups who face a similar level of hardship in accessing accommodation, including hardship because of their large family sizes; and (iii) evidence that the Orthodox Jewish community face no material disadvantage in terms of accessing suitable housing relative to other groups (including evidence that the Orthodox Jewish community are over-represented in the private rented sector).

77. Finally, he points out that Hackney itself operates a needs-based scheme for the allocation of social housing, so that where members of the Orthodox Jewish community have particularly pronounced housing needs, then these will be addressed as necessary by the operation of Hackney's housing allocation scheme. The Divisional Court failed to explain why *additional* preferential treatment for the Orthodox Jewish community was required beyond the priority that would be afforded under Hackney's general scheme to sufficiently needy members of that community, in circumstances where AIHA have made no allegation that Hackney's scheme discriminates against the Orthodox Jewish community in any way.

78. The Divisional Court dealt with anti-Semitism in a number of places. I have already quoted their conclusion at [66], where they accepted the evidence of Ms Cymerman-Symons as credibly describing the disadvantages that members of the Orthodox Jewish community are likely to face in seeking accommodation.

79. 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 per cent of units. The remaining 99 per cent 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.

80. So far as the second criticism is concerned, this is in essence an argument to the effect that the Orthodox Jewish community does not suffer a disadvantage as compared with members of groups who do not share their protected characteristic. But that argument is inconsistent with the acceptance that section 158 (1) is satisfied. In addition, the

question is not simply whether others are in equal or greater housing need. The question is whether that need is linked to the relevant protected characteristic: in this case adherence to Orthodox Judaism. By concentrating solely on housing need, Mr Wise's argument consistently overlooked the need for the link to the relevant protected characteristic. Finally, under this head, it is unfair to suggest that the Divisional Court did not consider the available evidence. It is plain that they did, even if they did not set all of it out in detail. Moreover, as I have said, we should assume that the lower court has taken into account all the evidence unless there is a compelling reason to the contrary. That compelling contrary reason does not exist in the present case.

81. Likewise, in my judgment, the third criticism rests on the premise that members of the Orthodox Jewish community do not suffer a disadvantage as compared with members of groups who do not share their protected characteristic. In other words, the argument is that since Hackney operates an allocation scheme which would cater for the housing needs of the community, there is no disadvantage to be overcome. That argument, too, is inconsistent with the acceptance that section 158 (1) is satisfied. Section 158 specifically allows for differential (and preferential) treatment of those who suffer disadvantage as a result of a protected characteristic.

82. Mr Wise next argued that in a case of discrimination on religious grounds it is necessary to be satisfied that the reasons said to justify the discrimination are "weighty". This is illustrated by the decision of the European Court of Human Rights in *Vojnity v Hungary* (Application no 29617/07). Mr Vojnity belonged to a particular religious sect and actively proselytised on its behalf. This was regarded as being harmful to the well-being of his son, with whom Mr Vojnity was not living, although he had access rights. In consequence the domestic courts completely removed all his access rights to his son. The Court held that his rights under article 14, taken together with articles 8 and 9, had been violated. At [36] the court held:

> "The Court notes that the subject matter of this case is the applicant's differential treatment in the context of the total removal of his access rights to his son, and this to a decisive extent on account of the applicant's religious beliefs. It considers that, in the light of the importance of the rights enshrined in art 9 of the Convention in guaranteeing the individual's self-fulfilment, such a treatment will only be compatible with the Convention if very weighty reasons exist. The Court has applied a similar approach in the context of differences in treatment on the basis of sex (see *Abdulaziz*, para 50), birth status (see *Inze v Austria* [1987] ECHR 8695/79, para 41), sexual orientation (see *L v Austria* [2003] ECHR 39392/98 and 39829/98, para 50) and nationality (*Gaygusuz v Austria* [1996] ECHR 17371/90, para 42)."

83. The Divisional Court, he said, had failed to appreciate the need for weighty reasons to justify the direct discrimination on religious grounds in this case. I do not accept this criticism. At [63] they said that the disadvantages faced by Orthodox Jews are "real and substantial"; and at [75] they described the disadvantages and needs of Orthodox Jews as "many and compelling". Mr Wise accepted that there was no difference in substance between "weighty" and "compelling". In *Vojnity* what had to be justified by

very weighty reasons was the particular treatment to which Mr Vojnity was subject; namely the complete removal of *all* access rights to his son. It is difficult to imagine a more serious interference with family life. In the present case the relevant disadvantage suffered by non-members of the Orthodox Jewish community is the diminution of the potentially available pool of housing by 1 per cent. I regard this criticism as no more than a semantic one.

84. The last argument asserted that AIHA's policy was a blanket policy; and that the Divisional Court were wrong to hold otherwise. It was not clear to me where acceptance of this argument would lead. In answer to a question from Sir Stephen Richards, Mr Wise accepted that even if the policy were a blanket one, that would not necessarily invalidate it. In the present case the relevant aim for the purposes of section 158 (2) was meeting the needs of the Orthodox Jewish community in Hackney; and that was also the "legitimate aim" for the purposes of section 193 (1) (a). But it must not be forgotten that AIHA's allocation policy, combined with the number of units at its disposal, does not in fact *achieve* the aim. It goes some way towards achieving the aim; but there are still many Orthodox Jews in Hackney whom AIHA cannot accommodate and who still suffer the disadvantages associated with the relevant protected characteristic. As the Divisional Court held at [74]:

> "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."

85. As Mr Baker pointed out, correctly in my judgment, Mr Wise's criticism was not a criticism of the policy itself; but was a criticism of the application of the policy in response to the market conditions caused by the imbalance between supply and demand. On the facts of this case the Divisional Court were, in my judgment, entitled to hold that the practical effect of the policy was proportionate.

86. At the end of their consideration the Divisional Court held at [77]:

> "The example in the statutory code, under the heading "Distinguishing positive action and 'positive discrimination'", specifically recognises that positive action in favour of a preferred group may well cause disadvantage to other groups, but the advantages to the preferred group may well outweigh the disadvantage, and so be proportionate. 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."

87. In short, I consider that the Divisional Court answered the questions posed by *Coll*:

    i) The disadvantage to non-members of the Orthodox Jewish community was the withdrawal of 1 per cent 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.

88. I do not consider that there is any flaw in this analysis which would entitle an appeal court to intervene. For these reasons, too, I would reject the appeal in so far as directed against AIHA.

The appeal against Hackney

89. The starting point for my consideration of the appeal against Hackney is my conclusion that AIHA's allocation policy is lawful. Mr Wise argues that Hackney directly discriminates against non-members of the Orthodox Jewish community by not nominating them to properties owned by AIHA. I am by no means convinced that the factual substratum for this argument has been made out. The material that we have been shown indicates that Hackney *would* nominate a non-member of the Orthodox Jewish community to a property owned by AIHA if asked to do so. Such a nomination would not be successful because of AIHA's allocation policy; but that policy is lawful.

90. Mr Wise next asserts that Hackney cannot rely on either section 158 or section 193, not having relied on either section in its pleaded case. I accept that Hackney cannot rely on section 193 because it is not a charity. If (as I would hold) AIHA's allocation policy is justified by section 158, I cannot see why Hackney cannot rely on section 158, which applies to everybody, even though Hackney did not advance a positive case to that effect. The evidence of Ms Facey was that *Hackney* believes that AIHA's allocation policy is lawful because providing housing to the Orthodox Jewish community "meets particular housing needs of the Orthodox Jewish community that are not adequately served by the private rented market." She went on to say that *Hackney* "believes that the Orthodox Jewish community faces disadvantage in relation to access to adequate housing which [AIHA's] charitable purposes are designed to address". Thus, the evidence is that Hackney has formed the reasonable opinion described in section 158 (1). Because AIHA's allocation policy satisfies section 158 (2), Hackney is not acting unlawfully in making nominations in accordance with that policy.

91. The Divisional Court held at [114]:

> "Provided that AIHA is acting lawfully in the relevant respect, Hackney simply has no legal right or power, even if it were so

> minded, to insist that AIHA jettison its lawful arrangements, and to make allocation decisions without regard to those arrangements. AIHA has a "duty to co-operate", but it has not been suggested, nor could it be sensibly suggested, that AIHA would act "unreasonably" in so far as it insisted, as it currently insists, on applying arrangements that are perfectly lawful under the 2010 Act. AIHA is co-operating with Hackney in a manner that is consistent with its own lawful arrangements."

92. I agree.

Section 11 of the Children Act 2004

93. Under section 11 of the Children Act 2004 Hackney, as a local authority, has a statutory duty to make arrangements for ensuring that it discharges its functions having regard to the "need to safeguard and promote the welfare of children". This duty applies not only to the formulation of policy, but to its application in a particular case. But a general policy may explain how individual decisions are made consistently with that statutory duty: *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] PTSR 549.

94. As presented orally, Mr Wise's argument was that Hackney owed a duty to Z's children which went beyond the mere application of its housing allocation policy which incorporated the possibility of nomination to property let by AIHA. That duty was entirely separate from its arrangements with AIHA. If as a result of those arrangements, a child is left in limbo, Hackney must put in place alternate measures to promote the welfare of the child. What those measures were, Mr Wise did not say.

95. In my judgment this argument is not open to him on this appeal. The Judicial Review Claim Form clearly ties the claim under section 11 to Hackney's arrangements with AIHA. That claim is made in paragraphs 69 and 70 of the pleading. It was that claim that was repeated in the skeleton argument prepared for the hearing below. Paragraph 30 states:

> "The Claimants' case is that in making and maintaining nomination arrangements with [AIHA], [Hackney] has failed to ensure that it has exercised its housing allocation functions "*having regard to the need to safeguard and promote the welfare of children*"."

96. No wider breach was asserted. That was the argument that the Divisional Court dealt with in their judgment. They said:

> "[124] The claimants did not contend that Hackney failed to comply with section 11 in settling the scheme, or in its application generally of the arrangements for deciding priority to applicants for social housing. Nor is there any attack of that nature on Hackney's nomination arrangements as such with AIHA.

> [125] The real thrust of the claimants' case under section 11 is that, in "allowing" AIHA to operate its arrangements for allocating its available properties, and, in particular, in "allowing" AIHA to operate lawful discriminatory arrangements, Hackney did not have regard to section 11, and, implicitly, that it might have not "allowed" such conduct if it had had regard to such duty."

97. In my judgment the Divisional Court rightly rejected that argument, having regard to their earlier conclusions. They also pointed to Hackney's evidence (which they clearly accepted) that:

> "AIHA's allocation arrangements are valuable for the purpose of alleviating high levels of child poverty in the Orthodox Jewish community, and also more general evidence showing that the Orthodox Jewish community has households very substantially larger than average, and that young children form a relatively large proportion of the community."

98. The only possible conclusion is that those arrangements did promote the welfare of children.

99. In addition, Hackney's housing allocation policy provides for the making of a direct offer in cases of urgent need to move which, in effect, moves an applicant to the top of the queue. That is precisely what happened in Z's case, because of her children's needs.

Result

100. I would dismiss the appeal

Lady Justice King:

101. I agree.

Sir Stephen Richards:

102. I also agree.