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FLASH REPORT

Country: United Kingdom
Title: Positive action on grounds of religion or belief
Date: 21 October 2020
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Update of flash report: [United Kingdom - Positive action on grounds of religion or belief \(PDF 64 kB\)](#)

Context

Issue at stake: Was a policy of restricting housing to one religious community a proportionate form of positive action?

Grounds of discrimination: Religion or belief, Racial or ethnic origin

Field of application: Housing

Source: National court decision, R (on the application of Z and another) v London Borough of Hackney Council and Another [2020] UKSC 40, 16 October 2020

Applicable law: Equality Act 2010; Directive 2000/43

Content

Case development: The case involves the obligations under the Equality Act 2010 of a charity which was set up to provide housing for a disadvantaged group. Agudas Israel Housing Association Ltd provides social housing to members of the Orthodox Jewish community. Z was a single mother who required social housing. Her name was not put forward to the housing association by Hackney council as she was not from the Orthodox Jewish community. The question arose as to whether the discrimination was lawful positive action, on the basis that it was a proportionate means to compensate a disadvantaged community. The Divisional Court¹ accepted that there was a correlation between poverty and deprivation in the Haredi community and their religion and found that the discrimination was lawful as a proportionate means of compensating for that disadvantage. Z appealed and the Court of Appeal upheld the Divisional Court's finding.² Z appealed.

Decision of the court: The Supreme Court dismissed the appeal.

Key points of analysis: The Equality Act 2010 makes it unlawful to discriminate on grounds of religion and belief, and on grounds of race. Exceptions apply for both positive action which addresses, proportionately, disadvantages and needs connected to a protected characteristic; and for charities to restrict benefits to those with a protected characteristic if that restriction is a proportionate means of achieving a legitimate aim or of preventing or compensating for disadvantage linked to the protected characteristic. The focus of the appeal was on whether the housing association's housing allocation policy was lawful. The Supreme Court upheld the lower courts' findings that the restriction of housing to members of the disadvantaged religious group was proportionate. The aim of the

¹ [2019] EWHC 139 (Admin), <https://www.bailii.org/ew/cases/EWHC/Admin/2019/139.pdf>.

² [2019] EWCA Civ 1099, <https://www.bailii.org/ew/cases/EWCA/Civ/2019/1099.html>.

measure, to minimise the disadvantages which are connected to the Haredi community's religious identity and to counteract the discrimination which they suffer, was legitimate. The Court was also entitled to find the housing allocation policy to be proportionate. The Supreme Court also considered whether the housing allocation policy contravened the Racial Equality Directive 2000/43. This was a new ground of appeal that was not decided in the earlier hearings. In deciding this aspect of the case, the Supreme Court differentiated the UK Supreme Court JFS case³ which had held that discrimination in education against non-Jewish pupils was direct race discrimination. In the JFS case the discrimination operated against anyone who could not trace matrilineal descent from a Jewish mother or one who had been converted in accordance with the tenets of Orthodox Judaism, with no requirement of observance or practice of the Jewish faith. In contrast, in this case, the housing association did not select on the basis of an individual's matrilineal descent, but instead selection was based on whether they participated in Orthodox Jewish religious observance. The Supreme Court held that this amounted to discrimination on the grounds of religion or belief, rather than race, and so the housing policy could not be found to be in contravention of the terms of the Racial Equality Directive. As a result of this finding, the Supreme Court did not go on to consider fully the positive action exception under Directive 2000/43 Article 5, but suggested that such an exception might well apply.

Internet link source: <https://www.bailii.org/uk/cases/UKSC/2020/40.html>.

³ R (E) v Governing Body of JFS (United Synagogue intervening) [2009] UKSC 15
<https://www.supremecourt.uk/cases/docs/uksc-2009-0105-judgment.pdf>.