On charitable discrimination: positive action, proportionality and ‘bright lines’

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Discrimination has long been a feature of the provision of charitable services in the UK. This perhaps uncomfortable truth arises from the fact that, faced with a world of need, many charities target their services at particular groups of potential beneficiaries. Who is included, and therefore, excluded, often is determined by reference to a protected characteristic under the Equality Act 2010. As the Act bans discrimination in the provision of services, these charities must be able to rely upon a defence under the Act to what would otherwise constitute direct discrimination. Two potential defences are that the charity’s actions constitute positive action under s.158 or the ‘charities exception’ in s.193. In R (on the application of Z and Anor) (AP) v Hackney London Borough Council and Anor [2020] UKSC 40 the Supreme Court considered both for the first time and held that a charity’s policy to only offer its services to members of the Orthodox Jewish community (OJC) was lawful under sections 158 and 193 of the Act. Lord Sales gave the lead judgment (Lords Reed, Kerr and Kitchin in agreement) and Lady Arden gave a short concurring judgment.

The appellant, Z, is a single mother of four children, two of whom have autism spectrum disorder. She was inadequately housed and Hackney Council placed her in the highest priority category on the waiting list for a four-bedroom property. Agudas Israel Housing Association (AIHA) is a small charitable housing association and Hackney has nomination rights over its properties. In line with its governing documents, AIHA lets its properties primarily to members of the OJC, in particular the Haredi community, and its properties are disproportionately properties suited to larger families, as compared to the rest of the available social housing stock in Hackney. As the demand for social housing in the OJC far exceeds supply, the Supreme Court noted that in effect these market conditions mean that AIHA would only ever allocate a property to a member of the OJC. While Z and her family waited to be re-housed for over fifteen months, AIHA let six four-bedroom properties to other families. Hackney did not nominate Z and her family for any of these properties because of AIHA’s religious policy. Z and her family unsuccessfully alleged direct discrimination based upon religion and race under the Act against Hackney and AIHA in the Divisional Court, and the Court of Appeal dismissed their appeal.

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It is seldom that a major feature of equality law is considered afresh by the Supreme Court, and if equality lawyers were excited by this, charity lawyers were agog. The decision is mainly concerned with positive action under s.158, however, and charity lawyers will have to content themselves with what is clearly a secondary discussion of s.193. Due to space limitations, I will focus on three points from the decision: (1) the expansive limits of positive action as conceived by the Court; (2) the determination that no separate assessment of proportionality is required under s.193(2)(b); and (3) the acceptability of ‘bright line’ tests in determining where to draw these boundaries between who is in and who is out for the provision of charitable services.

Any person, not just a charity, may take positive action in line with s.158(2) of the Act that is a proportionate means of compensating for a disadvantage to people who share a protected characteristic, to increase their participation, or to meet their particular needs. This proportionality test is similar to that in s.193(2)(a) for charities who wish to limit their services in a way that is a proportionate means of achieving a legitimate aim.

In the Divisional Court considerable data had been presented about the particular needs of the OJC to live near one another, with access to specific relevant services, and access to larger properties to accommodate their larger families, as well as of the discrimination that the OJC suffers, including in relation to accessing privately rented housing. These disadvantages were linked to the protected characteristic of religion shared by the community and it was both a legitimate aim for AIHA to attempt to compensate and proportionate for it to do so via adopting clear lines for who could benefit from its services. Lord Sales held that the Divisional Court had correctly considered the policy in light of the appropriate legal framework and therefore was entitled to make the proportionality assessment it did. The Court of Appeal had correctly noted that a proportionality assessment should only be set aside when the court of first instance had applied the wrong legal framework or made a logical error in its analysis. Lady Arden, in concurrence, would not therefore consider it appropriate for an appellate court to make its own assessment of proportionality.

It is notable that Lord Sales rejects arguments that AIHA’s policy is not proportionate because it was concerned with equality of outcome, rather than simply equality of opportunity. Equality of outcome was a legitimate aim for AIHA in a positive action situation, as opposed to the more limited ‘final tie-break’ (para. 60) approach allowed in employment cases under the Equal Treatment Directive. Charities and others concerned with redressing disadvantage suffered by particular groups therefore do not need to limit themselves to providing a level playing field, but can consider other, stronger, measures intended to provide for more substantive notions of equality.

What is more, in weighing proportionality, it was appropriate for the Divisional Court to weigh the relative advantages and disadvantages of affected groups, instead of picking out the worst-affected individual as compared the most-advantaged individual. It is difficult to set aside the compelling need of the appellants in this case, whose individual circumstances were certainly urgent. There will also be individuals within the group privileged by the allocation policy, however, who have urgent individual needs but who were not provided with services, as the evidence was that demand far outstripped supply even within the OJC.
In terms of s.193(2)(b), which allows for a charity to restrict its services if it is for the purposes of preventing or compensating for disadvantage linked to a protected characteristic, this did not involve a proportionality analysis nor could a need for one be read in. Charities can therefore feel comfortable relying on their service restrictions so long as they can draw clear connections to the disadvantage they are addressing, without also having to conduct a separate proportionality analysis. This is significant because the reach of s.193(2)(b) is seen as being considerably broader than that of s.193(2)(a). In an empirical study of the impact of the Act on charities, we found that lawyers for charities thought that the test in s.193(2)(b) was the easier test to satisfy (Morris et al. 2013). Indeed it was not at all clear to participants what the circumstances would be where a charity could not bring itself within s.193(2)(b) exception but could bring itself within the proportionality test of s.193(2)(a). This is borne out by the somewhat tortured example of a charity benefitting female farmers in order to combat hunger even though all farmers, whatever their sex, are hungry given in the Charity Commission’s guidance to illustrate a charity falling within s.193(2)(a) (Charity Commission 2013).

Finally, ‘bright line’ tests are acceptable for charities seeking to put limits around their potential class of beneficiaries when determining how to allocate their finite resources. Where those limits are drawn can be established by reference to protected characteristics. Where the state is providing social welfare benefits it is accepted that it is legitimate and proportionate for it to focus provision on particular groups via a bright line test. This is cheaper and more streamlined to administer and also adds certainty. These same arguments apply ‘a fortiori’ (para. 86) to AIHA as it is a private entity, and so not obliged to provide any support at all. Charities do not bear the same responsibility as the state and they also do not have the same level of resources at their disposal. Minimising wastage and administrative costs for charities while at the same time encouraging charitable giving are legitimate aims. I have previously argued that we may be more comfortable with these sort of bright line limits where charities are discriminating in favour of a particular group, rather than against a disapproved of group (Morris et al. 2016).

While agreeing with Lord Sales’s position that it is the responsibility of the state to provide ‘essential welfare benefits for all who need them’, I am not so sure about his seeming assumption that the state will provide ‘where there is pressing need’ (para. 106). Surely the past ten years of welfare policy in the UK do not allow us to rest comfortably on this conclusion. Of course the appellants deserved to be adequately housed, and it is utterly deplorable that it took so long for that to happen. Nevertheless, this responsibility remained that of the state, rather than AIHA.

**Disclosure statement**

No potential conflict of interest was reported by the author.
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