Neutral Citation Number: [2019] EWHC 139 (Admin)

Case No: CO/667/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2019

Before:

Lord Justice Lindblom
and
Sir Kenneth Parker

- -

Between:

R. (on the application of Z and others)	**Claimants**
- and -	
(1) Hackney London Borough Council	
(2) Agudas Israel Housing Association	**Defendants**

- -

Mr Ian Wise QC and Mr Michael Armitage (instructed by **Hopkin Murray Beskine)** for the **Claimants**
Mr Matt Hutchings QC (instructed by **Hackney Legal Services)** for the **First Defendant**
Mr Christopher Baker and Ms Rea Murray (instructed by **Asserson Law Officer)** for the **Second Defendant**

Hearing dates: 20, 21 and 22 November 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom and Sir Kenneth Parker

Introduction

1. This is the judgment of the court.

2. The claimants are a mother and her son, aged three. The defendants are Hackney London Borough Council ("Hackney") and Agudas Israel Housing Association ("AIHA"). The claim challenges the arrangements made by AIHA for the allocation of social housing properties owned or controlled by AIHA, which in present circumstances in effect preclude any persons who are not members of the Orthodox Jewish community from becoming tenants of such properties. The claim also challenges the lawfulness of Hackney's arrangements for the nomination of applicants to these properties, which again in present circumstances in effect precludes any persons who are not members of the Orthodox Jewish community from receiving nominations for the properties owned by AIHA. In short, the claimants contend that these arrangements discriminate against them because they are not members of the Orthodox Jewish community, and are unlawful, principally, under the Equality Act 2010.

Housing Act obligations on Hackney

3. Hackney is the local housing authority. Part 6 of the Housing Act 1996 sets out its functions concerning the allocation of social housing. Section 159(2) states:

> "For the purposes of this Part a local housing authority allocate housing accommodation when they –
>
> …
>
> (c) nominate a person to be an assured tenant of housing accommodation held by a private registered provider of social housing or a registered social landlord.
>
> … ."

Section 166A(1) states:

> "Every local housing authority in England must have a scheme (their "allocation scheme") for determining priorities, and as to the procedure to be followed, in allocating housing accommodation."

Section 166A(14) provides:

> "A local housing authority in England shall not allocate housing accommodation except in accordance with their allocation scheme."

Hackney's allocation scheme

4. Hackney operates a needs points-based, choice-based letting allocation scheme, governed by the allocation policy set out in its lettings policy of 1 July 2016. Sections 3 and 4 of the policy set out the eligibility criteria. Section 6 governs the choice-based lettings scheme

whereby Hackney awards rehousing applicants priority under a banding/points system based on need. Paragraph 6.1 states:

> "… if you have been accepted onto the Council's Housing Register you will be asked to "bid" on council properties and those nominated by our Registered Providers (RPs). Because the demand for social housing in Hackney far exceeds that which we can supply, it is necessary that we prioritise each application on the Housing Register to help ensure that the housing stock we do have is allocated in the most appropriate way."

Paragraph 6.2 states:

> "This means that the household with the highest priority bidding for a property is given first refusal on whether they take up this offer, and if not the opportunity passes down to the next highest priority household."

5. Paragraph 6.6 sets out "the bands in descending priority order and the number of points you require to fall within this band". These are "Emergency" with 250-998 points, "Urgent" with 100-240 points, "Priority" with 40-90 points, "Homeless" with 999+ points and "General" with 10-30 points.

6. Paragraph 6.12 stipulates that:

> "… these points are not accumulative, if you qualify in more than one area … the points you are awarded are not added together. Instead, whichever of the areas that generates the highest priority is used to define the band you are placed in."

7. Points are awarded for various factors such as emergency situations (paragraph 6.13), disrepair of accommodation (paragraph 6.16), overcrowding (paragraph 6.27), medical conditions (paragraph 6.34) and exceptional social pressure (paragraph 6.50). Under paragraph 6.81, where a household has multiple or composite needs, Hackney may:

> "a) [Make] an additional points award so that your application is moved into a higher band as appropriate,
> b) [Adjust] priority date [sic] of you [sic] application within the band you have been placed, or
> c) A combination of both (A) and (B)."

8. There are a few other ways in which Hackney may allocate housing, including by making a direct offer. Paragraph 7.2 states:

> "Sometimes, a household's need to move is so urgent that the process of bidding for a suitable property may take too long to avert a crisis occurring. Alternatively a household living in temporary accommodation who coming towards the end of their lease, or who are not taking sufficient action to find suitable permanent accommodation [sic]. There will also be occasions when it is of mutual benefit to both the Council and a household seeking to move to circumvent the Choice Based Lettings process. In these types of instances the Council reserves the right to make a direct offer of accommodation to a household currently on the Housing Register. Please be aware you will one [sic] receive one direct offer."

9. Paragraph 7.16 also states that:

> "Anyone affected by domestic violence or racial harassment and who feels unable to continue living in their home as a result of this is entitled to apply as homeless to the Council's Homelessness Service or to any other local authority."

10. Paragraph 1.5.1 stipulates that the policy covers tenancies of both Hackney's own properties and those of housing associations in respect of which Hackney has nomination rights. Hackney refers priority applications to private providers. Paragraph 9.6 sets out the following in relation to nominations to housing associations:

> "The Council has nomination rights to some housing association properties. These properties are let in exactly the same manner as Hackney's own housing stock. Housing association properties may be advertised or offered directly to high priority applicants. The same banding system and method of prioritising applies to housing association homes and no separate list is retained for nominations to housing associations."

Paragraph 9.9 states:

> "Housing associations are independent of the Council and have the final decision as to whether or not to accept a nomination from Hackney Council. If an applicant is unhappy with the viewing process operated by a housing association, or feels their nomination has been unfairly rejected, then they are advised in the first instance to use the complaints procedure of the relevant housing association."

Bidding

11. Once applicants have been awarded their points, they must bid on properties to take advantage of their awarded priority. The East London Letting Company ("ELLC") runs the online bidding process for the Hackney housing register. Their website sets out how the nominations procedure works in practice:

> "When bidding closes all bids are sorted into priority order with those in the highest band and with the oldest band date placed at the top of the list. Eligibility checks are then carried out by the lettings team, including checks for rent arrears, local connection and immigration status.
>
> After the checks have been completed, a list of the top five eligible bidders will be sent to the Council neighbourhood offices or Housing Associations. 'Shortlisted' applicants will usually be contacted within a week by phone or letter and invited to view the property…"

The nominations agreement

12. Hackney, like other local authorities, operates contractual arrangements with private housing providers so as to enable it to make nominations. Hackney entered into a housing

associations nominations agreement with AIHA. Paragraph 5.3 sets out Hackney's role in the nominations process:

> "Generally, the Council will submit one nomination per vacancy. If this nomination is unsuccessful then successive nominations will be made on an individual basis. …"

13. Under paragraph 8.3.1, Hackney is entitled to nominate in relation to 50% of one-bed/bedsit vacant properties and to 75% of those with two beds or more. Paragraph 8.5.3 states:

> "Occasionally, there may be instances where the Council will find it difficult to nominate to housing schemes catering for groups not specifically classified [in] the Council's ethnic monitoring system. If this is the case there are two ways in which this problem will be addressed…. *For associations/co-ops catering solely for a specific ethnic group outside of the Council ethnic monitoring schema* [sic], *problems of this nature should be resolved through the procedures outlined in the review section at 11.0 below.*" (original emphasis)

14. Paragraphs 9.1 and 9.2 on reconciling policy differences state:

> "9.1 As '*Partners*' recommends, associations/co-ops should generally accept the local authority's prioritisation of need. There may however be instances where Council nominees are deemed to be inappropriate according to the association/co-op's own policy criteria (see paragraph 6.9 for procedural detail). Some of the policy areas where there are likely to be such differences are: bedspace and floor level standards, medical assessments, policies on children of the same/opposite sex sharing, and policies for families with children under five to have access to a garden.
>
> 9.2 When an association/co-op is concerned that a policy difference is regularly becoming a point of contention the following procedures should be adopted in an attempt to resolve the policy difference and respect each party's autonomy."

15. Paragraph 6.9, to which paragraph 9.1 refers, states:

> "Occasionally, a third approach may be required for instances where an insurmountable *policy difference* between the Council and an association, such as over the assessment of a household's bed size requirement, leads to the association wishing to reject a nominee. When this occurs efforts should be made by officers of the association and the Council to resolve this, possibly through substitution of another vacancy suitable under the association's criteria. Where this is not possible the Council may make alternative nominations, and the association should record that one nomination has been processed."

16. Paragraphs 9.3 to 9.5 set out the appropriate steps and bodies to report to. Paragraphs 9.6 and 9.7 state:

> "9.6 It should be noted that the role of this Agreement is limited to providing an appropriate procedural framework for attempting to resolve policy differences. In

no sense can it give a definite answer on which organisation's policy will prevail in the final analysis.

9.7 *If the point at issue is the Council's ability to nominate suitable households to a scheme for a particular ethnic group, then satisfying ethnic origin criteria stipulated by the association will be non-negotiable, and the matter will need to be dealt with according to 8.5.3 above."* (emphasis added)

17. Paragraph 12.1 further states:

> "The Borough and associations/co-ops wish to promote equal access to housing and are committed to a policy of equality of opportunity with regard to race, gender, marital status, ethnic or national origin, religion, creed, disability and sexuality."

18. On the East London Letting's Company website, advertised AIHA properties are accompanied by a note under the heading "Further information", which states: "CONSIDERATION ONLY TO THE ORTHODOX JEWISH COMMUNITY…"

The housing market

19. Social housing is under severe pressure in Hackney, as elsewhere in the country. There has been a rise in the private sector, a decline in owner occupation, increasing demand for social housing as well as dramatic cuts in central government funding. New housing delivery in Hackney has fallen since 2011/2012. Benefit reforms including the benefit 'cap', and changes regarding under-occupation and local housing allowance are also likely to affect the rental sector. The 2015 "Objectively Assessed Housing Need", i.e. the number of new homes needed, was 1,758.

AIHA

20. AIHA's charitable object is set out in its rules, as follows:

> "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."

21. Mrs Ita Cymerman-Symons MBE, the chief executive officer of AIHA, explained the charity's mission as providing "decent homes to members of the Orthodox Jewish Community who are in housing need and whose needs cannot be met in the private market".

22. AIHA was established as a charitable housing association in 1986 and is registered with the Regulator of Social Housing of England as a smaller private registered provider of social housing under Part 2 of the Housing and Regeneration Act 2008. It is a registered society under the Co-operative and Community Benefit Societies Act 2014 and is an exempt charity under schedule 3 of the Charities Act 2011. The majority of the charity's properties are in Hackney and consist of general needs social rented housing but also contain a mixture of other sheltered, supported, residential care, extra care and shared ownership accommodation. AIHA had 89 lettings available between April 2011 and March 2018. This amounts to an average of 12-13 lettings per year. AIHA's properties range in size, and between 2011 and 2018, in round numbers, 45 per cent of the let social housing properties had one or two bedrooms, 24 per cent had three bedrooms, 26 per cent had four bedrooms, and 6 per cent had five or more bedrooms.

23. AIHA recently made available properties in new newly built houses: Gelman and Zemba House. In February 2018 there were altogether 14 properties available in these Houses, and the number of bids for each of the properties ranged from 25 to 369, with in each case the band of the highest bid being either "Homeless" or "Urgent". The housing association provided details of nine families, each containing between three and seven children, housed in their new developments. Some members of these families have medical needs and disabilities such as hyperactivity, development delay, eczema, allergies and Down's Syndrome. The families were living in overcrowded conditions and one of the families had a mite infestation. Rebekah Carrier, a specialist housing solicitor and solicitor for the claimants, stated in her witness statement that under Hackney's allocation scheme the families would have been placed in "general", "homeless" or "urgent" bands but none so high as the "emergency" band. She further explained that according to this system of prioritisation, their housing need was less than that of the claimants, who had been promised a direct offer, and not out of the ordinary in a highly deprived borough such as Hackney.

24. AIHA also develops housing for sale on the open market and undertakes some mortgage rescue work. It also operates two state-of-the-art homes for people with mental health problems and a small care home in Salford, and provides supported living placements for adults with learning difficulties and adapted properties for people with physical disabilities. It also offers assistance with welfare benefits and employment and housing advice.

AIHA's allocation system

25. Alongside details of housing and income, AIHA's housing application form asks 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".

26. AIHA has its own "Allocations and Lettings Manual" separate from Hackney's allocation scheme. It states that the organisation's "primary aim… is to house members of the Orthodox Jewish Community". Paragraph 1.4.1 states:

> "Agudas Israel HA operates a direct waiting list. Separate waiting lists are maintained for transfers, under occupiers and decants."

27. Paragraph 1.4.3. states:

> "The Lettings Officer will allocate an empty property in accordance with the annual lettings plan. … Offers are made at the discretion of a selection panel. …"

28. Paragraph 2.3.3, on local authority nominations, states:

> "
> - In most instances Local Authorities will have 75% nomination rights to all new developments. …
>   - All relets are subject to Local Authority nomination agreements, which are generally:
>   - Family Sized true voids 75% to the local authority
>   - Non-Family Sized true voids 50% to the local authority."

29. Section 4.0 sets out the points-based band assessment system, which to a large extent mirrors the considerations of that of Hackney. Relevant factors include: security of tenure, absence of amenities, disrepair of property, and medical and social factors. The system has four bands, "Emergencies", "Urgent", "Priority" and "General", and works on a cumulative basis.

30. Between 2003 and 2017, AIHA had a total expenditure of £161,862,844. During this time £29,242,166 of its funding came from shared ownership and other sales receipts, £37,423,743 came from social housing grants, £52,208,143 came from loan facilities and £42,387,792 came from operating cash flow/existing loan/cash balances. The percentage of total expenditure contributed by the grant ranged from 0.00% in 2011 and 2012, to 63.40% in 2007. In 2017, the proportion was 9.44%.

The Orthodox Jewish Community in Hackney

31. According to the Centre of Jewish Policy Research's 2011 report, the Jewish population in the United Kingdom is contracting and the average age is increasing. At the same time, the strictly Orthodox Jewish community, otherwise known as the Haredim, is growing at 4% per year, with 34% of Jews in Hackney aged 14 or under. The Report found that "strictly Orthodox Jews were more likely to experience poverty and deprivation than other "mainstream" Jewish families". The Report stated that "in 2001, 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)". The Report also found that "in Hackney in 2001, 25 percent of Jewish families lived in overcrowded conditions compared with 8 per cent of the general Jewish population". In 2011, 62% of Jewish families in Stamford Hill also received child benefits and 18% received income support. In the 2011 census, 6.3% of Hackney's residents were Jewish, of whom 85% were living within the Springfield, New River, Lordship and Cazenove wards in the

north of the borough – where the Orthodox Jewish community resides. (New River and Lordship wards have since been abolished.) Interlink, an Orthodox Jewish action group, estimated in 2010 that over 50% of Hackney's Haredim were under the age of 16. In 2014/2015, 201 out of 10,715 (1.97%) housing register applicants self-identified as Orthodox Jewish, in 2015/2016 it was 210 out of 11,238 (1.87%) and in 2016/2017, 250 out of 12,378 (2.02%). In terms of allocations, Hackney made 33 out of 1338 (2.47%) to Orthodox Jewish applicants in 2014/2015, 18 out of 1077 (1.67%) in 2015/2016, and seven out of 1229 (0.57%) in 2016/2017. 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.

32. The Orthodox Jewish community has a particular need for larger properties because of the large family sizes. Self-identifying Orthodox Jews represent an increasing proportion of housing applicants as the number of bedrooms increases. On 15 May 2018, there were 11/5242 waiting for a one-bedroom property, 39/4349 wanting two bedrooms, 71/2669 wanting three, 66/459 wanting four, 32/64 wanting five, and 29/35 wanting six.

Anti-Semitism and Crime

33. In 2017, the Community Security Trust, a charity that protects British Jews from anti-Semitism and related threats, recorded 1,382 anti-Semitic incidents, the highest annual total ever recorded. According to the De Montfort University report by Christine Holman and Naomi Holman (dated 2002), 33 per cent of respondents in a survey of AIHA tenants had experienced racial harassment. The Stamford Hill Shomrim (Community Safety Patrol) described the daily anti-Semitism including the "Swastikas on Jewish schools and vehicles … anti-Semitic abuse and threats". There were eight convictions related to anti-Semitism around Stamford Hill in 2016 relating to charges of racially and religiously aggravated intentional harassment and common assault. The verbal abuse included the following statements: "Shame Hitler didn't kill all you Jews", "I'll fucking beat you up, you fucking Jewish cunt" and "I'm going to kill all the Jews". One 14-year old was arrested after placing lit fireworks in the pockets of Jewish pedestrians. Separately, a current AIHA tenant in her witness statement described her previous experience of living in a mixed community:

> "We were the only Orthodox Jewish family in the vicinity. We felt isolated in terms of location and community. Neighbours complained about our children and told us they were not allowed to play outside at the front of the building, even though they allowed their children to play there.
>
> One night two men came to our door and threw stones at our front door and windows. I was home alone with the children at the time and it was terrifying."

Christine Holman and Naomi Holman found in their 2002 report that "11% of households had been victims of vandalism" and one third of these "were perceived to have a racial motive". Members of 43% of households also reported receiving verbal abuse – most of which involved racist language. In a survey the authors carried out within the Haredi community, 27% of households had had their car "tampered with or damaged by vandals or people attempting to steal". This was far above the contemporaneous 2.4% average for England and Wales and 5.7% for inner city areas, as reported in the British Crime Survey 2001.

Religious needs

34. The witnesses for AIHA repeatedly 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. For example, Joel Friedman, the chairman of the trustees of the Jewish Congregation of Canvey Island stated in his witness statement:

> "I would say that it is impossible for Orthodox Jews to properly maintain their practice and belief without being part of a community and without having the facility and infrastructure nearby. The Orthodox Jewish community is characterised by its way of life, which manifests itself in its reliance on proximity to community infrastructure and facilities. In my view, the more religious you are on the spectrum, the more reliant you are on community. The greater the personal Jewish conviction, the tighter community you need to live in."

Micah Gold, a senior consultant and facilitator in the field of public service modernisation, referred in evidence to a report of December 2017 by Dr David Graham of the Institute of Jewish Policy Research, in which Dr Graham considered the social housing needs of the Jewish population in London. Micah Gold was asked by the Industrial Dwellings Society to lead a qualitative assessment of Dr Graham's report, and for that purpose met with a focus group representing different parts of the Jewish Community. He stated:

> "I met with ten women for my focus group. The responses that I collected attest not only to the centrality of community to haredi or Orthodox Jewish religious, cultural and social life, but also to the commitment and need of members of the Orthodox Jewish community to remain geographically proximate to that community, even if that means foregoing improved living conditions, bigger houses, or proper housing at all. It is plain from the responses that the attachment to specific locations is not a question of convenience but effectively reflective of a way of life and community."

Rabbi Abraham Pinter, the Principal of the Yesodey Hatorah educational institutions in Stamford Hill and a trustee of the Union of Orthodox Hebrew Congregations, stated:

> "Community is essential to the spiritual life that Orthodox Jews strive to live. I have already mentioned how the Orthodox Jewish community prays together and how a minyan is needed. We celebrate and mourn as a community. When we confess, we do so collectively, irrespective of whether we as individuals have transgressed in any particular way. …
>
> In Orthodox Judaism, we come before God as a community. We develop our moral character as individuals through our community, by our commitment to the common good in community. We do that work locally ourselves and we do it together. Being part of a community, both physically and spiritually, is a prerequisite of fulfilling the life of an Orthodox Jew."[1]

35. Mrs Cymerman-Symons MBE states in her witness statement that AIHA properties are designed specifically for Orthodox Jewish religious needs whereby the tenants are able to

[1] A minyan is a quorum of ten or more adult men required for Jewish public worship.

follow the tenets of their faith and follow the rules relating to the Sabbath. As such AIHA therefore provides the following facilities: kosher kitchens, succos (area exposed to the elements), Shabbos booster pumps, an absence of television aerials, Shabbos locks on the estate, Shabbos timers in individual flats, mezuzas on communal doors. The witness statement of Rabbi Danny Rich, the Senior Rabbi and Chief Executive of Liberal Judaism, on the other hand, responds to Mrs Cymerman-Symons as follows:

> "If this is meant to suggest that the facilities are necessary to enable Orthodox Jews to observe the Sabbath (or other religious laws) then that is simply wrong. At best the facilities she describes make Sabbath observance, and the observance of other laws, normative." (original emphasis)

For example, with reference to kosher kitchens, where there is a prohibition on mixing meat and dairy products, he states that having two sinks "makes life easier" but that it is possible to strictly conform with the dietary laws, for example, by "having two washing up bowls (typically a pink or red one for meat and a blue one for milk)".

The claimants

36. The claimant Z is a single mother with four children: two sons including RS, diagnosed with autism spectrum disorder, and twin daughters born in July 2018, currently living in temporary accommodation provided by Hackney. Z also suffers from anxiety and depression. She has lived in Stamford Hill her whole life and embraces the diversity of the local community. Her mother lives nearby and Z relies heavily on her support with the children. The family were previously tenants of a different Hackney property that was unsuitable and unsafe for the family until September 2017. On 20 August 2017 Mrs Justice May ordered that:

> "The Defendant Council is forthwith to re-house the family in accommodation which provides a safe and risk-free environment for the claimant's two young children. For the avoidance of any doubt, their current accommodation is not considered to provide such an environment."

Following this, Hackney moved the family to temporary accommodation and agreed in the consent order of 2 October 2017 that it would make Z a direct offer of the next unit of suitable three-bedroom accommodation that became available.

37. Z has been given the highest possible priority rating for rehousing by Hackney. Her sons were unsettled by the move due to their disability and she is struggling to meet their needs in the temporary accommodation due to its lack of essential amenities. She is keen to find a safe home for her daughters and disabled sons. In November 2017, Hackney identified a property at 7 Taverner House that they deemed to be suitable. It was later agreed that it is in fact unsuitable. Z's need increased from three bedrooms to four with the birth of her twins. She is now on the direct offer list for four-bedroom accommodation.

38. An appropriate property would have a bathroom with sufficient space to allow Z to supervise all her children, four bedrooms since the boys must be kept separate due to their autism, and an enclosed outdoor space and direct access to reserved parking. It would also be on a single level without a balcony, near to Z's mother, who provides essential support, and near to the

elder son's specialist school. No offer has yet been made. Since Hackney made the direct offer, at least six four-bedroom properties owned by AIHA that fit Z's required criteria have become available in the newly built Zemba House and Gelman House. Specifically, in 2017 to 2018, AIHA let 100% of all four-bedroom properties in Stamford Hill and 50% of four-bedroom properties in the borough.

39. Z's mother stressed in her witness statement the fact that the litigation is not driven by anti-Semitism: she appreciates the diversity of the area and was herself brought up by a Jewish foster mother. She also emphasised the difficulties faced by her daughter as a single mother, which have only increased since the birth of the twins. She went on to say that Z was willing to be housed outside Stamford Hill despite her dependence on her mother's support.

Relevant law (2010 Act claim)

40. Section 13(1) of the 2010 Act defines direct discrimination:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

41. Section 19 defines indirect discrimination:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

42. Sections 4 and 19(1) include religion and race as protected characteristics in relation to direct and indirect discrimination. Section 9(1) states that race includes "colour", "nationality", and "ethnic or national origins".

43. Section 29 concerns discrimination in the context of provision of services:

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service**.**
> **…**
>
> (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

Section 31(4) states:

> "A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998."

44. Section 193 provides for an exception for charities:

> "(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.
>
> …
>
> (4) If a charitable instrument enables the provision of benefits to a person of a class defined by reference to colour, it has effect for all purposes as if it enabled the provision of such benefits –
>
> (a) to persons of the class which results if the reference to colour is ignored, or
>
> (b) if the original class is defined by reference only to colour, to persons generally."

45. Section 194 supplements the provisions of section 193:

> "(1) This section applies for the purposes of section 193.
>
> (2) That section does not apply to race, so far as relating to colour.
>
> (3) *"Charity"* –
>
> (a) in relation to England and Wales, has the meaning given by section 1(1) of the Charities Act 2011; …
>
> (4) "*Charitable instrument"* means an instrument establishing or governing a charity (including an instrument made or having effect before the commencement of this section)."

46. In Part 11 (Advancement of Equality) of the 2010 Act, section 158 specifies the conditions that justify taking "positive action", as follows:

> "(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."

The explanatory notes to the Equality Act 2010 provide the following general guidance in respect of the effect of section 158:

"511. This section provides that the Act does not prohibit the use of positive action measures to alleviate disadvantage experienced by people who share a protected characteristic, reduce their under-representation in relation to particular activities, and meet their particular needs. It will, for example, allow measures to be targeted to particular groups, including training to enable them to gain employment, or health services to address their needs. Any such measures must be a proportionate way of achieving the relevant aim.

512. The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them. This provision will need to be interpreted in accordance with European law which limits the extent to which the kind of action it permits will be allowed."

The issues in the claim

47. In our view, it is appropriate to consider first the question whether AIHA's arrangements for the allocation of social housing accommodation in Hackney have been, and remain, lawful. We take that course partly because Mr Hutchings QC, on behalf of Hackney, accepted that the lawfulness of AIHA's relevant arrangements was a necessary condition for the lawfulness of Hackney's arrangements for the nomination of AIHA's social housing properties. He submitted that the lawfulness of AIHA's relevant arrangements was in effect a sufficient condition for the lawfulness of Hackney's arrangements for the nomination of AIHA's properties. It was a necessary condition because Hackney would contravene section 112 of the 2010 Act if it knew, or at least had been put on notice, that AIHA's arrangements were unlawful and, by nominating AIHA's properties, thereby helped AIHA to contravene the relevant provisions of the 2010 Act. Mr Hutchings QC urged us not to declare, with retrospective effect, that Hackney's arrangements were unlawful by reason of any perceived legal flaw in AIHA's arrangements, presumably on the ground that Hackney had honestly and reasonably believed before these proceedings that AIHA's arrangements were lawful. That is a matter that may not arise for decision in the light of our overall conclusions.

A. The challenge against AIHA's arrangements under the 2010 Act

48. It is common ground that AIHA's relevant arrangements on any view involve direct discrimination as defined by section 13(1) of the 2010 Act. AIHA's conduct in "primarily" allocating social housing properties to the Orthodox Jewish community, because of the

protected characteristic of religion, treats less favourably those persons who seek such allocation but who are not members of that community. There is a contest as to whether the conduct also discriminates by reason of the protected characteristic of "race", with a concomitant connection to "colour", which we determine below (see paragraphs 86 to 92 below).

49. Mr Baker, on behalf of AIHA, also accepted that AIHA was a "service-provider", within the meaning of section 29 of the 2010 Act, and that AIHA accordingly discriminated under that section against persons, such as the claimants, in so far as it did not provide the relevant "service" to them because they were not members of the Orthodox Jewish community. Mr Baker, however, submitted that the relevant service was "the provision of a system of [social housing] allocation". It was not, he contended, a service of providing housing accommodation, because "the availability and suitability of housing from AIHA depends on a wide range of factors and cannot be guaranteed". In support, he cited *R. (XC) v Southwark LBC* [2017] E.W.H.C. 736 (Admin); [2017] H.L.R. 24, where Garnham J. accepted from Mr Baker a similar contention (see paragraph 58 of the judgment), holding that there was no relevant "entitlement".

50. With respect, we have reservations about Mr Baker's submission. If he were right, the description of the statutory service could shift, depending solely upon whether or not the demand for the goods, services or other resources being provided happened to be capable of being met in full at any particular time. This would tend in general to make the description uncertain, variable, and could potentially involve examination of complex and contentious market circumstances, an exercise that we do not think Parliament intended in the present context. The concept of "entitlement" is also not without difficulty, because providers may not uncommonly have lawful commercial reasons for declining to supply goods or services to certain customers, or categories of potential customers, and it would be inapt to say that any group of customers had an unqualified "right" to be provided with the service. However, nothing in this claim turns upon the precise description of AIHA's "services", and we do not need to express a definitive view on this point.

51. There was also an issue whether AIHA's arrangements fell within section 29(6) of the 2010 Act. That subsection broadens the scope of section 29: a person, not providing a relevant "service", but exercising a "public function", is subject to the prohibition of discrimination. AIHA denied that it exercises such a function, a somewhat academic question in the context of section 29 (AIHA having accepted that it provides a relevant "service"), but, submitted Mr Baker, relevant to the issue whether AIHA is amenable to judicial review, and to relief. These are matters that we consider later in this judgment.

52. AIHA contended in any event that its discriminatory conduct is rendered lawful, both by section 158 and also by section 193 of the 2010 Act. We consider these sections in turn.

Section 158

53. Section 15(4)(b) of the Equality Act 2006 requires us to take into account, where it appears relevant, the Statutory Code of Practice issued by the Human Rights Commission. The Code of Practice gives guidance on the meaning and effect of section 158.

54. Paragraph 10.12 of the Code of Practice (under the heading, "What does 'reasonably think' mean?") states:

> "In order to take positive action, a service provider must reasonably think that one of the above conditions applies that is, disadvantage, different need or disproportionately low participation. This means that some indication or evidence will be required to show that one of these statutory conditions applies. It does not, however, have to be sophisticated statistical data or research. It may simply involve looking at the profiles of services users and/or making inquiries of other services providers in the area. It could involve looking at differential rates of take-up of benefits or services or access to memberships or differential rates of exclusions or rejections. A decision to take positive action could be based on qualitative evidence, such as consultations with users and non-users, surveys showing poor experiences of a service related to a protected characteristic, focus groups, complaints, inspection reports, discrimination claims, or evidence of similar problems gathered by other organisations."

55. Paragraph 10.13 states:

> "Disadvantage is not defined in the [Equality] Act. It may, for example, include exclusion, rejection, lack of opportunity, lack of choice, or barriers to accessing services…. Disadvantage may be obvious from statistical sources, such as national data, but in other cases may be shown by qualitative evidence or from the results of monitoring that has been carried out."

56. Paragraph 10.14 notes:

> "The [Equality] Act enables action to be taken to enable or encourage people who share a protected characteristic and who suffer a disadvantage connected to that characteristic to overcome or minimise the disadvantage. The Act does not limit the action that could be taken, provided it satisfies the statutory conditions and is a proportionate means of achieving the aim…. Such action could include identifying through consultation, surveys or a review of data possible causes of the disadvantage and then:
>
> - …
> - Providing services specifically aimed at a disadvantaged group;
> - … ."

57. Paragraph 10.15 is especially relevant:

> "A group of people who share a particular protected characteristic have 'different needs' if, due to past or present discrimination or disadvantage or due to factors that especially apply to people who share that characteristic, they have needs that are different from the needs of others. This does not mean that the needs of a group have to be entirely unique from the needs of other groups to be considered 'different'. Needs may also be different because, disproportionately, compared to the needs of other groups, they are not being met or the need is of particular importance to that group.

> For example, all pregnant women need good antenatal care. However, the high rate of infant mortality among Gypsies and Travellers may indicate that they have different needs for antenatal, maternity and child health services, such as requiring more frequent antenatal health checks."

58. As to proportionality, paragraph 10.22 states:

> "The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups."

The claimants' submissions on section 158

59. Mr Wise QC, on behalf of the claimants, accepted that members of the Orthodox Jewish community shared a "protected characteristic" under section 4 of the 2010 Act, namely, "religion". However, he contended, first, that the Orthodox Jewish community in Hackney did not suffer any disadvantage connected to the characteristic, or that they had needs that were different from the needs of the non-Orthodox Jewish community. Secondly, he submitted that AIHA's allocation arrangements were not in any event "proportionate".

60. On his first submission, Mr Wise QC acknowledged that many members of the Orthodox Jewish community in Hackney have very severe housing needs. However, he submitted that on the evidence before the court the members of the Orthodox Jewish community did not suffer any relevant disadvantage, or have any relevant need, that was not also shared generally by applicants for social housing in Hackney. For example, the circumstances of the nine families described by Mrs Cymerman-Symons MBE (see paragraph 23 above) were not in any way unusual for such applicants. That proposition was illustrated by the circumstances of the claimants who had the very highest priority for social housing and who, according to the experienced and informed view of Ms Rebekah Carrier (see paragraph 23 above), would be entitled to substantially greater priority under Hackney's allocation scheme than any of the nine families. These nine families, according to Mr Wise QC, had thereby been enabled to "jump the queue" for social housing in Hackney.

61. In the present context Mr Wise QC did not accept that the specific features of AIHA's properties (see paragraph 35 above) were relevant "needs" (or "disadvantages"), because they were no more than, as he put it, "outward manifestations" of the religion of the Orthodox Jewish community, and which furthermore were not necessary (as distinct from desirable) aspects of that religion, and which could in any event be met by relatively straightforward and inexpensive adaptations of any available property.

62. As to proportionality, Mr Wise's principal submission was that AIHA's arrangements represented a "blanket" policy of restricting allocation of available properties to members of the Orthodox Jewish community, and of absolutely excluding non-Orthodox Jews from such allocation.

Discussion

63. We observe, first, that under section 158(1)(a) the sole limitation on the relevant "disadvantage" is that the disadvantage must be connected to (in this case) the religion of Orthodox Judaism. It is plain from the evidence set out at paragraphs 31 to 34 above that the disadvantages faced by Orthodox Jews are both real and substantial.

64. First, there are very high levels of poverty and deprivation, with associated low levels of home ownership. Section 158(1)(a) does not stipulate that a relevant disadvantage need be caused by the protected characteristic. Parliament has used a somewhat looser term – "connected to the characteristic" – which, in our view, invites a broader and more holistic investigation. 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.

65. In any event there are in this case disadvantages which, on any view, are "connected to" the religion of Orthodox Judaism.

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.

67. Secondly, under section 158(1)(b) the sole limitation on the relevant "need" is that of being "different" from the needs of persons who do not share the protected characteristic. In our view, the evidence again demonstrates that the "needs" of the Orthodox Jewish community are indeed different. For the reasons we have just set out, the members of that community have a relevant need to live relatively close to each other, with a view to reducing apprehension and anxiety regarding personal security, anti-Semitic abuse and crime.

68. 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. We reject Mr Wise's contention that such needs, being adjuncts of the religion in question, should be discounted, for three reasons. First, there is no such limitation in the express wording of sections 158(1)(a) or (b), and Mr Wise's suggested gloss on the wording is inconsistent with the express language. Secondly, we can discern no ground of principle or policy that would support such a gloss, and none was put forward. On the contrary, if applied generally to section 158 of the 2010 Act, it would produce absurdity: a disabled person would have no relevant "need", in so far as the need was the result of the disability; the needs of a pregnant woman would be discounted, if they were the result of pregnancy, or a choice to become pregnant. Thirdly, the gloss is inconsistent with *R. (Adath Yisroel Burial Society) and another v HM Senior Coroner for North London* [2018] EWHC

969 (Admin), [2018] HRCR 15 (in paragraphs 100 and 108 to 112), which Mr Wise cited with approval for another, but related purpose, where the court plainly recognised that the need for expeditious burial of the dead, which was a specific and special feature of the Jewish religion, was a relevant "need" under the legislation.

69. 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. Given appropriately limited weight, they may properly be taken into account in the proportionality analysis with the considerably weightier matters to which we have already referred.

70. There was much evidence before the court relating to very high levels and experience of overcrowded accommodation in Hackney. Again, Mr Wise QC argued that such evidence did not support AIHA's justification for the discriminatory arrangements, because overcrowding was a general problem in Hackney. However, 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.

71. 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.

72. We respectfully adopt the general approach to proportionality explained by Baroness Hale in *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] UKSC 15; [2015] AC 1399 at [28]:

> "The concept of proportionality contained in section 15 is undoubtedly derived from European Union law, which is the source of much of our anti-discrimination legislation. Three elements were explained by Mummery LJ in *R (Elias)* v *Secretary of State for Defence* [2006] 1 WLR 3213, para 165:
>
> > '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?'
>
> This three-fold formulation was drawn from the Privy Council case *de Freitas* v *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, which was itself derived from the Canadian case *R* v *Oakes* [1986] 1 SCR 103. However, as Lord Reed JSC explained in *Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700, 788, para 68 et seq, 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. As the Court of Justice of the European Communities put it in *R. v Minister for Agriculture, Fisheries and Food, ex parte Fedesa* (Case C-331/88) [1990] ECR 1-4023, para 13, 'the disadvantages caused must not be disproportionate to the aims pursued': or as Lord Reed JSC himself put it in the *Bank Mellat* case [2014] AC 700, 791, para 74, 'In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.'"

The explanatory notes to section 158 of the 2010 Act state (at paragraph 512):

> "The extent to which it is proportionate to take positive action measures which may result in people not having the relevant characteristic being treated less favourably will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or under-representation and the availability of other means of countering them. This provision will need to be interpreted in accordance with European Law which limits the extent to which the kind of action it permits will be allowed."

The foregoing explanation is echoed at paragraph 10.22 of the statutory code of practice, as follows:

> "The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the law participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups."

The statutory code of practice also refers to the EU origin of "proportionality" for present purposes (paragraph 5.32). At a late stage in the argument before us Mr Wise QC presented to the court a lengthy extract from the committee debate on clause 152 of the bill that became section 158 of the 2010 Act. He referred to certain remarks by the then Solicitor General, Vera Baird QC, MP, touching on the scope and effect of the relevant clause. We admitted the Hansard extract "de bene esse", but on consideration do not believe that it is admissible in accordance with the criteria set out in *R. v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Limited* [2000] UKHL 61; [2001] 2 AC 349. In any event we drew no additional assistance on the meaning and scope of section 158 from the observations of the Solicitor General.

73. A central point in Mr Wise's submissions on proportionality was that AIHA's allocation arrangements represented a "blanket" policy of restriction and exclusion. We do not believe that that is a fair and accurate way of characterising those allocation arrangements. 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.

74. In these circumstances it appears to us to be self-evident why in practice AIHA allocates each of the properties, which at the margin becomes available, to members of the Orthodox Jewish community. 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.

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.

76. It is also appropriate to recall in this context the particular need of Orthodox Jews for larger accommodation (see paragraph 32 above). That particular need is reflected in data showing that Orthodox Jewish applicants constitute almost 83% of Hackney's waiting list for accommodation with six or more bedrooms, and 50% of those waiting for five-bedroom accommodation. In those circumstances, given the acute scarcity of such accommodation, it is readily understandable, and proportionate, that such properties are allocated to members of the Orthodox Jewish community who have need of the accommodation.

77. For completeness, we mention a submission that Mr Wise QC made to us, that AIHA's arrangements amounted to "positive discrimination", as distinct from "positive action", which the statutory code of practice states to be prohibited under the 2010 Act. We reject that submission. 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.

78. We emphasise that the proportionality analysis is specific to the particular arrangements under challenge. For example, AIHA is recognised by the Regulator of Social Housing as a "small provider". AIHA's 470 properties in Hackney are only 1% of the 47,000 units of general needs housing potentially available for letting in the area, and its lettings each year are less than 1% of social housing lettings. It should not be assumed that the result of the

proportionality analysis that we have conducted would be the same in a case having not dissimilar features to this, but where the service provider enjoyed a large share of whatever was considered to be the relevant market for the goods, services or other resources being provided.

79. Finally, we should mention that Mr Wise QC also referred, in support of his case on proportionality, to the decision of the European Court of Justice in *Briheche* v *Ministre de L'Intérieur & Others* (Case C-319/03) ECR 2004 1-08807 [2005] 1 CMLR 4 ("*Briheche*"). In that case the French minister for justice had refused Mr Briheche's application to sit an open competitive examination for the recruitment of administrative assistants for the prison service, on the ground that he was over the qualifying age limit for such competitions. The French law imposing the relevant age limit had an exception in favour of "mothers with three or more children, widows who have not remarried, divorced women who have not remarried, legally separated women or unmarried men or women with at least one dependent child, all of whom are obliged to work." Mr Briheche claimed that his exclusion violated article 141(4) EC and article 3(1) of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards employment, vocational training and promotion, and working conditions. Article 3(1) prohibited discrimination on grounds of sex, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

80. The French Government in its defence relied principally upon article 2(4) of the Directive, which provided in effect a derogation for measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affected women's opportunities in relevant areas. The Advocate General highlighted specific and formidable difficulties with the French law under challenge: it did not simply distinguish between men and women, but also referred to marital status; and it was unclear why widows who had not remarried, divorced women who had not remarried and legally separated women should have been distinguished from other categories of single individuals, whether male or female. The French Government had not demonstrated that women were under-represented in relevant areas, and had not provided any evidence likely to support any alleged rationale for the challenged law (paragraph 44).

81. In any event the court observed that article 2(4) of the Directive authorised national measures relating to access to employment which gave a specific advantage to women to improve their ability to compete on the labour market and to pursue a career on an equal footing with men. The aim of the provision was to achieve substantive, rather than formal, equality by reducing de facto inequalities which might arise in society and thus, in accordance with article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons concerned (paragraph 25).

82. However, the court recognised that there were specific situations where the candidatures for particular positions were the subject of an "objective assessment which took account of the specific personal situations of all candidates". In that context women and men could be equally qualified; and article 2(4) did not in such a context allow "automatic and unconditional priority to women" (paragraph 23). In the case before the court – which was plainly within the relevant context – Mr Briheche might be better qualified than any other candidate, male or female, but the challenged French law ruled him out of the competition altogether, whereas a woman in the same situation, being older than 45 but not having remarried after the death of the spouse, would be allowed to compete (see paragraphs 27 to

28). In these circumstances the Court of Justice also held that the French law was disproportionate for the purposes of article 141(4) EC.

83. It can be seen that in *Briheche* the court was interpreting specific provisions of community law, in particular, article 2(4) of Directive 76/207, which dealt with access to employment as between men and women, and in the special context identified above. The present case does not concern access to employment, or touch upon inequality between men and women in that area, and a fortiori does not raise issues of female priority where candidates for employment are to be assessed in the first instance on objective merit. The present context is one in which an acutely scarce resource, social housing, is to be allocated, and where the demand for such housing greatly exceeds supply. In any event, it is not a case where "automatic and unconditional priority" has been accorded to members of the Orthodox Jewish community. AIHA's charitable objective confers only a "primary" position to such members, and, for reasons already explained at length, it is the very special market circumstances that explain why AIHA in fact allocates each of the small number of properties that become available to members of the Orthodox Jewish Community. *Briheche* does not, therefore, alter or cast doubt on our analysis of proportionality in this case.

Section 193 of the 2010 Act: the charities exception

84. Having concluded that AIHA's arrangements are lawful under section 158 of the 2010 Act, we do not strictly need to consider the application of section 193. However, we have heard full argument on this issue, and AIHA put section 193 at the forefront of its case. We believe, therefore, that it is appropriate to consider the lawfulness of AIHA's arrangements also under this provision.

85. Mr Wise QC submitted, first, that AIHA may not rely at all on section 193 by reason of section 194, which provides that:

> "That section [section 193] does not apply to race, so far as relating to colour".

86. In her evidence Mrs Cymerman-Symons MBE stated that AIHA did not discriminate according to ethnic background. AIHA's housing applicants come from a variety of ethnic backgrounds. She continued at paragraph 28 of her second witness statement:

> "… Our sole criterion is that the applicants are of the Orthodox Jewish faith. This is certainly not an issue of race; it is purely about religious observance. We respond to people from many ethnic backgrounds. The common factor is a commitment to the Orthodox Jewish way of life."

In any event there is no evidence that "colour" plays any part at all in the admission of persons to the Orthodox Jewish community. On the evidence a person of any "colour" may join the community.

87. However, Mr Wise QC contended that, even if AIHA primarily provided benefits to persons who were not defined by reference to race, or colour, the practical effect of such provision could be seen on the evidence disproportionately to favour persons of the white race. Of those on AIHA's waiting list, 90% (89.6%) are Ashkenazi Jews, who are of Eastern and central European origin and are white. It is not clear what proportion of Sephardi Jews are

white, but the inescapable conclusion is nonetheless that AIHA in fact provides benefits predominantly to white people. By contrast white applicants constitute only about 28% of Hackney's Register for social housing. It follows that the proportion of white persons who receive benefits pursuant to AIHA's arrangements is almost certainly to be significantly greater than the proportion of white people who would benefit if AIHA did not accord "primary" consideration to Orthodox Jews, but instead allocated some of its available accommodation to non-Orthodox Jews who had priority on Hackney's Register. AIHA's arrangements thus have the effect of discriminating indirectly against persons who are not of the white race, and AIHA cannot rely at all on section 193.

88. This is a somewhat startling conclusion, and it requires close examination. First, Mr Wise's interpretation does not sit well with the express language of section 193(1), which refers in terms to the restriction of the provision of benefits to "persons who share a protected characteristic" (emphasis added). The natural interpretation of those words would direct attention to the specific protected characteristic identified in the relevant charitable instrument, in this case, the religion of Orthodox Judaism. That specific characteristic is not, on the evidence, based in any way upon "colour".

89. Secondly, the statutory code of practice gives no support to Mr Wise's construction of section 194. By contrast, at paragraph 13.31 of the Code of Practice, under the heading "charities", section 193(1) and (2) are accurately summarised. Paragraph 13.32 has a side reference to section 194(2), showing that it is intended to explain the effect of that section. The first sentence of paragraph 13.32 states:

> "This exception [that is, the exception just summarised in the preceding paragraph] does not apply if the group of people who are to receive benefits under the charitable instrument is defined by colour…" (emphasis added).

90. In our view, that explanation accords entirely with what we believe is the natural import of section 193(1) (see above), which directs attention to the specific protected characteristic in the relevant charitable instrument. We are not aware of any authority, or published official or academic material, questioning or criticising what is said in paragraph 13.32 of the Code of Practice, and in our view we must give due weight to it. To reiterate, persons who are Orthodox Jews are not defined under the relevant charitable instrument by "colour".

91. Thirdly, in our view, Mr Wise's construction produces tension with section 193(4)(a), which states that if the provision of benefits is to "persons of a class defined by reference to colour", the charitable instrument has effect "for all purposes" as if it enabled the provision of such benefit to persons of the class which results if the reference to colour is ignored. Again, the emphasis is on the protected characteristic as defined by the charitable instrument; and the clear implication is that the provision of benefits to any class as re-defined by section 193(4)(a) is entitled to benefit from section 193(1) and (2).

92. Finally, if Mr Wise's construction were correct, the scope and application of section 193 would be substantially reduced. It could well be that a significant number of charities who, either locally or nationally, provide benefits, for example, to the aged or to the disabled, are in effect fortuitously providing such benefits disproportionately to people of a certain colour, and so discriminating indirectly, even if wholly unintentionally. If Mr Wise were right, they would thereby be unable to rely at all on the provisions of section 193(2), and would be unable to justify the restriction of benefits (e.g. to the aged or disabled) under those

provisions, either as a proportionate means of achieving a legitimate aim, or for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic defined in the relevant charitable instrument. We do not discern what policy objective would be promoted by Mr Wise's construction. On the contrary, it appears to undercut the policy that informs section 158, especially in circumstances where any detriment resulting from any putative indirect indiscrimination on the grounds of colour in favour of a defined, or statutorily re-defined, class of beneficiaries, may be appropriately taken into account in the proportionality analysis under section 193(2).

93. Mr Wise QC also submitted that AIHA could not rely upon section 193 because it did not act "in pursuance of a charitable instrument", for the purposes of section 193(1)(a). Mr Wise QC argued that the result of AIHA's arrangements was that its available properties were allocated only to members of the Orthodox Jewish community. That result was not mandated or required by its charitable instrument: it was no more than an exercise of a discretionary power under that instrument. Mr Wise QC relied principally upon *Hampson* v *Department of Science* [1991] 1 AC 171, in which *General Medical Council v Goba* [1988] ICR 885, EAT was approved.

94. In our view, the expression "in pursuance of", in its ordinary and natural meaning means simply "authorised by", "in line with" or "in accordance with" (compare, for example, *Saul v Norfolk County Council* [1984] Q.B. 559, at 566 where Slade L.J. held that the words "in pursuance of" a particular statute naturally meant "in exercise of the authority conferred by" the statute).

95. The explanatory notes to the 2010 Act, which are a legitimate guide to interpretation, state at paragraph 608:

> "This section [section 193] allows charities to provide benefits only to people who share the same protected characteristic…. If this is <u>in line with their charitable instrument</u> …" (emphasis added).

96. Similarly, the Code of Practice at paragraph 13.31 effectively translates "in pursuance of" to mean "in accordance with". Mr Baker, on behalf of AIHA, also pointed to predecessors of section 193 (for example, section 43 of the Sex Discrimination Act 1975, and section 34(1) of the Race Relations Act 1976), which used for the same purpose the expression "contained in a charitable instrument".

97. We accept that, if the legislative purpose requires, the wide and ordinary meaning of "in pursuance of", as explained above, can be displaced in favour of a narrower, stricter and, on one view, rather strained meaning. *Hampson* was such a case. In short, section 41(1)(b) of the Race Relations Act 1976 rendered lawful any act of racial discrimination, direct or indirect, if the act was done "in pursuance of any instrument made under any enactment by a minister of the Crown". Statutory regulations, which were undoubtedly a relevant "instrument", specified detailed teacher qualifications. However, the regulations conferred a discretion on the minister to approve certain qualifications which, in his or her view, were "comparable to" the specified qualifications.

98. The claimant, from Hong Kong, sought recognition of her teacher qualifications. However, her qualifications did not meet the discretionary standard approved by the minister, and she claimed that she had been a victim of indirect discrimination on racial grounds. Her claim

was summarily dismissed by the tribunal because the minister had set the standard "in pursuance of" the regulations.

99. It may well have been that the minister's discretionary standard resulted in significantly fewer non-white teachers being qualified than would have been so if a different, and less exacting, standard had been set, but, if a wide meaning were given to the key statutory language, the minister would avoid the need to justify such indirect discrimination. The standard approved by the minister was not of course contained in primary legislation, nor even in secondary legislation that would have been subject to Parliamentary scrutiny, but was the result simply of an exercise of administrative discretion. It is not surprising that the House of Lords applied a narrow and strict test, so that the challenged standard, to be an exempt "act", would need to be contained, in this case, in the regulations themselves. The case was remitted to the tribunal which could then consider if and how the challenged standard resulted in indirect discrimination, and, in that event, what, if any, the justification might be.

100. In the present case the application of the natural and ordinary meaning to "in pursuance of" does not, unlike the position in *Hampson*, immunise AIHA's arrangements, or any arrangements under section 193, from scrutiny under the proportionality test. It is no more than a threshold criterion, along with others, which enables AIHA, or other charities falling within section 153, to justify those arrangements as proportionate under section 193(2).

101. For these reasons, we conclude that "in pursuance of" means no more than "in line with", "in accordance with" or "authorised by".

102. As a fallback argument, Mr Baker submitted that in so far as AIHA allocated each of the available properties to members of the Orthodox Jewish community, it was not only permitted, but required in the relevant circumstances, to do so, and therefore was acting "in pursuance of" its charitable objectives – even on Mr Wise QC's interpretation. That subsidiary argument might engage interesting questions of charity law, but in the light of our clear conclusion above on the meaning of the relevant words, it is unnecessary to explore it.

103. Both sides agreed that, as to substance, there was very substantial, if not complete, overlap between section 158(1) and (2) and section 193(2) of the 2010 Act. Section 193(2)(a) refers to the provision of benefits needing to be "a proportionate means of achieving a legitimate aim", and section 193(2)(b) of such provision needing to be "for the purposes of preventing or compensating for a disadvantage linked to the protected characteristic".

104. We believe that, in our analysis of the application of section 158(1) and (2), we have already dealt exhaustively with all matters that are relevant to the analysis under section 193. We have in particular addressed comprehensively each of the points made by Mr Wise QC in his challenge to the application of sections 158(1) and (2). We would simply be repeating what has gone before if we embarked on any detailed consideration of the application of section 193. It is sufficient to record, for the reasons already given in relation to section 158, that we conclude that AIHA has met the criteria under section 193, and that we reject the submissions of Mr Wise QC to the contrary.

B. The challenge against Hackney under the 2010 Act

105. Mr Wise QC submitted that Hackney engaged in direct discrimination contrary to section 13(1) of the 2010 Act. It operated its allocation scheme in such a way that only members of the Orthodox Jewish community were offered accommodation by AIHA. This was directly discriminatory on the grounds of both race and religion. As to race, Mr Wise relied on *R. (E) v Governing Body of JFS* [2010] 2 AC 728 ("*JFS*"), in which the Supreme Court held that the test of matrilineal descent applied by Orthodox Judaism was a test of ethnic origin, and that the policy of the Jewish Free School of admitting only students who met that ethnic test constituted unlawful direct discrimination on racial grounds.

106. As to religion, Hackney, in its nomination arrangements, treated people such as the claimants who were not members of the Orthodox Jewish community less favourably than those who were members. He cited Lord Phillips in *JFS* who said at [9],

> "[A] policy which directly favours one racial group will be held to constitute racial discrimination against all who are not members of that group."

107. Hackney's nomination arrangements are a "service`" under section 29(1) of the 2010 Act, and also represent "the exercise of a public function" under section 29(6) of the 2010 Act. Hackney's direct discrimination in the provision of the relevant service and in the exercise of the public function against those who are not members of the Orthodox Jewish community are not, as a matter of law, capable of justification: see the observations of Baroness Hale in *JFS* at [57], and in *Aster Communities* v *Akerman-Livingstone* [2015] AC 1399 at [30].

108. Referring to Hackney's grounds of resistance in this claim, Mr Wise QC pointed out that there were detailed provisions in its nomination agreement with AIHA which enabled Hackney to take action if AIHA declined to accept a particular nomination because of a "policy difference" (see paragraphs 14 to 18 above), but there was no evidence that Hackney had taken any action in respect of the putative direct discrimination of AIHA on religious grounds. Similarly, Hackney had a statutory right under section 170 of the Housing Act 1996 to ask AIHA to "co-operate … in offering accommodation to people with priority under [the Hackney] allocation scheme, and AIHA was obliged to co-operate with such a request "to such extent as is reasonable in the circumstances". There was no evidence that Hackney had made any request for co-operation.

Discussion

109. It is useful, first, to recall certain features of Hackney's arrangements that are not subject to challenge. Hackney's allocation of social housing is governed by its allocation scheme "The Hackney Lettings Policy 2016" dated 1 July 2016. As we have explained, this is a choice-based lettings scheme under which Hackney awards applicants priority under a banding/points system based on need. It is for an applicant, once potentially suitable property has become available for letting, to bid for the property, and the outcome will be determined by the assessment of priority.

110. Hackney may also make nominations to private providers of social housing, such as AIHA. Hackney refers applicants who have been assessed as having priority needs to the private provider whose property has become available for letting. The final decision on whether a

property will be let to a particular applicant rests with the private provider. Local housing authorities typically enter into contracts with private providers which set out in some detail the provisions intended to regulate nominations. As already explained, Hackney has such an agreement with AIHA, and the nomination agreement allows AIHA substantial freedom to apply its own arrangements as regards allocation of properties made available by AIHA. It is notable in that context that paragraph 9.7 records specifically that "… satisfying ethnic origin criteria stipulated by the association will be non-negotiable". That is plainly a reference to AIHA's arrangements for giving "primary" position in housing allocation to members of the Orthodox Jewish community.

111. As Mr Hutchings QC pointed out, the claimants do not challenge as unlawful any aspect of either Hackney's scheme for letting social housing or of the nomination agreement with AIHA.

112. The real thrust of the claimants' case is in respect of the discriminatory nature of AIHA's arrangements, which we have already examined in full. This is brought into sharp focus by the precise substantive remedy which is sought against Hackney by the claimants in these proceedings, in particular:

> "… a declaration that [Hackney's] allocation of social housing by (i) nomination of social housing applicants to [AIHA], subject to the Orthodox Jewish Rule … is unlawful…" (emphasis added).

113. In other words, the core of the claim is that Hackney may not lawfully nominate AIHA properties to applicants, knowing or believing that AIHA in present circumstances is certain to allocate available properties only to members of the Orthodox Jewish community. However, once it is established, as it has been established by our discussion of the case against AIHA, that AIHA is legally entitled, under section 158 and/or section 193 of the 2010 Act, to discriminate in the allocation of its available properties in favour of members of the Orthodox Jewish community, the core of the claimants' real case perforce dissolves.

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.

115. Mr Wise QC carefully eschewed the difficult – and it seems to us impossible – task of identifying specifically what steps Hackney should, and could lawfully take, in line with the remedy sought in the claim. In theory, Hackney might seek to engage in coercive conduct and threaten to terminate altogether the nomination agreement with AIHA if it did not abandon, or at least radically alter in relevant respects, its present arrangements for the allocation of social housing. However, there is nothing in the evidence to suggest that Hackney would be minded to engage in such draconian conduct. Indeed, it is not difficult to see that serious questions could arise as to whether, under principles of public law, Hackney would be at liberty to act in such a manner, namely, to seek to coerce AIHA radically to change arrangements that AIHA believed were best promoting its charitable objectives, and that were justifiable under applicable legislation.

116. It should be observed that AIHA, or any provider in the position of AIHA, if faced with the threat of such action, might decide to withdraw some or all of its available properties from the nomination arrangements with Hackney, rather than be forced into jettisoning allocation arrangements that it believed best promoted its charitable objectives, and that were justifiable under applicable legislation. It is very difficult to see how such a reaction by AIHA, or any provider in a similar position, would promote any of the objectives of either the 2010 Act or of social housing more generally.

117. For these reasons the claim against Hackney under the 2010 Act must fail.

The claimants' case that Hackney has failed to comply with relevant principles of public law

118. Mr Wise QC submitted that Hackney, contrary to undisputed principles of public law, had failed to comply with its own policy in relevant respects, citing Lord Dyson's judgment in *Lumba* v *Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, at [26], for the general proposition of law.

Discussion

119. We can deal with this issue very shortly.

120. Paragraph 1.3.6 of Hackney's scheme states that:

> "We are committed to providing excellent services that ensure the widest possible access to housing and prevent discrimination on the grounds of race, religion, gender or marital status, sexual orientation or disability."

121. It is clear from the context that these statements are directed essentially at any form of unlawful discrimination. They are not directed at circumstances such as those of the present case, where Hackney has entered into arrangements with a third party provider, and though acting in a discriminatory manner, does so in a way that is consistent with and justified by the relevant legislation – namely the 2010 Act. This head of claim therefore provides no independent ground of challenge.

The claimants' challenge under section 11 of the Children Act 2004

122. Mr Wise QC submitted that Hackney failed to ensure that it exercised its housing functions "having regard to the need to safeguard and promote the welfare of children", as required by section 11 of the Children Act 2004. He referred to Baroness Hale's observations in *R. (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73; [2017] 3 WLR 1486 at [46], that "safeguarding" is not enough: their welfare has to be actively promoted.

123. There are no written contemporaneous documents in which Hackney considered whether its nomination arrangements with AIHA comply with section 11. Mr Wise submitted that the absence of such material unequivocally demonstrates a failure to comply with the duty under

section 11 (see, for example, the speech of Lord Lowry in *R. v IRC, ex parte Coombs and Co* [1991] 2 AC 283, at p.300F-G; and the judgment of Sir Thomas Bingham MR (as he then was) in *R. v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037, at p.1047).

Discussion

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.

126. Correctly analysed in this way, it can immediately be seen that the claimants' case contains a hidden and necessary premise, which is false. As we have already concluded, Hackney had no legal or realistically practical means of procuring or inducing AIHA to abandon, in whole or part, that aspect of AIHA's arrangements that the claimants find objectionable, but which is entirely lawful. Asking itself the question, therefore, whether the lawful discrimination to which the claimants take exception "actively promoted", in Baroness Hale's words in *HC*, the interests of children, would have served no useful purpose. Even if Hackney had asked itself whether the interests of children might hypothetically be better provided if AIHA were to abandon, in whole or part, the discrimination inherent in its arrangements, Hackney would not have materially improved its prospects of procuring or inducing AIHA to abandon the discrimination, in circumstances, as here, where (a) the discrimination was lawful under the 2010 Act; and (b) any abandonment of, or substantial modification to, the discrimination was not consistent with what AIHA believed was the best way of promoting its charitable objectives.

127. It can also be seen that, considered in this light, the claimants' case under section 11 is not in truth an independent one, but is logically dependent upon the court accepting the central thrust of the claimants' case against both AIHA and Hackney under the 2010 Act.

128. For these reasons we reject Mr Wise's submissions on section 11.

129. We have in mind here Hackney's evidence 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. On this evidence we could not conclude that AIHA's arrangements in general were likely to have a significantly negative effect on the welfare of children.

Justiciability

130. We have rejected the various arguments put forward by the claimants, and that is sufficient for us to dismiss the claim for judicial review. As we have said, there was a contest whether AIHA exercised a "public function" for the purposes of section 29(6) of the 2010 Act. That contest is academic, given that AIHA accepted that it provides a relevant "service" under section 29(1), and so there is no need for us to decide the point in issue.

131. There was also a contest as to whether AIHA exercised a "public function" under CPR 54.1(2)(a)(ii), so as to be amenable to judicial review. We believe that this question too may be academic, and need not be decided by us. The principal target of the claim was Hackney, even if the main thrust of the attack was necessarily on AIHA's discriminatory arrangements. And Hackney is obviously amenable to judicial review. The proceedings might have been constituted to make Hackney the sole defendant, with AIHA an interested party, at the admitted cost of rendering unattainable some parts of the relief sought in the claim. We have read Mr Baker's detailed and exhaustive written submissions, in which he contended that *R. (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587; [2010] 1 WLR 363 was wrongly decided and was in any event distinguishable in the light of the specific circumstances of AIHA and of legislative changes since the Court of Appeal decided that case. It is sufficient to say on this that our provisional view was that the indicia identified by Elias L.J. in *Weaver* to support the conclusion of the majority in the Court of Appeal appear to be substantially present in this case.

132. There was a further issue whether section 113 of the Equality Act 2010 precluded proceedings for judicial review. Mr Baker referred to the observations of Singh J., as he then was, in *Hammett v Essex County Council* [2014] EWHC 246 (Admin); 2014 [2014] 1 WLR 2562, at [64], and to those of Gross L.J. on appeal in *Hammett* [2017] EWCA Civ 6; [2017] 1 WLR 1155 at [29].

133. Section 113(3) of the 2010 Act provides that section 113(1) does not prevent a claim for judicial review. Under that provision this court plainly has a discretion to allow proceedings to proceed by way of judicial review. Nicol J. granted permission to apply for judicial review, with knowledge of the legislative context, the broad factual background and the issues between the parties. We see no reason in principle to disagree. In the light of the central legal issue raised by the claim, which is perhaps of wider import, we would in any event be in no position seriously to question the judge's exercise of discretion to allow this claim to proceed by way of judicial review.

134. Finally, we should mention that AIHA submitted that there was a suitable alternative remedy to judicial review, in the form of recourse to the Regulator of Social Housing. That submission was unsuccessfully advanced before Nicol J. in an effort to persuade him to refuse permission. We accept that, notwithstanding the grant of permission this question might in some cases properly be revisited if the claim for judicial review were to succeed. That contingency, however, does not arise in the light of our conclusions.

Conclusion

135. For the reasons we have given, we dismiss this claim for judicial review.