EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 19839/21
L. F.
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 24 May 2022 as a Chamber composed of:

Gabriele Kucsko-Stadlmayer, *President,*
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Yonko Grozev,
Armen Harutyunyan,
Ana Maria Guerra Martins, *judges,*

and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to the above application lodged on 9 April 2021,

Having deliberated, decides as follows:

# THE FACTS

1. The applicant, L.F., is a British national, who was born in 1991 and lives in London. She was represented before the Court by Ms R. Carrier of Hopkin Murray Beskine, a lawyer practising in London.

## The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows:

### *1. The applicant's family background*

3. The applicant is a single mother of four children: two sons born in July 2011 and January 2015 respectively and twin daughters born in

July 2018. Until 2017, the applicant lived in social rented accommodation provided to her by the London Borough of Hackney ("LBH").

4. In August 2017, an occupational therapist employed by LBH assessed the applicant's accommodation as posing various risks to two of her children who had been diagnosed with autism spectrum disorder. Following this assessment, the applicant lodged judicial review proceedings against LBH and on 20 August 2017 the High Court ordered it to re-house the applicant and her family in "accommodation which provides a safe environment," for her two young children.

5. Upon the order being made, LBH re-located the family to temporary accommodation which, according to the applicant, remained ill-adapted to the children's needs.

6. Whilst living in the temporary accommodation, the applicant became aware of six four-bedroom properties owned by Agudas Israel Housing Association ("AIHA"), a charity that provided housing for members of the Orthodox Jewish Community ("OJC"). AIHA is recognised by the Regulator of Social Housing as being a small provider of housing outlets. As part of LBH's arrangements for allocating accommodation, AIHA would make some of its housing available to individuals who had applied to LBH for social housing; however, in line with its agreements with the charity, LBH would in practice only "nominate" potential tenants for properties operated by AIHA if they met the latter's criteria, that is if they were members of the OJC. Therefore, the Council did not put the applicant forward for consideration by AIHA.

### *2. The Divisional Court Proceedings*

7. In February 2018 the applicant lodged judicial review proceedings against LBH and AIHA. She challenged both AIHA's housing criteria and LBH's agreement with AIHA on the grounds that they amounted to unlawful direct discrimination contrary to section 13 of the Equality Act 2010 ("the 2010 Act" - see paragraph 26 below).

8. In a judgment dated 4 February 2019, the Divisional Court rejected the applicant's judicial review claim.

9. The court noted that social housing was under severe pressure in LBH as a result of a decline in home ownership, increasing demand and dramatic cuts in central government funding. Against this background, the disadvantages faced by the OJC in the housing sector were both "real and substantial". These disadvantages included, *inter alia,* high levels of poverty which the Divisional Court found to be linked to their way of life, especially affecting employment and education opportunities; prejudice when renting in the private sector on account of their appearance, language and religion; and an exponential increase in anti-Semitic hate crime, giving rise to a pressing need for members of the OJC to live in close proximity to one another "with a view to reducing apprehension and anxiety regarding personal security,

anti-Semitic abuse and crime". The traditional Orthodox Jewish clothing, which characterised the community, heightened the exposure to anti-Semitism and to related criminality. Moreover, owing to their large family size, members of the OJC had a particular need for accommodation, likely to be in short supply, which was suited for larger family sizes and which would significantly reduce the particular and intensified risk to such families of eviction from overcrowded accommodation. The housing provided by AIHA catered to these needs.

10. In view of the above evidence, and having regard to the relevant statutory guidance issued by the Equality and Human Rights Commission (see paragraph 28 below) the court concluded that AIHA's housing allocation scheme, and hence LBH's policy, was a proportionate means of achieving a legitimate aim and therefore justified under sections 158 and 193 of the 2010 Act (which provide defences to accusations of direct discrimination: see paragraphs 28 and 29 below). AIHA's 470 properties in LBH accounted for only 1% of the 47,000 units of general needs housing potentially available for letting in the area, and its lettings each year were less than 1% of social housing lettings. The Divisional Court continued:

> "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."

11. Finally, the court reiterated the fact that Orthodox Jewish applicants constituted 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 was readily understandable, and proportionate, that properties such as those operated by AIHA were allocated to members of the Orthodox Jewish community who had need of the accommodation.

12. Since AIHA's policy was lawful under the 2010 Act, LBH had no legal right or power to insist that the charity jettison its lawful arrangements.

### *3. The Court of Appeal*

13. The applicant appealed the Divisional Court decision to the Court of Appeal.

14. During oral argument, counsel for the applicant submitted that LBH's housing arrangements with AIHA infringed Article 14 of the Convention when taken in conjunction with Articles 8 and 9.

15. Furthermore, the applicant critiqued section 193 of the 2010 Act (see paragraph 29 below). This provision (referred to as the "charities exemption") allowed for organisations acting in pursuance of a charitable instrument to discriminate directly in the provisions of services provided that such discrimination was a proportionate means of achieving a legitimate aim

(section 193(2)(a)) *or* that it was for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic (section 193(2)(b), emphasis added). Unlike section 193(2)(a), section 193(2)(b) did not explicitly provide for a proportionality assessment. Hence, to read the legislation in a manner compatible with the Human Rights Act 1998 and the Convention, the applicant contended that it had to be interpreted as containing such an assessment.

16. In a judgment dated 27 June 2019, however, the Court of Appeal dismissed these arguments.

17. Giving the leading judgment, Lord Justice Lewison noted that, where the 2010 Act required a proportionality assessment, it said so in terms. The fact that section 193(2)(b) of the 2010 Act, which was clearly an alternative test to that in section 193(2)(a), did not contain this requirement had to be taken to have been a deliberate policy choice by Parliament, well within the legislature's margin of appreciation. Second of all, the applicant's representative had conceded during oral argument that preventing or compensating for a disadvantage linked to a protected characteristic might *not* be a legitimate aim. If it was a legitimate aim it would have been caught by section 193(2)(a), meaning that section 193(2)(b) would have been redundant. For Lord Justice Lewison, this was another powerful reason why the latter section should not be read as requiring a proportionality assessment.

18. Furthermore, Lord Justice Lewison did not consider that the applicant's complaints fell within the ambit of the Convention: a local authority had no obligation to provide someone with a home; nor did Article 8 itself entitle someone to be provided with a home. The applicant was already housed by the local authority (if not entirely satisfactorily) and wanted a larger property: however the right to permanent settlement did not fall within the scope of Article 8. So far as Article 9 was concerned, the possibility of being housed in a property owned by AIHA was far removed from the core value protected by that Article and any connection with this provision was tenuous at best. For these reasons, Lord Justice Lewison did not consider that the applicant's complaint fell within the ambit of either Article.

19. Even if that were not the case, Lord Justice Lewison considered that the Divisional Court had been entitled to hold that the housing policy was a proportionate means of achieving a legitimate aim. In particular, the Divisional Court had adequately assessed the disadvantage suffered by non-members of the OJC as a result of LBH's arrangements with AIHA:

> "On the basis of the Divisional Court's findings, the effect of AIHA's allocation policy (taken at its most restrictive) is to withdraw from the pool of potentially available properties for letting 1 per cent of units. The remaining 99 per cent are potentially available to persons who do not share the relevant protected characteristic. Thus the disadvantage to those persons is minuscule. Even if one concentrates on larger units, where AIHA has a larger share of units, Orthodox Jews are disproportionately represented among applicants for such units."

20. In line with the proper approach of an appellate court, the Court of Appeal could only interfere with the lower court's proportionality analysis if it were able to identify either an error or flaw in the latter's reasoning that undermined the cogency of its conclusions. However the Divisional Court had appropriately assessed all of the available evidence pertaining to the "many and compelling" disadvantages suffered by the OJC and, on this basis, no flaw in the Divisional Court's analysis could be identified that would entitle the Court of Appeal to intervene.

*4. The Supreme Court*

21. The applicant lodged an appeal to the Supreme Court.

22. On 16 October 2020, the Supreme Court dismissed the applicant's appeal.

23. Giving the leading judgment, Lord Sales (with whom the other members of the Court agreed) essentially agreed that the Divisional Court had directed itself correctly as to the proportionality test to be applied; that it had made appropriate findings on the evidence before it; and that Lord Justice Lewison had been right to hold that there was no proper basis on which an appellate court could interfere with the Divisional Court's conclusion that AIHA's allocation policy was a proportionate means of achieving legitimate aims.

24. In assessing the proportionality of AIHA's policy, the courts below had been entitled to weigh the benefits for the OJC as a group as compared with the disadvantages experienced by other groups as a result, rather than by comparing the benefits for that community with the disadvantage suffered by one person drawn from those other groups falling outside the policy. The proportionality assessment would have been distorted by simply taking the worst affected individual who was not covered by the measure and comparing her with the most favourably affected individual who was covered by it. That was in effect what counsel for the applicant had sought to do by comparing the applicant with a member of the OJC, out of the many in need, who happened to be fortunate in having one of AIHA's properties assigned to them in the relevant period. If AIHA changed its allocation policy to bring in people who were not members of the OJC, that would inevitably dilute the impact it could have on addressing the needs and disadvantages experienced by that community in connection with their faith. In light of the unmet need for social housing for the OJC and the small impact on other groups, the Divisional Court had been entitled to conclude that it was proportionate for AIHA to focus its efforts on the OJC.

25. Furthermore, in the provisions of social welfare benefits, it was generally a legitimate approach and in accordance with the principle of proportionality for state bodies, such as LBH, to use bright line criteria to govern their availability. In this regard, Lord Sales referred to *Carson and Others v. the United Kingdom* [GC], no. 42184/05 ECHR 2010 and *Bah*

*v. the United Kingdom*, no. 56328/07, ECHR 2011. In other words, the State was entitled to focus the provision of social welfare benefits on a particular group, and hence exclude other groups, even though there may be little or no difference at the margins in terms of need between some particular individual in the first group and another particular individual in the excluded groups. Use of bright line criteria in this way was justified because it minimised the costs of administration of a social welfare scheme; it may have been the best way of ensuring that resources are efficiently directed to the group which, overall, needs them most; it can reduce delay in the provision of benefits; and it provided clear and transparent rules which could be applied accurately and consistently.

## RELEVANT DOMESTIC LAW AND PRACTICE

26. The Equality Act 2010 ("the 2010 Act") prohibited direct discrimination. Section 13(1) defined direct discrimination in the following terms:

> "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."

27. These protected characteristics, set out under section 4, include race, religion or belief.

28. However, defences to accusations of direct discrimination are provided for by sections 158 and 193 of the 2010 Act. Section 158 applies if a person (P) reasonably thinks that: persons who share a protected characteristic suffer a disadvantage connected to that characteristic; persons who share a protected characteristic have needs that are different from the needs of persons who do not share it; or participation in an activity by persons who share a protected characteristic is disproportionately low (section 153(1)(a)-(c)). In such circumstances, section 158 does not prohibit P from taking any action which is a proportionate means of achieving the aim of enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage; meeting those needs; or enabling or encouraging persons who share the protected characteristic to participate in that activity (section 158(2)(a)-(c)). According to the Statuary Code of Practice issued by the Equality and Human Rights Commission, when assessing whether any action taken pursuant to section 158 is proportionate:

> "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" (paragraph 12.27)."

29. Under section 193 ("the charities exemption"), a person acting in pursuance of a charitable instrument does not contravene the 2010 Act only by restricting the provision of benefits to persons who share a protected

characteristic (section 193(1)(a)). Before a person can avail themselves of the protection of this section, however, it must be shown that the provision of benefits was a propionate means of achieving a legitimate aim (section 193(2)(a)) *or* that it was for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic (section 193(2)(b), emphasis added).

30. Section 3 of the Human Rights Act 1998 states that:

> "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

31. Under section 2(1)(a):

> "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights."

# COMPLAINTS

32. The applicant complains under Article 14 in conjunction with Article 8 of the Convention that LBH's arrangements with AIHA and the relevant statutory framework discriminated against her on the basis of her non-membership of the OJC without a reasonable or objective justification.

# THE LAW

33. The applicant complains under Article 14, taken in conjunction with her Article 8 right to respect for private and family life, that she was discriminated against on the basis of her religion.

34. Article 8 of the Convention provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

35. Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

## A. General principles

36. Article 14 of the Convention has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms"

safeguarded by those provisions. The prohibition of discrimination in Article 14 therefore extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide. It is necessary but it is also sufficient for the facts of the case to fall within the ambit of one or more of the Convention Articles (see, for example, *Biao v. Denmark* [GC], no. 38590/10, § 88, 24 May 2016, with references therein).

37. Only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14. Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see, for example, *Biao*, cited above, § 89, with references therein). Article 14 lists specific grounds which constitute "status" including, *inter alia*, race, national or social origin and birth.

38. Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (*Taddeucci and McCall v. Italy*, no. 51362/09, § 81, 30 June 2016). A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (*Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 64, 24 January 2017; *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017). The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

39. The scope of this margin will vary according to the circumstances, the subject matter and the background (*Molla Sali v. Greece* [GC], no. 20452/14, § 136, 19 December 2018). For instance, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (*Jurčić v. Croatia*, no. 54711/15, § 64, 4 February 2021; *Šaltinytė v. Lithuania*, no. 32934/19, § 64, 26 October 2021). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is manifestly without reasonable foundation (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, § 36, 10 May 2007).

40. Where general social and economic policy considerations arise in the context of Article 8, the scope of the margin of appreciation afforded to the Contracting State will depend on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant. This is because Article 8 concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (*Connors v. the United Kingdom*, no. 66746/01, § 82, 27 May 2004).

### B. Application of these principles to the present case

41. In the current case, the applicant complains of a violation of Article 14 taken in conjunction with Article 8 of the Convention. The Court of Appeal did not consider that her case fell within the ambit of Article 8 of the Convention, since Article 8 did not entitle someone to be provided with a home and in any event the applicant was already housed by the local authority (see paragraph 18 above). However, it was prepared to assume that Article 14 of the Convention was engaged in conjunction with Article 8, but considered that even if that were so the difference in treatment was objectively and reasonably justified in the circumstances of the case (see paragraph 19 above).

42. While there is no right under Article 8 of the Convention to be provided with housing (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 99, ECHR 2001-I), as the Court has previously held with regard to other social benefits (see, for example, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 55, ECHR 2005-X), where a Contracting State decides to provide such benefits, it must do so in a way that is compliant with Article 14. The arrangement between LBH and AIHA in this case impacted upon the eligibility of the applicant and her family for assistance in finding suitable accommodation (see, for example, *Bah v. the United Kingdom*, no. 56328/07, § 40, ECHR 2011). The Court would therefore accept that the facts of this case fall within the ambit of Article 8 of the Convention. It further considers that the applicant was treated differently from members of the OJC on account of her non-membership of a religious community insofar as she was denied access to accommodation which, pursuant to the arrangement between LBH and AIHA, was to be accorded to families belonging to the OJC. Furthermore, the applicant, having a large family, was in a comparable situation to members of the OJC who were likewise seeking accommodation capable of catering to similar family sizes.

43. Nonetheless, the Court considers that the difference in treatment flowing from the arrangement between LBH and AIHA was objectively and reasonably justified for the reasons set out below.

44. Article 14 of the Convention does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them (see *Runkee and White*, cited above, § 35). That was clearly at issue in the present case: in this regard, the Court notes that the Divisional Court addressed in great detail the significant hardship faced by the OJC in the private rental sector. In particular, members of the OJC faced high levels of poverty affecting employment and education opportunities; prejudice when renting in the private sector on account of their appearance, language and religion; and an exponential increase in anti-Semitic hate crime (see paragraph 9 above). Members of the OJC also constituted a significant portion of those on the waiting list for larger accommodation owing to their family sizes and thus had a pressing need for properties that would reduce the particular and intensified risk of eviction from overcrowded accommodation.

45. Furthermore, the Court has repeatedly held that because the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see *Runkee and White*, cited above, § 36). It is true that the scope of the margin of appreciation afforded to the Contracting State may be narrower where rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community are concerned (see *Connors*, cited above, § 82). However, while that may be so in the sphere of housing where the interference consists in the loss of a person's only home (see, for example, *Ivanova and Cherkezov v. Bulgaria*, no. 46577/15, § 54 21 April 2016), that was not the case here. On the contrary, the applicant, who was housed in temporary accommodation, complains about a restriction on the properties available to her for longer-term rehousing (see paragraph 6 above).

46. In the present case the domestic courts carefully considered whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the arrangement between LBH and AIHA, and at each level of jurisdiction they agreed that it was objectively and reasonably justified. The Divisional Court observed that the AIHA's properties in LBH accounted for only 1% of the units of general needs housing potentially available for letting in the area, and its lettings each year were less than 1% of social housing lettings. Moreover, members of the OJC constituted almost 83% of LBH's waiting list for accommodation with six or more bedrooms, and 50% of those waiting for five-bedroom accommodation. It concluded that, in those circumstances, and given the acute scarcity of such accommodation, it was proportionate that properties such as those operated by AIHA were allocated to members of the OJC who had need of the accommodation (see paragraph 11 above).

47. In equally detailed judgements both the Court of Appeal and the Supreme Court agreed that the Divisional Court had made appropriate findings on the basis of the evidence before it and that it had applied the correct proportionality exercise. On the basis of the Divisional Court's findings, they noted that the effect of AIHA's allocation policy (taken at its most restrictive) was to withdraw 1% of units from the pool of potentially available properties for letting. Consequently, the disadvantage to persons who were not members of the OJC was minuscule (see paragraphs 19 and 24 above).

48. In light of the foregoing, the Court cannot but conclude that in the circumstances of the case the arrangement between LBH and AIHA did not exceed the wide margin of appreciation afforded to the national authorities in such cases.

49. In addition to her complaint about the aforementioned arrangement, the applicant also advances a complaint about the charities exemption enshrined in section 193(2)(b) of the 2010 Act. She claims that as this provision does not require any difference in treatment to be justified, it effectively bypasses the requirement under Article 14 of the Convention that any difference in treatment on the grounds of religion pursue a legitimate aim and be proportionate to that aim. However, it is not necessary for the Court to consider whether section 193(2)(b) is compatible with Article 14 of the Convention since it is clear that on the facts of the present case that the domestic courts considered the proportionality of AIHA's allocation policy with full reference to this Court's jurisprudence and held that it was a proportionate means of achieving a legitimate aim. In these circumstances, the Court fails to see how the applicant was in any way prevented from having her Article 14 rights properly considered at the domestic level.

50. It follows that the application must be rejected as being manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 16 June 2022.

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| Ilse Freiwirth<br>Deputy Registrar | Gabriele Kucsko-Stadlmayer<br>President |