

Latest cases and changes to immigration rules affecting religious workers



Caroline van den Bergh
Senior Paralegal
T: 020 7551 7775
c.vandenBergh@bwbllp.com

Caroline supports the Charity and Social Enterprise department on a range of charity and commercial matters. She was previously a paralegal in the Corporate and Commercial team at BWB and brings her experience of company law matters to her current role. Caroline also supports the Faith-Based Organisations group across the firm.



Farheen Ahmed
Paralegal
T: 020 7551 7911
f.ahmed@bwbllp.com

Farheen supports the Public Services team within the Charity and Social Enterprise department and has recently graduated with an LLB Law degree.

Can a faith-based charity prioritise those of its own religion?

Faith-based charities may prioritise members of the religion that they seek to advance as their intended beneficiaries, and in certain cases exclude those not belonging to that religion. The lawfulness of this was tested in *Z & Ors, R (On the Application Of) v Hackney London Borough Council & Anor* [2019] EWHC 139.

The claimants in this case were a non-Jewish woman with four children, and her three-year-old son who were at the top of Hackney Council's list for a four-bedroom house. The Agudas Israel Housing Association (AIHA), which provides social housing for Orthodox Jews, denied her application for housing and she claimed that this constituted unlawful discrimination under the Equality Act 2010.

The court acknowledged that the AIHA's system of allocating housing was discriminatory under the Equality Act 2010 as it treated less favourably those who were not members of the Orthodox Jewish community. However, it found that in the circumstances, this was lawful by virtue of s.158 (proportionate positive action) and s.193 (the exception for charities) of the 2010 Act.

This is one of the first decisions by the higher courts on these provisions of the act and will be of interest to faith-based charities which may be restricting the benefits that they provide, particularly those with limited resources as the small size of AIHA was taken into consideration in the decision. The strong evidential basis for this case should be emphasised. Among other things, the court looked at and noted the strong correlation between 'the evidenced poverty and deprivation and the religio' as well as widespread anti-Semitism in finding that there was positive action to justify the priority given to members of the Orthodox community.

Full judgment: <https://www.bailii.org/ew/cases/EWHC/Admin/2019/139.html>

Jehovah's Witnesses calling door-to-door subject to data protection legislation

Members of the Jehovah's Witnesses religious community often conduct door-to-door preaching, and take notes during their conversations. In July 2018 the Court of Justice of the European Union (CJEU) ruled that the collection of personal data during such visits falls under the data protection regime as it was not personal data processed as a purely personal or household activity. The court also ruled that a religious community is a data controller, together with its members who preach, of the processing of personal data carried out by its members in the context of door-to-door preaching that is encouraged by the community.

Full judgment: <http://www.bailii.org/eu/cases/EUECJ/2018/C2517.html>

The High Court justifies interference with rights under the ECHR in *R v Walsall Council*

The High Court has dismissed a judicial review claim against Walsall Metropolitan Council's (WMC) cemetery policy which prohibited the claimant from erecting a marble edge around his father's grave for religious reasons.

The claimant wanted to raise the edges of his father's grave as he believed that stepping on the grave was an offensive and religiously-prohibited act. The claimant brought a judicial review claim on the basis that WMC's rules, which prevented any obstructions or barriers between graves, constituted a breach of Articles 8 (right to respect for private and family life) and 9 (right to freedom of thought, conscience and religion) of the European Convention on Human Rights and that it constituted unjustified direct or indirect discrimination on the basis of age.

The High Court dismissed the claim upholding that WMC's interference with the claimant's rights were justified given WMC's legitimate aims of preserving the 'lawn cemetery' principle and the protection of the visitors to the cemetery and those who worked there.

This decision will be of interest to local authorities and organisations dealing with similar requests based

on religious grounds and the legitimate aims relied upon to justify any interference under the European Convention on Human Rights.

Full judgment: <https://www.judiciary.uk/wp-content/uploads/2019/01/ul-haq-v-walsall-mbc-judgment-final.pdf>

Ashers bakery – cake refusal not discriminatory

In October 2018, the UK Supreme Court unanimously ruled that Ashers bakery's refusal to make a cake with a slogan which supported same-sex marriage was not discriminatory under the Equality Act 2010.

In 2014, the Christian owners of Ashers bakery in Northern Ireland were sued for discrimination by a gay rights activist after refusing to make a cake with the slogan 'Support Gay Marriage' as the slogan was inconsistent with their religious beliefs. The bakery insisted that its objection was to the message on the cake rather than the customer himself. After losing to the Court of Appeal, the bakery appealed to the UK Supreme Court.

The UK Supreme Court ruled that while the judgment does not diminish the need to protect gay people or those who support gay marriage from discrimination, the bakery did not refuse to fulfil the customer's order due to his sexual orientation, but because the owners disagreed with the message on the cake. The court also expressed that support for gay marriage could not be seen as a proxy for a particular sexual orientation as people of all sexual orientations could support gay marriage.

This case demonstrates the continued perceived tensions between rights such as freedom of expression and equal treatment within society and the challenges that courts face in balancing such rights. The case could also raise uncertainty on the approach courts would take in cases where services are refused on the basis of various other beliefs held by service providers, for example, printing shops refusing to print banners with messages they do not support.

Full judgment: <https://www.supremecourt.uk/cases/docs/uksc-2017-0020-judgment.pdf>.

Reliance on religion of discriminator as a basis for direct discrimination will fail

In *Gan Menachem Hendon Limited v De Groen* UKEAT/0059/18, the Employment Appeals Tribunal (EAT) held that there was no direct or indirect discrimination on grounds of religion or belief of a nursery teacher who was dismissed for cohabiting with her boyfriend, in contravention of the Orthodox Jewish beliefs of the nursery.

The EAT reversed the tribunal's finding for direct discrimination on the grounds of religion or belief, as less favourable treatment by an employer (the nursery) because of its own religion or belief does not establish direct discrimination under section 10 of the Equality Act. The tribunal's decision as to direct discrimination came before the ruling in the Ashers bakery case: in that case Lady Hale's judgment made it clear that any direct discrimination claim that relied on the discriminator's own protected characteristic would fail.

Full judgment: https://www.bailii.org/uk/cases/UKEAT/2019/0059_18_1202.html

Change to the immigration rules affecting charity and religious workers

Faith-based charities that hold sponsor licences commonly use two subcategories within Tier 5 of the points-based immigration system:

- charity workers – for individuals undertaking voluntary work for a charity e.g. a charity fieldworker;
- religious workers – for individuals coming to work as religious workers e.g. a pastor.

Cooling off period

From 10 January 2019, Tier 5 religious and charity workers will now need to spend a minimum of 12 months outside the UK before returning in either category. This change is intended to prevent individuals applying for consecutive visas to enable them to live in the UK for extended periods and closes a loophole whereby faith-based charities could assign consecutive visas where, for instance, a project for a charity worker had been extended. The change underlines that Tier 5 is intended for temporary visas.