Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 13 February 2025[1]

Case C-417/23

Slagelse Almennyttige Boligselskab,
Afdeling Schackenborgvænge
v
MV,
EH,
LI,
AQ and LO,
joined parties:
BL – Danmarks Almene Boliger,
Institut for Menneskerettigheder
and
XM,
ZQ,
FZ,
DL,
WS,
JI,
PB,
VT,
YB,
TJ,
RK
v
Social-, Bolig- og Ældreministeriet,
joined parties:
Institut for Menneskerettigheder,
FN særlige rapportør E. Tendayi Achiume,
FN særlige rapportør Blakrishnan Rajagopa

(Request for a preliminary ruling from the Østre Landsret (High Court of Eastern Denmark, Denmark))

[1] Original language: English.

(Reference for a preliminary ruling – Directive 2000/43/EC – Equal treatment between persons irrespective of racial or ethnic origin – National legislation requiring the adoption of development plans in certain residential areas designated as 'parallel societies' – Criterion of 'immigrants and their descendants from non-Western countries' – Concepts of 'ethnic origin', 'direct discrimination' and 'indirect discrimination')

I. Introduction

1. The present case requires the Court to interpret certain aspects of the Race or Ethnic Origin Directive.[2] In particular, the Court has the opportunity to elaborate further on what is understood by the notion of 'ethnic origin' in that directive, and to delimit the concepts of direct and indirect discrimination.

2. The present reference arises from a number of disputes before the national courts in Denmark in relation to national legislation which requires the adoption of development plans for public housing units in certain residential areas called 'parallel societies' (previously, 'ghettos'), named as such owing to the majority of the population in those areas being 'immigrants and their descendants from non-Western countries'. The Court's ruling in this case will also be decisive for several other cases pending before other Danish courts.[3]

II. The background, the questions referred and the procedure before the Court

A. The relevant Danish law

3. In 2010, the Kingdom of Denmark inserted Paragraph 61a into the Almenboligloven (Law on Public Housing).[4] That law was further amended twice more, first in 2018, when the scheme at issue in the present case was adopted, and then in 2021, when certain, mostly terminological, amendments were introduced ('the Law on Public Housing'). The term 'parallel society' replaced the term 'ghetto', whilst the term 'transformation area' replaced the previous term 'hard ghetto area'.

4. The key provisions relevant to the disputes in the main proceedings are Paragraphs 61a, 168a and 168b of the Law on Public Housing.

5. Paragraph 61a identifies three types of public housing areas.

[2] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22; 'the Race or Ethnic Origin Directive').

[3] Point 2 of the request for a preliminary ruling indicates that similar questions are also being examined in a number of other cases before Danish courts, including seven cases before the Højesteret (Supreme Court, Denmark) and two cases before the retten i Aarhus (Aarhus District Court, Denmark). The Højesteret (Supreme Court) has decided to stay the cases before it, pending consideration by the Court of Justice of the preliminary questions in those cases.

[4] It is important to note at the outset that the original translation of the title of that law was Law on *Social* Housing. However, at the hearing, MV and others, including BL, explained that that translation is misleading, as the housing that the law is regulating is available not only to persons in need of social assistance, but to all residents of Denmark. For that reason, I have decided to translate the title as the Law on Public Housing, which seems more appropriate.

6. First, a 'vulnerable housing area' is an area that fulfils at least two of the following four criteria ('the socioeconomic criteria'):

'(1) The proportion of residents aged between 18 and 64 with no link to the labour market or education is over 40%, calculated as the average over the last two years.

(2) The proportion of residents convicted of offences under the Criminal Code, the Weapons Act or the Drugs Act is at least three times the national average, calculated as the average over the last two years.

(3) The proportion of residents aged between 30 and 59 with only primary education exceeds 60%.

(4) The average gross income of taxpayers aged between 15 and 64 in the area, excluding those seeking education, is less than 55% of the average gross income for the same group in the region.' [5]

7. Second, a 'parallel society' (formerly 'ghetto') is an area which fulfils two of the four socioeconomic criteria, much like a vulnerable housing area, but where, *in addition*, more than 50% of the residents are 'immigrants and their descendants from non-Western countries'. [6]

8. Third, a 'transformation area' (formerly 'hard ghetto') is an area which has fulfilled the parallel society criteria for the last five years. [7]

9. The competent ministry publishes a list of those different housing areas on 1 December every year. [8]

10. The terms 'Western' and 'non-Western' are not defined in the Law on Public Housing. The referring court indicates, however, that they were taken from the Danmarks Statistik (Statistics Denmark), which has drawn them up for statistical purposes. In that respect:

'Western countries include the EU, Andorra, Australia, Canada, Iceland, Liechtenstein, Monaco, New Zealand, Norway, San Marino, Switzerland, the UK, the USA and the Vatican City State.

Non-Western countries include the European countries Albania, Belarus, Bosnia and Herzegovina, Kosovo, Macedonia, Moldova, Montenegro, Russia, Serbia, the Soviet Union, Türkiye, Ukraine and Yugoslavia. All countries in Africa, South and Central America and Asia. All countries in Oceania (other than Australia and New Zealand) and stateless persons.'

11. The referring court further explains that an 'immigrant' is a person born abroad and neither of whose parents was born in Denmark or is Danish citizen. A 'descendant' is a person who was born in Denmark but for whom neither parent is both a Danish citizen and born in Denmark, or whose parents, even if they were born in Denmark and acquired Danish nationality, also retain their foreign nationality.

5 Paragraph 61a(1) of the Law on Public Housing.

6 Paragraph 61a(2) of the Law on Public Housing.

7 Paragraph 61a(4) of the Law on Public Housing.

8 As provided for by Paragraph 61a(6) of the Law on Public Housing.

12. For the areas designated as transformation areas, the Law on Public Housing requires that certain measures be carried out. Thus, Paragraph 168a(1) of that law provides that the public housing associations owning such areas must, together with the municipal council, draw up a development plan. The Social-, Bolig- og Ældreministeriet (Minister for the Interior and Housing, Denmark) must approve that development plan.

13. Under Paragraph 168b(1) of the Law on Public Housing, a social housing association and the municipal council must set out in the development plan how the proportion of public housing units in the transformation areas is to be reduced to 40% by 1 January 2030.

14. In order to achieve that goal, the development plan may envisage, among other things, the sale of properties to private developers or demolition, or the conversion of family housing into housing for young people. In such cases, the lease of the previous tenants must be terminated. The Law on Public Housing provides that the municipal council is obliged to find a rehousing solution for such tenants and to cover their costs.

B. The disputes in the main proceedings and the questions referred

15. The disputes in the main proceedings concern two different transformation areas: Ringparken, an area that is part of the Slagelse Municipality, and Mjølnerparken which is in Copenhagen (Denmark).

16. Ringparken is owned by the housing company Slagelse Almennyttige Boligselskab ('SAB').[9] It was designated a 'hard ghetto area' (now 'transformation area') with effect from 1 December 2018 because that housing area met all four of the socioeconomic criteria and, in addition, 55.6% of its residents belonged to the category of 'immigrants and their descendants from non-Western countries'.

17. On 17 February 2020, in line with the development plan for that area, SAB terminated 17 leases in Schackenborgvænge.[10] The terminations were made in accordance with the approved criteria, and the tenants who had their leases terminated were, according to the information provided, not selected on the basis of whether they were 'immigrants or their descendants from non-Western countries'.[11] The tenants were offered permanent rehousing.[12]

18. The first four cases concern five tenants who opposed the termination of their leases. SAB therefore initiated actions before the competent court for a declaration that those tenants must recognise that the termination of their leases is lawful.[13]

19. The fifth case concerns the Mjølnerparken transformation area in Copenhagen, managed by the housing association Bo-Vita.[14]

9 SAB is a public non-profit company belonging to Slagelse Municipality; https://www.dabbolig.dk/slagelse-almennyttige-boligselskab/.

10 At the hearing, SAB explained that the development plan would transform the Schackenborgvænge block, resulting in the least possible number of leases that had to be terminated. SAB subsequently sold Schackenborgvænge to Estate Invest A/S, though nevertheless remains the claimant in the main proceedings.

11 The criteria used were those prescribed for eligibility for public housing in transformation areas, that is, no criminal conviction within the household in the last six months and a certain level of income.

12 The tenants in the main proceedings dispute the equivalence in size and price of the housing offer. In any event, the determination of such factual circumstances remains within the sole competence of the national court.

13 Since 1 December 2021, Ringparken is no longer classified as a transformation area as it no longer satisfies the socioeconomic criteria. However, SAB is still obliged to implement the approved development plan for that area.

14 Bo-Vita is also a public housing association, founded in 1951.

20. On 1 December 2018, Mjølnerparken was designated a 'hard ghetto area' (now 'transformation area') because it met three of the four socioeconomic criteria and because approximately 80% of the residents in that area belonged to the category of 'immigrants and their descendants from non-Western countries'. [15]

21. On 8 May 2019, Bo-Vita drew up a development plan on that basis, which was approved by the competent ministry on 10 September 2019. The plan involved the sale of certain apartment blocks. Accordingly, it fell to that association to terminate the leases of the tenants, who were offered rehousing.

22. On 27 May 2020, 11 residents of Mjølnerparken brought an action against the competent ministry, claiming that its approval of the development plan for Mjølnerparken is invalid because, inter alia, the plan is based on Paragraph 61a(4) of the Law on Public Housing, defining transformation areas. The ministry contended that the action should be dismissed.

23. Those five cases have been referred to the Østre Landsret (High Court of Eastern Denmark, Denmark), the referring court in the present case, for examination at first instance, since it is considered that the cases raise issues of principle.

24. That court harbours doubts as to whether the national legislation is compatible with the Race or Ethnic Origin Directive.

25. When explaining the background of the case, the referring court indicates that, prior to the 2018 amendments, the Danish Government had drawn up a strategy entitled 'Ét Danmark uden parallelsamfund – Ingen ghettoer i 2030' ('A Denmark without parallel societies – No ghettos 2030'), [16] which emphasised the desire for a cohesive Denmark 'without parallel societies' among people with a non-Western background. It further emerges from the order for reference that the 'the central challenge in [parallel societies] is the lack of integration of immigrants and their descendants from non-Western countries'.

26. In those circumstances, the Østre Landsret (High Court of Eastern Denmark) referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the term "ethnic origin" in Article 2(2)(a) and (b) of [the Race or Ethnic Origin Directive] be interpreted as meaning that that term, in circumstances such as those in the present case – where, under the Danish Law on [Public Housing], there must be a reduction in the proportion of social family housing in "transformation areas", and where it is a condition for categorisation as a transformation area that more than 50% of residents in a housing area are "immigrants and their descendants from non-Western countries" – covers a group of persons defined as "immigrants and their descendants from non-Western countries"?

(2) If the answer to the first question is wholly or partly in the affirmative, must Article 2(2)(a) and (b) be interpreted as meaning that the scheme described in this case constitutes direct or indirect discrimination?'

[15] As of 1 December 2023, Mjølnerparken is no longer classified as a transformation area, as the number of residents has decreased to less than 1 000.

[16] Danish Government, 'Ét Danmark uden parallelsamfund – Ingen ghettoer i 2030', 1 March 2018; available at https://www.regeringen.dk/media/4937/publikation_%C3%A9t-danmark-uden-parallelsamfund.pdf.

C. The course of the proceedings in the present case

27. Written observations were submitted to the Court by SAB, XM and others, BL – Danmarks Almene Boliger (BL – Denmark's Public Housing; 'BL'), the Institut for Menneskerettigheder (Danish Institute for Human Rights), the UN Special Rapporteurs E. T. Achiume and B. Rajagopa, the Danish Government, the Spanish Government and the European Commission.

28. A hearing was held on 30 September 2024 at which SAB, MV and others, XM and others, BL, the Danish Institute for Human Rights, the UN Special Rapporteurs E. T. Achiume and B. Rajagopa, the Danish Government and the Commission presented their pleadings.

III. Analysis

A. Structure of the present Opinion

29. The present case requires the Court to interpret the Race or Ethnic Origin Directive in specific circumstances resulting from the Danish Law on Public Housing.

30. That law imposes the obligation on public housing associations to adopt, in agreement with respective local authorities, development plans aiming at lowering the number of public housing units to 40% in neighbourhoods designated as transformation areas (or 'hard ghettoes' in the earlier version of the same law). What distinguishes such areas from other neighbourhoods with comparably disadvantaged socioeconomic situations is that they are populated by more than 50% of persons described as 'immigrants and their descendants from non-Western countries'.

31. In the two transformation areas relevant to the disputes pending before the referring court – Ringparken in Slagelse and Mjølnerparken in Copenhagen – the development plans resulted in the unilateral termination of a number of leases in public housing units.

32. Can such consequences as those that ensued from the Law on Public Housing be characterised as discrimination on the basis of ethnic origin, contrary to the Race or Ethnic Origin Directive?

33. The Race or Ethnic Origin Directive aims at eliminating discrimination on those two grounds only: race and ethnicity; other prohibited grounds are covered by different EU directives. [17]

34. Therefore, that directive applies only if a distinction between Western and non-Western immigrants and their descendants can be understood to be based on the criterion of 'ethnic origin'. For the sake of brevity, I will refer to that distinction as the 'Western/non-Western criterion'.

35. I will propose to the Court that the Western/non-Western criterion indeed falls within the concept of 'ethnic origin'. On that basis, I will further propose that this lead to the conclusion that the discrimination that results therefrom is direct discrimination. My analysis is structured as follows.

[17] See, for instance, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) ('the Framework Equality Directive') and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

36. Under heading C, and in response to the first question of the referring court, I will demonstrate why the Western/non-Western criterion should be understood as being based on a criterion of ethnic origin.

37. Under heading D, and in response to the second question of the referring court, I will submit that the adverse treatment that results from the relevant legislation based on such a criterion is one of direct discrimination. That is so, as I will explain, notwithstanding the fact that the choice of persons whose leases were terminated under the development plans was not based on the Western/non-Western criterion. Should the Court disagree with my opinion, I will offer alternative arguments based on indirect discrimination.

38. Before I engage in the analysis of the abovementioned issues, two preliminary questions relating to the applicability of the Race or Ethnic Origin Directive to the circumstances of the present case will be addressed under heading B.

B. Preliminary issues relating to the scope of the Race or Ethnic Origin Directive

1. Under which point of Article 3(1) of the Race or Ethnic Origin Directive is this case situated: (e), (f) or (h)?

39. The first preliminary issue, which was raised by the Commission, concerns whether the Law on Public Housing falls within the scope of point (e) social protection, including social security and healthcare, point (f) social advantages, or point (h) access to and supply of goods and services, including housing, of Article 3(1) of the Race or Ethnic Origin Directive.

40. The Commission considers that public housing represents a form of social advantage and that the present case therefore falls within the scope of Article 3(1)(f) of the Race or Ethnic Origin Directive.

41. However, following the explanations offered at the hearing by BL and the tenants in both lines of cases – representing the two different public housing areas – and after consulting the rules on the system of public housing in Denmark, [18] I am of the view that Danish public housing is a service and is therefore captured by Article 3(1)(h) of the Race or Ethnic Origin Directive.

42. Public housing represents 20% of the total number of households in Denmark and provides housing to around 1 million people. Public housing for families are built and rented out by public housing associations. There are almost 700 such associations of varying sizes, spread across urban areas and rural districts. The associations are not-for-profit organisations whose aim is to offer affordable housing to the inhabitants of Denmark. There is no income limit for entry and anyone over 15 years of age can register (for a fee) on waiting lists. The rent of housing is lower than the market price, as it is solely meant to cover the costs of the operation of the housing units with the addition of provisions for maintenance. However, tenants pay full rent for the use of public housing.

[18] The rules surrounding the system of public housing in Denmark can be found in Bekendtgørelse om ændring af bekendtgørelse om drift af almene boliger m.v. (Executive Order amending the Executive Order on the operation of public housing), BEK nr 1368 af 28 November 2018.

43. Given those features of the Danish public housing system, I am of the opinion that the circumstances of the present case fall within the scope of point (h) of Article 3(1) of the Race or Ethnic Origin Directive relating to the provision of 'services which are available to the public, including housing'.

44. Such a view is further supported by the legislative history of the Race or Ethnic Origin Directive. The original proposal of the Commission contained a reference to 'access to and supply of goods and services' without express mention of housing.[19] A number of Member States disputed the inclusion of goods and services in the scope of that directive. It is worth recalling that the Framework Equality Directive, which was adopted in parallel and covered other prohibited grounds – religion or belief, disability, age and sexual orientation – did not include the provision of goods and services in its scope.[20] A compromise in the context of the Race or Ethnic Origin Directive was to include goods and services 'available to the public'. As far as the addition of 'including housing' is concerned, that wording was proposed by the European Parliament[21] and was included in the amended proposal of the Commission.[22] Once the agreement on the inclusion of 'goods and services which are available to the public' within the scope of the Race or Ethnic Origin Directive was agreed, 'there was then no difficulty in securing the clarification that housing also fell under the definition of goods and services.'[23]

2. The meaning of the first sentence of Article 3(1) of the Race or Ethnic Origin Directive

45. The second preliminary issue which was raised at the hearing concerns the interpretation of the introductory sentence of Article 3(1) of the Race or Ethnic Origin Directive, which starts with the following words: '*Within the limits of the powers conferred upon the Community*, this Directive shall apply to …'.[24]

46. More specifically, as the present case concerns national legislation on public housing – a policy area that the Treaties do not confer to the regulatory competence of the European Union – the question referred raises a more general, constitutional issue of whether the Race or Ethnic Origin Directive is applicable to such a policy without encroaching on national competences.

47. In that respect, it is important to note, first, that the introductory sentence of Article 3(1) of that directive reflects the wording of Article 19 TFEU, the legal basis which enabled the adoption of that directive.[25]

[19] Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (COM(99) 566 final of 25 November 1999).

[20] See, for instance, Article 3 of that directive.

[21] Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Report on the proposal for a Council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (COM(1999) 566 – C5-0067/2000 – 1999/0253(CNS)) of 16 May 2000.

[22] Amended proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (COM(2000) 328 final) (OJ 2000 C 311E, p. 169).

[23] In that respect, see Tyson, A., 'The Negotiation of the European Community Directive on Racial Discrimination', *European Journal of Migration and Law*, 2001, p. 199-229, at pp. 208.

[24] Emphasis added.

[25] That provision was introduced by the Treaty of Amsterdam and, at the time of the adoption of the Race or Ethnic Origin Directive, was under Article 13 of the Treaty establishing the European Community.

48. That legal basis provides the Council of the European Union with the power to adopt acts to combat, among other things, discrimination based on racial or ethnic origin. Such legislation requires unanimity in the Council and consent of the Parliament. The introductory sentence of Article 19 TFEU states that such an act is to be adopted 'without prejudice to the other provisions of the Treaties and *within the limits of the powers conferred by them upon the Union*'.[26]

49. That provision might be seen as the reaction of the Member States, as masters of the Treaties, to Opinion 2/94,[27] in which the Court considered that the European Community, as it existed under the EC Treaty, could not join the European Convention on Human Rights (ECHR) because the Treaties, as they were then, did not confer on it the competence in the field of human rights.

50. Thus, Article 19 TFEU (then Article 13 EC) was inserted into the Treaties to confer competence that would enable the European Union to actively combat discrimination.

51. Nevertheless, that horizontal competence was not intended to expand areas in which the European Union could already regulate, but to introduce a 'human rights competence' which empowers the European Union to combat discrimination *within* the scope of EU law as defined by the Treaties.

52. Given that housing policy is not an area of competence conferred on the European Union by the Treaties, does that mean that the Race or Ethnic Origin Directive cannot apply to national legislation regulating public housing?

53. Such a reading of Article 19 TFEU and of the introductory sentence of Article 3(1) of the Race or Ethnic Origin Directive would, to my mind, be too narrow and would exclude the application of that directive, as well as the application of other EU acts containing a similar wording,[28] to numerous areas of national legislation.

54. As explained above (see point 43 et seq. of this Opinion), public housing in Denmark is a service offered for remuneration, in the sense of the Treaties. As such, public housing falls within the scope of EU law.

55. In that regard, it is settled case-law that even in the areas in which the Member States hold regulatory powers, their regulatory choices are limited by the EU constitutional and legislative framework. For example, in the field of education, which is also within the competence of Member States, the Court considered that while EU law does not detract from the power of Member States as regards the content of education and the organisation of education systems, the fact remains that, when exercising that power, Member States must comply with EU law.[29]

[26] Emphasis added.

[27] Opinion 2/94 *(Accession of the Community to the ECHR)* of 28 March 1996 (EU:C:1996:140, paragraph 27).

[28] In that regard, the Framework Equality Directive and Article 3(1) thereof, whose wording is identical. This might also be relevant in relation to Article 2(2)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1), which provides: 'This Regulation does not apply to the processing of personal data … in the course of an activity which falls outside the scope of Union law'.

[29] See, in that respect, judgments of 11 September 2007, *Schwarz and Gootjes-Schwarz* (C-76/05, EU:C:2007:492, paragraph 70), and of 7 September 2022, *Cilevičs and Others* (C-391/20, EU:C:2022:638, paragraph 59 and the case-law cited). In relation to public health, see judgment of 16 May 2006, *Watts* (C-372/04, EU:C:2006:325, paragraph 92).

56. In the same way, a Member State remains free to have a system of public housing – or not – and to choose the form of public housing and the persons to whom it may be offered. However, the rules on public housing, if enacted, cannot discriminate on the grounds prohibited by the EU anti-discrimination law, the enactment of which the European Union has competence on the basis of Article 19 TFEU. EU law therefore indeed limits, to a certain extent, the choices available to Member States when developing their public housing policies – in particular, they cannot adopt public housing policies that discriminate on the basis of ethnic origin. In imposing such a limit, the European Union does not, however, acquire competence over public housing, that is to say, it cannot replace or impose certain types of housing policy on Member States.

57. Therefore, by empowering the European Union to combat discrimination within the scope of EU law as defined by the Treaties, the Member States accept that the commonly agreed policy of equality will also impose limits on their regulatory choices in the area of housing policy. In other words, by enacting the Race or Ethnic Origin Directive, which applies to housing, the European Union acted within the limits of the powers conferred upon it by Article 19 TFEU and did not attribute to itself any new regulatory powers.

58. It follows that the Race or Ethnic Origin Directive is applicable to national legislation on public housing, even though the Member States retain their competences in regulating public housing in the territory under their jurisdiction.

C. 'Ethnic origin' as a prohibited ground

59. It follows from the above that the Race or Ethnic Origin Directive prohibits discrimination on the ground of ethnic origin in the area of public housing.

60. By its first question, the referring court asks, in essence, whether the distinction between 'Western' and 'non-Western' immigrants and their descendants is a distinction based on ethnic origin in the sense of that directive.

61. SAB argues that the concept of 'immigrants and their descendants from non-Western countries' is not based on ethnic origin, but on nationality, which is excluded from the scope of application of the Race or Ethnic Origin Directive by virtue of Article 3(2) thereof.

62. The Danish Government also denies that that concept is linked to ethnic origin, arguing that instead it is so broad that it is not liable to affect persons of a particular ethnicity.

63. Conversely, the tenants in the two transformation areas that are parties to the cases before the national court, the Institut for Menneskerettigheder (Danish Institute for Human Rights), the FN's særlige rapportører (UN Special Rapporteurs), the Spanish Government and the Commission all contend, in essence, that the group of 'immigrants and their descendants from non-Western countries' are distinctive on the basis of their ethnic origin.

1. Wording, context and purpose of the Race or Ethnic Origin Directive

64. To begin, it must be noted that the wording of the Race or Ethnic Origin Directive does not contain a definition or any other indication of what is to be understood as 'ethnic origin'.

65. Lacking a legislative definition, one may look for the usual meaning in everyday language of the word 'ethnic', 'ethnicity' or 'ethnic origin'.[30] A quick search of the dictionaries available on the internet reveals that those terms refer to a group of people connected by certain common characteristics. However, those characteristics differ across dictionary definitions.[31] They often include a shared culture, tradition, language, history, race or religion. Additionally, dictionary definitions often add 'etc.' or similar, indicating that other characteristics might also be relevant.[32]

66. When it comes to the context in which the words 'ethnic origin' appear, one may notice that prohibition of discrimination on such a basis is dealt with in the act that at the same time addresses the prohibition of discrimination on the basis of racial origin. Does this help to understand what ethnicity is?

67. Use of the terms 'ethnic' and 'racial' together and interchangeably seems to be a result of the evolution in the understanding of this type of discrimination. According to scholars, the origin of the term 'racism' seems to lie in a critique of the earlier scientific theories on 'race', which sought to categorise the human population into a number of biologically distinct 'races'.[33]

68. In the Race or Ethnic Origin Directive, the EU legislature expressly makes it clear that the European Union rejects such theories which posit the existence of different human races.[34] It nevertheless continues to use the term 'race' but, unlike the earlier legal instruments,[35] it adds the term 'ethnic origin', possibly to emphasise the attachment of those concepts to social constructs rather than to any given inherited characteristics.

69. Therefore, the use of the term 'ethnic origin' in the Race or Ethnic Origin Directive should be read together with the term 'race', as referring to a social construct – a perception in a given society of the existence of a group that is recognisable as different on the basis of certain socio-cultural characteristics, such as language, literature, music, customs or similar.

30 See, in that respect, judgment of 15 November 2018, *Maniero* (C-457/17, EU:C:2018:912, paragraph 30).

31 For example, the *Cambridge Dictionary* proposes as one of the possible meanings of 'ethnic': 'relating or belonging to a group of people who can be seen as distinct (= different) because they have a shared culture, tradition, language, history, etc.'. The *Merriam-Webster* dictionary proposes, inter alia: 'of or relating to large groups of people classed according to common racial, national, tribal, religious, linguistic, or cultural origin or background'. The *Hrvatski jezični portal* (Croatian Linguistic Portal) proposes that an 'ethnic group' includes members of one 'ethnos' who share a common identity on the basis of the same culture, religion, language, customs and other factors. The *Larousse* dictionary defines 'ethnie' as 'Groupement humain qui possède une structure familiale, économique et sociale homogène, et dont l'unité repose sur une communauté de langue, de culture et de conscience de groupe'.

32 Scholars remark that it is difficult to find a generally accepted definition of 'ethnicity'. See, for instance, Krivokapić, B. and Salkiewicz-Munnerlyn, E., 'An attempt of defining Ethnic Minorities for their better protection', *Ukrainian Journal of International Law*, 2020, pp. 26-40. See also Opinion of Advocate General Wahl in *Jyske Finans* (C-668/15, EU:C:2016:914, point 33).

33 Bell, M., *Racism and Equality in the European Union*, Oxford, Oxford University Press, 2009, p. 8.

34 Recital 6 of the Race or Ethnic Origin Directive.

35 Thus, for example, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which dates back to 1965, to which all of the Member States are parties and which is quoted in recital 3 of the Race or Ethnic Origin Directive, uses only the term 'racial discrimination'. However, its Article 1(1) provides that '"racial discrimination" shall mean 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. The ECHR does not contain the expression 'ethnic origin' either. However, the European Court of Human Rights ('ECtHR') has considered that 'discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination' (ECtHR, 13 November 2007, *D.H. and Others v. the Czech Republic* (CE:ECHR:2007:1113JUD005732500, § 176 and the case-law cited)).

70. Finally, the purpose of the Race or Ethnic Origin Directive is to establish a framework to combat discrimination in order to put into effect the principle of equality. According to Article 2 TEU, equality is one of the founding values of the European Union. As this Directive thus puts into effect one of the fundamental values of the European Union, the notion of 'ethnic origin' should be given a broad interpretation. [36]

71. Recital 12 explains that the Race or Ethnic Origin Directive aims to 'ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin'.

72. Furthermore, several recitals of the Race or Ethnic Origin Directive refer to the initiatives of the European Council, the Council and the Commission to fight 'racism and xenophobia'. [37] The fight against xenophobia is, therefore, an element of the development of *tolerant* societies, [38] and the notion of 'ethnic origin' should be understood under such a purpose of that directive.

73. In such a context, the notion of 'ethnic origin' may be understood as referring to a perception of a person or of a group of persons as strangers or foreigners. As such, a division on the ground of 'ethnic origin' can be understood as a division between 'us' and 'them'; the dividing line being dependent on certain physical and socio-cultural characteristics or, at least, on the perception that differences in those characteristics exist.

74. The development of a society that is *tolerant* to ethnic differences would entail the recognition of equal rights for 'them', despite the belief or perception that 'they' possess different characteristics to 'us'.

2. The relevant case-law of the Court

(a) The judgments in CHEZ *and* Jyske Finans *– the factors of 'ethnicity'*

75. There is little case-law of the Court that interprets the notion of 'ethnic origin'. Unless I am mistaken, the Court has dealt directly with the meaning of that term in only two cases: *CHEZ* and *Jyske Finans*. [39]

76. The leading case in the area of ethnic discrimination is that of *CHEZ*. It arose out of a situation in which a Bulgarian electricity provider mounted electricity meters to a height of over six metres in a neighbourhood that was predominantly populated by persons of Roma origin, even though it was common practice to place them at a height of under two meters. The Court considered that, in those circumstances, persons of Roma origin could be understood as an ethnic group. [40]

[36] In that respect, the Court has already considered that the scope of that directive cannot be interpreted restrictively. See judgments of 12 May 2011, *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 43); of 16 July 2015, *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 42; '*CHEZ*'); and of 15 November 2018, *Maniero* (C-457/17, EU:C:2018:912, paragraph 36).

[37] See, in that respect, recitals 7, 10 and 11 of the Race or Ethnic Origin Directive.

[38] Tolerance is also the value enumerated in the second sentence of Article 2 TEU. In that respect, the Race or Ethnic Origin Directive might be understood as elaborating not only the principle of equality, but also the value of tolerance.

[39] Judgment of 6 April 2017, *Jyske Finans* (C-668/15, EU:C:2017:278; '*Jyske Finans*').

[40] Paragraph 60 of *CHEZ*. In that conclusion, the Court was also inspired by the ECtHR judgments of 6 July 2005, *Nachova and Others v. Bulgaria* (CE:ECHR:2005:0706JUD004357798), and of 22 December 2009, *Sejdić and Finci v. Bosnia and Herzegovina* (CE:ECHR:2009:1222JUD002799606).

77. To arrive at such a conclusion, the Court started from a more general understanding of the notion of ethnicity: 'the concept of ethnicity, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community'. [41]

78. It is clear from the definition relied on in that judgment that the concept of 'ethnicity' groups persons on the basis of several common characteristics, some of which are prohibited grounds of discrimination in themselves (religion, and in certain circumstances, nationality) whilst others are not (language, cultural and traditional origins and backgrounds).

79. Much like the previously analysed common or dictionary meaning of the word 'ethnic', the characteristics mentioned in the *CHEZ* are not exhaustively enumerated (the Court has used the wording 'in particular'), and nor is the fulfilment of all of those criteria necessary to consider that a distinction is based on ethnicity.

80. There is, however, one characteristic under which people are often grouped but which the Race or Ethnic Origin Directive does not cover: nationality. [42] Nevertheless, as it follows from the previously quoted definition taken from the *CHEZ*, [43] even nationality might be taken into consideration to determine whether a certain division is based on the criterion of 'ethnicity' – if it only figures as one factor, and not the only one, on which different treatment is based.

81. In *Jyske Finans*, the Court confirmed that the list of characteristics of ethnicity that appears in *CHEZ* is not exhaustive. It considered that the country of birth [44] might also be one of the criteria to determine a person's ethnicity, even if that characteristic was not mentioned in *CHEZ*. [45] However, at the same time, the Court considered that the ethnicity of a person cannot be determined on the basis of a single criterion but is based on a whole number of factors, some subjective and others objective. [46] Therefore, a person's place of birth might lead to the conclusion that that person was treated differently on the basis of their ethnic origin, but it is not sufficient to justify it.

82. Although the Court mentioned in *Jyske Finans* that the characteristics of ethnicity might be both objective and subjective, it did not elaborate on that. The factors the Court mentioned in the judgments in *CHEZ* and *Jyske Finans* are all objective. There might also be subjective factors contributing to the notion of ethnicity, such as a perception of belonging to an ethnic group, but those were not mentioned in either of those two judgments. [47] Subjective factors impose 'ethnic

41 Paragraph 46 of *CHEZ*.

42 Nationality is excluded from the scope of the directive by its Article 3(2).

43 See point 77 of this Opinion.

44 In *Jyske Finans*, a person claimed that a credit company discriminated against him because of his place of birth, that is, Bosnia and Hercegovina. The place of birth indicated on his driver's licence was, as he claimed, the reason why that company required him to provide additional documents, such as passport or residence permit, in order to process the request for a credit to buy a new car. The company did not require the additional documents from his partner, however, who was born in Denmark. In that case, the Court did not find discrimination because of ethnic origin, stating, among other things, that such discrimination cannot be deduced from only one factor such as place of birth. At the same time, the Court did not exclude place of birth as one of the relevant factors for determining ethnic origin.

45 *Jyske Finans*, paragraph 18.

46 *Jyske Finans*, paragraph 19.

47 Krivokapić, B. and Salkiewicz-Munnerlyn, E., op. cit.

boundaries', which result in group inclusion or exclusion.[48] Thus, the perception that one ethnic group has, whereby certain persons do not belong to that group, might contribute to the conclusion that that different treatment is motivated by ethnic origin.

(b) The judgment in Feryn *– the homogeneity of a group treated less favourably*

83. In *CHEZ*, the ethnic group on the ground of which less favourable treatment occurred was a specific ethnic group, perceived as a homogenous group.[49]

84. In the present case, the group of 'immigrants and their descendants from non-Western countries' is not composed of persons linked objectively by the same history, culture, religion, language, place of origin or by their subjective perception of belonging to the same ethnic group. Here, 'non-Westerners' are persons who immigrated to Denmark from any country in the world except those countries that are considered Western. As indicated by the Danish Government, the countries that that group comes from represent the home of 88% of the world's population.

85. Indeed, unlike the Roma community in Bulgaria which was (at least perceived as) one ethnic group in *CHEZ*, 'non-Westerners' are an ethnically diverse group.

86. What unites that group, however, is not a commonality of factors that form 'ethnicity' within the group; it is rather the perception by the Danish legislature that this group does *not* possess the characteristics of the other group, that is, of 'Westerners'. The group is thus formed on the basis of the exclusion of 'non-Westerners' from the 'Western' group.

87. To my mind, that distinction, made by the Danish Law on Public Housing, is based on the belief that 'immigrants and their descendants from non-Western countries' integrate into Danish society with more difficulty than immigrants and their descendants from Western countries. Such a belief was confirmed – albeit not substantiated by any facts – by the Danish Government in the present proceedings.

88. This position, as indicated by the Commission, rests on the idea that immigrants and their descendants from Western countries, and Danish citizens, share a similar culture, similar traditions and similar religious convictions. For that reason, they form a homogeneous ethnic group, different from that of immigrants and their descendants from non-Western countries, which is why members of the 'Western' group do not usually have difficulty with integration, unlike the members of the 'non-Western' group.

89. Thus, in terms of ethnic origin, the 'non-Western' group is negatively defined as a group *not possessing* certain ethnic characteristics, rather than as a group *possessing* certain common ethnic characteristics. That definition, on the grounds of exclusion, however, does not negate the fact that the distinction between the two groups is made on the basis of the criterion of 'ethnic origin'.

[48] Isajiw, W.W., 'Definition and Dimensions of Ethnicity: A Theoretical Framework', paper presented at the 1992 Joint Canada-United States Conference on the Measurement of Ethnicity in Ottawa (Canada) and published in Statistics Canada and U.S. Bureau of the Census (eds.), *Challenges of Measuring an Ethnic World: Science, politics and reality – Proceedings of the Joint Canada-United States Conference on the Measurement of Ethnicity – April 1-3, 1992*, U.S. Government Printing Office, Washington, DC 1993, pp. 407-427, at p. 6 of the offprint available at https://utoronto.scholaris.ca/bitstreams/91e5f959-754b-4eea-bae0-1a3638bcd1e9/download.

[49] See, however, criticism of such an approach towards Roma people being a homogenous group in McGarry, A., 'Ethnic Group Identity and the Roma Social Movement: Transnational Organizing Structures of Representation', *Nationalities Papers*, Vol. 36(3), 2008, p. 449-470, at pp. 463 and 464.

90. The question raised by the present case, which is new in relation to *CHEZ*, is whether discriminating against all other ethnicities except that which is dominant in the society at issue is also captured by the Race or Ethnic Origin Directive.

91. In that respect, I agree with the Commission's position, which considered that that directive covers situations not only in which a specific ethnic group is treated less favourably, but also where diverse groups are placed in a disadvantaged position, if the criterion on the basis of which that occurs is that group's 'ethnic origin'. The opposite interpretation would undermine the efficient combat against discrimination based on ethnic origin.

92. If 'ethnicity' is understood as a division into 'us' and 'them', and if the Race or Ethnic Origin Directive is interpreted as aiming to provide 'them' with equal rights in 'our' societies, then, in order to live up to its purpose, that directive must be applicable whenever persons are treated less favourably simply because of their perceived ethnic 'otherness'.

93. Albeit not expressly, the Court has already recognised that the group that is treated less favourably does not need to be an ethnically homogeneous group. In *Feryn*,[50] the dispute arose from an employer in Belgium who stated that he would not employ '*allochtonen*', as opposed to '*autochthonen*' (the Dutch word was translated as 'immigrants' in the English-language version of the Court's judgment). A non-governmental organisation sued the employer, asking the Belgian court to find discrimination. The main legal issue the Court was asked to resolve in that case was whether, in a situation in which there is no victim as such, discrimination based on racial or ethnic origin might still exist.

94. In *Feryn*, neither the Court nor any of the parties had raised the question of whether the group that was treated less favourably – the '*allochtonen*' – could be understood as a group based on ethnic origin. As in the situation in the present case, the '*allochtonen*' were not an ethnically homogeneous group. Rather, the employer's statement discriminated against all 'foreigners', as opposed to autochthons or to a group of people perceived not to be foreigners.

95. Thus, tacitly, the Court accepted that the Race or Ethnic Origin Directive also applies when the group discriminated against is not a homogenous ethnic group, but the less favourable treatment is nevertheless based on the criterion of 'ethnic origin'.[51]

96. To my mind, therefore, the purpose of the Race or Ethnic Origin Directive and of the case-law of the Court corroborate the conclusion that a group treated less favourably does not necessarily need to be a homogeneous group, so long as the persons concerned are seen as belonging to that group on the basis of criteria that are used for determining ethnic origin.

[50] Judgment of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397; '*Feryn*').

[51] In the context of the ICERD, there is equally no requirement that differential treatment only affect a group with one ethnic origin in order to qualify as prohibited racial discrimination. See, in that respect, *Submission of the United Nations Special Rapporteur on Contemporary forms of Racism, Xenophobia and Related Intolerance and the United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, to the Court of Justice of the European Union (CJEU) in Case C-417/23*; accessed at: https://www.ohchr.org/sites/default/files/documents/issues/housing/AmicusBrieftoDenmark-CJEU-third-party-intervention.pdf.

3. The 'Western/non-Western' criterion used by Danish legislation is based on ethnic origin

97. In the present case, 'immigrants and their descendants from non-Western countries' are placed in a different group from immigrants and their descendants from Western countries on the basis of several factors that point to the fact that the perceived ethnic origin was a reason for distinguishing between the two: nationality, place of birth and descent.

98. A person belongs to the former group if his or her nationality or the nationality of their parent(s) is not Danish or from a Western country, if their place of birth is not Denmark or a Western country, and if their descent, demonstrated by the place of birth of their parent(s), is not Danish or a Western country. As pointed out by the Institut for Menneskerettigheder (Danish Institute for Human Rights), children of immigrants and their descendants from non-Western countries born in Denmark can remain in the 'non-Western' group for several generations if neither of their parents is a Danish citizen or was born in Denmark, even if they themselves acquire Danish citizenship.

99. Therefore, as the criterion on the basis of which the Danish law distinguishes between 'Western' and 'non-Western' is that of 'ethnic origin', the Race or Ethnic Origin Directive is applicable.

100. I also find it relevant that the Danish legislature seemed to understand that division as one that is established on the grounds of ethnicity. In the order for reference, the referring court pointed to the preparatory documents of the 2018 amendments to the Law on Public Housing, which suggest that the legislation at issue was proposed on the premiss that 'non-Western' is an ethnic characterisation. [52]

101. The fact that the 'immigrants and their descendants from non-Western countries' are in themselves not a homogenous ethnic group is irrelevant if the criterion according to which they were placed in that group is that of ethnic origin.

102. Finally, several international organisations, such as the Committee on Economic, Social and Cultural Rights of the UN Economic and Social Council, also considered that the establishment of the 'non-Western' migrants category by Danish legislation is discrimination based on, among other things, ethnic origin. [53]

103. On the basis of the foregoing, I propose that the Court find that the distinction between 'Western' and 'non-Western' immigrants and their descendants is based on ethnic origin.

104. This leads me to the next question – whether the Law on Public Housing is discriminatory and, if so, whether it constitutes direct or indirect discrimination.

[52] For example, the proposal of the 2018 amendments to the Law on Public Housing stated, inter alia, that a strong concentration of citizens *of different ethnic origin* is an indication that attention must be given to the area at issue. See, in that respect, point 100 of the present order for reference.

[53] Committee on Economic, Social and Cultural Rights, *Concluding observations on sixth periodic report of Denmark*, E/C.12/DNK/CO/6, paragraph 52; Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Denmark*, 2022, CERD/C/DNK/CO/22-24, paragraph 12.

D. Direct or indirect discrimination

105. By its second question, the referring court asks whether the 'Western/non-Western' criterion results in direct or indirect discrimination.

106. To begin with, discrimination implies that a person or a group of persons is treated adversely.

107. Direct discrimination occurs when such adverse treatment is based directly on ethnic origin. To establish direct ethnic discrimination, it is necessary to establish that a person (or a group of persons) is treated *less favourably* than another person (or group of persons) *based on* the criterion of ethnic origin. [54]

108. Indirect discrimination occurs when the adverse treatment of an ethnic group results from an apparently neutral measure. [55]

109. Recognising whether a situation represents direct or indirect discrimination is not always easy or clear. [56]

110. The most important consequence of finding that a rule or practice results in direct discrimination is that such a rule or practice cannot, in principle, be justified, whereby it is automatically prohibited. Less favourable treatment motivated by any of the prohibited grounds is, in principle, possible only in situations expressly envisaged by legislation. The Race or Ethnic Origin Directive provides for such a possibility only if differential treatment directly based on race or ethnic origin is a genuine and determining occupational requirement. [57] The situation in the present case does not result from such a situation.

111. On the contrary, indirect discrimination can be justified if the apparently neutral rule that particularly disadvantaged one ethnic group in comparison to another is really a neutral rule. This might be established if such a rule has a legitimate reason that is not connected to ethnicity, which it pursues in a proportionate way.

112. In the present case, it is not disputed that persons whose leases were terminated were not chosen on the basis of the 'Western/non-Western' criterion. Rather, the development plans adopted for each transformation area established their own criteria – for instance, tenants whose leases were terminated in Ringparken were selected on the basis of disqualification criteria for public housing in transformation areas, that is to say, their criminal convictions in the last six months or the level of their income.

113. Indeed, some of the persons whose leases were terminated in Mjølnerparken are Danish citizens who cannot be placed in the group of 'immigrants and their descendants from non-Western countries' as defined by the Danish legislation.

54 Article 2(2)(a) of the Race or Ethnic Origin Directive.

55 Article 2(2)(b) of the Race or Ethnic Origin Directive.

56 For instance, Fredman, S., 'Legal Concepts: Direct, Indirect Discrimination and Beyond', *Discrimination Law*, 3rd edition, Oxford, OUP, 2023, pp. 247-313; Maliszewska-Nienartowicz, J., 'Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?', *International Journal of Social Sciences*, 2014, p. 41-55, at pp. 41. For such a discussion in the context of the headscarf judgments, see van den Brink, M., 'The Protected Grounds of Religion and Belief: Lessons for EU Non-Discrimination Law', *German Law Journal*, 2023, pp. 855-880.

57 Article 4 of the Race or Ethnic Origin Directive.

114. However, the fact that the victims of either direct or indirect discrimination were also persons who are not 'immigrants and their descendants from non-Western countries' does not affect the possibility of finding that ethnic discrimination has occurred.

115. The Court clarified this in *CHEZ*. A person who is a victim of discrimination and who turns to a court for legal protection need not belong to the ethnic group treated less favourably; that person may simply be a collateral victim of reliance on the ethnic origin in making decisions or in legislating. In *CHEZ*, the victim of discrimination was a person who was not of Roma ethnicity but lived in the neighbourhood in which electricity meters were placed at an abnormal height because it was predominantly populated by persons of Roma origin. In that context, the Court considered that the principle of equal treatment 'applies not to a particular category of person but by reference to the grounds mentioned in Article 1 [of the Race or Ethnic Origin Directive], so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds'. [58]

116. In the same way, Danish citizens or immigrants and their descendants from Western countries can also rely on the prohibition of ethnic discrimination provided for in the Race or Ethnic Origin Directive if they were treated adversely due to the application of the ethnic criterion or of an apparently neutral criterion which, however, predominantly affects persons belonging to the 'non-Western' group.

117. Another issue clarified in the case-law of the Court which may be of relevance for the present case is that, for discrimination to be established, a victim of discrimination as such need not exist. It follows from *Feryn* that it suffices that the application of the ethnic criterion *might* bring about the less favourable treatment for some persons. [59]

118. That means that discrimination may also be found in proceedings involving abstract judicial review, such as the one initiated by 11 tenants of the Mjølnerparken housing area.

119. What remains to be resolved is whether the adverse treatment, that is, the existence of a risk of the unilateral termination of leases, is a result of the application of the ethnic 'Western/non-Western' criterion or of an ethnically neutral rule on the basis of which the persons whose leases were terminated were identified (by reference to their criminality or poverty). In the former situation, the discrimination at issue would be direct discrimination. In the latter situation, the discrimination could be classified as indirect discrimination if it affects more persons from the same ethnic group (in this case, 'immigrants and their descendants from non-Western countries') and is not justified.

120. In my view, there are two reasons to consider that the situation created by the Danish legislation is direct discrimination, as I will elaborate below. Should the Court disagree with my position, however, I will offer an alternative solution according to which the situation might be understood as indirect discrimination.

[58] *CHEZ*, paragraph 56.

[59] *Feryn*, paragraphs 23 and 25.

1. Direct discrimination

121. For a finding of direct discrimination, the less favourable treatment must be directly based on ethnic origin.

122. The *less* favourable treatment implies a comparator – for direct discrimination to occur, a person must be treated worse than another person is or would be treated in a comparable situation.

123. What does the less favourable treatment consist of in the present case and who is a comparator?

124. To my mind, the adverse treatment in the present case exists on two levels.

125. The first and obvious manifestation of adverse treatment is the unilateral termination of leases in public housing units or a possibility thereof.

126. The second, less visible manifestation of adverse treatment is the stigmatisation of an ethnic group.

127. I will deal with both manifestations of direct discrimination in turn.

(a) Unilateral termination of the leases

128. The development plans at issue have led, or might lead, to a termination of leases in public housing units, thus depriving the tenants of their homes.

129. According to Article 7 of the Charter of Fundamental Rights of the European Union, the respect of one's home is a fundamental right guaranteed under EU law. The Court, relying on the case-law of the ECtHR,[60] has recognised the importance of that fundamental right, considering in particular that the loss of one's family home is an important interference with that right, as it places the family of the person concerned in a particularly vulnerable position.[61]

130. During the proceedings, it was submitted that the tenants at issue did not, or would not, lose their home, as the housing association is obliged by law to offer appropriate rehousing.

131. Without it being necessary to look into the extent to which the right to be rehoused was respected in practice, which would in any case be for the national court to establish, suffice to say that the possibility of rehousing has no bearing on the question of the difference in treatment.

132. That is to say, the relevant comparator to conclude whether there exists *less favourable* treatment in this case are the tenants in public housing units in other vulnerable social housing areas, such as those defined by Paragraph 61a(1) of the Law on Public Housing. These areas are comparable, as they also fulfil two or more of the socioeconomic criteria (related to criminality, unemployment, low income and lack of education), as do the transformation areas. However, the tenants of vulnerable areas are not exposed to a risk of losing their home, contrary to those living

[60] ECtHR, 27 September 1995, *McCann and Others v. the United Kingdom* (CE:ECHR:1995:0927JUD001898491), and ECtHR, 25 July 2013, *Rousk v. Sweden* (CE:ECHR:2013:0725JUD002718304).

[61] See, to that effect, judgment of 10 September 2014, *Kušionová* (C-34/13, EU:C:2014:2189, paragraphs 63 and 65 and the case-law cited), which was confirmed in the judgment of 9 November 2023, *Všeobecná úverová banka* (C-598/21, EU:C:2023:845, paragraph 85).

in transformation areas. The only difference between the two areas is that the population of vulnerable areas consists of less than 50% of immigrants and their descendants from non-Western countries.

133. Therefore, even if adequate rehousing is offered to tenants in transformation areas, they are still treated less favourably in relation to tenants in comparable areas, the majority population of which are 'Western' residents. The former risk their leases being terminated, whereas the latter do not face such a risk at all.

134. The structure of the Danish legislation – which obliges housing associations and local authorities to adopt development plans but leaves it up to them to decide on the particular measures leading to a reduction in the number of the public housing units – creates a picture that the 'culprit' for the termination of leases is the concrete development plan and not the Law on Public Housing.

135. Nevertheless, in my opinion, the two cannot be separated. Had there not been a differentiation between vulnerable areas and parallel societies based on the ethnic criterion, the tenants of the parallel societies – which have fulfilled the criteria for the last five years – would not be exposed to the risk of losing their homes. Alternatively, if development plans were also required for vulnerable areas, there would be no less favourable treatment. However, it was precisely the ethnic criterion used by the Law on Public Housing that brought about the difference in treatment.

136. As the Court held in *CHEZ*, 'it is sufficient, in order for there to be direct discrimination within the meaning of Article 2(2)(a) of [the Race or Ethnic Origin Directive], that [Roma] ethnic origin determined the decision to impose the treatment'. [62]

137. In the present case, the non-Western ethnic origin of the tenants was determinative in the obligation to adopt development plans. The obligation to adopt such a plan creates the risk of losing one's home, thus putting tenants living in transformation areas in a less favourable position than tenants living in vulnerable areas.

138. Even more clearly than in *CHEZ*, in which the Bulgarian company did not expressly rely on an ethnic criterion, the relevant Danish legislation expressly relies on the ethnic distinction between Western and non-Western residents.

139. The difference in treatment, therefore, exists *because of* the ethnic criterion, which is a clear case of direct discrimination.

140. Furthermore, for the purposes of establishing direct discrimination, I do not find it relevant to attribute to the Danish legislature any intention to discriminate. [63] It suffices that the less favourable treatment is a consequence of the reliance on an ethnic criterion.

[62] *CHEZ*, paragraph 76.

[63] On problems caused by trying to define direct discrimination through discriminatory intention, see, Campbell, C. and Smith, D., 'Distinguishing Between Direct and Indirect Discrimination', *Modern Law Review*, 2023, p. 307-330.

141. Such a position is supported once again by the Court's findings in *CHEZ* that 'if it is apparent that a measure which gives rise to a difference in treatment has been introduced for reasons relating to racial or ethnic origin, that measure must be classified as "direct discrimination" within the meaning of Article 2(2)(a) of [the Race or Ethnic Origin Directive]'. [64]

142. The Danish Government has explained that the intention behind the Law on Public Housing is an effort to enable and encourage the better integration of immigrants and their descendants from non-Western countries into Danish society. One may not object to such an intention.

143. One may also not object to the finding, if scientifically substantiated, that immigrants and their descendants from non-Western countries integrate into Danish society with more difficulty than immigrants and their descendants from Western countries. [65] It is easy to agree in that respect with the Commission that, in a pluralist, democratic society, there should not be any taboo topics. Recognising the existence of a structural disadvantage of an ethnic group within a given society is, in fact, a necessary step in achieving real equality. [66]

144. I understand EU equality law as aiming at establishing real – as opposed to only formal – equality. [67] That is why the the Race or Ethnic Origin Directive, for example, declares that the principle of equal treatment means not only that there must not be direct discrimination, but also that there must not be indirect discrimination. Structural discrimination is a form of indirect discrimination that is difficult to eliminate.

145. However, recognised structural inequalities cannot be resolved by discriminating against the ethnic group that already finds itself in a more difficult position. EU equality law, including the Race or Ethnic Origin Directive, allows for measures of positive action to address such built-in inequalities. [68] Thus, Member States may adopt measures to compensate for disadvantages linked to ethnic origin. Whereas such measures might benefit the disadvantaged group without benefiting other group(s) at the same time, measures of positive action cannot discriminate against disadvantaged groups, even if it is believed that this might benefit those groups in the long term.

146. There is a saying that 'the road to hell is paved with good intentions'. The effort to diversify neighbourhoods might indeed be well intended. Nevertheless, such diversification cannot be achieved by placing an already disadvantaged ethnic group in a less favourable position. However, in the present situation, the Danish legislation does precisely that.

64 *CHEZ*, paragraph 95.

65 Such a conclusion is, however, acceptable only of if it is based on facts and proper research, and not if it is based merely on stereotypes and prejudices.

66 See, in that respect, Marion Young, I., holding that 'where racialised structural inequality influences so many institutions and potentially stigmatises and impoverishes so many people, a society that aims to redress such injustice must *notice* the processes of racial differentiation before it can correct them', 'Structural Injustice and the Politics of Difference', in Kymlicka, W., *Multicultural Citizenship*, Princeton University Press, 1990 (2011), p. 79-116, at pp. 91.

67 On the difference see, for example, De Vos, M., 'The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law', *International Journal of Discrimination and the Law*, 2020, pp. 62-87. More generally, on different approaches towards the concept of equality, see McCrudden, C., 'The New Concept of Equality', Academy of European Law, paper given at the ERA Congress Centre, Trier, 2-3 June 2003.

68 Article 5 of the Race or Ethnic Origin Directive.

(b) Stigmatisation

147. This leads me to the second reason why the Law on Public Housing might be understood as directly discriminatory: stigmatisation. [69]

148. For the purposes of this discussion, I understand stigmatisation to mean that members of an ethnic group are attributed socially reproachable characteristics solely on the basis of their membership or perceived membership of that group.

149. In *CHEZ*, the Court considered that the offensive and stigmatising nature of the practice at issue in that case, which assumed that all members of an ethnic group were potential perpetrators of unlawful conduct, was one reason for establishing less favourable treatment. [70]

150. Similarly, legislation might be understood as discriminatory on the grounds of ethnic origin if it is based on generalised stereotypes and prejudices about an ethnic group. [71]

151. In that respect, the order for reference adduces certain passages from the preparatory acts for the Law on Public Housing. [72] In the 2010 proposal for a legal definition of ghettoes, it was stated that three criteria should be used in defining them: (i) the proportion of immigrants and their descendants from non-Western countries, (iii) unemployment and (iii) criminal convictions. It was further contended that each of those three criteria, and thus 'non-Western' as a criterion in itself, indicates that there exists a social problem. The Danish Government's strategy, as mentioned in point 25 above, observed that parallel societies – that is, enclaves of persons who do not participate actively in Danish society – have been created among non-Western residents. According to that document, those persons do not participate and do not even try to participate actively in Danish society and the labour market. They do not adhere to Danish values; for instance, women being considered inferior to men, and social control and lack of equality imposing narrow limits to individuals' freedom of expression. [73] What is therefore at issue, that strategy stated, is 'the negative spiral of counter-culture'.

152. By generalising those characteristics perceived as negative and unacceptable in Denmark and attributing them to all immigrants and their descendants from non-Western countries, the Law on Public Housing seems not only to be based on prejudice, but it also contributes to the perpetuation of that stereotyping and stigmatisation.

153. At the same time, there does not seem to be any evidence of the existence of parallel societies or of their creation exclusively among non-Western immigrants. [74] This is, of course, for the national court to verify. However, when asked at the hearing to describe the criteria on the basis of which it is concluded that a person is not integrated into Danish society, the Danish

[69] Some scholars developed the proposal that the purpose of anti-discrimination law should be the fight against stigmatisation. See Solanke, I., *Discrimination as Stigma: A Theory of Anti-discrimination Law*, Hart, Oxford, 2017.

[70] *CHEZ*, paragraph 87 in relation to paragraph 84.

[71] As an inspiration, it is possible to rely here on the findings of the ECtHR in the judgment of 24 May 2016, *Biao v. Denmark* (CE:ECHR:2016:0524JUD003859010), which was discussed at the hearing. See, especially, paragraph 126 of that judgment.

[72] See points 99 to 103 of the present order for reference.

[73] In a direct translation, the wording of the plan stated: 'We have gained a group of citizens who do not fully embrace Danish norms and values. Where women are sometimes considered of lesser worth than men. Where social control and gender inequality sometimes place narrow constraints on individual freedoms'; taken from Tireli, U., 'Shaping Strict Migrant Policies through Housing Strategies in Denmark', *Migration and Diversity* 2024, p. 151-163, at pp. 160.

[74] See, for instance, Barse, M., 'Parallelsamfund er noget, politikerne har opfundet', 20 February 2018; available at https://videnskab.dk/kultur-samfund/parallelsamfund-er-noget-politikerne-har-opfundet/(last time consulted on 3 February 2025) (machine translated into English).

Government invoked the socioeconomic criteria which define vulnerable societies and the lack of knowledge of the Danish language. Those criteria do not indicate, in themselves, that persons in such a position do not 'want' to integrate into Danish society or that only the 'non-Western immigrants and their descendants' have such difficulties with integration.

154. International organisations have also noted the stigmatising potential of the Law on Public Housing. Thus, the UN Committee on the Elimination of Racial Discrimination expressed its concern that the terms '"Western" and "non-Western" as used in that legislation and in policies [in Denmark] may lead to marginalisation and stigmatisation of those classified as "non-Western", and that it could create a distinction between those considered to be "real Danes" and the "others"'".[75] Assessing the 'parallel society plan', that committee concluded that adding a discriminatory ethnic and racial element to the laws can result in stigmatisation in various areas of life, such as employment, housing and access to services.[76]

155. Similarly, the Committee on Economic, Social and Cultural Rights observed that the Law on Public Housing 'not only results in discrimination based on ethnic origin and nationality, but also further marginalises those residents [from non-Western countries].'[77]

156. Thus, paradoxically, the Danish legislation that was enacted to help immigrants and their descendants from non-Western countries to integrate more easily into Danish society seems to have the contrary effect. By perpetuating stigmatisation on ethnic grounds, it makes it more difficult for the members of the group of 'non-Western immigrants and their descendants' to find a job, acquire respect and participate on equal footing in Danish society.

157. To conclude, the Danish legislative scheme, understood as the Law on Public Housing together with the development plans that must be adopted on the basis of that law, seems therefore to directly discriminate on the basis of an ethnic criterion ('non-Western'). First, that scheme brings all persons related to such a criterion to a precarious position in relation to the security of their right to a home, thus resulting in their less favourable treatment in comparison to tenants of other comparable neighbourhoods. Second, it stigmatises the ethnic group whose structural disadvantage in their ability to integrate into Danish society was recognised, thus curtailing rather than enhancing their chances of integrating into that society.

158. On the basis of the foregoing, I propose that the Court reply to the second question that the Danish legislative scheme introduced on the basis of the Law on Public Housing represents direct discrimination.

2. Alternative solution: Indirect discrimination

159. The Commission considered that the situations from which the cases pending before the referring court arose should be classified as indirect discrimination.

160. According to the Commission, that is so because the tenants whose leases were terminated were not chosen on the basis of an ethnic criterion. In the Ringparken area, the criteria were the level of income and the criminal convictions of the tenants or their partners in the last six months.

[75] See Committee on the Elimination of Racial Discrimination, op. cit., paragraph 10.

[76] Ibid., paragraph 12.

[77] See Committee on Economic, Social and Cultural Rights, op. cit., paragraph 51.

In the Mjølnerparken area, two entire blocks were sold so that all leases had to be terminated. However, among those tenants, many were Danish citizens born in Denmark not belonging to the group of 'immigrants and their descendants from non-Western countries'.

161. If the Court were to construe the case in that way, I suggest that the influence of the Law on Public Housing on the termination of the leases should at least be interpreted as indirect discrimination.

162. Under that law, development plans, which in some cases led to the unilateral termination of leases, are to be established only in the areas in which more than 50% of the inhabitants are 'immigrants and their descendants from non-Western countries'. Simple mathematics applied to such a situation suggests that there is a better chance that the lease of a 'non-Westerner' will be terminated than the lease of a 'Westerner' because it is known in advance that there are more 'non-Westerners' than 'Westerners' living in the neighbourhood.

163. Therefore, as suggested by the Commission, the immigrants and their descendants from non-Western countries are exposed to a higher risk of termination of their leases.

164. Indirect discrimination occurs when statistically, one ethnic group is affected by a neutral rule more than other groups.

165. Nevertheless, such a particular disadvantage that one ethnic group suffers can be justified if a neutral rule has a legitimate aim that it pursues in a proportionate way. This assessment is for the national court to make.

166. The argument here is that measures in neighbourhoods in which the majority of the population are 'non-Westerners' are taken in order to enable their better integration into Danish society.[78] Changing the structure of the neighbourhood is understood as enhancing such integration.

167. In order to assess whether the indirect discrimination may be justified, the national court will first have to establish what the Danish legislature understands as successful integration into Danish society. At the hearing, the Danish Government explained that this would entail participation in the workforce, lack of criminal convictions and knowledge of the Danish language.

168. Understanding what it means to successfully integrate is necessary if the Court is to move to the proportionality analysis. In that exercise, the national court must first assess whether the decrease in the number of public housing units through termination of a lease in certain neighbourhoods can achieve integration (better employment, literacy in Danish, decrease in criminality, etc.). It will likewise have to assess the consistency of that measure and whether there is a reason to take measures for the integration of immigrants and their descendants from non-Western countries only. If such a policy decision is based on prevailing social prejudice and not on scientific evidence that those immigrants integrate with more difficulty, the policy goal may be called into question.[79]

[78] Even if it is self-evident that enabling integration is a desirable and legitimate aim, it is far from easy to find the appropriate line between multiculturalism and accepting differences and the limits of tolerance. For general discussion, see Joppke, C., 'The retreat of multiculturalism in the liberal state: theory and policy', *The British Journal of Sociology*, 2004, p. 237-257.

[79] See, by analogy, judgments of 17 July 2008, *Corporación Dermoestética* (C-500/06, EU:C:2008:421, paragraph 39); of 4 July 2019, *Commission* v *Germany* (C-377/17, EU:C:2019:562, paragraph 92); and of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU:C:2021:89, paragraph 70).

169. In the next step in the proportionality analysis, the national court has to assess whether the decrease in the number of public housing units was necessary to achieve integration. That would be so if the same aim could not have been achieved by measures that are less restrictive for the housing rights of the tenants at issue. In that respect, that court might need to enter into more detail into the Danish Government's arguments that they have already tried other measures but failed. Finally, even if the decrease in public housing is an appropriate and necessary measure for the attainment of the goals of integration as they were set out by the legislation, the final step in the proportionality analysis requires the national court to balance the value of such an aim against the intensity of interference with housing rights. If it is found that such a right was excessively harmed, that court might find the measure disproportionate, which might then require that the legislature reconceptualise the legitimate aim of integration.

170. To my mind, and for the reasons I elaborated on in points 130 to 153 and 156 of this Opinion, I am sceptical that the Danish public housing legislation can be justified by the aim of enabling integration of the 'immigrants and their descendants from non-Western countries'. In any case, as I have already explained, I do not find it convincing that the influence of the 'Western/non-Western' criterion used by by the Law on Public Housing on the termination of leases can be construed as representing a neutral rule.

171. Therefore, I propose that the Court find that the situation such as the one created by the Law on Public Housing in Denmark is direct, rather than indirect, discrimination.

IV. Conclusion

172. In the light of the foregoing, I propose that the Court of Justice answer the questions referred by the Østre Landsret (High Court of Eastern Denmark) as follows:

(1) The term 'ethnic origin' in Articles 1 and 2 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

must be interpreted as covering a group of persons defined as 'immigrants and their descendants from non-Western countries'.

(2) The scheme that uses concepts such as 'immigrants and their descendants from non-Western countries' for the categorisation of a neighbourhood in which a number of public housing units is to be reduced

must be interpreted as direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/43.