THIRD-PARTY INTERVENTION OF 30 JUNE 2021
BY THE DANISH INSTITUTE FOR HUMAN RIGHTS

1. INTRODUCTION AND REASON FOR THE THIRD-PARTY INTERVENTION

This case concerns the question of whether the Ministry of Interior and Housing has violated the applicants' human rights, including the prohibition of discrimination, by approving the development plan for the applicants' housing estate. A plan that entails that a significant share of the residents in the housing estate will have to move out of their homes against their will.

As part of Denmark's implementation of Council Directive 2000/43/EC, the Danish Institute for Human Rights has been appointed national equality body in relation to racial and ethnic origin. The Danish Institute for Human Rights is of the opinion that the present case raises a question of principle about the interpretation of the concept of ethnic origin, which is found *inter alia* in the Ethnic Equal Treatment Act, which implements Directive 2000/43.

The Institute endorses the arguments submitted by the applicants before the High Court, but has in agreement with the applicants decided to limit the third-party intervention to the question of dismissal (section 2), the question of whether the development plan constitutes direct discrimination on the basis of ethnic origin (section 3), and the question of preliminary reference to the European Court of Justice (section 4).

As stated below, the Danish Institute for Human Rights is of the opinion that the development plan constitutes direct discrimination on the basis of ethnic origin.

2. CLAIM FOR DISMISSAL

The Danish Institute for Human Rights endorses the applicants' view that the case should not be dismissed. In agreement with the applicants, the Danish Institute for Human Rights has decided only to address the argument that the case should be dismissed because the claim is unclear and unsuited for a ruling.

The Danish Institute for Human Rights submits that the applicants have the right to have the allegation that they have been subjected to discrimination in violation of the Ethnic Equal Treatment Act and Directive 2000/43 tried before the courts.

It would constitute a violation of the applicants' right to effective judicial protection if the case were to be dismissed, cf. recital 19 in the preamble to, and Article 7(1) of, Directive 2000/43 as well as the CJEU in *Leitner* (C-396/17), para. 62, according to which anyone who has been the subject of discrimination on the grounds of racial or ethnic background must be able to assert their rights before a court and be guaranteed effective judicial protection of their right to equal treatment.

It is the view of the Institute that the applicants have the right to have the question of whether they have been subjected to unlawful discrimination in violation of the Ethnic Equal Treatment Act reviewed without having to submit an executable claim for compensation, cf. the CJEU decision in *Braathens Regional Aviation AB* (C-30/19). The Court found that it was a violation of Directive 2000/43 if the respondent could conclude the case by acknowledging the claim for compensation, without the applicant having the question of whether they had been subjected to discrimination acknowledged before a court of law.

This is moreover supported by the fact that the announcement of a violation of the prohibition of discrimination in itself can be a sanction under Article 15 of the Directive and have a real deterring effect, cf. the CJEU decision in *Asociatia Accept* (C-81/12), para. 68.

On this basis, it is the assessment of the Institute that a dismissal of the case, which would prevent the applicants from having the question of whether they have been subjected to discrimination in violation of the Directive reviewed, would not constitute actual and sufficient enforcement of the Directive.

In addition, it should be noted that the applicants' claim is suitable for a declaratory judgment and that the adjudication of a claim for declaratory relief of this nature finds support in Danish case law:

> See U.2013.128H where the claim was: "Primarily, the respondent must acknowledge that it is in violation of Section 2 of the Equal Opportunity Act that the respondent charges different rates for men and women."; U.2010.1035H where the Supreme Court concluded: "On this basis, it is our view that the indirect discrimination entailed by the 28-years-rule cannot be considered to be legitimately justified and, for that reason, that it is in violation of Article 14, in conjunction with Article 8, of the Human Rights Convention; U.2018.1460H: "On the basis of the above-stated reasons, the Supreme Court does not find reason to establish that the scheme following from Section 29 of the Basic Law is in violation of Article 3 of Protocol No. 1 or Article 14 in conjunction with Article 3 of Protocol No. 1."

3. THE PROHIBITION OF DIRECT DISCRIMINATION ON THE BASIS OF ETHNIC ORIGIN

In general, the Danish Institute for Human Rights submits that the approval by the Ministry of Interior and Housing of the development plan for Mjølnerparken constitutes direct discrimination on the basis of ethnic origin in violation Section 3(1), in conjunction with Section 3(2), of the Ethnic Equal Treatment Act.

Direct discrimination is prohibited under international human rights treaties, EU law as well as Danish law. Direct discrimination on the basis of ethnic origin can never be justified.

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin, cf. Section 3(2) of the Ethnic Equal Treatment Act and Article 2(2)(a) of Directive 2000/43. Thus, establishing that direct discrimination on the basis of ethnic origin has occurred is based on the condition that the approved development plan particularly effects ethnic minorities on the basis of their ethnic origin (subsection 3.1) and that the development plan entails less favourable treatment (subsection 3.2).

3.1 The approval of the development plan by the Ministry of Interior and Housing constitutes direct discrimination on the basis of ethnic origin

It is submitted that the approval of the development plan by the Ministry of Interior and Housing constitutes direct discrimination on the basis of ethnic origin, because the Ministry of Interior and Housing has taken the criterion "non-Western immigrants and descendants" into account (paragraph 3.1.1), and because the criterion is directly and inextricably connected to ethnic origin (paragraphs 3.1.2 and 3.1.3).

3.1.1 The Ministry of Interior and Housing has taken the criterion "non-Western immigrants and descendants" into account

It is submitted that the Ministry of Interior and Housing has taken the criterion "non-Western immigrants and descendants" into account, because since the legislative change in 2018, the criterion about 50 % of the residents being non-Western immigrants or descendants has become the condition for classifying a housing estate as a "ghetto" and, after four years, a "tough ghetto". Thus, the criterion is decisive for the requirement of drawing up a development plan under Section 168a of the Common Housing Act.

The discriminating party has *taken* ethnic origin *into account* if ethnicity has been *decisive for or influenced* the decision to initiate a measure that entails less favourable treatment, or if that measure proves to have been *introduced and/or maintained* for reasons relating to the ethnic origin, cf. the CJEU in *CHEZ Razpredeleine Bulgaria* (C-83/14), paras. 76, 91 and 95.

Thus, the Ministry of Interior and Housing has *taken* ethnic origin *into account*, because the residents' "non-Western origin" has mattered, and because the measures have been *introduced for reasons* that concern the residents' "non-Western origin" and thus the residents' ethnic origin.

3.1.2 Direct discrimination does not require that a "specific" ethnic origin can be identified

It is submitted that direct discrimination on the basis of ethnic origin does not require that a "specific" ethnic group can be identified.

It is a central dispute in the case whether the criterion "non-Western immigrants and descendants" in the Common Housing Act is covered by the concept of "ethnic origin", and whether a requirement for delimiting a "specific" ethnic origin exists in relation to direct discrimination. It is the view of the Danish Institute for Human Rights that the concept of ethnic origin ought not to be understood in the same way when the case concerns direct discrimination as when it concerns indirect discrimination. This already follows from the wording of Section 3(2) of the Ethnic Equal Treatment Act as well as the underlying Directive 2000/43. In Section 3(2) about direct discrimination, the requirement of *a specific* racial or ethnic origin does not appear as opposed to Section 3(3) about indirect discrimination.

It is the assessment of the Institute that an interpretation that limits the scope of the Directive to situations where applicants can positively delimit a specific ethnic origin by listing the common features of a demographic would be a significant restriction of the protection against ethnic discrimination than previously seen in the CJEU case law and incompatible with the Directive, the purpose of which it is to ensure that no one is subjected to discrimination regardless of ethnic origin.

Previously, the protection against ethnic discrimination has not generally related to the definition of racial or ethnic origin as such, but rather concerned an assessment of the discrimination and the less favourable treatment experienced by a minority group whose minority status is based on the fact that the members of the group differ socially and culturally from the majority population in the country where they live, cf. CJEU case law in the cases *CHEZ Razpredelenie Bulgaria* (C-83/14) and *Feryn* (C-54/07).

In neither of the cases, the CJEU performed a further delimitation of racial or ethnic origin as a concept. On the contrary, in *CHEZ Razpredelenie Bulgaria* (C-83/14) it was not necessary that the person who had been the subject of discrimination belonged to a specific ethnic origin as long as the measure was

introduced because of ethnic origin. In both cases, the focus was on the less favourable treatment that took place as a result of prejudices against a specific demographic.

This interpretation also follows from the decision by the European Court of Human Rights in *Biao v Denmark* (38590/10). The Court found that the demographic, who had been subjected to discrimination, consisted of persons with *different* ethnic origin than Danish and persons with a *foreign* ethnic origin, cf. paras 112 and 113. The Court did not examine whether a specific ethnic origin existed, in the sense of an identifiable and coherent ethnic group. Instead, the focus was on what the effect of the discrimination and the prejudices, on which the discrimination was based, was on persons who were not of Danish ethnic origin, cf. paras. 125 and 126 (Shreya Atrey (2018), *Race Discrimination in EU Law after Jyske Finans*, Common market law review 55.2, p. 637-338).

3.1.3 The criterion "non-Western immigrants and descendants" in the Common Housing Act is inextricably linked to ethnic origin

It is submitted that the criterion "non-Western immigrants and descendants", as it is used in the Common Housing Act, is directly and inextricably linked to ethnic origin.

It follows *directly* from several sources that the legislature with this criterion has intended to address problems with a specific demographic on the basis of ethnic origin:

> *"The integration of immigrants and descendants from non-Western countries in vulnerable housing estates is a focal point. It is important that residents in housing estates socialise across ethnic origin […] Thus, a high concentration of citizens of a different ethnic extraction is a sign that focus on the area is needed.* (emphasis added) (General remarks on Act No. 45 of 31 October 2013, para. 3.1.2 of L 45)

> *"The final goal is that Denmark by 2030 does not have parallel societies at all. Instead, we will have a lot of lively and mixed housing estates where children and adults meet across ethnic and social divides."* (emphasis added) (Report on Parallel Societies of 24 June 2020, p. 3)

> *"[…[28,000 families with non-Western background can be said to live in parallel societies. It concerns the ethnic composition in housing estates, schools and day-care institutions, participation in education and the labour market, crime rate etc."* (emphasis added) (One Denmark without Parallel Societies – No Ghettos by 2030, March 2028, p. 7)

In connection with the amendment of the ghetto criteria in 2013 by Act No. 1610, reference was also made to the criterion "non-Western immigrants and descendants" as the "ethnicity criterion" (Parliamentary Report on the Bill amending the Common Housing Act etc.). When the criteria were amended in 2018 by Act No. 1322, it was stated in the explanatory memorandum that the intention with the new bill was not an amendment of the criterion "non-Western immigrants and descendants". Thus, the criterion that in 2013 was linked to ethnic origin is the same criterion appearing in the current legislation.

Thus, it follows from the preparatory works as well as other political publications and statements that the criterion "non-Western immigrants and descendants" is meant to include the ethnic origin of the residents in the assessment of whether a development plan needs to be initiated.

The aim of the criterion is to target a specific demographic in Denmark, which according to the preparatory works differs from the majority of the Danish population because of their norms and values, which relate to the citizens' extraction, national, familial and cultural affiliation, and origin. Dividing the population in such a way is classification of ethnic origin, cf. *inter alia CHEZ Razpredelenie Bulgaria* (C-83/14), para. 46.

It is irrelevant that the criterion affects a group of persons with *several* different ethnic origins. A criterion that treats several different ethnic groups less favourably than others still constitutes discrimination on the basis of ethnic origin (Parliamentary Report 2002 No. 1422 on the implementation of the Race Equality Directive in Danish law, 1 January 2002, p. 296).

3.1.4 It is not a requirement that the discrimination exclusively results from ethnicity to be unlawful
It is submitted that it is irrelevant for direct discrimination whether other criteria than ethnic origin are taken into account.

It is not a requirement in relation to direct discrimination that ethnic origin is decisive for a person's treatment, just as it is without significance to the assessment that ethnic origin is only one *among several* elements. The purpose of the discrimination legislation is to ensure that significance is not attached to criteria such as ethnic origin, gender, sexuality etc., and the purpose of the discrimination protection is to prevent that any person is treated less favourably because of such group affiliations.

Thus, direct discrimination has occurred regardless of whether significance has been attached to the other criteria in Section 61a(1) of the Common Housing Act when deciding whether a development plan needs to be drawn up. The decisive factor is that the criterion "non-Western immigrants and descendants" has also been taken into account. Moreover, it should be noted that in the present case, the criterion has decisive significance because the ethnicity criterion must be fulfilled before an area is classified as a ghetto area.

3.2 Less favourable treatment has occurred
It is submitted that the applicants in the case have been treated less favourably than residents in other common housing estates that have not been classified as a tough ghetto; *in part* because the residents risk being evicted from their current homes, *in part* because the classification of a housing estate as a ghetto is stigmatising.

3.2.1 Comparable situation
It is submitted that the applicants find themselves in an comparable situation to other residents who live in housing estates that are not covered by the requirement of a development plan because the areas are not classified as a tough ghetto.

Thus, the applicants are in an identical situation to that of residents in other housing estates that experience the same socio-economic conditions as listed in Section 61a(1) of the Common Housing Act, but because the applicants live in a housing estate that for four years or longer have had more than 50 % immigrants and descendants from non-Western countries, a development plan must be drawn up for the area with negative consequences as a result.

3.2.2 Forced eviction and rehousing
It is submitted that the risk of forced and permanent eviction from the applicants' homes constitutes less favourable treatment within the meaning of the law. The home and its location frame the

applicants' family and private life and has significance for the applicants' social and cultural networks as well as the feeling and safety. The fact that rehousing is offered does not change this.

It follows from human rights law and practice that the home is of fundamental significance, cf. *inter alia* the European Court of Human Rights in the decisions *Gillow v. The United Kingdom*, (9063/80), para. 55, and *Connors v. The United Kingdom* (66746/01), paras. 85-86. Within several human rights frameworks, the home enjoys a special protection, including protection from forced eviction, cf. *inter alia* Art. 11(1) of the ICESC, Art. 17 of the ICCPR, Art. 8 of the ECHR, and Art. 1(1) of Protocol 1 to the ECHR. In addition, it follows from CJEU case law that the requirement of less favourable treatment does not depend on a "serious" disadvantage. Thus, there is no lower threshold for when discrimination has occurred, cf. *CHEZ Razpredelenie Bulgaria* (C-83/14), paras. 64-69.

3.2.3 Stigmatisation

Furthermore, it is submitted that the classification of Mjølnerparken as a ghetto based on the share of residents of non-Western origin in the area is stigmatising in and of itself and thus constitutes less favourable treatment, as protected by the Ethnic Equal Treatment Act, the underlying directive, and the ECHR.

Stigmatisation, stereotyping, and prejudices are very central elements in the assessment of discrimination, cf. the CJEU decisions in *Belov* (C-394/11) and *CHEZ Razpredelenie Bulgaria* (C-83/14). See *CHEZ Razpredelenie Bulgaria* (C-83/14), paras. 82 and 87:

> *"[…] CHEZ RB asserted that in its view the damage and unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin. Such assertions could in fact suggest that the practice at issue is based on ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds."*

and

> *"First, it cannot be denied that the treatment resulting from that practice is unfavourable for the inhabitants — for the most part of Roma origin — of the urban district concerned, having regard both […]to that practice's offensive and stigmatising nature […]"*

In *CHEZ Razpredelenie Bulgaria* (C-83/14), para. 95, the advocate general stated that the residents were treated less favourably because the contested practice was liable to have a stigmatising effect, as a negative impression of the residents had been created among the public.

Stigmatisation and stereotyping also appear as legal concepts in the case law of the European Court of Human Rights, cf. *inter alia Biao v Denmark* (38590/10), para. 126; *Konstantin Markin v Russia* (30078/06), paras. 142-143; *Kiyutin v Russia* (2700/10), para. 64; *Alajos Kiss v Hungary* (38832/06), para. 42; *Guberina v. Croatia* (23682/13), para. 73.

First, the use of the word "ghetto" is stigmatising because of the historical meaning of the concept as a term for forced segregation of a demographic because of their "race" (Goldman, Wendy Z, and Joe William Trotter. *The Ghetto in Global History: 1500 to the Present*. 1st ed. Milton: Routledge, 2018. Web).

Second, the meaning ascribed to the concepts of "ghetto" and "parallel society" today in the public and political debate has a stigmatising effect, because a public consensus that parallel societies and ghetto areas relate to socially challenged and troubled immigrant communities has emerged.

The classification of a housing estate as a ghetto results in stereotyping because "ghetto residents" become equivalent to negative characteristics, such as irresponsibility, unemployment, social control, criminal behaviour etc.:

> *"[…] many residents – often immigrants from non-Western countries and descendants of immigrants – live in isolated enclaves and do not adopt Danish norms and values to a sufficient extent […]"* (General remarks on Bill No. 38 of 3 October 2018, para. 2.6.2)

> *"Parallel societies have emerged among persons with non-Western background. Too many immigrants and descendants have ended up without association with the surrounding society. Without education. Without employment. And without knowing sufficient Danish."* (One Denmark without Parallel Societies – No Ghettos by 2030, March 2018, p. 4)

> *"We have a group of citizens who do not adopt Danish norms and values. Where women are seen as less worth than men. Where social control and a lack of gender equality set narrow boundaries for the free development of the individual."* (One Denmark without Parallel Societies – No Ghettos by 2030, March 2018, p. 5)

3.3 Justification of direct discrimination

It is submitted that direct discrimination cannot be justified with reference to legitimate interests.

Direct discrimination cannot be justified except in situations where it has been positively authorised or in the case of affirmative action (Parliamentary Report No. 1422 on the implementation of the Race Equality Directive in Danish law, p. 39-40). This is not the case in the present case.

This interpretation follows from the wording of the provisions on direct and indirect discrimination in Sections 3(2) and 3(3) of the Ethnic Equal Treatment Act:

> *"(2) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.*
>
> *(3) Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."* (emphasis added)

According to the definition of indirect discrimination, unlawful indirect discrimination shall be taken to occur, *unless* the discrimination is objectively justified and proportionate. Such possibility of justification for direct discrimination does not follow from the wording of the provision.

Thus, it is irrelevant for the assessment of whether direct discrimination has occurred that Sections 61a and 168a of the Common Housing Act have been passed for the purpose of remedying what the

preparatory works describe as societal challenges with immigration from non-Western countries, and that the division of Western and non-Western countries is based on the legitimate aim of analysing the effects of immigration to Denmark.

The Danish Institute for Human Rights notes that the equality legislation does not preclude that the legislature introduces measures for the purpose of changing resident compositions and solving housing-related social problems. Moreover, the prohibition of discrimination does not prevent legislation with the purpose of promoting the population's level of education, employment rate, and welfare as well as preventing crime and creating balanced housing estates.

However, the prohibition of discrimination does prevent that the legislation uses selection criteria based on ethnic origin that entails less favourable treatment of persons because of their ethnic origin.

4. PRELIMINARY REFERENCE TO THE EUROPEAN COURT OF JUSTICE

It is submitted that the case ought to be referred to the CJEU under Art. 267(2) of the TFEU, *because* there are diverging interpretations in the CJEU case law, which may be decisive for the conclusion of the case, *because* it is unclarified whether direct discrimination can be justified under EU law, and *because* a clarification of the question of interpretation will affect the development of EU law and the protection against ethnic discrimination in Europe generally.

4.1 Diverging interpretations of the CJEU case law on Directive 2000/43

It is submitted that the CJEU case law on the concept of "ethnic origin" in Directive 2000/43 is unclear. First, the unclarity concern the question of whether direct discrimination on the basis of ethnic origin depends on whether a "specific" ethnic group can be identified.

In the present case, it is particularly contested how the CJEU decision in *Jyske Finans A/S* (C-668/15) ought to be interpreted in light of the Court's earlier decisions in *CHEZ Razpredelenie Bulgaria* (C-83/14) and *Feryn* (C-54/07). All three cases concern the interpretation of Directive 2000/43.

As argued in paragraph 3.1.2, the CJEU required a more specified delimitation of a specific ethnic origin in neither *CHEZ Razpredelenie Bulgaria* (C-83/14) nor *Feryn* (C-54/07). However, as something new, it was a decisive premise for both the advocate general and the CJEU in *Jyske Finans A/S* (C-668/15) whether a "specific" ethnic origin could be identified in relation to both direct and indirect discrimination, cf. paras. 20 and 33.

The requirement of a "specific" ethnic origin does not follow from all language versions of Directive 2000/43:

> For example, the requirement is found in the Swedish version: *"personer av en viss ras eller ett visst etniskt ursprung"* and the Dutch one: *"personen van én bepaald ras of een bepaalde etnische afstamming"*, but not in the German version: *"im Zusammenhang mit der Rasse oder der ethnischen Herkunft"* or the English one: *"persons of a racial or ethnic origin at a particular disadvantage"*.

Thus, the different wording in the various versions raises doubt about the requirement of a "specific" ethnic origin.

Second, the case law is unclear because it can be inferred from *Jyske Finans A/S* (C-668/15) that *one* criterion or certain criteria *alone* cannot determine a person's ethnic origin. The Court found that an ethnic origin cannot *solely* be determined on the basis of a *single criterion* (place of birth), but must be based on an array of elements of both objective and subjective nature, cf. paras. 17 and 19. However, the Court's decision does not provide any guidelines for whether one criterion *always* is insufficient, and if so, how many common characteristics a demographic must possess before it may be seen as an ethnic origin covered by the Directive.

4.2 The significance of the diverging interpretations to the case

It is submitted that a clarification of the described question of interpretation is decisive to the High Court's decision in the case.

An assessment of whether unlawful discrimination has occurred must be performed specifically and concretely in light of the facts of the case and not abstractly or generally, cf. *Jyske Finans A/S* (C-668-15), para. 32. It is the opinion of the Institute that the present case is not comparable to *Jyske Finans A/S* (C-668-15).

First, the discrimination is not practiced solely on the basis of birthplace or nationality. The Common Housing Act discriminates individuals on the basis of a combination of the individual's parents' citizenship and birthplace, the individual's own birthplace as well as whether the birthplace is a Western or non-Western country. For descendants, the birthplace is Denmark and the nationality is Danish, although this part of the population statistically counts as Western or non-Western immigrants and descendants. Thus, there are more criteria that together are decisive for how the citizen is categorised.

Second, it follows from the preparatory works and the context, in which the criterion "immigrants and descendants" is used, that the measures to a far extent target a specific demographic in Denmark, cf. paragraph 3.1.3.

Nonetheless, in *Jyske Finans A/S* (C-668/15), the CJEU has as something new and more generally laid down conditions in cases concerning Directive 2000/43, cf. subsection 4.1. For that reason, it is decisive to determine whether the delimitation of a "specific ethnic origin" is a requirement, and if so, whether the demographic described in paragraph 3.1.3 defined in the legislation under the criterion "non-Western immigrants and descendants" has enough common characteristics and is delimited to such an extent that it would fulfil the requirement of a "specific ethnic origin".

However, such an approach would deviate from previous case law, according to which the decisive factor would be that a demographic, which in Denmark differs culturally from the majority population, is being discriminated against as a result of the approval of the development plan by the Ministry of Interior and Housing. According to previous case law, the decisive factor should be that the discrimination is rooted in the view that non-Western immigrants and descendants have "other" values than the Danish ones, that these are equalled with a number of negative characteristics, and that this view thus reflects prejudices against an ethnic minority group in Denmark.

On this basis, it is submitted that the current CJEU case law cannot provide the necessary clarification with respect to the assessment of whether ethnic origin in Directive 2000/43 covers discrimination on the basis of "non-Western immigrants and descendants".

As described, the decision in this case depends on a clarification of important questions in relation to the application and interpretation of Directive 2000/43. The case cannot be based on the application of already well-established EU law with respect to the specific circumstances of the case. As this paragraph and the pleadings by the parties illustrate, diverging case law and different language versions exist, and the case raises difficult questions of the interpretation of EU law that have decisive and concluding effect on the result of the case. Already for this reason, the High Court ought to refer the case to the CJEU to ensure a harmonised, correct application of EU law and to ensure the effective enforcement of EU law (Morten Broberg og Niels Fenger (2021), *Preliminary References to the European Court of Justice*, 3. udg. Oxford University Press, p. 250-252).

It should be noted that the classification of parts of the Danish population as "Western/non-Western" appears directly several places in the Danish legislation. Thus, reference to the CJEU would also prevent that a practice that is incompatible with EU law develops more generally.

4.3 Justification of direct discrimination

Moreover, it is submitted that it is relevant to refer to the CJEU the question of whether direct discrimination can be justified.

It is the view of the respondent that the underlying considerations of the legislation have a bearing on the assessment of whether direct discrimination has occurred. In other words, that direct discrimination may be justified if the measure pursues legitimate interests. According to the respondent, it would be a disproportionate and unintended intervention in the sovereignty of the member states, if this were not possible.

The respondent refers to *CHEZ Razpredelenie Bulgaria* (C-83/14), para. 83, where the CJEU stated that matters that may also be taken into consideration included the fact that, notwithstanding requests to this effect from the referring court in respect of the burden of proof, CHEZ RB had failed to adduce evidence of the alleged damage, meter tampering and unlawful connections, asserting that they were common knowledge.

However, as stated in subsection 3.3., the general human rights view is that direct discrimination on the basis of racial or ethnic origin is so morally deplorable and humiliating that it cannot be justified in a modern society, see also the decisions by the European Court of Human Rights in *Biao v Denmark* (38590/10), para. 94, *D.H. and Others v the Czech Republic* (57325/00), para. 176.

Thus, the case gives cause to refer the question to the CJEU for the purpose of clarifying the boundaries of justification of direct ethnic discrimination and of whether ethnicity as selection criterion may be lawful in situations that do not concern affirmative action.

4.4 Concluding remarks on preliminary reference to the CJEU

In conclusion, it is submitted that it is necessary to refer the case to the CJEU.

The case raises questions of interpretation in relation to the concrete case and concerns problems that are not unlikely to arise in other cases, and which have a real influence on the harmonisation of EU law. Moreover, the judgment in this case will undoubtedly have a general influence on the future application of the Ethnic Equal Treatment Act and Directive 2000/43.

Finally, the case raises very fundamental questions of principle with far-reaching significance that are of general interest to the uniform application of EU law, and which can contribute to the development of EU law. Preliminary reference to the CJEU could contribute to the clarification of questions that could drive the development of the protection against ethnic discrimination in Denmark, and which are particularly central to the protection of ethnic minorities across Europe.

CONCLUSION

In conclusion, it is submitted:

that the approval by the Ministry of Transport and Housing of the development plan for Mjølnerparken constitutes direct discrimination on the basis of ethnic origin;

that the development plan for Mjølnerparken has been drawn up as a result of the residents' ethnic origin because the definition of a "ghetto" and the criterion "non-Western immigrants and descendants" in the Common Housing Act are inextricably linked to ethnic origin;

that direct discrimination on the basis of ethnic origin does not depend on the identification of a "specific" ethnic group;

that the applicants are treated less favourably than residents in other housing estates that are not classified as a tough ghetto; *in part* because residents risk eviction from their current homes, and *in part* because the classification of the housing estate as a ghetto is stigmatising;

that direct discrimination cannot be justified with reference to legitimate aims, and;

that it is necessary to refer the case to the CJEU in order to clarify its questions of EU law interpretation.

REQUEST

The Danish Institute for Human Rights requests permission to address the court during the final hearing.

PROCEDURAL NOTIFICATIONS

Procedural notifications to the third-party intervener may be sent to the Danish Institute for Human Rights, Wilders Plads 8K, 1403 Copenhagen (file number 20/01473).

VAT REGISTRATION

The Danish Institute for Human Rights is not registered for VAT.

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Copenhagen, 30 June 2021

Nikolaj Nielsen
Head of Equality