Response

To the Eastern High Court, 14th department

In case BS-27824/2020-0LR:

1. Applicant 1
2. Applicant 2
3. Applicant 3
4. Applicant 4
5. Applicant 5
6. Applicant 6
7. Applicant 7
8. Applicant 8
9. Applicant 9
10. Applicant 10
11. Applicant 11
12. Applicant 12

(all represented by attorney Eddie Omar Rosenberg Khawaja)

versus

The Ministry of Transport and Housing

(attorney Peter Biering and attorney Emil Wetendorff Nørgaard)

I shall appear on behalf of the respondent and submit the following

1. CLAIMS

In the first instance: Dismissal.

In the second instance: Acquittal.

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2. THE SUBJECT-MATTER OF THE CASE

The applicants have filed the present case against the Ministry of Transport and Housing, because they hold that the ministry has discriminated against them on the basis of racial or ethnic origin and has violated their rights under the ECHR.

In their claim, the applicants have stated that the discrimination is tied to the ministry's approval of 10 September 2018 of a so-called development plan for Mjølnerparken.

A development plan, which has been drafted jointly by the housing association Bo-Vita and the Municipality of Copenhagen, and which sets out how the number of common family units in Mjølnerparken can be reduced to a maximum of 40 % of the total housing stock by 2030.

The provisions in Sections 61a and 168a of the Common Housing Act, which instruct Bo-Vita and the Municipality of Copenhagen to draft the development plan, are within the portfolio of the Ministry of Transport and Housing. However, the provisions do not prescribe *specifically and concretely* how a development plan must be drafted.

The decision about the concrete development plan is made jointly by the common housing association (in this case Bo-Vita) and by the city council (in this case the Municipality of Copenhagen). In the case of Mjølnerparken, they have decided that the applicants' rental units are to be sold to a private investor. Because of that, the applicants will have to move to other dwellings.

This is the situation with which the applicants are dissatisfied.

….

The Ministry of Transport and Housing has submitted a claim for dismissal, alternatively for acquittal.

The claim for dismissal has been submitted, because the case raises the question of whether the ministry is the <u>correct respondent</u>.

The fact that a development plan must be drafted for Mjølnerparken does not in itself have any concrete and individual legal effect on the applicants. It affects them exclusively by virtue of the specific decisions, which Bo-Vita and the Municipality of Copenhagen have made in relation to Mjølnerparken. In other words, the applicants' dissatisfaction with the fact that their rental units are to be sold is a matter between them, Bo-Vita, and the Municipality of Copenhagen.

Furthermore, the case raises the question of whether the applicants have <u>legal standing</u>.

It is stated several times in the application that it is not only the ministry's specific approval that the applicants want to have examined. They also want an examination of whether the provisions of the Common Housing Act generally speaking are in violation of the Ethnic Equal Treatment Act, EU law, and the ECHR.

However, the applicants are not concretely, currently, and individually affected by the provisions of the Common Housing Act, and thus case law does not support that they can have the case tried.

….

The ministry's claim for acquittal is directed at <u>two questions</u>.

<u>Firstly</u>, whether the applicants have been discriminated against either *directly* or *indirectly*, and <u>secondly</u> whether the ministry has violated their rights under the ECHR.

In relation to the first question, the applicants hold in particular that Section 61a of the Common Housing Act is based on criteria of racial and ethnic origin, since it distinguishes between *Western and non-Western immigrants and descendants.*

The Ministry of Transport and Housing disagrees.

The ministry holds that the applicants have not demonstrated that they themselves or indeed any specific racial or ethnic origins have been treated less favourably. The category "non-Western immigrants and descendants" comprises more than half of the world's population.

In addition, the applicants' understanding of the concept of ethnic origin is wrong. It disregards the fact stated by the CJEU in the seminal decision *Jyske Finans A/S* (case C-668/15, judgment of 6 April 2017), namely that ethnic origin is decided on the basis of a wide range of criteria – not just one or two criteria, such as a person's place of birth or a person's parents' place of birth.

In other words, the applicants want the High Court to expand the concept of racial and ethnic origin under EU law. There is no basis for this.

With respect to the second question concerning the ECHR, there is no basis for saying that the applicants' rights have been violated.

The authorities have a wide margin of appreciation when implementing socio-economic policies, including in particular policies aimed at improving integration.

Furthermore, it is clearly implied in case law that Section 61a of the Common Housing Act – which safeguards the interest of successful integration – is objectively justified and proportionate. Thus, it is not in violation of the convention.

3. SUPPLEMENTARY STATEMENT OF FACTS

3.1 Development plans and Sections 61a and 168a of the Common Housing Act

The obligation to draft a development plan is prescribed by Section 168a(1) of the Common Housing Act.[1]

The provision states that the common housing association and the city council together must draft a so-called development plan for a tough ghetto area, as defined in Section 61a of the act.

The goal of the development plan must be to reduce the share of common family housing to a maximum of 40 % of the housing stock in the tough ghetto area in question by 1 January 2030.

Under Section 61a(4) a tough ghetto area is taken to mean a housing estate, which in four consecutive years has been characterised as a ghetto area.

A ghetto area is defined in Section 61a(4) as a housing estate, which fulfils two out of four conditions concerning socio-economy and crime, which are listed in Section 61a(1) (by which it is characterised as a so-called vulnerable housing estate). In addition, among the residents of the housing estate, at least 50 % must be "immigrants or descendants from non-Western countries."

This is the condition, which in the opinion of the applicants means that they are being discriminated against compared to tenants in other (vulnerable) housing estates.

[1] Consolidated Act No. 119 of 1 February 2019.

The latest listings of ghetto areas (**appendix A**) and tough ghetto areas (appendix 2) – the so-called "ghetto lists" – show that as of December 2019 there were 28 ghetto areas in Denmark, of which 15 were tough ghetto areas.

Section 61a of the Common Housing Act was introduced in 2010 by Act No. 1610 of 22 December 2010. At that time, it was prescribed by the provision that a housing estate should be characterized as a ghetto area if it fulfilled two of three specifically listed criteria.

One of these criteria was that the share of immigrants and descendants from non-Western countries in the housing estate exceeded 50 %.

As one of the reasons for introducing the provision, it is stated in paragraph 1 of the general remarks to the act, cf. Bill No. 60 of 17 November 2010, that:

> *"Today there is a number of housing estates that have so great challenges that they fall under the designation ghetto areas. There are areas where a large part of the residents is without job. Where relatively many are criminals, and where many people with immigrant background live. In such areas, it may be more difficult for foreigners to be integrated into the Danish society."* (Emphasis added)

….

For example, the government presented "Regeringens strategi mod ghettoisering" [English: "The Government's Strategy against the Ghettoization"] already in May 2004, where in the introduction, it was stated that it is *"strongly problematic that in spite of several years of efforts, there is a tendency towards ghettoization. And this tendency has intensified further in certain vulnerable areas."*

As part of the strategy, a so-called "programme board" [Danish: "programbestyrelse"] was established, composed of representatives from the common housing sector, the business community, and municipalities, who should oversee the development in the areas and the implementation of the strategy as well as continuously assess the need for dispensations, experiments, and new initiatives, cf. page 9.

In November 2008, the programme board published the report "Fra udsat boligområde til hel bydel" [English: "From Vulnerable Housing Estate to Whole Neighborhood"] (**appendix C**), which partly recounts the history of vulnerable housing estates and the development towards ghettoization, and partly gave a number of recommendations for future measures against ghettoization.

The report's account of the history of vulnerable housing estates and ghettos appears in paragraph 4 (p. 37ff.) and contains among other things an account of those initiatives, which since the 1980s have been taken with the aim of combatting parallel societies in the ghettos. By way of introduction, it is stated on page 37 of the report:

> *"The problem with vulnerable housing estates is not new. The current vulnerable areas have in some cases been under pressure since their construction as a result of difficulties with renting, high interest rates on the financing, faulty construction, and social factors.*
>
> *This led to the nickname "the socially maladjusted" in the 1980s. Throughout the 1970s, a number of* ad hoc *solutions were made, which targeted the specific problems of the areas. In 1985, legislation was introduced, making it possible to reprioritise loans and repair faulty construction. Two years later, the concurrently appointed John Winther Committee identified a number of housing estates, which were characterised by the aforementioned plurality of problems. The Winther Committee and the simultaneous reprioritisation act mark the*

beginning of a number of consecutive initiatives, which have progressed during the last 20 years. These initiatives have kept the vulnerable housing estates afloat and prevented total collapse, but have nonetheless not been able to turn the development in the areas around." (emphasis added)

Following this, it is stated on page 37:

"It is the opinion of the Programme Board that it is absolutely necessary that the situation in the vulnerable housing estates be changed. And after many years of efforts to rectify the stigmatisation of the vulnerable housing estates, a reinforced effort is clearly called for to successfully turn around the development in the vulnerable housing estates." (emphasis added)

The development concerns the share of immigrants and descendants from non-Western countries in the common housing estates and is furthermore described in paragraph 4.1.4.4 (page 41), where it is stated:

"The easily accessible dwellings in the large common housing areas also meant that many of the immigrants who came to Denmark in the period from the mid-1960s and onwards settled here. By the early 1980s, there was an overrepresentation of immigrants and descendants from non-Western countries of 67 %. The overrepresentation rose to 186 % in 2000, after which it has stabilised. In 2007, the share of immigrants and descendants made up 24 % in the common housing sector against 9 % of the population as a whole.

For the 37 vulnerable areas, on which the Programme Board has focused, the share of immigrants and descendants from non-Western countries is even higher, namely 53 %. In that connection, it should be noted that around 25 % of all descendants to immigrants from non-Western countries below the age of 18 live in one of the 37 housing estates, on which the Programme Board focuses. That should be compared against the fact that around 2 % of the population live in one of the 37 housing estates." (emphasis added)

Paragraph 4.2 (page 43ff.) of the report also describes those initiatives, which since the 1980s have been taken to combat parallel societies in the vulnerable housing estates and ghettos.

The *recommendations* to the government from the Programme Board appear in paragraph 3.2 (page 25) of the report. It is *inter alia* stated that:

"The Programme Board recommends that the government without delay creates the framework for a long-term effort in the vulnerable housing estates. The framework should ensure that municipalities and housing associations in a long-term perspective can organise an efficient effort, which can create radical physical and social changes in the vulnerable housing estates." (emphasis added)

Furthermore, it is stated on page 26 of the report that:

"The options for selling family units in the vulnerable housing estates (the permanent sales scheme) should be used pro-actively when possible. It could for example be done by creating an economic basis for selling the entire housing block as owner-occupied dwellings. Considerations about selling dwellings in the vulnerable areas should thus form part of the drafting of overall plans. This may mean that some residents will have to move to appropriate rehousing, which should be made possible." (emphasis added)

….

Section 61a of the Common Housing Act was – since its introduction in 2010 – first amended by Act No. 1609 of 26 December 2013 (on the amendment of the Common Housing Act), adding two additional criteria to the definition of a ghetto area. With the change, it was thus decided that a ghetto area would be a housing estate that fulfilled three of the five specifically listed criteria.

In the explanatory memorandum to the act, cf. Bill No. 45 of 31 October 2013, the following is stated:

> *"The current criteria continue to be of decisive importance. The integration of immigrants and descendants from non-Western countries in the vulnerable housing estates is a focal point. It is important that residents in the housing estates socialise across ethnic origin. If not, it may be more difficult to understand each other culturally and linguistically, and prejudices may easily arise, negative opinions, and a dangerous division between 'them' and 'us'. It threatens the cohesion in society. A high concentration of citizens with a different ethnic extraction is thus a signal that it is necessary to focus on the area. It is proposed that the share of immigrants and descendants from non-Western countries continues to be used as a yardstick for integration with a threshold of 50 %."* (emphasis added)

3.2 The Parallel Society Package and the current wording of Sections 61a and 168a of the Common Housing Act

Section 61a of the Common Housing Act got its current wording by Act. No. 1322 of 27 November 2018, which followed the policy paper "Ét Danmark uden parallelsamfund – ingen ghettoer i 2030" [English: "One Denmark without Parallel Societies – No Ghettos by 2030"] (The Parallel Society Package), drafted by the Ministry of Economy and Interior (**appendix D**).

The amendment of the provision in 2018 entailed in particular that the condition that there must be more than 50 % immigrants and descendants from non-Western countries was made mandatory. In other words, the change meant that a housing estate no longer can be characterised as a ghetto area, if there are not more than 50 % immigrants or descendants from non-Western countries.

With the act, Section 168a(1) of the Common Housing Act was also introduced, which, as already mentioned, obligates the common housing association and the city council to draft a development plan for housing estates that are being characterised as so-called tough ghetto areas.

The background for the amendment is *inter alia* described in detail in the Parallel Society Package.

Here on page 4, it is emphasised that the government wants a cohesive Denmark, building on democratic values, such as liberty, rule of law, equal worth, open-mindedness, tolerance, and gender equality.

In that connection, it is stated that since 1980 the number of persons with non-Western background has increased from 50,000 persons in 1980 to almost 500,000 persons in 2018. A total increase of about 7.5 %.

A third of these persons with non-Western background live in common housing estates, and about 25 % of the residents in common housing estates have non-Western background.

Furthermore, it is stated on page 5 that immigrants and descendants from non-Western countries, according to the latest calculation from the Ministry of Finance, costed Denmark DKK 36 billion in 2015, and that Danish taxpayers could have saved DKK 17 billion, if non-Western immigrants were employed to the same extent as Danes.

Furthermore, reference is made to several other statistics supporting the fact that the integration of non-Western immigrants and descendants in Denmark at the time constituted a special challenge.

It counts for example that about 15 % of all families with non-Western background exhibit several signs indicating that they live relatively isolated from the rest of society. The typical family thus lives in a common housing estate, where many of the residents have non-Western background, cf. page 5.

Or that a third of non-Western immigrants between the ages 22 and 59 are long-term passive, meaning that they have been neither employed nor undergone education in at least four of the last five years.

These descriptions are reiterated in Bill No. 38 of 3 October 2018, which formed the basis for Act No. 1322 of 27 November 2018.

Here in paragraph 1, it is stated that with the Parallel Society Package a *broad political agreement* was reached between the former government (*Venstre*, *Liberal Alliance*, and *Det Konservative Folkeparti*) and *Socialdemokratiet*, *Dansk Folkeparti*, and *Socialistisk Folkeparti* about implementing initiatives on the housing market, which would discourage parallel societies, cf. page 4.

It is stated in the bill, that the parties agreed on the need for *extensive physical transformations* of the ghetto areas.

Focus being on extensive physical transformation, including a reduction of the share of common family housing in order to create the conditions for a mix of different types of housing (common housing, owner-occupied dwellings, co-operative housing, and private rentals) and thus a changed resident composition, cf. page 4.

Paragraph 2.1 of the bill concerns the new definition of ghetto areas in Section 61a of the act.

It emerges from this that the intention was to update and consolidate the ghetto criteria, so that they would be more robust, and so that it could be ensured that the efforts would target the right areas.

When it was proposed that it would be made an independent and mandatory condition that the share of immigrants and descendants comprises more than 50 % of the residents in the housing estate, it was because of the need for focusing on the fact that the *central challenge* in the ghetto areas was the lack of integration of immigrants and descendants from non-Western countries, cf. page 6.

The requirement concerning the share of immigrants and descendants from non-Western countries is nonetheless a supplement to the criteria in Section 61a(1). Thus, first an assessment is made of whether the housing estate fulfils the criteria in Subsection (1) (i.e. whether it is a vulnerable housing estate), and – if that is the case – it is only subsequently assessed whether the share of non-Western immigrants and descendants constitutes more than 50 % of the total number of residents (i.e. whether it is a ghetto area).

Paragraph 2.2 of the bill concerns the obligation to draft development plans for tough ghetto areas.

Here it emerges that it was believed that a significant reason for why the ghetto areas had emerged was the uniform composition of housing, which was a result of the uniform type of housing in the housing estates. Because of that, there was a need for reducing the share of common housing estates in ghetto areas, cf. page 7.

Furthermore, the paragraph contains a wide range of suggestions as to how such a reduction of the share of common family housing could be done:

> *"The reduction of the share of common family housing can be achieved in different ways. It can be done by building new dwellings that are not common family dwellings. That can for example be terrace houses or attic flats, which are then sold as owner-occupied dwellings. Furthermore, existing common family dwellings can be sold to be used as private rentals, co-operative*

> *dwellings, or owner-occupied dwellings. Furthermore, undeveloped plots can be sold for the purpose of further condensation through the construction of private owner-occupied dwellings. It is also possible to reduce the share of common family housing by establishing commercial spaces or by moving municipal jobs to the area. 75 square metres of commercial space count as one dwelling, a commercial space of 150 square metres counts as two dwellings and so on.*
>
> *Furthermore, a reduction of the share of common family housing can be achieved by demolishing common family dwellings, so that they no longer form part of the housing estate. Dwellings, which are being demolished, or which have been demolished since 2010, can be included in the calculation of the share of common family housing. When including already demolished dwellings in the calculation, it is a condition that they have not been replaced by new dwellings in the housing estate.*
>
> *Finally, the share of common family housing may be reduced by converting common family dwellings into common housing for students or seniors, if the conditions are met."* (emphasis added)

In Section 168a(2) of the Common Housing Act, it is prescribed that the Minister for Transport, Construction, and Housing shall approve development plans. Furthermore, Section 168a(3) states that the minister in special cases and upon application may grant an exemption to the demand of reduction in Subsection (1).

The framework for the minister's approval of development plans is described in Ministerial Order No. 1354 of 27 November 2018 on the physical transformation of tough ghetto areas.

In Section 13(1) of the ministerial order, it is stated that when approving a development plan, the Minister for Transport, Construction, and Housing must perform a concrete assessment of the plan. Section 13(2) prescribes that when approving a plan, the following should be taken into account:

- that the development will result in the required reduction of the share of common family housing in the housing estate by 2030,
- that the initiatives are realistic and appropriate for achieving the goal,
- that the financial aspects are realistic,
- that the time plan contains information about the stages of the individual initiatives,
- that the specified time plan is realistic.

The ministerial order also describes the framework for the minister's power to grant exemptions to the requirement of reduction.

3.3 The Development Plan for Mjølnerparken

The development plan for Mjølnerparken was drafted by Bo-Vita on 8 May 2019 and presented to the Technical and Environmental Committee of the Municipality of Copenhagen on 27 May 2019, where it was passed with five votes against two. One member refrained from voting (appendix 5).

It is stated in the development plan that although Mjølnerparken has enjoyed a positive development the last years, there is still a massive concentration of residents who are economically, socially, and culturally vulnerable. The challenges are particularly rooted in an overrepresentation of children and young people who struggle in school and do not participate in public activities or association activities, cf. page 2 of the plan.

The development plan consists mainly of two parts, one part being a continuation of the so-called physical *overall plan*, and another part being *sale* of surplus family units, cf. page 3 of the plan.

As mentioned before, it is the part of the development plan relating to sale, which has given rise to dissatisfaction among the applicants, and which has given cause to the present case.

Thus, for example in the article by TV2 Lorry of 6 March 2020 *"Mjølnerparkens beboere i åbent brev til S: I kan stoppe salg, hvis I vil"* [English: "Residents of Mjølnerparken in open letter to the Social Democrats: You can stop the sale if you want to"] (**appendix E**), it appears that, among others, the chairman of the local board [redacted] has sent a letter to the Municipality of Copenhagen and the parliament where they specifically request the sale to be stopped.

However, in the article, the social democratic member of the Finance Committee of the Municipality of Copenhagen, Jonas Bjørn Jensen, is quoted for saying:

> *"We do not intend to change our decision with regard to Mjølnerparken. That is because we want Mjølnerparken to be part of the city. It should be as other parts of the city.*
>
> *In the ten years I have been a member of the Municipal Council, we've discussed Mjølnerparken. We have advanced employment initiatives, we have tried to improve the area physically, we have promoted safety with better street lighting*
>
> *But we can see that Mjølnerparken unfortunately is falling behind. That applies both when we look at education, when we look at crime, and when we look at a range of those things that are decisive for what kind of life people can get. Now we have a plan that we believe in, because it will mix the housing stock in Mjølnerparken."* (emphasis added)

That the residents' dissatisfaction particularly concerns the element of sale is also supported by the fact that the branch board in Mjølnerparken [redacted] has drafted an alternative development plan for Mjølnerparken (appendix 7).

The alternative development plan differs from the "official" development plan by not relying on sale of the rental units. Instead it relies on so-called re-categorisation of the rental units, cf. *inter alia* page 3 of the plan:

> *"In the opinion of the residents, the solution is not to sell blocks to an extent equalling about 300 flats, as Bo-Vita has described in its development plan.*
>
> *[...]*
>
> *As we see it, the solution is that a greater number of the flats in Mjølnerparken are being re-categorised, and that this takes place to the extent that the natural vacation takes place."* (emphasis added)

The alternative development plan was forwarded to the Ministry of Transport [*sic*] on 31 May 2019 (appendix 6), and by email of 25 June 2019 (appendix 8) the Transport, Construction and Housing Authority rejected to consider the plan.

In the email, the authority referred to the fact that under Section 168a(1) of the Common Housing Act, a development plan must be submitted jointly by the municipality and the housing association, and the forwarded development plan had been approved and signed by neither the Municipal Council of Copenhagen nor the highest authority of Bo-Vita.

The decision that the "official" development plan should rely on the sale of rental units was made by Bo-Vita and the Municipality of Copenhagen.

In an article by TV 2 Lorry *"Mjølnerparkens beboerformand vil af ghettolisten – men ikke ved at sælge boliger"* [English: "The chairman of Mjølnerparken wants to get off the ghetto list – but not by selling

flats"] from 11 February 2020 (**appendix F**), the chairman of Bo-Vita, Jan Hyttel, has expressed that the decision to sell rather than to re-categorise was made in the interest of resources:

> *"The entire Mjølnerparken needs to be renovated, and if we should convert a number of the family units into student units, the entire tender process needs to start over again. It would take up to four years, before we could begin. It would also mean that 50 % more bathrooms and kitchens needed to be constructed, and it would cost hundreds of millions to complete."*

In the article, he has also expressed that it is the Municipality of Copenhagen, which specifically has decided that it is precisely blocks 2 and 3 in Mjølnerparken that are to be sold:

> *"When it's precisely blocks 2 and 3 that are to be sold, it's because the Technical and Environmental Administration expressed concerns about selling too many family units."* (emphasis added)

The "official" development plan was approved by the Ministry of Transport and Housing on 10 September 2019 (appendix 9). The following reason was given in the approval:

> *"Since the development plan for the housing estate Mjølnerparken fulfils the requirement of reduction to a maximum of 40 %, cf. the above calculation, and since the drafted timeline and the milestones specify the overall development towards the realisation of the plane, I hereby approve the development plan."* (emphasis added)

3.4 The question of rehousing

In the wake of the approval of the development plan, there has been some debate about the extent to which the development plan entails that persons, who will be rehoused as a result of it, will be rehoused within or outside Mjølnerparken.

The question of rehousing is regulated by Section 86(1) of the Common Housing Rent Act.[2]

The provision states that a tenant, who is being evicted, because their dwelling is located in a vulnerable housing estate, cf. Section 61a(1) of the Common Housing Act, and must be transferred completely or in part, shall be offered alternative accommodation.

The provision also states that this alternative accommodation must be situated in the same housing estate if it concerns a dwelling, which is located in a tough ghetto area, and the transfer of the dwelling happens as part of a development plan.

The following is stated in the specific remarks to the provision, cf. Bill No. 38 of 3 October 2018:

> *"It is proposed to expand the current provision in Section 86(1) of the act on the mandatory offer of alternative accommodation to also include the case of termination according to the proposed provision on termination as a result of complete or partial transfer, cf. the proposed Section 85(1)(2). If it concerns sale of dwellings in properties as part of a development plan, cf. Section 168a of the Common Housing Act, alternative accommodation can, however, only be offered within the housing estate, in which the transferred property is located."* (emphasis added)

The residents' attorney Eddie Khawaja has, indeed, emphasised this when he was interviewed to the article of 25 January 2020 in Information *"Beboere nægter at flytte ud af Mjølnerparken, når*

[2] Consolidated Act No. 928 of 4 September 2019.

bygningerne skal sælges" [English: "Residents refuse to move out of Mjølnerparken, when the buildings are to be sold"] (**appendix G**):

> *"They [the residents of Mjølnerparken] have a right to be rehoused in Mjølnerparken. That's the clear point of departure."*

Attorney Eddie Khawaja said the same in the article of 10 June 2020 in Information *"Boligministeriet giver ikke opbakning til at flytte beboere ud af Mjølnerparken"* [English: "The Ministry of Housing does not support moving residents out of Mjølnerparken"] (**appendix H**):

> *"The Ministry of Housing cannot clearly side with Bo-Vita and say that rehousing can take place within the framework of the overall plan, as the housing association wishes. When I read the response from the ministry, <u>I understand it in line with what we've thought the entire time: namely that there is uncertainty, but that the assessment will tend towards that rehousing must take place in the same housing estate, because it happens in connection with sale of flats in a tough ghetto area."</u>* (emphasis added)

In the article, reference is made to a letter of 20 April 2020 from the Ministry of Transport and Housing to the Municipality of Copenhagen (**appendix I**) regarding the question of which rules for rehousing apply in the case where a flat needs to be renovated/converted before it is to be sold.

In the memorandum, it is stated on pages 3-4 that *"this combined double measure with regards to a flat [sale and conversion] cannot be regarded as being expressly regulated by the law,"* and for that reason it depends on a concrete assessment of which rules apply. Nonetheless, on pages 3-4 it is stated that:

> *"Moreover, it could be imagined that the landlord enters an agreement with a private buyer about sale of (parts of) a common housing property and that the landlord in that connection commits themselves to convert the property before entering into possession.*
>
> *<u>In this situation, the assumption would be that the entire transaction should be regarded as a sale, which entails that the landlord's access to terminate leases and the obligation of rehousing will be assessed under the rules in the Common Housing Rent Act on termination and rehousing in connection with sale."</u>* (emphasis added)

4. ARGUMENTS

4.1 The claim for dismissal

4.1.1 The applicant's claim is unclear and unsuited for a ruling

In support of the claim for dismissal, the Ministry of Transport and Housing submits that the applicants' claim is <u>unsuited</u> for a ruling.

With the claim, the applicants want the ministry to acknowledge that the ministry's approval of 10 September 2018 of the Development Plan for Mjølnerparken of May 2019 drafted by Bo-Vita and the Municipality of Copenhagen (appendix 3) *is in violation* of the Ethnic Equal Treatment Act,[3] EU law, and Denmark's obligations under international law.

[3] Consolidated Act No. 438 of 16 May 2012. The act implements Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive), cf. Parliamentary Report No. 1422/2002 on the implementation of the Racial Equality Directive in Danish law.

However, it is not stated in the claim what legal consequences or what result the applicants want to achieve (e.g. compensation or voiding of the approval). Therefore, the claim has the appearance of an *argument*.

Moreover, the Ministry of Transport and Housing finds that the claim is unclear.

Although the applicants' claim expressly concerns the approval of 10 September 2018 by the Ministry of Transport and Housing, it is expressed several places in the application that the applicants, in reality, want the general compliance of the Common Housing Act with the Ethnic Equal Treatment Act to be examined.

Thus, on page 13 of the application, it is stated:

> *"If Mjølnerparken had not been categorised as a "tough ghetto", the applicants would not be in the situation, where they risk being evicted from their flats, since in that case there would not have been a requirement of a development plan with a reduction of the number of family units under Section 168a of the Common Housing Act.*
>
> *[...]*
>
> *Moreover, the use of the designation "ghetto" for the applicants' homes entails that the applicants are being stigmatised as "ghetto" dwellers, a term which the current Minister of Housing has admitted is derogatory and affects the residents, cf. statement to the Danish Broadcasting Corporation (appendix 23)."* (emphasis added)

In the opinion of the Ministry of Transport and Housing, the case must be delimited in a way so that it is clear what the case is about. Only then, the ministry may properly safeguard its interests. Whether the case concerns one thing or the other affects the question of legal standing and correct respondent, cf. paragraph 4.1.2 below.

The applicants are invited (**invitation A**) to rectify their claim so that it clearly appears what legal consequence they want to achieve.

Moreover, the applicants are invited (**invitation B**) to state precisely in the reply whether they want:

- An abstract examination of whether Section 168a(1), in conjunction with Section 61a(2), of the Common Housing Act in its entirety is in violation of the Ethnic Equal Treatment Act, EU law, and the ECHR, or
- a concrete examination of whether the ministry's approval of 10 September 2019 of the development plan for Mjølnerparken is in violation of the Ethnic Equal Treatment Act, EU law, and the ECHR.

Depending on the applicants' reply to the invitations, the Ministry of Transport and Housing reserves the right to request that the claim for dismissal be separated for individual and interim consideration under Section 253(1) of the Administration of Justice Act.

4.1.2 The applicants lack legal standing and the Ministry of Transport and Housing is not the correct respondent

If the applicants want an abstract examination of the legality of Section 168a(1), in conjunction with Section 61a(2), of the Common Housing Act, the Ministry of Transport and Housing submits that the applicants lack legal standing.

Thus, it is commonly implied in case law that the courts do not try a claim for a declaration that solely concerns the abstract interpretation of law without basis in a concrete and relevant dispute, cf. e.g. U.2010.2109 H and B . Gomard & M. Kistrup, "Civilprocessen", 8th edition (2020), page 406ff.

A concrete, individual, and relevant dispute between the applicants and the Ministry of Transport and Housing is not present. Thus, in reality, the applicants ask the courts for a legal opinion.

The applicants hold that they, as tenants in Mjølnerparken, are being treated less favourably than tenants in other housing estates, since the development plan for precisely Mjølnerparken entails that their rental units are to be *sold*.

First of all, it is surprising that the applicants have filed the lawsuit at a time when it is still unclear whether the applicants will be evicted, and in that case whether they can be rehoused within the area of Mjølnerparken. The applicants are invited (**invitation C**) to indicate why they have filed the lawsuit now and not waited until that question has been clarified.

Moreover, as stated in paragraph 3.3 above, the decision to sell has not been made by the Ministry of Transport and Housing, but by Bo-Vita and the Municipality of Copenhagen. The applicants' dissatisfaction with the development plan for Mjølnerparken is thus obviously a matter between the applicants on the one side and Bo-Vita and the Municipality of Copenhagen on the other.

In that way, the case resembles the case in the Supreme Court judgment of 6 September 2013 in case 85/2010 (U.2013.3295 H). In that case, the interest organisation *Margarineforeningen* had sued the Danish Food Administration, since it wanted an examination of a decision, by which the administration had reversed an order from Food Region North to Arla Foods prohibiting the sale of the company's composite product "Lurpak Smørbar".

The Supreme Court found that Margarineforeningen did not have standing to have the decision by the Food Administration tried – neither in its own right or on behalf of Dragsbæk, a member of the interest organisation, which produced a competing product.

The Supreme Court justified this with reference to the fact that neither Margarineforeningen nor Dragsbæk was the addressee of the Food Administration's decision or otherwise so concretely affected by the decision that it could justify legal standing.

Moreover, the Supreme Court emphasised that Dragsbæk could have its argument that Arla Foods' marketing of their composite product was misleading tried by filing a lawsuit directly against Arla Foods. Thus, there was no legal vacuum.

Finally, the Supreme Court emphasised the (untenable) circumstance that a case between Margarineforeningen and the Food Administration about the aforementioned decision would, in reality, be tried without any participation of the addressee of the decision, Arla Foods.

The same is true for the present case.

The applicants are not addressees of the ministry's approval of the development plan for Mjølnerparken, and the approval has no independent legal effect on the applicants. If the applicants want an examination of whether the development plan is in violation of the Ethnic Equal Treatment Act, they need to file the lawsuit against Bo-Vita and the Municipality of Copenhagen.

It is entirely correct that Section 168a(1) of the Common Housing Act obligates Bo-Vita and the Municipality of Copenhagen to draft the development plan, and that the plan must have as its goal to reduce the share of common family housing to a maximum of 40 % before 1 January 2030.

Yet, the Common Housing Act does not prescribe *how* this development plan specifically and concretely should be drafted, or *how* the goal of reducing the number of common family dwellings should be achieved.

On the contrary, as stated in paragraph 3.2, it appears in the explanatory memorandum to the Common Housing Act that a range of different options exists for how to fulfil this requirement of reduction.

In other words, it is quite possible within the framework of the rules in the Common Housing Act to draft a development plan for Mjølnerparken that does not entail sale of common family units.

This is best illustrated by the alternative development plan (appendix 7) that the branch board for Mjølnerparken [redacted] submitted to the Ministry of Transport and Housing on 31 May 2019, cf. paragraph 3.3 above.

It has no bearing on the question of legal standing that the Ministry of Transport and Housing has *approved* the development plan drafted by Bo-Vita and the Municipality of Copenhagen.

As stated in paragraph 3.2 above, the ministry merely ensures that the development plans fulfil the formal criteria in the Common Housing Act, which is also clearly stated in the approval itself (appendix 9). Thus, it is not the case that the Ministry of Transport and Housing with its approval has "rubber-stamped" possible discrimination of the applicants.

Given that the development plan was drafted within the framework of the Common Housing Act and the ministerial order on the physical transformation of tough ghetto areas, there is no basis for saying that the ministry should have *refused* to approve the development plan or have indicated other solutions to the reduction of the number of common family units than those contained in the development plan.

The aforementioned also means that the Ministry of Transport and Housing is not the correct respondent in a lawsuit about whether the development plan for Mjølnerparken is in conformity with the Ethnic Equal Treatment Act, EU law, and the ECHR.

A lawsuit of this kind should instead be directed at either Bo-Vita or the Municipality of Copenhagen, who have drafted the plan and decided its content, and who thus are in a direct legal relationship with the applicants.

4.2 The claim for acquittal

In support of the subsidiary claim for acquittal, the Ministry of Transport and Housing submits

- *that* the applicants have not demonstrated factual circumstances that could justify that the burden of proof should be reversed under Section 7 of the Ethnic Equal Treatment Act, cf. paragraph 4.2.1 below, and
- *that* the ministry's approval of the development in any case
  - does not constitute *direct* discrimination in violation of Section 3(2), in conjunction with Subsection (1), of the Ethnic Equal Treatment Act and EU law, cf. paragraph 4.2.2 below,
  - does not constitute *indirect* discrimination in violation of Section 3(3), in conjunction with Subsection (1), of the Ethnic Equal Treatment Act and EU law, cf. paragraph 4.2.3 below,
  - does not constitute *instruction* to discriminate in violation of Section 3(5) of the Ethnic Equal Treatment Act and EU law, cf. paragraph 4.2.4 below,

- is moreover not in violation of Article 8 of the ECHR, Article 1 of Protocol No. 1, Article 4 [*sic*] of Protocol No. 4, and Article 14, cf. paragraph 4.2.5 below.

These arguments will be elaborated in the following.

4.2.1 No basis for reversing the burden of proof

In cases about discrimination on the basis of racial or ethnic origin, the ordinary starting point of direct burden of proof applies.

The provision in section 7 of the Ethnic Equal Treatment Act gives the option of reversing the burden of proof, if the counterpart demonstrates factual circumstances, which give rise to an assumption that direct or indirect discrimination has occurred.

It is stated in the specific remarks to Section 7, cf. Bill No. 155 of 29 January 2003, that under this provision, it is required that the person who considers themselves violated must substantiate their claim of discrimination, e.g. through written evidence or their own or a third party's statements.

In the present case, the applicants have not demonstrated factual circumstances that would call for reversing the burden of proof.

Reference is made to the detailed presentation of the ministry's arguments below.

4.2.2 Not direct discrimination in violation of Section 3(2), in conjunction with Subsection (1)

It is stated in Section 3(1) of the Ethnic Equal Treatment Act that no one shall submit another person to direct or indirect discrimination on the basis of their own or a third person's racial or ethnic origin.

Section 3(2) of the act states that *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.

In that connection, the Ministry of Transport and Housing submits

- that the applicants neither are, nor have been, nor will be discriminated against,
- that the ministry has not taken the applicants' or others' racial or ethnic origin into account when approving the development plan for Mjølnerparken, and
- that Sections 61a and 168a neither refer to nor include persons' racial or ethnic origin.

These arguments will be elaborated in paragraphs 4.2.2.1, 4.2.2.2, and 4.2.2.3 immediately below.

4.2.2.1 The applicants neither are, nor have been, nor will be treated less favourably

The prohibition on direct discrimination in Section 3(2) of the Ethnic Equal Treatment Act presupposes that one or more persons of a specific racial or ethnic origin are being treated less favourably than others with a different racial or ethnic origin.

It is stated in the specific remarks to Section 3(2), cf. Bill No. 155 of 29 January 2003, that the further assessment can be performed by comparing the treatment of the person, who considers themselves to have been violated, with how another person (of a different racial or ethnic origin) is, has been, or would be treated in a *similar* situation.

On pages 12-13 of the application, the applicants submit that they – as a result of the development plan for Mjølnerparken – are being treated less favourably than tenants in other common housing estates.

In part because they, as a result of the development plan for Mjølnerparken, are under concrete *threat* of eviction from their current dwellings, in part because they *risk* being rehoused outside

Mjølnerparken, and in part because the use of the term "ghetto" entails *stigmatisation* of them as residents in the housing estate in question.

The Ministry of Transport and Housing holds that the applicants have <u>not</u> satisfied the burden of proof for this.

The assessment hereof must depend on whether the applicants – who are tenants in precisely Mjølnerparken where the share of immigrants and descendants from non-Western countries exceeds 50 % - are being treated less favourably than tenants in a similar common housing area where this does not apply.

That is not the case.

Thus, there is no basis for saying that the fact that a development plan must be drafted for a housing estate *in itself* entails less favourable treatment of the tenants in the housing estate in question. Rather, it depends on how the development plan is drafted.

As stated in paragraph 3.2 above, the Common Housing Act prescribes a requirement that housing estates with more than 50 % immigrants and descendants from non-Western countries must reduce the share of common family housing to a maximum of 40 % by 2030.

However, the law does not prescribe *how*.

Whether the development plan entails a less favourable treatment of the tenants in the housing estate in question depends thus on the specific choices made by the common housing association and the municipal council in connection with drafting the development plan, and the specific circumstances that exist in the housing estate.

It could be the decision whether the requirement of reduction should be achieved by re-categorising, selling, or demolishing rental units, or whether, incidentally, enough tenants decide to be rehoused voluntarily. Furthermore, it could be whether there are enough tenants on temporary leases residing in the housing estate.

In the case of Mjølnerparken, all these questions are still open.

Thus, for example it appears in the article *"Mjølnerparkens boligselskab føler sig som en syndebuk I politisk spil om ghettoplanen"* [English: "The Housing Association of Mjølnerparken Feels Like a Scapegoat in Political Game about the Ghetto Plan"], which was published in Information on 18 February 2020 (**appendix I**), that the chairman for Bo-Vita does not expect that any residents in Mjølnerparken need to move involuntarily. The following emerges from the article:

> *"The housing association has decided to do it by selling two of the blocks. As it came out the week before last, Jan Hyttel expects Bo-Vita to conclude a sales agreement with a private investor next month. <u>That also means that 228 families need to move out of their flats.</u> According to Information's coverage, this has created a climate of uncertainty among some residents who fear that they will be removed by force. Jan Hyttel maintains that they have chosen precisely the solution that is best for the residents.*
>
> *'Of course, I think that it's a terrible situation for the individual family that feel that they need to move away from there. <u>But I believe that it is possible to vacate the buildings without coercion. 130 are on temporary leases, and we actually also have 130 who have agreed to move voluntarily. And 32 have already moved,' he says and notes: 'so we'll easily reach the 228</u>. It doesn't look so bad.'"* (emphasis added)

The same is true with respect to the question of rehousing.

On page 13 of the application, the applicants have stated that they unquestionably will be rehoused outside of Mjølnerparken, which will put them at a disadvantage. This is not correct.

As stated in paragraph 3.4 above, it is stated in Section 86(1) of the Common Housing Act that a tenant, whose lease can be terminated because their dwelling is located in a vulnerable housing estate, cf. Section 61a(1), and has to be transferred completely or in part, must be offered alternative accommodation. Moreover, the provision prescribes that this alternative accommodation must be located *in the same housing estate*, if it concerns a dwelling located in a tough ghetto area and the transfer happens as part of a development plan.

In other words, the Common Housing Act obligates Bo-Vita to rehouse the applicants within Mjølnerparken if their dwellings are sold, which the applicants' own attorney also has emphasised when he was interviewed to the article in Information of 25 January 2020 (appendix G).

It makes no difference for the question of rehousing that Bo-Vita in a number of articles have expressed that they do not think that it is *practically possible* to rehouse tenants within Mjølnerparken. Reference is made to the article in Information on 10 June 2020 *"Boligministeriet giver ikke klar opbakning til at flytte beboere ud af Mjølnerparken"* (appendix G) [*sic*].

This problem must be addressed by Bo-Vita through the proper channels. It is not a matter that can be addressed through a lawsuit between the applicants and the Ministry of Transport and Housing. The legal basis for rehousing within Mjølnerparken is thus clear, and the Ministry of Transport and Housing cannot be held responsible for Bo-Vita's concrete dispositions in relation to the applicants.

As for the applicants' view that the use by the Ministry of Transport and Housing of the concept of "ghetto" is stigmatising, the ministry merely notes that an interest so vaguely defined is not protected by the Ethnic Equal Treatment Act, the underlying EU directive, or by the ECHR.

In conclusion, the applicants have <u>not</u> satisfied the burden of proof for that they are being, have been, or will be treated less favourably as a consequence of the ministry's approval of the development for Mjølnerparken.

4.2.2.2 The Ministry of Transport and Housing has not taken into account the applicants' or any third person's racial or ethnic origin when approving the development plan for Mjølnerparken

In any case, the Ministry of Transport and Housing submits that the ministry has not taken into account the applicants' or any third person's racial or ethnic origin when approving the development plan for Mjølnerparken.

As stated in paragraph 3.3 above, it emerges clearly from the ministry's approval (appendix 9) that it was justified exclusively by the fact that the development plan drafted by Bo-Vita and the Municipality of Copenhagen fulfilled the requirement of reducing the number of common family units, and that a realistic timeline for fulfilling this requirement was attached to the plan.

Thus, the approval was in accordance with the rules in Ministerial Order No. 1354 of 27 November 2018 on the physical transformation of tough ghetto areas, including in particular Section 13(1) and (2) that describe the criteria for the minister's approval of development plans.

The applicants have not pointed to other factual circumstances that could change the aforementioned. Thus, they have <u>not</u> satisfied the burden of proof for that the Ministry of Transport and Housing has taken into account the applicants' or any third person's racial or ethnic origin when approving the development plan for Mjølnerparken.

The approval does on this basis undoubtedly not entail direct discrimination.

4.2.2.3 Section 61a(2) neither refer to nor include racial and ethnic origin

It also does not constitute direct discrimination when Section 168a(1) of the Common Housing Act obligates tough ghetto areas to draft a development plan.

This is firmly based in the fact that the wording of neither Section 61a nor Section 168a *refers* to the criteria of racial and ethnic origin.

Yet, the applicants have submitted that the provisions in question nonetheless entail direct discrimination, since the reference to "immigrants and descendants from non-Western countries" is *directly and inextricably linked* to racial and ethnic origin.

The Ministry of Transport and Housing disagrees.

The definition of non-Western immigrants and descendants in the Common housing Act is clear and precise. The same is true for the definition of racial and ethnic origin. When the two concepts are compared, it is clear that there is no basis for saying that they are directly and inextricably linked.

….

The concepts of racial and ethnic origin are not defined in the wording of Section 3(2) of the Ethnic Equal Treatment Act.

However, it is stated in the specific remarks to the provision that the concepts should be understood in accordance with ordinary terminology, such as it is laid down in national and international law, including in CJEU case law on the underlying directive.

Moreover, in the explanatory memorandum it is stated that race is taken to mean a general affiliation with a group of people who are defined on the basis of physical criteria, including skin colour.

Ethnic origin is taken to mean a general affiliation to a group of people who are defined on the basis of common history, traditions, culture or cultural background, language, geographical origin etc.

The question of what is understood by the concept of "ethnic origin" has also been clarified through case law from the CJEU, including in particular the judgment *Jyske Finans A/S* of 6 April 2017, C-668/15.

The case addressed whether the credit institution Jyske Finans A/S had subjected a client to discrimination on the basis of ethnic origin by requesting that the customer send additional legitimation information, since it appeared on his driver's license that he had been *born* outside the EU and EFTA countries.

The CJEU found that this was not the case and stated in that connection:

> *"17 It should be noted in that regard that the concept of 'ethnicity' has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds (judgment of 16 July 2015, CHEZ Razpredelenie Bulgaria, C-83/14, EU:C:2015:480, paragraph 46).*
>
> *18 While a person's country of birth does not appear on that list of criteria, it should be noted that, as the list begins with the words 'in particular', it is not exhaustive and it cannot therefore be ruled out that a person's country of birth might be included among those criteria. However, even if that were the case, it is clear that it is only one of the specific factors which may justify the conclusion that a person is a member of an ethnic group and is not decisive in that regard.*

19 Ethnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective. Moreover, it is not disputed that a country of birth cannot, in general and absolute terms, act as a substitute for all the criteria set out in paragraph 17 above.

20 As a consequence, a person's country of birth cannot, in itself, justify a general presumption that that person is a member of a given ethnic group such as to establish the existence of a direct or inextricable link between those two concepts." (emphasis added)

Thus, the CJEU stated that ethnic origin is more than merely a person's nationality or national origin.

….

The concept of "immigrants and descendants from non-Western countries" is likewise not defined in the Common Housing Act – or, to the best of the ministry's knowledge, any other parts of Danish law.

The concept contains *in part* a distinction between Danes, immigrants, and descendants, and *in part* a distinction between whether these persons come from Western or non-Western countries.

The distinction between Danes, immigrants, and descendants was introduced by Statistics Denmark in October 1991 in the statistical survey no. 43 "Indvandrere og deres efterkommere i Danmark" [English: "Immigrants and their descendants in Denmark"] (**appendix K**). The survey was initiated on the basis of recommendations from a working group appointed by the Minister of Economy about expanding the statistical base on immigration to Denmark.

The concepts have subsequently been used continuously by Statistics Denmark, including in the memorandum "Statistikdokumentation for indvandrere og efterkommere 2017" [English: "Statistical documentation on immigrants and descendants 2017"] (**appendix L**). Here an immigrant is defined as follows:

"An immigrant is a person born abroad, each of whose parents is either a foreign citizen or born abroad. Where there is no information on either parent, an individual is classed as an immigrant if they were born abroad."

Moreover, a descendant is defined in the memorandum:

"A descendant is born in Denmark. Neither of the parents is both Danish citizen and born in Denmark. If there is no available information on either parent, an individual who is a foreign citizen is defined as a descendant. When one or both of the parents, who are born in Denmark, become naturalised, their children will no longer be classified as descendants. However, if the Danish-born parents both maintain their foreign citizenship, their children will be classified as descendants."

The same definitions are being used by Statistics Denmark to this day and appear for example on their website (**appendix M**).

The definitions from Statistics Denmark is also used by the Transport, Construction and Housing Authority when drawing up the annual "ghetto lists", where one finds an overview of all ghetto areas and tough ghetto areas in Denmark. Reference is made to the ghetto list of 1 December 2019 (appendix 6).

Finally, the concept of immigrants and descendants from non-Western countries is used in a broad range of Danish laws also referring to Statistics Denmark's definition. Reference is made to the Administrative Library's list of 15 March 2019 (**appendix N**).

….

Also the other distinction in Section 61a(2) – between Western and non-Western countries – comes from Statistics Denmark. Specifically, their groupings of countries, which are used in the population statistics to describe the immigration and emigration.

The distinction has been further described by an article in Altinget, Mandag Morgen of 27 May 2019 *"Hvem er de ikkevestlige udlændinge alle taler om?"* [English: "Who are the non-Western foreigners everyone speaks about?"] (**appendix O**), where head of department for Population and Education at Statistics Denmark, Henrik Bang, is quoted for saying:

> *"We have used the grouping 'Western and non-Western countries' since 2002, which is a continuation of the previously used UN definition of 'more and less developed countries'."*

In the article, Henrik Bang says that the purpose of the distinction is to group countries that are similar on a number of general and relevant parameters:

> *"'What characterises the distinction is that the countries are similar on some very general parameters, such as demographics and employment,' Henrik Bang explains.*
>
> *'And there is typically a difference in the basis for residence that foreigners from the types of countries come to Denmark with,' he explains.*
>
> *'Persons coming from what we call Western countries almost never come to apply for asylum, while those who come from non-Western countries often come with asylum and family reunification as their basis for residence,' he says"* (emphasis added)

In 2018, Statistics Denmark initiated an examination of whether there was reason to abandon the distinction between Western and non-Western countries and instead apply an alternative distinction. Statistics Denmark found that there was no reason for doing so, which head of department Henrik Bang elaborates on in the article:

> *"The purpose is to make descriptions of immigrants coming to Denmark in order to look at differences and similarities in comparison with the Danish population as a whole. One clearly sees, if one looks at employment and education, that there are large differences between immigrants from Western and non-Western countries. So, analytically the distinction makes sense."* (emphasis added)

Moreover, it is stated in the article that other countries, including Norway and the Netherlands, use a similarly binary distinction of persons from Western and non-Western countries.

The examination by Statistics Denmark, to which the article refers, is described in Statistics Denmark's memorandum of 24 May 2019 *"Notat om indstilling vedrørende anvendelse af landegruppering i DSTs befolkningsstatistikker"* [English: "Memorandum on request concerning the use of country groupings in Statistics Denmark's population statistics"] (**appendix P**).

On page 2 of the memorandum, it is stated that the distinction between Western and non-Western countries represents perfectly legitimate interests, namely by helping to illuminate the socioeconomic consequences of immigration:

> *"[…] In addition, it should be noted that the purpose of the distinction is to describe* inter alia *the cause of immigration, the contribution to the economy, and social conditions. The categorisation of countries as belonging to one group or another thus, as a starting point, has nothing to do with whether the countries in a geographical, political, economic, or cultural*

sense belong to one group or another, since it is the background of the immigrants, including their basis for residence in Denmark as well as their contribution to the economy, which are the determining criteria. For that reason, the grouping of countries is exclusively used for statistics on persons, as the purpose of the grouping is to describe the population." (emphasis added)

This is moreover supported by the fact that as part of the aforementioned examination, it was concluded that the used distinction should be kept in place, because it was statistically and analytically useful, cf. pages 3-4 of the memorandum:

"Thus, it is to a far extent the name that is the problem and not the analytical utility.

[…]

Although there are communicative challenges associated with the distinction 'Western/non-Western countries', it does not change the fact that the distinction is statistically and analytically useful. In addition, the distinction has been written into several pieces of current legislation. Thus, the grouping has to a far extent been institutionalised. Therefore, there will be continued need for calculations and analyses with this distinction as a starting point, which we as the national statistics agency cannot disregard. Building on this, it is not believed to be realistic to rename the groupings." (emphasis added)

….

The comparison of the two definitions shows that the concept of immigrants and descendants from non-Western countries, as it appears in Section 61a(2), is not linked to racial and ethnic origin.

What is decisive for whether a person is an immigrant or descendant is thus the person's own place or birth and/or the person's parents' place of birth and citizenship.

These factors are undoubtedly separate from the question of race, which is based on physical traits.

Even though a person's place of birth can *form part* of determining a person's ethnic origin, it is not in itself the decisive factor, since a broad range of other factors, such as religious conviction, language, cultural background, traditions, and place of living form part of the definition. None of these factors appear in Statistics Denmark´s definitions.

This also appears clearly in the *Jyske Finans* judgment, cf. above, and is concluded illustratively in the first two paragraphs in the opinion of Advocate General Wahl:

"1. What does a person's place of birth say about that person's ethnic origin?

2. Surprisingly little."

This is not changed by the fact that paragraph 3.1.2 in the general remarks to Bill No. 45 of 31 October 2013 emphasises the importance of residents socialising across ethnic origins, as pointed out on page 16 of the application. In that paragraph, the language is political and lifted almost directly from the Parallel Society Package and not a strictly legal interpretation of the concept of non-Western immigrants and descendants.

The applicants have emphasised the CJEU judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, which in their opinion is similar to the present case.

The Ministry of Transport and Housing disagrees.

The *CHEZ* judgment clearly concerned direct discrimination of Romany people, which could not be justified as objective, legitimate, or proportionate.

In addition, the company (CHEZ) being accused of direct discrimination had in a number of previous instances expressed that they thought that the illegal power connections were caused by citizens of Romany origin, cf. para. 82, and that they completely abstained from submitting material to the court for the purpose of justifying this claim, cf. para. 83.

Moreover, the applicants have emphasised the CJEU judgment of 10 July 2008, *Firma Feryn NV*, C-54/07, which concerned an employer's statement that he would not hire "foreigners". On page 15 of the application, the applicants have argued that the judgment is relevant to the present case, because the CJEU found that the concept of "foreigners" was linked to the concepts of racial and ethnic origin.

However, the applicants read the judgment wrongly. The CJEU solely considered whether the lack of an actual victim in the case (no one had been denied employment as a result of the statement) meant that no discrimination had taken place.

The Court merely hypothetically assumed that the company Feryn had taken racial and ethnic origin into account, and stated that in that case, it would have constituted discrimination (despite the lack of a victim), cf. for example para. 25:

> *"25. The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim."* (emphasis added)

Thus, the *Feryn* judgment is not an example of the CJEU considering the concept of "foreigner" as directly linked to racial and ethnic origin, which would also contradict the Court's interpretation of the concept of ethnic origin in the later *Jyske Finans* judgment, cf. above.

….

The comparison of the definitions also show that it is not correct, as the applicants argue on page 15 of the application, that the distinction in the Common Housing Act between Western and non-Western countries is *arbitrary* and based on *the skin colour* of the majority population in the countries in question.

Racial discrimination, in other words.

On the contrary, the distinction is based on a legitimate interest, namely the need for being able to analyse the effects of immigration to Denmark.

Thus, there are significant differences between the socioeconomic consequences of immigration (and descendants) from Western and non-Western countries, and that is why it is legitimate and well-founded to operate with a distinction between them.

This is supported for example by the latest economic analysis by the Ministry of Finance from June 2020 *"Indvandreres nettobidrag til de offentlige finanser i 2017"* [English: "Immigrants' net contribution to the public finances in 2017"] (**appendix Q**), which is based precisely on Statistics Denmark's definitions of immigrants and descendants, cf. for example page 7 of the analysis:

> *"If the net contribution is calculated according to origin on the basis of Statistics Denmark's definition of immigrants, descendants, and persons of Danish origin, non-Western immigrants and descendants carry a net cost of DKK 33 billion in 2017, whereas Western immigrants and descendants contributes positively with about DKK 7 billion, cf. table 1.1."* (emphasis added)

As stated in paragraph 3.2 above, it is these significant differences that are the reason why a broad political majority in 2018 found it necessary to ensure that the share of common family housing in tough ghetto areas is reduced, and that the parallel societies thereby are eradicated.

For that reason, the requirement to make development plans has been aimed specifically at those common housing estates where the share of immigrants and descendants from non-Western countries constitutes more than 50 %. As stated in the bill:

> *"the central challenge in the ghetto areas is the lack of integration of immigrants and descendants from non-Western countries."* (emphasis added)

Seen as a whole, it means that neither the definition of immigrants and descendants nor the distinction between Western and non-Western countries is linked to racial and ethnic origin. Thus, Section 168a(1), in conjunction with Section 61a(2), does not constitute direct discrimination.

4.2.3 No indirect discrimination in violation of Section 3(3), in conjunction with Subsection (1)

It is stated in Section 3(3) of the Ethnic Equal Treatment Act that indirect discrimination shall be taken to occur when an apparently neutral provision, condition, or practice puts persons of a specific racial or ethnic origin at a particular disadvantage compared to other persons.

However, this does not apply if the provision, condition, or practice in question is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary.

The Ministry of Transport and Housing submits:

- that neither the ministry's approval of the development plan for Mjølnerparken nor Section 61a(2) puts persons of a *specific* racial or ethnic origin at a particular disadvantage compared to other persons, and
- that the approval of the development plan and Section 61a(2) in any case are objectively justified by a legitimate aim and are proportionate.

These arguments will be elaborated in the following paragraphs 4.2.3.1 and 4.2.3.2.

4.2.3.1 No persons of a particular racial or ethnic origin have been put at a particular disadvantage

Whereas the question of direct discrimination concerns whether the racial or ethnic origin of the victim of discrimination *has been taken into account*, the question of indirect discrimination concerns *the effect* of a provision, practice etc.

That follows from the specific remarks to Section 3(3), cf. Bill No. 155 of 29 January 2003:

> *"The prohibition of indirect discrimination aims at preventing the application of provisions, conditions, or practices, which despite appearing neutral still will put persons of a specific racial or ethnic origin at a particular disadvantage compared to other persons, unless legitimate interests are pursued, and the means of achieving this or these interests are proportionate to the goal."* (emphasis added)

Moreover, it is stated in the remarks:

> *"The exact assessment of whether the provision etc. in question will put a person of a specific racial or ethnic origin at a particular disadvantage compared to other persons, can be performed on the basis of statistical material about factual circumstances, which demonstrates that the provision etc. in question, in actuality, puts persons of a specific ethnic origin at a particular disadvantage compared to other persons.*

However, it is not always possible to provide the necessary statistical material, and for that reason the provision, in accordance with the directive, gives the option of performing the assessment in any other way, which may render it probable that the provision etc. in question may cause this effect." (emphasis added)

The same is firmly implied in CJEU case law, including for example the *Jyske Finans* judgment, paras. 32 and 33:

"32. As the Advocate General observed in point 64 of his Opinion, for the purposes of ascertaining whether a person has been subject to unfavourable treatment, it is necessary to carry out, not a general abstract comparison, but a specific concrete comparison, in the light of the favourable treatment in question.

33. It follows that the argument that the use of the neutral criterion at issue in the main proceedings, namely a person's country of birth, is generally more likely to affect persons of a 'given ethnicity' than 'other persons' cannot be accepted." (emphasis added)

As it is stated in the quoted paragraphs, the Court refers to advocate general Wahl's opinion. It the opinion, it is stated:

"58. When considering whether Jyske Finans' use of the neutral criterion of place of birth entails indirect discrimination, it could be claimed that targeting persons born outside of the Union or the EFTA States is more likely generally to affect persons of 'a [certain] ethnic origin' adversely.

59. However, such a view is unsustainable.

60. […] the concept of indirect discrimination under that provision requires that the alleged discriminatory measure has the effect of placing a particular ethnic origin at a disadvantage. Put differently, that provision requires identifying the particular ethnic origin (or origins, in case a practice affects several distinct ethnic communities) to which the protection under that directive applies and which has suffered a less advantageous treatment. (emphasis added)

The exposition above shows that it is insufficient for establishing indirect discrimination that a provision puts a larger group of persons – including persons of certain ethnic origins – at a disadvantage. It must be demonstrated concretely and specifically, e.g. with statistical material, that the provision puts one or more *specific* ethnic origins at a disadvantage compared to other persons.

The applicants have not satisfied this burden of proof.

The only thing, to which the applicants have pointed in that regard, is the fact that half of all non-Western immigrants and descendants in Denmark have origins in the same ten countries – Turkey, Syria, Iraq, Lebanon, Pakistan, Bosnia-Herzegovina, Iran, Somalia, Afghanistan, and Yemen, cf. page 21 of the application.

However, this fact only says something about the persons' nationality or national origin. It says nothing about their *ethnic* origin, cf. the *Jyske Finans* judgment.

Take for example Turkey.

If one looks at CIA's annual publication, The World Factbook (**appendix Q**), out of Turkey's approximately 82 million inhabitants, about 70-75 % have Turkish ethnicity. In addition, 19 % of the population have Kurdish ethnicity, and the remaining 7-12 % have other ethnic origins.

The same is true for Syria. Here it appears that out of the country's approximately 19.5 million inhabitants, about 50 % have Arab ethnic origin, 15 % have Alawite ethnic origin, 10 % have Kurdish

ethnic origin, 10 % have Levantine ethnic origin, and 15 % have other ethnic origins. The other ethnicities cover Druze, Ismaili, Imami, Nusairi, Assyrian, Turkoman, and Armenian.

In Iraq, the country's approximately 40 million inhabitants comprise 75-80 % Arabs, 15-20 % Kurds, and 5 % other ethnicities, including Turkmen, Yezidi, Shabak, Kaka'i, Bedouin, Romani, Assyrian, Circassian, Sabaean-Mandaean, and Persian.

In Lebanon, the country's approximately 5.5 million inhabitants comprise 95 % Arabs, 4 % Armenians, and 1 % other ethnicities.

In Pakistan, about 44.7 % of the country's approximately 233.5 million inhabitants have Punjabi ethnic origin. Moreover, 15.4 % have Pashtun ethnic origin, 14.1 % have Sindhi ethnic origin, 8.4 % have Saraiki ethnic origin, 7.6 % have Muhajir ethnic origin, 3.6 % have Balochi ethnic origin, and 6.3 % have other ethnic origins.

In Vietnam approximately 99 million inhabitants live, of whom about 85 % have Kinh ethnicity, about 2 % have Tay ethnicity, and about 2 % have Thai ethnicity. Moreover, 1.5 % have Muong ethnicity, 1.5 % have Khmer ethnicity, about 1 % have Mong ethnicity, about 1 % have Nung ethnicity, and about 1 % have Hoa ethnicity. The remaining 4.3 % have other ethnicities.

It is also stated that the Vietnamese government recognises 54 different ethnicities in total.

The same could be said for all the countries to which the applicants have referred on page 21 of the application.

On that basis, the applicants are invited (**invitation D**) to provide documentation for that Sections 61a and 168a of the Common Housing Act put one or more specific racial or ethnic origins at a disadvantage compared to other persons.

If the applicants fail to provide such documentation, it must be assumed that there are not one or more specific racial or ethnic origins who are being treated less favourably, cf. Section 344(2) of the Administration of Justice Act.

….

When Sections 61a and 168a do not affect one or more racial or ethnic origins, it is because, as stated in paragraph 4.2.2.3 above, that they *include* neither racial nor ethnic origin.

This is supported by Jonas Christoffersen's article *"Indirekte forskelsbehandling på grund af etnisk oprindelse"* [English: "Indirect discrimination on the basis of ethnic origin"] published in U.2008B.17.

In the article, Jonas Christoffersen has examined the preparatory works and case law on the prohibition on indirect discrimination in Section 3(3) of the Ethnic Equal Treatment Act, and has concluded that the legislator has *narrowly* delimited the boundaries for what constitutes indirect discrimination on purpose.

Moreover, he has concluded that a provision etc., which predominantly affects persons with a different ethnic background than Danish, e.g. because the law is based on a criterion about nationality or national origin (such as Section 61a(2) of the Common Housing Act), does not constitute indirect discrimination:

> *"Discrimination on the basis of criteria, which predominantly affect persons with a different ethnic background than Danish – such as nationality, national origin, language skills, religion and belief etc. – will normally affect persons without any further degree of common ethnic*

> *origin. Apparently neutral provision etc. will therefore normally not put persons of a specific racial or ethnic origin in a less advantageous position than other persons."* (emphasis added)

….

Even if it could be demonstrated that Section 61a(2) to a marked degree affects specific ethnic origins, that does not suffice to establish that the provision therefore constitutes indirect discrimination.

The provision applies *indifferently* to *all persons*, who come from non-Western countries.

A category that notedly comprises more than half of the world's population from countries, such as Russia, China, Japan, South Africa, Brazil, Argentina, and Mexico, which have widely different population compositions. And which potentially represent all ethnic origins on Earth.[4]

In the *Jyske Finans* judgment, this fact was decisive for the CJEU's conclusion that the practice concerned in the case (also) did not constitute indirect discrimination. On this, the Court stated:

> *"26 With regard, in the second place, to whether such a practice constitutes indirect discrimination based on ethnic origin, it is necessary to determine whether, in the light of Article 2(2)(b) of Directive 2000/43, that practice, although on the face of it neutral, would put persons of a given racial or ethnic origin at a particular disadvantage compared with other persons.*
>
> *[…]*
>
> *28 In that connection, it was argued before the Court that, whatever the 'less favourably' treated ethnic origin of Mr Huskic, persons of 'Danish ethnicity' will be treated more favourably as a result of the practice at issue in the main proceedings as they are not subject to the requirement in question.*
>
> *29 However, it is sufficient to note that that requirement is applicable without distinction to all persons born outside the territory of a Member State of the European Union or the EFTA."* (emphasis added)

The same was true for the ECtHR's judgment of 28 May 1985, *Abdulaziz, Cabales and Balkandali v The United Kingdom*, application nos. 9214/80, 9473/81, and 9474/81.

The case had been filed jointly by three applicants, Abdulaziz, Cabales, and Balkandali, who had permanent residence in the UK, but their spouses (husbands) were refused permission by the British immigration authorities to join them in that country.

The applicants maintained that the British immigration legislation was in violation of Article 8 of the ECHR (the right to family life), in conjunction with Article 14 (prohibition of discrimination), since they claimed to be victims of a practice of discrimination on the grounds of their race.

The ECtHR found that this was not the case and emphasised in that connection that the rules were applied *indifferently* on immigrants from all parts of the world:

> *"85. The Court agrees in this respect with the majority of the Commission. The 1980 Rules, which were applicable in general to all 'non-patrials' wanting to enter and settle in the United Kingdom, did not contain regulations differentiating between persons or groups on the ground of their race or ethnic origin. The rules included in paragraph 2 a specific instruction to immigration officers to carry out their duties without regard to the race, colour or religion of*

[4] General advocate Wahl likewise emphasised this point in his opinion concerning the *Jyske Finans* case, para. 67.

> *the intending entrant (see paragraph 20 above), and they were applicable across the board to intending immigrants from all parts of the world, irrespective of their race or origin."* (emphasis added)

Furthermore, the ECtHR stated that the fact that the rules to a higher degree affected white persons than black persons [*sic*] was due to the fact that the immigration at that time primarily came from Pakistan as well as Asian and African countries in the British Commonwealth:

> *"That the mass immigration against which the rules were directed consisted mainly of would-be immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not a sufficient reason to consider them as racist in character: it is an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others."* (emphasis added)

The same is true for the present case.

Section 61a(2) applies *indifferently* to all persons who come from or have origin in non-Western countries without taking racial or ethnic origin into consideration – as argued in paragraph 4.2.2.3 above.

In other words, the provision is not apt to discriminate on the basis of racial or ethnic origins.

In that connection, it should be noted that the purpose of Section 168a(1) is to reduce the share of common family housing, *not* reducing the share of persons with non-Western background. There is no basis for saying – as the applicants do – that the *real purpose* of the provision should be something else.

Even if it could be demonstrated that the provision affects more persons with for example Middle Eastern background, it would be due to the fact that – more or less coincidentally – currently it is primarily from this area that the immigration to Denmark is greatest.

However, this could change. Therefore, it is not possible to say that the provision *by its nature* discriminate on the basis of racial or ethnic origin. Thus, it is not in violation of section 3(3) of the Ethnic Equal Treatment Act.

4.2.3.2 The ministry's approval and Section 61a(2) are both objectively justified and proportionate

It is stated in Section 3(3) of the Ethnic Equal Treatment Act that a provision, condition, or practice is not in violation of the provision, if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (proportionality).

As argued in the exposition in paragraphs 31.-3.2 above, Sections 61a(2) and 168a(1) of the Common Housing Act particularly represent the interest of *socio-political goals*, including in particular the interest of ensuring *successful integration*.

The introduction (and the subsequent adjustment) of the scheme by which housing estates – on the basis of *inter alia* the share of immigrants and descendants – are obligated to draft a development plan is thus the result of a *broad political desire* to confront the socio-political challenges caused by immigration from non-Western countries.

Changing governments and the parliament have wished to get rid of parallel societies.

The background for this has been described in detail in Bill No. 60 of 17 November 2010, Bill No. 45 of 31 October 2013, Bill No. 38 of 3 October 2018, and the Parallel Society Package, where it is stated,

- *that* the share of immigrants and descendants from non-Western countries has been increasing since 1980,
- *that* in this section of the population, a range of particular challenges exist concerning for example unemployment and social isolation, which impose a significant and disproportionate economic burden on society,
- *that* this section of the population to a considerable extent lives in common housing estates, which is believed to be caused by the uniform type of housing in common housing estates, and
- *that* this taken as a whole is a significant cause of the emergence of parallel societies in Denmark,

These factors in the aforementioned bills and the Parallel Society Package are <u>all</u> supported by statistical materials and thus constitute <u>objective</u> reasons.

For this reason, the present case distinguishes itself from e.g. the *CHEZ* judgment, where the Court in paras. 116 and 117 more than suggested that the reasons provided by the company CHEZ as justification for their practice were general and subjective. Prejudices and stereotypes.

….

It follows from CJEU case law that the member states have a wide margin of appreciation, *both* with regard to choosing to pursue a specific socio-political goal, *and* with regard to the means of achieving that goal, cf. e.g. CJEU judgment of 11 April 2013, *HK Danmark v. Dansk Almennyttigt Boligselskab and Dansk Arbejdsgiverforening*, C-335/11 and C-337/11, para. 81.

The same is stated in the reasoning by the Supreme Court in U.2002.1789 H in the so-called taxi judgment, which concerned the question of whether a requirement of citizenship as a condition for a taxi driver licence was in violation of the ECHR or the International Convention on the Elimination of All Forms of Racial Discrimination. The Supreme Court found that this was not the case and stated in that connection:

> *"[…] <u>the parliament must be granted a certain discretion</u> when determining whether a requirement of citizenship is appropriate and proportionate to the pursued aim"* (emphasis added)

In the present case, where Sections 61a and 168 [*sic*] of the Common Housing Act have been passed on the basis of a broad and robust political majority, the parliament must likewise be granted a wide discretion.

Moreover, the CJEU has explicitly confirmed that the objective of ensuring the successful integration constitutes an <u>overriding reason in the public interest</u> under EU law, cf. e.g. CJEU judgment of 12 April 2016, *Caner Genc v Integrationsministeriet*, C-561/14, paras. 54-56.

In that connection, the CJEU has emphasised that the integrating measures aimed at third-country nationals carry special weight in EU law. Among other things, this is due to the fact that it is clear from Article 79(4) of the TFEU that such measures are to be encouraged and supported, just as it is stressed in a number of EU legal instruments that the integration of third-country nationals is a key factor in promoting social and economic cohesion, a fundamental objective of the Union set out in the Treaty.

On that basis, the Ministry of Transport and Housing submits that Sections 168a and 61a of the Common Housing Act are objectively justified by legitimate interests. Naturally, the same is true for the ministry's approval of the development plan for Mjølnerparken.

….

In addition, the Ministry of Transport and Housing submits that the ministry's approval and Sections 61a and 168a of the Common Housing Act are proportionate.

As stated on page 23, it follows from CJEU case law that the appraisal of the proportionality of an intervention is based on whether the intervention is *appropriate* and *necessary* to achieve the pursued aim, cf. e.g. the *CHEZ* judgment, paras. 119-120.

In the opinion of the ministry, Sections 61a and 168a of the Common Housing Act are undoubtedly, under the present circumstances, appropriate as integrative measures.

As stated above, changing governments and parties across the political spectrum have considered *that* parallel societies constitute a problem for society, *that* they emerge in common housing estates as a result of a uniform form of housing, and *that* they particularly emerge among immigrants and descendants from non-Western countries.

All these reasons are supported by statistical data.

The appropriateness is further supported by the fact that the measures have been shown to have a positive effect on the extent of parallel societies. Thus, in the latest report on Parallel Societies by the Ministry of Transport and Housing, published in June 2020 (**appendix S**), the following is stated in the summary on page 7:

> *"When the resident composition in the vulnerable housing estates is considered, the development since the passing of the parallel society agreement in 2018 has been positive. More people have found employment, more people achieve higher education than primary school, and the average income has increased. Only with regard to the number of former convicts, the* status quo *has remained. However, despite the positive development, there are many areas fulfilling the criteria of residents with a weak connection to the labour market and who only have primary school education."* (emphasis added)

Sections 61a and 168a are also necessary for achieving the aim of successful integration.

Thus, there is no basis for saying that less intrusive measures could solve the same challenges.

Firstly, this is due to the fact that less intrusive measures have been *attempted* and have been found insufficient.

In that connection, reference is made to the Programme Board's report from November 2008 *"Fra udsat boligområde til hel bydel"* (appendix C) described in paragraph 3.1 above.

It is stated in paragraph 4 of the report that since the 1980s, a wide range of initiatives have been taken, which are less intrusive than the ones introduced with the "ghetto criteria" in 2010 and the Parallel Society Package in 2018. As it is stated in the Programme Board's recommendations in paragraph 3.2 of the report, none of the mentioned initiatives have had the desired effect.

On that basis, the Programme Board recommended the government to, among other things, create the framework so that the housing associations and municipalities could create *radical physical and social transformations* in the vulnerable housing estates.

Moreover, the so-called ghetto criteria in Section 61a of the Common Housing Act have continuously been updated and adjusted.

It has continuously been ensured that the provision – and the associated effects – have met the contemporary needs in relation to the aforementioned legitimate aim of integration.

It is for example stated in the general remarks to Bill No. 38 of 3 October 2018 that the amendment, by which the requirement about the number of non-Western immigrants and descendants was made mandatory and the obligation to draft development plans was introduced, was caused by a need to update and consolidate the provisions, *"so they would become more robust, and so that it could be ensured that efforts were aimed at the right areas."*

The amendment in question notedly not only entailed a *tightening-up* of the of the conditions in Section 61a(1) of the Common Housing Act, but also relaxation of certain conditions.

The criterion in Section 61a(1)(*3*) (previously no. (*4*)) was relaxed so that only common housing estates, where more than 60 % of the residents between the ages of 30 and 59 years only had primary school education, would fulfil the condition. Prior to the amendment, it was 50 %.

In other words, when it was decided to make the condition about the share of immigrants and descendants from non-Western countries mandatory for determining whether an area was a ghetto, it was because it upon a concrete assessment was believed to be needed. The lack of integration of immigrants and descendants from non-Western countries was – as stated on page 6 of the bill – a *central challenge*.

In that way, the case distinguish itself from the *CHEZ* judgment, where the CJEU stated in relation to the proportionality assessment:

> *"25. It will also be incumbent upon it to take into consideration the binding, widespread and long-standing nature of the practice at issue which, as is common ground, and as has already been pointed out in paragraph 84 of the present judgment, is imposed without distinction and lastingly on all the inhabitants of the district concerned notwithstanding the fact — which is for the referring court to verify — that no individual unlawful conduct is attributable to most of them and they cannot be held accountable for such acts caused by third parties either."* (emphasis added)

Moreover, Mjølnerparken is a good example of why the introduction of development plans has been necessary. As stated in paragraph 3.3 above, member of the municipal council of Copenhagen Jonas Bjørn Jensen said that none of the initiatives taken the last 10 years have had the necessary effect on Mjølnerparken.

When it is not possible to say that less intrusive measures could solve the problem, it is secondly because Sections 61a and 168a of the Common Housing Act are not particularly *intrusive*.

The obligation in Section 168a(1) to draft a development plan thus exclusively requires that the common housing association and the municipal council reduce the number of common family units. The provision does not dictate specific means to achieve the aim.

As the applicants themselves point out on page 23 of the application, it is stated in the explanatory memorandum to Bill No. 38 of 3 October 2018 that the requirement could be fulfilled by a broad range of different methods. Thus, it would count to build new units that are not common housing, to sell either common housing units or undeveloped plots, to establish commercial areas, to move in municipal workplaces, to demolish common housing units as well as to re-categorise common family units.

Whether a development plan could be said to be too intrusive for a concrete tenant depends on the concrete circumstances in the individual case. The assessment cannot be made *generally* in relation to the Common Housing Act.

The fact that the branch board in Mjølnerparken has been able to draft a development plan, which in their opinion does not entail discrimination on the basis of racial or ethnic origin, illustrates the fact that Sections 61a and 168a cannot *generally* be said to be in violation of the Ethnic Equal Treatment Act.

In addition, both the Common Housing Act and the ministerial order on the physical transformation of tough ghetto areas contain the option for the minister to dispense with the requirement of reduction. Naturally, however, this requires a request from the common housing association and the municipal council.

In the present case, Bo-Vita and the Municipality of Copenhagen have not submitted such a request, and therefore the ministry neither has nor should have considered whether the requirement should have been dispensed with.

Finally, the Ministry of Transport and Housing has ensured that the legal framework generally speaking is in place so that those tenants, who may be affected by the sale of their flats, can be rehoused within the same area where they reside. This way, the ministry has provided legal basis for the tenants being affected *as little as possible* by a decision to sell.

Given that the member states' wide margin of appreciation also includes *which* measures can be applied to achieve a legitimate aim, the Ministry of Transport and Housing submits that Sections 61a and 168a of the Common Housing Act are both appropriate and necessary to achieve the aim of successful integration.

The same is true for the ministry's approval of the development plan for Mjølnerparken, which – as previously argued – solely concerned ensuring that the formal criteria in the Common Housing Act were fulfilled.

4.2.4 No instruction to discriminate in violation Section 3(5)

It is stated in Section 3(5) of the Ethnic Equal Treatment Act that an instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination.

In that connection, the Ministry of Transport and Housing submits that neither the ministry's approval of 10 September 2018 of the development plan for Mjølnerparken nor Sections 61a and 168a of the Common Housing Act constitute *instruction* to discriminate on the basis of racial or ethnic origin.

Firstly, it is stated in the specific remarks to Section 3(5) that it is a condition for applying the provision that the person giving the instruction has *powers of direction* or supervisory authority over the person receiving the instruction. There must be a certain legal subordination.

By virtue of its preparatory works, the provision is sufficiently clear, and therefore it is not correct, as the applicants argue on page 24 and 25 of the application, that the prohibition on instruction in Section 3(5) should be interpreted to include all attempts at discriminating, even without coercion.

Regardless of what may follow from Article 4(c) of the International Convention on the Elimination of All Forms of Racial Discrimination or other provisions in the convention, it cannot lead to a *contra legem* interpretation of Section 3(5).

As stated above in paragraph 4.2.2.1 above, the Ministry of Transport and Housing does not have powers of direction over Bo-Vita and the Municipality of Copenhagen with regard to how to concretely fulfil the requirement of reduction in Section 168a(1) in the Common Housing Act.

Thus, there is no basis for saying that the approval constituted an instruction to discriminate on the basis of racial or ethnic origin.

Secondly, this is supported by the specific remarks to Section 3(5), where it is stated that the provision particularly applies to the relationship between employer and employee, by which the employer instructs the employee to discriminate in connection with performing their tasks within the scope of the law.

So the provision in Section 3(5) aims at a fundamentally different type of situations than the one in the present case.

With regard to Section 61a(2), reference is made to the ministry's argument in paragraph 4.2.2.3 above, where it *inter alia* is argued that the reference to immigrants and descendants from non-Western countries is not linked to racial and ethnic origin.

4.2.5 Not in violation of the ECHR

The Ministry of Transport and Housing submits that the ministry's approval of the development plan for Mjølnerparken and Section 61a(2),

- do not constitute an independent violation of Article 8 of the ECHR, cf. paragraph 4.2.5.1 below,
- do not constitute an independent violation of Article 1 of Protocol No. 1 to the ECHR, cf. paragraph 4.2.5.3 below,
- do not constitute an independent violation of Article 2 of Protocol No. 4 to the ECHR, cf. paragraph 4.2.5.4 below,
- do not constitute a violation of Article 14 of the ECHR in conjunction with the aforementioned provisions, cf. paragraph 4.2.5.5 below.

These arguments will be elaborated below.

4.2.5.1 Generally about the examination under the ECHR

In cases concerning violations of the ECHR, *direct burden of proof* is the point of departure, cf. e.g. P. Lorenzen et al., *"Den Europæiske Menneskerettighedskonvention med kommentarer"*, vol. 1, page 40. In the present case, it is thus the applicants who must demonstrate that their rights have been violated.

It goes for all the aforementioned provisions of the ECHR, that an intervention in those rights does not constitute a violation of the convention, if it can be demonstrated that the intervention is *objectively justified* and *proportionate*.

4.2.5.2 Not a violation of Article 8 (family and private life)

It is stated in Article 8(1) that everyone has the right to respect for their private and family life, their home, and their correspondence.

Article 8(2) states that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Ministry of Transport and Housing understands the applicants' argument to be that the ministry's approval of the development plan for Mjølnerparken and Section 168a of the Common Housing Act constitute a violation of the applicants' right under Article 8, because it *prevents* the applicants from *staying* in their rental units, cf. page 27 of application.

The Ministry of Transport and Housing agrees with the applicants that a measure, which forces persons to move away from their home, may constitute a violation of Article 8 of the ECHR. However, the ministry holds that that does not apply in the present case.

Firstly, Sections 61a and 168a have not in themselves had any direct effect on the applicants' housing situation, and the Ministry of Transport and Housing is, in any case, not responsible for a possible intervention in the applicants' rights under Article 8.

Secondly, Sections 61a and 168a are objectively justified and proportionate. Reference is made to the ministry's argument to this effect in paragraph 4.2.3.2.[5]

4.2.5.3 Not a violation of Article 1 of Protocol No. 1 (the right to protection of property)

It is stated in Article 1(1) of Protocol 1 that every natural or legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

On page 29 of the application, the applicants have submitted that the approval by the Ministry of Transport and Housing of the development plan for Mjølnerparken (and, implicitly, Section 168a of the Common Housing Act) constitute an intervention in their right to the *peaceful enjoyment of their possessions*.

The Ministry of Transport and Housing agrees with the applicant that a measure, which forces persons to move away from their home, may constitute a violation of Article 1 of Protocol No. 1 to the ECHR. However, the ministry holds that that does not apply in the present case.

Firstly, Sections 61a and 168a have not in themselves had any direct effect on the applicants' housing situation, and the Ministry of Transport and Housing is, in any case, not responsible for a possible intervention in the applicants' rights under Article 1.

Secondly, Sections 61a and 168a are objectively justified and proportionate. Reference is made to the ministry's argument to this effect in paragraph 4.2.3.2.

In that connection, it should be noted that the present case differs significantly from *Berger-Krall and Others v Slovenia* of 12 June 2014, application no. 14717/04, which concerned a Slovenian law entailing a significant worsening of the conditions in a number of special leases on state-owned properties, which had been entered immediately after the Second World War. The Court found that the law constituted an intervention in the right to protection of property, precisely because of the worsening of the tenants' rights, cf. para. 181.

In the present case, the ministry's approval of the development plan (as well as Section 168a) does not entail a significant worsening of the tenants' conditions, cf. the above argument about rehousing etc.

4.2.5.4 Not a violation of Article 2 of Protocol No. 4 (residence)

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[5] In the referred paragraph, CJEU case law is discussed, where the Court has stated that the interest of successful integration constitutes an overriding public interest. The same applies for the ECtHR, which in the case *Osmanoğlu and Kocabaş v Switzerland*, application no. 29086/12, of 10 January 2017 found that the pursued aim was legitimate when Muslim parents were fined for refusing to let their daughter participate in compulsory swimming lessons due to religious reasons. The Court stated *inter alia* that the interest of integration could fall under the legitimate aims listed in Article 9 (freedom of religion) and e.g. Article 8, including in particular protection of the rights and freedoms of others or the protection of public order, cf. paras. 64-65.

It is stated in Article 2(1) of Protocol No. 4 to the ECHR that everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose their residence.

Article 2(2) [*sic*] states that no restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Finally, Article 2(4) prescribes that the rights set forth in paragraph (1) may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

On page 25 of the application, the applicants have submitted that the ministry's approval of the development plan (and Section 168a(1) of the Common Housing Act) limit their right to *choose their residence*, since they no longer have access to a residence within Mjølnerparken.

The Ministry of Transport and Housing agrees with the applicant that a measure, which forces persons to move away from their home, may constitute a violation of Article 2 of Protocol No. 4 to the ECHR. However, the ministry holds that that does not apply in the present case.

Firstly, Sections 61a and 168a have not in themselves had any direct effect on the applicants' housing situation, and the Ministry of Transport and Housing is, in any case, not responsible for a possible intervention in the applicants' rights under Article 2.

Secondly, Sections 61a and 168a are objectively justified and proportionate. Reference is made to the ministry's argument to this effect in paragraph 4.2.3.2.

In that connection, it should be noted that the ECtHR in the judgment *Garib v the Netherlands*, application no. 43494/09, of 6 November 2017, ruled that a Dutch piece of legislation that limited the access to settle in certain areas of Rotterdam for persons, who fulfilled specific socio-economic criteria, was not in violation of Article 2 of Protocol No. 4.

Although the factual circumstances in that case differed from the present case, the judgment illustrates the margin of appreciation enjoyed by member states in questions of for example housing legislation. Thus, the Dutch authorities had given the public interest more weight than the interest of the individual tenants, which ECtHR found to be in accordance with the convention, cf. para. 166.

Moreover, the ECtHR took into account that the intervention was of low intensity and did not significantly affect the applicant, cf. paras. 164-165. As in the *Garib* judgment, the present case does not concern a disproportionate provision, since rehousing will take place within the same areas as mentioned above.

4.2.5.5 Not a violation of Article 14

Article 14 states that the enjoyment of the rights and freedoms set forth in the convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Whereas Article 8, Article 1 of Protocol No. 1, and Article 2 of Protocol No. 4 to the ECHR contain *independent* rights, Article 14 does not have *its own content*. Thus, it complements the other rights and ensures that the rights may be enjoyed without discrimination.

The Ministry of Transport and Housing refers generally to paragraph 4.2 above, as the ministry in particular submits that 1) the applicants have not been discriminated against, 2) that the discrimination in any case is justified by objective and legitimate reasons, and 3) that the discrimination is proportionate.

4.3 Summary of the ministry's arguments

On the basis of paragraphs 4.1 and 4.2 above, the arguments submitted by the Ministry of Transport and Housing can be summarised as follows.

In support of the claim for dismissal, the Ministry of Transport and Housing maintains,

- that the applicants' claim is unsuitable for a ruling,
- that the applicants lack legal standing,
    - because the approval by the Ministry of Transport and Housing of the development plan for Mjølnerparken is addressed to Bo-Vita and the Municipality of Copenhagen and does not affect the applicants in a concrete and relevant way, and
    - because Sections 61a and 168a of the Common Housing Act do not affect the applicants so concretely and relevantly that they can have it examined whether the provisions generally are in violation of the Ethnic Equal Treatment Act etc.
- that the Ministry of Transport and Housing is not the correct respondent in a case concerning the question of whether the content of the development plan for Mjølnerparken is in violation of the Ethnic Equal Treatment Act etc.

In support of the claim for acquittal, the Ministry of Transport and Housing maintains,

- that the applicants must lift the burden of proof that they have been subjected to discrimination in violation of the Ethnic Equal Treatment Act, EU law as well as that they have had their rights violated under the ECHR,
- that neither the ministry's approval of the development plan for Mjølnerparken nor Sections 61a and 168a of the Common Housing Act constitute direct discrimination of the applicants,
    - because the applicants neither are being, nor have been, nor will be discriminated against,
    - because there is no reference to racial or ethnic origin in the approval or the provisions of the Common Housing Act, and
    - because there is no basis for saying that the reference in Sections 61a(2) is directly and inextricably linked to racial and ethnic origin.
- that neither the ministry's approval nor Sections 61a and 168a of the Common Housing Act constitute indirect discrimination of the applicants,
    - because the applicants have not demonstrated that one or more *specific* racial or ethnic origins are being treated less favourably,
    - because both the approval and the provisions of the Common Housing Act are objectively justified by the interest of successful integration and are proportionate.
- that neither the ministry's approval nor Sections 61a and 168a of the Common Housing Act constitute instruction to discriminate, since the ministry does not have the necessary powers of direction over Bo-Vita and the Municipality of Copenhagen, and
- that neither the ministry's approval nor Sections 61a and 168a of the Common Housing Act constitute a violation of the ECHR, because both the approval and the provisions are objectively justified and proportionate.

5. PROCEDURAL NOTIFICATIONS

to the respondent may be directed to attorney Peter Biering and attorney Emil Wetendorff Nørgaard, Vester Farimagsgade 23, 1606 Copenhagen V (case no. 4001256).

6. VAT REGISTRATION

The respondent, the Ministry of Transport and Housing, is not registered for VAT.

7. DOCUMENTS

Appendix A: Memorandum of 1 December 2019 by the Ministry of Transport and Housing, "List of ghetto areas as of 1 December 2019"

Appendix B: Excerpt from "Regeringens strategi mod ghettoisering" of May 2004 (pages 1-10)

Appendix C: Excerpt from report of November 2018 "Fra udsat boligområder til hel bydel" (pages 1-15, 35-73, and 74-78).

Appendix D: Excerpt from policy paper of March 2018 "Ét Danmark uden parallelsamfund – ingen ghettoer i 2030" (pages 1-15).

Appendix E: TV2 Lorry article of 6 March 2020 *"Mjølnerparkens beboere i åbent brev til S: I kan stoppe salg, hvis I vil".*

Appendix F: TV2 Lorry article of 11 February 2020 *"Mjølnerparkens beboerformand vil af ghettolisten – men ikke ved at sælge boliger"*.

Appendix G: Information article of 25 January 2020 *"Beboere nægter at flytte ud af Mjølnerparken, når bygningerne skal sælges"*.

Appendix H: Information article of 10 June 2020 *"Boligministeriet giver ikke klar opbakning til at flytte beboere ud af Mjølnerparken"*.

Appendix I: Letter of 20 April 2020 from the Ministry of Transport and Housing to the Municipality of Copenhagen, *"Vedr. genhusning i forbindelse med udviklingsplaner"*

Appendix J: Information article of 18 February 2020 *"Mjølnerparkens boligselskab føler sig som syndebuk i politisk spil om ghettoplanen"*.

Appendix K: Excerpt from Statistics Denmark's statistical survey no. 43 of October 1991, *"Indvandrere og deres efterkommere i Danmark"* (pages 1-4).

Appendix L: Excerpt from Statistics Denmark's statistical overview *"Statistikdokumentation for indvandrere og efterkommere 2017"* (pages 1-3).

Appendix M: Screen dump from Statistics Denmark's website (as of 1 September 2020)

Appendix N: The Administrative Library's list of 15 March 2019 of the use of the concept of Western/non-Western countries in Danish legislation (the list is also included as appendix 2 to Statistics Denmark's memorandum of 24 May 2019, cf. appendix P below).

Appendix O: Altinget, Mandag Morgen article of 27 May 2019, *"Hvem er de ikke-vestlige udlændinge alle taler om?"*.

Appendix P: Statistics Denmark memorandum of 24 May 2019, *"Notat om indstilling vedrørende anvendelse af landegruppering i DST's befolkningsstatistikker"*.

Appendix Q: Excerpt from economic analysis of June 2020 by the Ministry of Finance, *"Indvandreres nettobidrag til de offentlige finanser i 2017"* (pages 1-7).

Appendix R: Relevant excerpts from the CIA's annual publication: The World Factbook (information concerning Turkey, Syria, Iraq, Lebanon, Pakistan, Bosnia-Herzegovina, Iran, Somalia, Afghanistan, and Vietnam) (screen dump from 1 September 2020).

Appendix S: Excerpt from memorandum of June 2020 from the Ministry of Transport and Housing *"Redegørelse om Parallelsamfund"* (pages 1-12)

Copenhagen, 1 September 2020

[Signature]

Peter Biering

Partner, Attorney