Rejoinder

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*)

The applicants' reply of 30 November 2020 does not give the Ministry of Transport and Housing cause to amend its claims, which continue to be:

1. CLAIMS
In the first instance: Dismissal.

In the second instance: Acquittal.

CONTENTS

2. INTRODUCTION

2.1 Structure of the pleading

As already mentioned, the Ministry of Transport and Housing maintains its claims and does not find cause to submit new arguments in light of the applicants' reply of 30 November 2020. Thus, in the following, the arguments made in the ministry's response of 1 September 2020 will be elaborated on to the extent that the reply gives cause for it.

Fundamentally, the present pleading follows the same structure as the response.

In section 3, the Ministry of Transport and Housing submits a request to separate the claim for dismissal and the question of correct respondent from the main proceedings, in accordance with Section 253(1) and (2) of the Administration of Justice Act, and in section 4 the request for hearing several cases in connection with each other is maintained and elaborated on, in accordance with Section 254(1). The ministry elaborates on its arguments in section 5, where paragraph 5.1 concerns the claim for dismissal, and paragraph 5.2 concerns the claim for acquittal. In section 6, the ministry explains why there should be no preliminary reference to the CJEU as requested by the applicants.

2.2 The subject-matter of the case is still not clear

Already here, the Ministry of Transport and Housing finds cause to draw attention to the fact that it is still not clear what the subject-matter of the present case is. In other words, the ministry does not know what the applicants want the High Court to decide on in the present case.

The applicants have – in responding to the ministry's invitation B – stated in the reply that they wish that the present case should concern the ministry's *approval* of the development plan for Mjølnerparken. Nonetheless, several places in the reply, it appears that, in reality, it is something else that the applicants are discontented with. In part, it is the decision that their tenancies are to be sold (and that they for that reason may have to vacate the premises), and, in part, Sections 61a and 168a of the Common Housing Act more generally.

The applicants should be clearer in their presentation of this, since it among other things bears on the question of legal standing and the correct respondent, cf. in further detail paragraph 5.1.2 below. That is one of the reasons why the ministry requests that these questions be separated from the main proceedings, cf. immediately below.

3. REQUEST FOR SEPARATION FROM THE MAIN PROCEEDINGS, CF. SECTION 253(1) AND (2) OF THE ADMINISTRATION OF JUSTICE ACT

When the Ministry of Transport and Housing maintains the claim for dismissal, it is supported, in part, by the fact that the applicants' claim (still) is unclear and unsuited for a ruling and, in part, by the fact that the applicants (still) lack legal standing. Moreover, the Ministry of Transport and Housing maintains the claim for acquittal, which is supported, in part, by the fact that ministry (still) is not the correct respondent.

The Ministry of Transport and Housing requests the Eastern High Court to *separate* the claim for dismissal as well as the question of whether the ministry is the correct respondent from the main proceedings, cf. Section 253(1) and (2).

As stated in paragraph 4.1 of the response and in paragraph 5.1 below, there is a strong presumption that the case should be dismissed on the basis of the lack of legal standing. This is the case, in part, because the applicants – without a concrete and immediate interest – wish a ruling on whether the provisions in Sections 61a and 168a of the Common Housing Act are in violation of the rules on ethnic

equal treatment, and, in part, because the applicants are not the addressees of the ministry's approval of the development plan for Mjølnerparken, cf. in particular U2013.3295H.

Similarly, there is a strong presumption that the ministry ought to be acquitted already because the ministry is not the correct respondent. Thus, it is not the ministry that has decided that the applicants' homes are to be sold. The ministry has approved the decision, but based on a number of legal and administrative criteria, which in their *substance* have nothing to do with the decision to sell.

A ruling on these questions could end the proceedings without a need for the High Court to consider the rules on ethnic equal treatment in Danish law, EU law, and the ECHR, including whether there is reason to refer questions to the CJEU as requested by the applicants.

Thus, a separate ruling on the above-mentioned questions would entail procedural savings for the parties and the High Court.

4. REQUEST TO CONNECT SEVERAL CASES, CF. SECTION 254(1) OF THE ADMINISTRATION OF JUSTICE ACT

The Ministry of Transport and Housing has by letter of 4 December 2020 requested that the present case be connected to the cases concerning Ringparken in Slagelse (case nos. BS-26702/2020-0LR, BS-26704/2020-0LR, BS-26705/2020-0LR, and BS-26706/2020-0LR), cf. Section 254(1) of the Administration of Justice Act.

The applicants have by note of 4 December 2020 (submitted digitally) preliminarily objected to connecting the cases; in part, because the Ministry of Transport and Housing has submitted a claim for dismissal in the present case, and, in part, because the applicants are not of the opinion that it is appropriate to connect the cases. In this connection, the applicants have called on the Ministry of Transport and Housing to elaborate its request to connect the cases in the rejoinder.

….

The Ministry of Transport and Housing maintains the request to connect the cases, cf. Section 254(1). Thus, the ministry holds that connecting the cases would be *appropriate* – regardless of whether the High Court in the present case should decide to separate the questions of legal standing and the correct respondent from the main proceedings, cf. above.

It is correct, as stated by the applicants in the note of 4 December 2020, that the cases do not concern *exactly the same* factual circumstance. The cases regarding Ringparken in Slagelse thus concern the termination of four specific tenancies, whereas the present case is different and unspecified, and concerns – as expressed by the applicants – the threat of termination. However, the difference between the factual circumstances of the cases is not of material importance to the question of connecting the cases.

In any case, in both cases it has been submitted – whether the applicants will stand by it or not – that Sections 61a and 168a of the Common Housing Act are the underlying reason for the alleged discrimination.

In the cases about Ringparken, the terminations have been carried out on the basis of a development plan drafted under Section 168a(1) of the Common Housing Act and approved by the Ministry of Transport and Housing in accordance with Section 168a(2) of the Common Housing Act. The applicants in that case have also submitted a separate claim for the applicant (*Dansk Almennyttigt Boligselskab* (henceforth "DAB")) to acknowledge that Section 61a of the Common Housing Act is void.

In the present case, the threat of termination, to which the applicants refer, is due to the fact that Bo-Vita and the Municipality of Copenhagen have drafted a development plan on the basis of Section 168a(1) of the Common Housing Act that states that certain units are to be sold.

Sections 61a and 168a of the Common Housing Act are also relevant for the questions of legal standing and the correct respondent.

On that basis, it is the view of the Ministry of Transport and Housing that connecting the above-mentioned cases with the present one would give the High Court a better and broader understanding of how the rules of the Common Housing Act function both legally and practically, just as it would give the High Court a better basis for deciding on the requests for referral to the CJEU, which have been put forward in both cases.

This is supported by the fact that both the applicant in the cases about Ringparken as well as *Danmarks Almene Boliger*, which intervenes as a third-party in these cases, agree with the Ministry of Transport and Housing that connecting the cases would be appropriate.

5. ELABORATION OF THE ARGUMENTS

5.1 The claim for dismissal

In support of the claim for dismissal, the Ministry of Transport and Housing argued on page 16ff of the response that the applicants' claim is *unclear and unsuited* for an operative ruling.

In that connection, the ministry invited the applicants to clarify their claim (invitation A) and to state whether they want a concrete examination of the ministry's approval of 10 September 2019 of the development plan for Mjølnerparken or an abstract examination of the rules in the Common Housing Act (invitation B).

The applicants have (in response to invitation B) on page 1-3 of the reply stated that they with the claim wish a *concrete examination* of whether the ministry's approval of the development plan for Mjølnerparken entails a violation of their rights. At the same time, the applicants have (in response to invitation A) clarified the claim so that it now appears exactly which rights that allegedly have been violated.

The reply gives cause to three remarks, cf. paragraphs 5.1.1-5.1.3 below.

5.1.1 The applicants' claim is still unsuited for a ruling

The Ministry of Transport and Housing maintains that the applicants claim (still) constitutes an argument, and that the claim therefore is unsuited for an operative ruling.

Even after the rectification, it is not stated in the claim what operative legal consequence the applicants wish to have imposed on the ministry. Thus, the ministry would not – as the claim stands – be able to fulfil a judgment in favour of the applicants.

5.1.2 The applicants' claim is still unclear

Moreover, the Ministry of Transport and Housing maintains that it is (still) unclear what the subject-matter of the present case is.

Despite the above-mentioned clarification that the applicants only wish an examination of the ministry's approval of 10 September 2019 of the development plan for Mjølnerparken, throughout the reply, the applicants state that it is the rules in the Common Housing Act, generally, that they are discontented with. For example, it is stated on page 4-5 of the reply that:

> *"Thus, as a direct consequences of the approval of the Development Plan by the Ministry of Transport and Housing, the applicants are being treated less favourably than other residents in housing estates characterised as vulnerable housing estates, because the applicants face losing their homes as a consequence of a development plan that only exists because the number of residents in Mjølnerparken with non-Western ethnic origin is higher than in other socio-economically comparable housing estates.*
>
> *…*
>
> *Likewise, it is maintained that the offensive and stigmatising nature, on which the approval of the Development Plan rests, including the categorisation of the housing estate as a "ghetto" and "tough ghetto" based on the number of residents with non-Western origin, constitutes unfavourable treatment under the EU directive and the ECHR." (emphasis added)*

When the Ministry of Transport and Housing is preoccupied with whether the applicants wish an examination of the rules of the Common Housing Act, the development plan, or the approval of the development plan, respectively, it is because that it, in principle, concerns *three different cases* with each their content.

One case regarding the approval by the Ministry of Transport and Housing of the development plan for Mjølnerparken must, in the ministry's opinion, concern whether the approval – in itself as an administrative act – is unlawful in one way or another.

As argued on page 11-12 and page 20 of the response, the approval by the minister of transport and housing of developments regulated in Section 168a(2) and (3) of the Common Housing Act and in Ministerial Order No. 1354 of 27 November 2018 on the physical transformation of tough ghettos.

In the specific remarks to Section 168a(2) (Bill No. 38 of 3 October 2018), it has been explained further what the legislature expects the minister to take into account when deciding on whether to approve a development plan. Here it is stated that the minister must assess whether the development plan is realistic and sufficient for the purpose of turning round the housing estate.:

> *"The requirement that the development plan shall be subject to the Minister's approval means that the Minister shall assess, whether the plan is realistic and adequate in relation to reversing the development of the housing estate, including whether the transformation is planned to be finalised before 2030. Thus, that the plan has as its aim to reduce the share of common family dwellings to maximum 40 % of all dwellings in the housing estate will not in itself mean that the conditions for the Minister's approval are fulfilled." (emphasis added)*

This is consistent with the criteria in Section 13 of the ministerial order, which lists the factors that the minister must take into account in particular in the approval, just as it is also consistent with Section 14, which states that the minister may require amendments to the development plan, including at specified times, if the minister cannot approve the development plan.

The Ministry of Transport and Housing has in Section 168a(2) of the Common Housing Act been given the *specifically delimited* task to approve development plans. The minister of transport and housing is not supposed to interfere with the *specific choices* made by the housing associations and municipal councils when drafting the development plans, unless it is clear that the choices in question are not realistic to fulfil the legal requirement to reduce the share of common family housing.

The approval of 10 September 2019 by the minister of transport and housing of the development plan for Mjølnerparken (appendix 9) is in accordance with Section 168a(2) of the Common Housing Act and

the ministerial order on the physical transformation of tough ghettos, since the minister assessed that the development plan drafted by Bo-Vita and the Municipality of Copenhagen was realistic and adequate in relation to the legal requirements.

There is no basis for arguing that the Ministry of Transport and Housing proactively must ensure that for example the common housing associations respect the rules of non-discrimination. This is further supported by the fact that the development plan has been drafted by, among others, the Municipality of Copenhagen.

This does not in any way leave the applicants in a legal vacuum. If they hold that they have been discriminated against on the basis of the development plan for Mjølnerparken, because it entails that they must vacate the premises of their tenancies, they have the option of making their claims against Bo-Vita and the Municipality of Copenhagen.

The above-mentioned fact must be clear to the applicants, and therefore it continues to puzzle the Ministry of Transport and Housing that the applicants have chosen to sue the ministry in the present case.

It is the ministry's view that the applicants' decision to sue the Ministry of Transport and Housing rather than Bo-Vita and the Municipality of Copenhagen and to attempt to build the case on the ministry's approval of the development plan for Mjølnerparken, while arguing that it is the rules of the Common Housing Act that are unlawful, is indicating a *constructed dispute*, possibly for the purpose of referring the question to the CJEU, cf. U2000.1276Ø (Dominic King).[1]

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

In the reply, the applicants have invited (1) the Ministry of Transport and Housing to state whether the ministry maintains that the respondents [*sic*] do not have legal standing.

In response to the invitation, the Ministry of Transport and Housing can inform the applicants that the ministry maintains the argument about legal standing, and that the argument is submitted regardless of whether the applicants wish an abstract or a concrete examination.

As argued in paragraph 4.1.2 of the response, the ministry is not of the opinion that the applicants have a concrete and immediate interest in an abstract examination of whether Sections 61a and 168a are in violation of the rules of non-discrimination. Such an examination would under the circumstances amount to a legal opinion for its own sake.

Thus, the applicants are not concretely, immediately, and individually affected by the rules of the Common Housing Act in themselves, but rather by the concrete choices made specifically for Mjølnerparken by the common housing association and the municipal council. The fact that the applicants live in a common housing estate, like nearly 1 million other persons in Denmark, does not in itself mean that the applicants have legal standing to have the provisions of the Common Housing Act examined.

The Ministry of Transport and Housing is also not of the opinion that the applicants have a concrete and immediate interest in a concrete examination of the ministry's approval of 10 September 2019 of the development plan for Mjølnerparken, since the applicants are not the addressees of the approval, cf. U2013.3295H.

[1] The judgment was appealed to the Supreme Court, which upheld the High Court's judgment, cf. U2001.1246H.

As in this judgment, there is no basis for arguing that the residents in Mjølnerparken, including the applicants, have a party-like status in relation to the approval of 10 September 2019 by the Ministry of Transport and Housing. Thus, the residents did not have the right to be consulted prior to the approval, just as there is no special right of complaint in that connection.

The reason for this, as mentioned above, is that the approval does not in itself change the residents' legal position. It *addresses* Bo-Vita and the Municipality of Copenhagen, which under Section 14 of the ministerial order on the physical transformation of tough ghetto areas would have to change the development plan, if it could not be approved.

Thus, the applicants' invitation 1 has been addressed.

….

Moreover, in the reply, the applicants have invited (2) the Ministry of Transport and Housing to specify whether the argument about the correct respondent is submitted in support of the ministry's claim for acquittal.

In response to the invitation, the Ministry of Transport and Housing can state that the ministry presumably would be the correct respondent in relation to a case about the ministry's approval of the development plan for Mjølnerparken, since the ministry has decided to approve the development plan. Nonetheless, for the reasons stated above, the applicants lack legal standing for an examination of this, for which reason the question is irrelevant.

By contrast, the Ministry of Transport and Housing submits that the ministry is not the correct respondent in relation to the question of whether the development plan (and the decision to sell) in itself has discriminated against the applicants on the basis of their ethnicity and/or race, which according to ministry's understanding is what the applicants, in reality, wish an examination of.

Under the circumstances, the ministry accepts that the argument about the correct respondent concerns the ministry's claim for acquittal, cf. also the Supreme Court's decision in U1979.565H.

Thus, the applicants' invitation 2 has been addressed.

5.2 The claim for acquittal

On page 3-11 of the reply, the applicants have maintained

- that the applicants are being treated less favourably as a result of the development plan for Mjølnerparken (page 3-5),
- that the Ministry of Transport and Housing has taken ethnic origin into account when it (through Section 168a(1) of the Common Housing Act) has instructed common housing associations and the municipalities to draft development plans (page 5-9), and
- that the ministry's approval of the development plan constitutes indirect discrimination (page 9-11).

The ministry's remarks to this are presented in paragraphs 5.2.1-5.2.3 below.

5.2.1 The applicants are not being treated less favourably

On page 3-4 of the reply, the applicants have argued that they have been subjected to less favourable treatment as a result of the approval of the development plan by the Ministry of Transport and Housing, because the applicants live under threat of having to vacate the premises of their tenancies.

The Ministry of Transport and Housing maintains that the applicants have not been treated less favourably. Neither as a result of Sections 61a and 168a of the Common Housing Act, nor as a result of the ministry's approval of the development plan for Mjølnerparken. Reference is made to paragraph 4.2.2.1 of the response.

In that connection, the Ministry of Transport and Housing notes that at present during the case preparation, it is still unclear what exactly the applicants' situation is, including for example whether they have been terminated, have received a notice of termination, have been offered rehousing etc.

As stated on page 23ff of the response, the ministry is puzzled by the fact that the applicants have decided to take legal action at a time when their status pertaining to landlord and tenant law is far from clear. Thus, it is the ministry's understanding that, at present, it cannot be said with certainty whether the applicants will have their current tenancies terminated, and/or whether there is an actual possibility of offering the applicants rehousing in one of the two other blocks in Mjølnerparken, before the sale of both blocks has been finalised in 2022.

Building on this, the applicants are invited to explain, *whether* they have had their tenancies terminated or have received notice of termination, and *whether* they have been offered rehousing, and if so, what the content of these offers has been, and what their answers to this have been (**invitation E**).

….

Furthermore, it is not correct, as stated on page 4 of the reply, that the Ministry of Transport and Housing has made the decision that the applicants' homes are to be sold.

The decision has been made by Bo-Vita and the Municipality of Copenhagen, and under Section 168a(2) of the Common Housing Act, the minister of transport and housing does not have cause to amend the development plan, if it is otherwise realistic and adequate to fulfil the reduction requirement in Section 168a(1) of the Common Housing Act, cf. paragraph 5.1.2 above.

Thus, the minister's approval of the development plan does *not* concern the actual sale of the blocks in Mjølnerparken, which is subject to approval by the municipal council (and in some cases, the minister of transport and housing) under the special scheme in Section 27 of the Common Housing Act. This has also been emphasised on page 2 of the approval of 10 September 2019 by the minister of transport and housing of the development plan for Mjølnerparken (appendix 9).

….

It is also not correct when the applicants on page 4 of the reply have argued that being forced to vacating one's home as a matter of course constitutes less favourable treatment – regardless of whether rehousing is being offered within the same housing estate.

According to the Ministry of Transport and Housing, it is essential to the present case that the ministry with Section 86(1) has provided the legal basis for offering rehousing within the housing estate in question to the persons who are being affected by the development, e.g. because their tenancies are terminated. As stated in paragraph 4.2.3.2, member states are thus granted a wide margin of appreciation in relation to implementing policies to promote integration, as long as the policies are proportionate.

On page 4 of the reply, the applicants state that Bo-Vita refuses to offer the applicants rehousing within the area of Mjølnerparken. In the opinion of the Ministry of Transport and Housing this remark merely

underlines the fact that the applicants' dispute is with Bo-Vita rather than with the ministry, and that this disagreement should be solved in a court case between the applicants and Bo-Vita.

Thus, the provisions in the Common Housing Act fall within the portfolio of the Ministry of Transport and Housing, and the ministry can defend the wording and preparatory works of the provisions. By contrast, the ministry cannot be held responsible for how Bo-Vita interprets and administers the provisions. If the applicants are discontented with this, they must take legal action against Bo-Vita.

….

Finally, on page 5 of the reply, the applicants have argued that they are being treated less favourably as a result of the offensive usage, on which the ministry's approval of the development is based. When Mjølnerparken is being categorised as a tough ghetto, it entails a *stigmatisation* of e.g. ethnic minorities in the opinion of the applicants. In that connection, the applicants have referred to the statement from three of the UN's special rapporteurs in a press release (**appendix T**).

As stated on page 24 of the response, the Ministry of Transport and Housing is not of the opinion that this matter is protected by the Ethnic Equal Treatment Act, the Race Equality Directive, or the ECHR, which is also not the conclusion in the statement referred to by the applicants.

The statement comes from the UN's so-called special rapporteurs, who form part of the so-called "Special Procedures". The following has been stated in the press release (appendix T) about these special procedures:

> *"The Special Rapporteurs are part of what is known as the Special Procedures of the Human Rights Council. Special Procedures, the largest body of independent experts in the UN Human Rights system, is the general name of the Council 's independent fact-finding and monitoring mechanisms that address either specific country situations or thematic issues in all parts of the world. Special Procedures' experts work on a voluntary basis; they are not UN staff and do not receive a salary for their work. They are independent from any government or organization and serve in their individual capacity."*

In the statement, the special rapporteurs express concern over whether the "ghetto legislation" is discriminatory, but do not conclude that the rules in the Common Housing Act, the development plan for Mjølnerparken, or the approval hereof by the Ministry of Transport and Housing is in violation of the rules of ethnic equal treatment etc. Moreover, the statement is not legally binding for the member states, and does therefore not place an obligation on the High Court in the present case.

In addition, it can be called into question whether the factual circumstances, on which the statement is based, are correct. As said in the statement, neither the Ministry of Transport and Housing nor Bo-Vita has been consulted prior to issuing the statement, and Bo-Vita has in a number of articles called attention to the fact that they do not agree – as said in the statement – that the development plan entails that persons will be forced to vacate their homes (**appendix U** and **appendix V**).

The Danish government is currently drafting a response to the statement from the special rapporteurs, which will be presented in the proceedings, when it has been issued.

5.2.2 The Ministry of Transport and Housing has not taken ethnicity into account

On page 5-9 of the reply, the applicants have argued that the Ministry of Transport and Housing has exercised direct discrimination, as they refer to the following:

"The Minister of Housing has made it entirely clear that the housing associations' obligation to draft a development plan for a ghetto, which the Ministry of Transport and Housing will only approve if it reduces the number of family units with at least 40 % by 2030, concerns the residents' ethnic origin." (emphasis added)

The paragraph in question illustrates clearly that the applicants' purpose with the present case is to have an abstract examination of the rules in the Common Housing Act. The obligation to draft a development plan – as mentioned in the quoted paragraph – does not appear in ministry's approval, but rather in Section 168a(1) of the Common Housing Act.

Building on this, the applicants are invited (**invitation B**) to specify where in the approval of 10 September 2019 of the development plan for Mjølnerparken, the ministry specifically has taken racial or ethnic origin into account.

….

In any case, the Ministry of Transport and Housing does not agree with the applicants that the concept of immigrants and descendants from non-Western countries is *directly and inextricably connected* with racial and ethnic origin, cf. also page 25-33 of the response.

Firstly, the Ministry of Transport and Housing does not agree with the applicants that it is *without importance* for the use of the concept of "immigrants and descendants from non-Western countries" within the meaning of the Common Housing Act that there, according to Statistics Denmark, is *statistical basis* for saying that there are particular consequences associated with the immigration from exactly these countries (as opposed to the immigration from Western countries).

The rules in Sections 61a and 168a of the Common Housing Act have been passed for the purpose of addressing these consequences.

The rules on ethnic equal treatment are undoubtedly no obstacle for the member states – when they observe that immigration from such a large group of countries, as "non-Western countries" constitute, entails significant societal challenges – introducing legislation that attempts to remedy such challenges.

In that connection, it should be remembered that Sections 61a and 168a do not prohibit housing estates with more than 50 % immigrants or descendants from non-Western countries, or indeed instruct these housing estates to reduce the share of family housing *without more*.

The obligation in Section 168(1) of the Common Housing Act is only activated, once two of the four socio-economic criteria in Section 61a(1) of the Common Housing Act have been met. It could for example be that too many residents in the housing estate are outside the labour market, cf. no. 1, or that the share of residents, who have been convicted of crimes, is disproportionately higher than the national average, cf. no. 2.

The is particularly illustrated by the so-called "ghetto list" for 2020 (**appendix X**), which shows that the number of ghettos has been almost halved since 2019.

It is seen in the list that the reduction in the number of ghettos is primarily due to the fact that more residents in the areas have found employment, cf. Section 61(1)(1) of the Common Housing Act, that there are fewer persons convicted of crimes in relation to the national average in the areas, cf. Section 61(1)(2), and that the level of education is generally improving, cf. Section 61(1)(3).

For instance, Finlandsparken in Vejle has been deleted from the ghetto list, as the number of unemployed has decreased from 41.1 % to 39 %. The housing estates Lindholm and Korskærparken are the only ones to be deleted from the list because of a reduction in the share of non-Western immigrants and descendants in the housing estates in question.

If the member states were not allowed to introduce such (proportionate) measures, it would, in the opinion of the Ministry of Transport and Housing, be a disproportionate and unintended interference in the member states' access to regulating an area (integration) where the CJEU specifically has indicated that the member states enjoy a wide margin of appreciation, cf. page 41 of the response.

It is irrelevant to the case that the category of "immigrants and descendants from non-Western countries" has been abandoned in Norway with reference to the fact that the category was associated with non-statistical challenges. As stated on page 29-30 of the response, Statistics Denmark arrived at a similar conclusion, but decided nonetheless to keep the concept because of its statistical and analytical advantages.

Neither the applicants, nor the Ministry of Transport and Housing, nor the High Court is equipped to re-evaluate this assessment.

Secondly, the Ministry of Transport and Housing holds that it is not in violation of the ethnic equal treatment rules that the minister of transport and housing in an interview with P1 Orientering on 27 May 2020 has stated that the government wishes that people in the Danish society *meet across ethnic divides*, or that the concept of "ethnic origin" appears in the preparatory works to the Common Housing Act.

It supports in no way the allegation that the ministry should have taken ethnicity into account in for example the categorisation of tough ghetto areas or the approval of the development plan for Mjølnerparken, which is what the present case concerns.

It is no secret that changing governments have had a desire to promote integration by ensuring that the common housing estates in Denmark are inhabited by both immigrants and their descendants and by persons of Danish origin, so that the level of employment, education, and language skills in the housing estates can be strengthened.

However, it does not change the fact that ethnicity and/or race is not determining for whether a housing estate is being categorised as a "tough ghetto area" under Section 61a(4) of the Common Housing Act.

It is conjecture, when the applicants argue that the concept of "immigrants and descendants from non-Western countries" has been intended as an ethnicity criterion. Thus, on page 27-33 of the response, the ministry has explained comprehensively how the concept ought to be understood and that the concept does not concern race or ethnicity.

Thirdly, it is not correct, as the applicants argue on page 8 of the reply, that the Ministry of Transport and Housing has neglected the fact that the concept of "immigrants and descendants from non-Western countries" also includes a person's parents' place of birth and citizenship.

This information appears already on page 4 of the response.

In any case, it does not change the fact that the CJEU with the C-668/15 Jyske Finans judgment established that a person's ethnic origin cannot be defined solely on single criteria, such as information about where the person's parents come from. Which, by the way, makes perfect sense. In the Jyske

Finans judgement, the CJEU thus held that an immediate parallel between the applicant's nationality and the applicant's ethnicity could not be drawn. The same evidently applies to information about the applicant's parents' place of birth or citizenship.

In other words, the Ministry of Transport and Housing finds it difficult to see how the two situations differ from each other.

The deciding factor in the present case is that there is no basis for saying that the group "immigrants and descendants from non-Western countries" – which comprises more than half of the world's population – is characterised by common traits such as nationality, religious conviction, language, cultural background, traditions, or living spaces, cf. para. 17 of the Jyske Finans judgment.

5.2.3 The approval of the development plan by the Ministry of Transport and Housing does not constitute indirect discrimination

5.2.3.1 No specific ethnic groups are being treated less favourably

On page 9ff of the reply, the applicants have argued that the approval by the Ministry of Transport and Housing of the development plan for Mjølnerparken puts specific ethnic groups at a particular disadvantage.

The question of indirect discrimination is another example of why, as mentioned above, it is important to clarify what the subject-matter of the present case is. Thus, there is a difference between whether the question of the present case is whether one or more ethnic groups have been particularly affected by the Common Housing Act or the approval, respectively.

In paragraph 4.2.3 of the response, the ministry has explained in detail why neither the rules in the Common Housing Act nor the approval entails indirect discrimination, including why it concerns legitimate and proportionate measures.

On page 36 of the response, the Ministry of Transport and Housing invited the applicants to present documentation for the allegation that Sections 61a and 168a put one or more specific racial or ethnic origins at a particular disadvantage compared to other persons.

In responding to the invitation, the applicants have presented appendix 34, in which it among other things has been documented that 28 % of the residents in Mjølnerparken in 2019 originated from Lebanon, just as 16,4 % of the residents originated from Somalia.

In that connection, the applicants have referred to the factsheets from the CIA World Factbook that show that 95 % of the Lebanese population are ethnic Arabs.

The Ministry of Transport and Housing is <u>not</u> of the opinion that the applicants thus have responded to the invitation.

First of all, the ministry holds that it cannot be assumed that practically all persons from e.g. Lebanon belong to the same ethnicity, as the concept has been defined in the Jyske Finans judgment, cf. above.

The Ministry of Transport and Housing has, indeed, presented the mentioned factsheets from the CIA, however, only to illustrate the difference between nationality and ethnicity.

Racial and ethnic origin – as they appear in the Ethnic Equal Treatment Act – are legal concepts that are to be interpreted by the Eastern High Court. It goes without saying that the High Court in that connection can assume that that the CIA has not based its factsheet on the CJEU's interpretation of racial and ethnic origin, and that the High Court, for that reason, is not bound by the information.

In the view of the Ministry of Transport and Housing, the applicants have merely shown that nearly half of the residents in Mjølnerparken originate from two countries. They have not demonstrated how this group of persons have common characteristics that justify designating them as one or more specific ethnicities.

In addition, the applicants' view that the *approval* in itself should put certain ethnic groups at a particular disadvantage compared to other persons rests on an assumption that the approval constitutes the actual decision to sell the two blocks in Mjølnerparken. The ministry disagrees with this view, cf. paragraph 5.2.1 above.

….

On page 10 of the reply, the applicants have argued that the European Court of Human Right's judgment of 28 May 1985 in *Abdulaziz, Cabales and Balkandali v. the United Kingdom* is not relevant to the present case, including due to the fact that the case in question concerned immigrants from the entire world and not *"just those from a special grouping of specific countries (as well as their descendants), as is the case in this case."*

The Ministry of Transport and Housing maintains that the reasoning from the judgment in question is relevant and bears on the present case, and the ministry also finds cause to reiterate that the "particular grouping of specific countries", to which the applicants refer, comprises more than half of Earth's population.

5.2.3.2 Justification and proportionality
In paragraph 4.2.3.2 of the response, the Ministry of Transport and Housing has explained in detail why the ministry's approval of the development plan as well as the rules in the Common Housing Act are objectively well-founded and proportionate.

The applicants' few remarks to this on page 10-11 of the reply only give cause to two remarks from the ministry.

Firstly, the so-called "ghetto list" for 2020 (appendix Y) supports that the measures in Sections 61a and 168a of the Common Housing Act have a positive effect on the integration, as it is shown on the list that the number of ghettos has been nearly halved since 2019, and that this development primarily is due to the fact that more residents in the ghettos have found employment, that fewer residents have been convicted of crimes, and that the level of education in the ghettos has improved as mentioned further above.

Secondly, on page 11 of the reply, the applicants state that the ministry has not explained why the *approval* of the development plan for Mjølnerparken is necessary to achieve the aim of successful integration.

The approval is necessary, because it ensures that those development plans, which are being drafted by the common housing associations and municipal councils, only are implemented when it is clear that they are realistic and sufficient to achieve the aims prescribed by the legislature in Section 168a(1) of the Common Housing Act, cf. paragraph 5.1.2 above.

Thus, the approval must ensure that common housing associations *actually* fulfil the requirement that by 2030, there are no more than 40 % common family housing in the housing estates that have been categorised as "tough ghetto areas".

The justification for the reduction requirement in Section 168a(1) of the Common Housing Act has been explained in detail in paragraph 4.2.3.2 in the response.

6. PRELIMINARY REFERENCE TO THE CJEU

On page 11, the applicants have requested that the proceedings be stayed for the purpose of a preliminary reference to the CJEU, and the applicants have in that connection posed two specific question that they wish to have referred.

The two questions basically concern whether Sections 61a and 168a of the Common Housing Act are in violation of the ethnic equal treatment rules, which only supports the fact that it is unclear what the actual subject-matter of the present case is.

The Ministry of Transport and Housing objects to the preliminary reference of the mentioned question, partly because the questions, in the opinion of the ministry, do not give cause to reasonable doubt about the interpretation of EU law, and partly because the rules of the Common Housing Act – which constitutes the factual circumstances in relation to a preliminary reference – have not been presented truly and fairly in the questions, cf. paragraphs 6.1 and 6.2 below.

Moreover, the ministry objects to separating the preliminary questions from the main proceedings for a separate formality hearing, cf. paragraph 6.3 below.

6.1 There is no reasonable doubt about the interpretation of EU law

The Ministry of Transport and Housing submits that the CJEU with the Jyske Finans judgment has given a clear interpretation of how the concept *ethnic origin* ought to be understood within the framework of the Race Equality Directive – and thus also the Ethnic Equal Treatment Act.

In the judgment in question, the CJEU found that there was no basis for saying that a credit institution had taken the applicant's ethnicity into account when it demanded additional documentation from the applicant on the basis of *his nationality*. The court stated that a person's ethnic origin cannot be defined on the basis of single criteria such as a person's nationality, but rather on the basis of a wide range of criteria. The Ministry of Transport and Housing finds it difficult to see what interpretative doubt this reasoning leaves.

The present case concerns legislation where information about *persons' place of birth and their parents' place of birth and citizenship* is determining for whether they belong to the group "immigrants and descendants from non-Western countries". It is difficult to see why the present case cannot be decided on the basis of the reasoning in the Jyske Finans judgment.

The way the applicants' questions have been formulated, they aim for a ruling in the dispute of the present case, rather than an abstract interpretation of the understanding of the ethnicity criterion. This has no legal basis in Article 267 of the TFEU.

6.2 The questions do not present the rules in the Common Housing Act truly and fairly

On page 13 of the reply, the applicants have formulated the questions, which they wish to refer to the CJEU.

The Ministry of Transport and Housing holds that these questions do not contain a true and fair presentation of the rules in Common Housing Act, on which the CJEU can base its answer to the questions of interpretation of EU law, to the extent that such questions should exist.

The way the question has been formulated, it is implied that the Common Housing Act stipulates that housing estates must reduce the share of family housing, if the housing estate merely contains more than 50 % residents with non-Western origin, which is not correct.

As argued above, it is stated in Section 61a(1) of the Common Housing Act that a housing estate can only be categorised as a ghetto when it – in addition to the requirement about the share of immigrants and descendants from non-Western countries in Section 61a(2) – fulfils at least two of the socioeconomic criteria in Section 61a(1).

Moreover, it is stated in Section 61a(4) that a ghetto area must have been a ghetto area for four years, before it can be characterised as a so-called "tough ghetto area", after which the obligation in Section 168a(1) to draft a development plan sets in.

These facts should in any case be reflected in the formulation of the questions, which the applicants wish to refer to the CJEU.

6.3 No reason for a formality hearing

On page 13 of the reply, the applicants have requested that the question of preliminary reference be separated from the main proceedings for an oral formality hearing.

The Ministry of Transport and Housing objects to this for the above-mentioned reasons.

Furthermore, the ministry holds that it is not appropriate that the question of preliminary reference should be separated from the main proceedings for a formality hearing. It is necessary to be able to explain the factual circumstances of the case in detail and the (domestic) legal framework, when a preliminary reference takes place, and a formality hearing would therefore require the same presentation of the rules and facts as in the main hearing. In other words, a formality hearing would entail no procedural savings.

In any case, in order for the High Court to even consider the question of a preliminary reference, it is a precondition that the court has decided on whether the applicants have legal standing, and whether the ministry is the correct respondent, cf. the request in section 3 above.

7. DOCUMENTS

Appendix T: OHCR "UN human rights experts urge Denmark to halt contentious sale of "ghetto" buildings", article of 23 October 2020.

Appendix U: Opinion piece of 10 November 2020 in *Politiken Byrum*, "FN's udtalelse om Mjølnerparken indeholder markante misforståelser" ["The UN's statement on Mjølnerparken contains significant misunderstandings"].

Appendix V: Article of 23 November 2020 in *Fagbladet Boligen*, "Bo-Vita: Vi ville gerne have været hørt af FN" ["Bo-Vita: We would have liked to have been consulted by the UN"].

Appendix X: The Ministry of Transport and Housing, list of ghetto areas as of 1 December 2020.

Copenhagen, 4 January 2021

[Signed]

Peter Biering

Partner, Attorney-of-law