REPLY

To the Eastern High Court, 14th department, in case BS-27824/2020-0LR:

[applicant names redacted]

(all represented by attorney Eddie Omar Rosenberg Khawaja)

versus

The Ministry of Transport and Housing

(attorney Peter Biering and attorney Emil Wetendorff Nørgaard)

In addition to what has been stated in the application, the Ministry of Transport and Housing's response of 1 September 2020 has given cause to note the following:

The Ministry of Transport and Housing's claim for dismissal

In support of its claim for dismissal, the Ministry of Transport and Housing firstly submits that the applicants' claim as it has been formulated in the application is unsuited for a ruling, and that it appears unclear, and secondly that the applicants lack legal standing.

To this and in response to **invitations (A) and (B)**, the applicants note that the claim concerns the determination of whether the approval of the Development Plan for Mjølnerparken (the Development Plan) by the Ministry of Transport and Housing constitutes a violation of the applicants' right to not be directly or indirectly discriminated against, as this right is expressed in Section 3 of the Ethnic Equal Treatment Act, which implements EU law, as well as Denmark's obligations under international law as expressed in Article 14 of the European Convention on Human Rights (ECHR) in conjunction with Article 8 of the ECHR on the right to respect for their private and family life, Article 1 of Protocol No. 1 on the right to protection of property, and Article 2 of Protocol No. 4 on the freedom to choose one's residence.

Furthermore, the claim concerns the determination of whether the approval of the Development Plan by the Ministry of Transport and Housing constitutes a direct violation of the applicants' rights under Article 8 of the ECHR, Article 1 of Protocol No. 1, and Article 2 of Protocol No. 4.

It is the applicants' view that they have access to have it assessed and determined by the courts whether their rights, to the extent stated in the application, have been violated, and that the stated claim is suited for this purpose.

However, the applicants feel called upon to clarify the claim as follows:

"The Ministry of Transport and Housing must acknowledge that the ministry's approval of 10 September 2019 of the Development Plan for Mjølnerparken

1) is in violation of the applicants' right to not be directly or indirectly discriminated against, cf. Section 3 of the Ethnic Equal Treatment Act, and Denmark's obligations under international law as expressed in Article 14 of the European Convention on Human Rights, in conjunction with Article 8 of the ECHR on the right to respect for their private and family life, Article 1 of Protocol No. 1 on the right to protection of property, and Article 2 of Protocol No. 4 on the freedom to choose one's residence, and/or

2) is in violation of Denmark's obligations under international law as expressed in Article 8 of the European Convention on Human Rights on the right to respect for their private and family life, Article 1 of Protocol No. 1 on the right to protection of property, and Article 2 of Protocol No. 4 on the freedom to choose one's residence."

Building on that, and with reference to the clarified claim, it is submitted that, contrary to what the Ministry of Transport and Housing has argued, it does not concern a request for an abstract examination of the legality of Section 168a(1) of the Common Housing Act, in conjunction with Section 61a, but rather that the ministry's approval, which is required for the Development Plan to acquire validity and be implemented, concretely violates the applicants, who are all residents in the two blocks in Mjølnerparken, which the Development Plan demands be sold, by virtue of the fact that they will be forced to vacate their rental flats.

Thus, the applicants are directly and concretely affected by the ministry's approval of 10 September 2019, regardless of whether or not the approval is regarded as having been addressed to them. It should be noted that it is not clearly stated in Section 13(1) of ministerial order no. 1354 of 27 November 2018 (Ministerial order on the physical transformation of tough ghetto areas) to whom the approval is addressed.

Thus, the applicants note that they, by virtue of renting their common housing flats in the concretely affected blocks in Mjølnerparken and through the democratic organs of the housing association, concretely – also under the above-mentioned ministerial order – can be regarded as addressees of the ministry's approval of the Development Plan.

With regard to **invitation (C)**, the applicants note that the Development Plan, which does not provide other options than selling the applicants' homes in order to reduce the share of common family housing to the necessary level, contains the actual decision that the applicants must vacate their flats. Thus, since the ministry's approval of 10 September 2019, a concrete, individual, and relevant dispute between the applicants and the ministry has existed.

Further reference is made to the below section on the Ministry of Transport and Housing's claim for acquittal.

Accordingly, the Ministry of Transport and Housing is **invited (1)** to indicate whether it maintains that the applicants do not have legal standing.

It is thus submitted that the applicants have legal standing to have the claim filed in the present case adjudicated, and that there is no basis for dismissing the case.

Thirdly, in support of its claim for dismissal, the Ministry of Transport and Housing has submitted that it is not the correct respondent.

To this, the applicants note that it is obvious that the question of whether the ministry is to be regarded as the correct respondent would be tied to the substance of the case, including the nature and content of the approval of the Development, which the ministry has granted on 10 September 2019.

The correct type of claim in relation to whether the Ministry of Transport and Housing is the correct respondent is thus a claim for acquittal, cf. U 1986.543/1 H, U 1998.1552 H, U 2002.757 H, U 2012.679 H, and U 2018.3230 H [Danish case law].

Building on this, the Ministry of Transport and Housing is **invited (2)** to clarify whether, in support of the claim for acquittal, it will submit that the ministry is not the correct respondent, since the response does not elaborate on this.

The Ministry of Transport and Housing's claim for acquittal

The Development Plan for Mjølnerparken constitutes less favourable treatment

In support of the claim for acquittal, the Ministry of Transport and Housing has in its response argued that the applicants are not being treated less favourably, because questions about terminations, forced relocation, and rehousing are still open.

Regardless of the fact that the applicants have not yet been terminated, it follows from the Development Plan for Mjølnerparken that the applicants' flats must be sold and vacated, and it is merely a question of time before it happens.

This threat of imminent sale and impending forced relocation from their homes, under which the applicants are as a consequence of the entry into force of the Development Plan by virtue of the ministry's approval, thus in itself constitutes less favourable treatment, irrespective of the fact that the sale and termination have not yet been implemented.

By approving the Development Plan, the Ministry of Transport and Housing has made the final decision that the applicants' current homes are to be sold.

In this connection, it is the view of the Ministry of Transport and Housing that the applicants must be offered alternative accommodation within Mjølnerparken, and that Bo-Vita's contradictory statements and actions in this regard are of no concern to the ministry.

This is not correct.

First, to be forced to vacate one's home constitutes less favourable treatment regardless of whether alternative accommodation within the same housing estate is offered.

This is particularly the case when the flat, which one is forced to vacate, has been one's home for decades. Thus, [redacted name] (applicant 1) must vacate his family's home for the last 26 years. The same is true for [redacted names] (applicants 7 and 8), whereas [redacted name] (applicant 4) and his family have lived in their home for more than 30 years.

Secondly, by approving the Development Plan and because the provisions of the Common Housing Act fall within the ministry's portfolio, the Ministry of Transport and Housing is directly responsible for the fact that the applicants now face homelessness, if they do not accept Bo-Vita's offer of rehousing outside Mjølnerparken.

If the Ministry of Transport and Housing is of the opinion that the legal basis for Bo-Vita's obligation to rehouse the applicants is that clear, the ministry should bring this to Bo-Vita's knowledge.

Thus, Bo-Vita continues to deny that the sale of the applicants' flats carries an obligation to rehouse them within Mjølnerparken, which further contributes to the feeling of unsafety and fear, from which the applicants suffer as a direct consequence of the approval of the Development Plan (**appendix 32**).

Finally, it should be noted that the reason why the applicants need to vacate their current homes is important to the question of whether the they are being treated less favourably than others, including how they would have been treated, had they lived in a common housing estate, which did not have more than 50 % residents with non-Western background.

If the applicants had lived in another common housing estate with similar social challenges, but where the area had less than 50 % residents with non-Western background (a so-called "vulnerable housing estate"), the applicants would not be in the situation where they are forced to vacate their homes.

Thus, regardless of whether or not they will be rehoused within Mjølnerparken, the applicants are undoubtedly in a disadvantageous situation compared to residents in housing estates characterised as vulnerable housing estates.

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.

For that reason, it is maintained that the applicants are being treated less favourably than other residents in similar housing estates that do not have more than 50 % residents with non-Western background, because they as a result of the approval of the Development Plan face an imminent and real threat of eviction from their homes.

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.

As stated recently by three UN special rapporteurs, such usage thus entails that persons, who either belong to or are considered belonging to ethnic or religious minority groups, are being stigmatised. I refer to the press release of 23 October 2020 published by the OHCHR on their website under the title "UN human rights experts urge Denmark to halt contentious sale of 'ghetto' buildings."

In that connection, it should be noted that the CJEU in case C-83/14, Nikolova v. CHEZ, in addition to pointing to the disadvantage of not being able to read your electricity meter, also considered the stigmatising and offensive nature of this disadvantage to constitute less favourable treatment, cf. para 87 of the judgement.

The Ministry of Transport and Housing has emphasised the importance of ethnic origin

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.

Thus, during an interview in the radio programme P1 Orientering on 27 May 2020, the Minister of Housing was asked whether the distinction between that a vulnerable housing estate such as Byparken/Skovparken in Svendborg does not have to reduce the number of family units whereas this is the case for Mjølnerparken, is not exactly owed to a significant focus on whence people originate, to which the Minister of Housing replied:

> "Yes, and that is because this legislation is made to combat parallel societies. We don't want a society like the one in New York where people with Chinese background live in one neighbourhood and people with Afro-American background live in another neighbourhood. We want that people meet each other across **ethnic divides** (…)" (emphasis added)

Moreover, the Minister of Housing's reply is not a deviation from the policy of the Ministry of Transport and Housing, but reflects the ministry's unambiguous focus on ethnic origin.

Thus, as the Ministry of Transport and Housing itself has emphasised several places in the response, including on page 8, it is directly stated in the preliminary works to Section 61a of the Common Housing Act that:

> "[a] high concentration of citizens with a **different ethnic extraction** is thus a signal that it is necessary to focus on the area." (emphasis added)

Thus, the approval of the Development Plan undoubtedly rests on the premise that resident composition in Mjølnerparken needs to be changed so that there no longer are too many persons with non-Western ethnic origin in the area.

As it has also been stressed in the application, ethnic origin is thus the decisive criterion for the creation of the Development Plan and thus the ministry's approval.

When the Ministry of Transport and Housing argues that ethnic origin has not influenced the approval of the Development Plan, including that "immigrants and descendants from non-Western countries" is not tied to racial or ethnic origin, it is thus in direct contradiction with the ministry's own statements on ethnic origin. This will be elaborated further in the following.

The concept of "immigrants and descendants from non-Western countries" in Section 61a(2) of the Common Housing Act

It is maintained that the use of the concept of "immigrants and descendants from non-Western countries" in Section 61a(2) of the Common Housing Act, according to which a housing estate is characterised as a ghetto and thus obligated to reduce the number of family units down to 40 % by 2030 is directly and inextricably linked to racial and ethnic origin within the meaning of the Ethnic Equal Treatment Act.

On pages 29-30 of the response, the Ministry of Transport and Housing refers to the fact that Statistics Denmark regards it as appropriate to use the category for statistical and analytical purposes.

But this is irrelevant for how the concept is being used and understood in the Common Housing Act, since the case does not concern statistical analysis.

The concept of "non-Western" has indeed been used for statistical purposes in Norway and the Netherlands, but it has never been used in the legislation in the same way as in Denmark, and the concept was completely abandoned in Norway in 2008.

In this connection, it should be noted that when abandoning the category "non-Western"/"Western", Statistics Norway, the Norwegian equivalent to Statistics Denmark, has stated that one of the reasons why Norway abandoned the concept of "non-Western" was that the categorisation had consequences beyond the statistical analyses, including being used for various political purposes (article presented as **appendix 33**).

The author of the article, Even Høydahl, senior consultant at Statistics Norway, thus points to the fact that "non-Western" is negatively defined and becomes a "burden" for those to whom the category is applied.

Another reason that Statistics Norway decided to abandon the concept of non-Western was, according to Even Høydahl, that the distinction between "Western" and "non-Western" had become a focal point in the political immigration debate, and the status as "non-Western" had become perceived as a very important feature of a person with immigrant status.

Similarly, the concept of "immigrants and descendants from non-Western" in Denmark is not a neutral, statistical concept.

Thus, there is a big difference between using a concept and a categorisation in a statistical context for descriptions and analyses of societal matters, compared to introducing it into the legislation and now

using it as the decisive criterion for when a housing estate becomes a "ghetto" and needs to reduce the share of the number of family units with large human consequences.

The historical and rhetorical context of the concept of "immigrants and descendants from non-Western countries" is thus essential for whether the use of the concept in Section 61a(2) of the Common Housing Act is to be considered linked to racial and ethnic origin within the meaning of the Ethnic Equal Treatment Act.

In "Regeringens strategi mod ghettoisering" from May 2004, six years before the categorisation "non-Western" was introduced into the Common Housing Act, the word "ethnic" is used 36 times, and the concept of "ethnic enclaves" is used to describe "ghetto areas" with a high share of unemployed immigrants, refugees, and descendants.

In the excerpt of the Programme Board's report from November 2008, presented as appendix C by the Ministry of Transport and Housing, the following is stated in section 4.5.1. on the development of the resident composition in selected vulnerable housing estates:

> "With regard to the purely demographic conditions, such as the distribution of age groups, types of households, and **ethnic origin**, focus is primarily on describing the current situation in the areas, whereas the development during the later years is only discussed to a limited extent." (emphasis added)

The Programme Board unequivocally couples the concept of "immigrants and descendants from non-Western countries" directly with ethnic origin. Thus, it should be noted that section 4.4.5., which is a subsection to a static description of the residents in the selected housing estates, is entitled "Ethnicity", and the section primarily focuses on the description of the residents' "non-Western" or "Western" origin.

In the report, it is clearly implied that "immigrants and descendants from non-Western countries" are considered one coherent ethnic origin, which moreover is considered distinct from "Danish origin", cf. page 61 of the report (appendix C, p. 42):

> "It is shown in the diagram that the share of residents without connection to the labour market in both age ranges is somewhat higher for immigrants and descendants from non-Western countries than for residents of Danish origin. For both **ethnic groups**, the share without connection to the labour market is somewhat higher for the older residents than for the younger ones." (emphasis added)

This rhetoric and the interpretation of "immigrants and descendants from non-Western countries" as connected to ethnic origin have, as argued in the application, continued throughout the 2010s and most clearly in the amendment of the ghetto criteria in 2018 and the introduction of Section 61a(2).

Thus, it should also be noted that in the memorandum on parallel societies of 24 June 2020, which has been presented as appendix S by the Ministry of Transport and Housing, the minister of housing states the following on page 3:

> "The final goal is that Denmark by 2030 does not have parallel societies at all. Instead, we need a lot of vibrant and mixed neighbourhoods, where children and grown-ups meet across **ethnic** and social divides." (emphasis added)

Several places in the memorandum, statistical data for "ethnic Danes" concerning for example unemployment and education on the one hand is compared with the same figures for the group "non-Western immigrants and descendants" on the other.

The grouping "immigrants and descendants from non-Western countries" is consistently described and viewed as one coherent ethnic group, irrespective of the fact that the grouping by definition potentially can be considered to contain ethnic groups from many different countries.

That the grouping is regarded as one coherent ethnic group is further illustrated by the fact that a rising number of laws, provisions etc. specifically address and seek to affect this group (including but not limited to the measures under the "Ghetto Package").

The use of the concept in Section 61a(2) of the Common Housing Act is thus undoubtedly intended as an ethnic criterion, irrespective of how the concept may be defined and used in a statistical context.

Thus, it is also irrelevant to the case whether the distinction between immigrants and descendants from non-Western and Western countries generally is in the interest of being able to analyse the consequences of immigration in Denmark. The distinction in Section 61a(2) of the Common Housing Act, upon which the Ministry of Transport and Housing's approval rests, has nothing to do with analysing the consequences of immigration to Denmark; the purpose of the legislation is not to analyse.

Thus, it is of no relevance to the case that there allegedly is a difference in the socio-economic consequences between immigration from Western and non-Western countries, which the Ministry of Transport and Housing on page 32 of the response argues is the legitimate reason for the distinction between "non-Western" and "Western" residents.

Indeed, the case concerns the ministry's approval of the Development Plan on the basis of legislation that distinguishes between "ghettos" and "vulnerable housing estate" despite the fact that these areas otherwise have the same socio-economic conditions. The Ministry of Transport and Housing has thus not demonstrated an "objective and well-founded" reason for using this distinction in the legislation and thus its approval of the Development Plan.

Finally, the Ministry of Transport and Housing appears to completely ignore the fact that the concept of "immigrants and descendants from non-Western countries" does not only comprise a person's own place of birth, as was the case in C-668/15 *Jyske Finans*, but also a person's parents' place of birth and citizenship (within an arbitrary category of selected countries). [name redacted] (Applicant 12) was born and raised in Denmark and has Danish citizenship, but because his parents were born in Lebanon, he is not regarded as having "Danish origin".

For that reason, the concept of "immigrants and descendants from non-Western countries" can by Statistic Denmark's definition cannot be regarded as a neutral "birthplace criterion", as the Ministry of Transport and Housing has interpreted it. When the concept includes a person's parents' place of birth and citizenship, it also includes a consideration of that person's extraction.

Like racial, ethnic, and national origin, extraction is an unlawful basis for discrimination under the International Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination, upon which the Council Directive 2000/43/EC is based, cf. point 3 of the preamble to the Directive. Denmark has, just as every other country in the EU, signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination.

In the application, it has been further argued in what other ways the concept of "non-Western" is inextricably linked with racial/ethnic origin. For example, the statutory basis aims specifically to combat "parallel societies", which allegedly should emerge as a result of "norms" and "values", including religious ones, which differ from those of the Danish majority population.

When Mjølnerparken is required to reduce the share of family housing to 40 % by 2030, because there are more than 50 % immigrants and descendants from non-Western countries, and when the Ministry of Transport and Housing has approved the plan for this, which entails that the applicants will be further stigmatised and face losing their homes, the applicants are undoubtedly being treated less favourably than residents in other similar common housing estates, exactly by virtue of Mjølnerparken's residents' ethnic or racial origin.

In overall terms, it is maintained that the approval by the Ministry of Transport and Housing of the Development Plan for Mjølnerparken constitutes direct discrimination of the applicants.

Indirect discrimination – ethnic groups in Mjølnerparken

Even if the category "immigrants and descendants from non-Western countries" as it is used in the provisions of the Common Housing Act not in itself should be considered inextricably linked to ethnic and racial origin, the approval by the Ministry of Transport and Housing of the Development Plan, in practice, treats certain ethnic groups less favourably than others.

Replying to the Ministry of Transport and Housing's **invitation (D)**, page 36 of the response, the report *"Den demografiske udvikling i Mjølnerparken sammenlignet med tre SUB-områder i perioden 2013-2019"* from the Centre for Alcohol and Drug Research, Department of Psychology and Behavioural Sciences, Aarhus University, is presented as **appendix 34**.

In the report, the resident composition in Mjølnerparken is compared with three other housing estates, which were characterised as "vulnerable housing estates", but which did not have more than 50 % residents of non-Western origin and thus were not considered "ghettos".

On page 11 of the report, it appears from which countries the residents in Mjølnerparken predominantly originate. Here it appears that 44 % of the residents in Mjølnerparken originate from Lebanon (28 %) and Somalia (16.4 %), respectively.

As the Ministry of Transport and Housing itself has pointed out on page 36 of the response, 95 % of Lebanon's population belong to the same ethnic groups. In the case of Somalia, 85 % of the population belong to the same ethnic group (**appendix 35**).

Thus, factual circumstances have been demonstrated, from which it may be presumed that the Development Plan entails indirect discrimination, since persons of Arab ethnic origin and Somali ethnic origin in particular are being treated less favourably.

So the burden of proof rests on the Ministry of Transport and Housing to prove that the principle of equal treatment has not been disregarded when approving the Development Plan, as a consequence of which the applicants will lose their homes. This burden of proof still has not been met.

To this, it should be noted that the Ministry of Transport and Housing's reference to the ECtHR judgement of 28 May 1985 in *Abdulaziz, Cobales and Balkandandi v. the United Kingdom*, on pages 38-39 of the response, is not relevant to the question of indirect discrimination in this case.

In this case, indirect discrimination does not concern the content of the rules, but rather the disproportionate effect that seemingly neutral provisions have on specific groups. Furthermore, the protection against discrimination under the ECHR is not limited to racial or ethnic origin, but covers any status, including national origin.

The ECtHR judgement of 28 May 1985 in *Abdulaziz, Cobales and Balkandandi v. the United Kingdom* is in any case not comparable to the present case and is not applicable.

Thus, it should be noted that the rules scrutinised in *Abdulaziz* applied to immigrants from all parts of the world, not just those from a special grouping of specific countries (as well as their descendants), as is the case in this case. Moreover, none of the applicants in this case are third country citizens; they are all Danish citizens, and several of them were born and raised in Denmark.

Finally, it is not correct when Ministry of Transport and Housing on page 39 of the response argues that the aim of the approval of the Development Plan is to reduce the number of family units in the area, not the number of non-Western immigrants and descendants.

However, as the Ministry of Transport and Housing itself points out several places in the response, the aim of the amendment of the Common Housing Act in 2018, by which Sections 61a and 168a were introduced, was to change the resident composition in the interest of the integration of persons with "non-Western background".

Thus, it is subsidiarily maintained that the approval of the Development Plan constitutes indirect discrimination of the applicants.

Indirect discrimination – justification

In its response, the Ministry of Transport and Housing has put forward a number of different justifications for indirect discrimination, which according to the applicants indeed underline that the ministry's actions are based on stereotypes and generalisations. This particularly applies to the desire for successful integration.

For example, the Ministry of Transport and Housing refers to the general remarks to Act No. L 60 of 17 November 2010, where the criterion of "immigrants and descendants from non-Western countries" for the first time was introduced in the Common Housing Act, where among other things the following is stated:

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

This shows that persons with "immigrant background" are being equated with "foreigners", although the category "immigrants and descendants from non-Western countries" also includes Danish citizens and/or persons born in Denmark.

To identify and attempt to take care of what the legislature considers to be an "overrepresentation" or inappropriate patterns of socialisation (which, in turn, are based on generalisations) by specific categories of humans is not a legitimate or objectively well-founded interest. The Ministry of Transport and Housing has also not managed to explain why the approval of the Development Plan is necessary to achieve the goal of successful integration,

Finally, the reference by the Ministry of Transport and Housing to a broad political agreement is not relevant for the question of whether a discriminating arrangement is to be considered justified. Broad political agreement is not in itself synonymous with the arrangement being objectively justified by a legitimate interest.

<u>Request for staying the proceedings for the purpose of preliminary reference to the CJEU</u>

The Ministry of Transport and Housing states in the response that the concepts of racial and ethnic origin have not been defined by the wording of Section 3(2) of the Ethnic Equal Treatment Act.

To this, the applicants note that the correct understanding of the concepts also does not follow directly from the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive).

On that basis, the applicants agree with the Ministry of Transport and Housing that the precise content of these concepts must be derived from the interpretation, to which the CJEU has submitted the concepts in its case law, including by drawing on the ECtHR case law relating to Article 14 of the ECHR as well as for example the delimitation of the concepts in International Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination.

As stated on pages 26-32 of the response and in sections 3.1 and 3.2 of the application, the parties do not agree on the interpretation of the concepts, including how the concepts are to be delimited in the Ethnic Equal Treatment Act and the Race Equality Directive, including the correct interpretation or application.

In the case C-668/15, *Jyske Finans A/S*, the CJEU has stated that a requirement to submit additional proof of identity when the customer's driving licence indicated that the customer was born outside the EU and EFTA countries did not constitute discrimination on the basis of ethnic origin, because birthplace alone constituted a criterion, which in itself could not say anything about the customer's ethnic origin, but depending on the circumstances could form part of the number of criteria that could constitute ethnic origin, cf. paras. 18-19.

In the same judgment, the CJEU further states, cf. paras. 31-34, that the question of whether a person has been subject to unfavourable treatment as required for indirect discrimination, 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.

In addition, in his opinion on the case C-668/15, para. 66, the general advocate Wahl appears to imply that the specific information surrounding the use of the criterion concerning birthplace could entail that the criterion could constitute ethnic discrimination of certain ethnic groups, in which case the criterion no longer would appear neutral. Presumably in light of the circumstances of the main proceedings, the CJEU did not address this question.

To this, it should be noted that the understanding of the CJEU judgment in case C-54/07, Firma Feryn NV, when compared with case C-668/15, can give cause to doubt, since the CJEU may have presumed a hypothetical matter of fact, as argued by the Ministry of Transport and Housing, but could also have – and not immediately in line with its later judgement in C-668 – presumed that the concept of "foreigners" was covered by the concept of racial or ethnic origin within the meaning of the Race Equality Directive.

Regarding the use of "birthplace" as a criterion for deciding which customers should be submitted to further scrutiny in case C-668/15, the applicants note that, in opposition to the Ministry of Transport and Housing, that the criterion is essentially different from "non-Western countries", regardless of the fact that an element in the determination of non-Western countries is tied to the birthplace of the residents themselves or their parents.

However, the applicants find that it may be beset with some uncertainty whether EU law and the correct understanding of the concept of ethnic origin exclude the possibility that the use of a criterion such as "immigrants and descendants from non-Western countries" is to be regarded as a neutral criterion, which does not otherwise say anything about a person's ethnic origin.

As further argued in the application and above, in the present case, the use of "non-Western countries" has been tied to expressions such as "different ethnic background", "ethnic origin/extraction", "non-Western background", "non-Western origin", "the country and culture from where they or their parents come". The CJEU has not previously considered such circumstances.

Finally, it should be noted that with regard to the question of indirect discrimination, in case C-668/15, the Court should only consider whether one neutral criterion, birthplace, in itself could lead to discrimination on the basis of ethnic origin, without being in possession of statistical material, statements from the credit institution or other information that made it possible to assess the question further. Thus, the Court did not further elaborate on the meaning of a "specific" ethnic origin other than that it is not sufficient to observe that the criterion would place persons of an ethnic origin in a different country than the EU and EFTA at a disadvantage, cf. para. 34 of the judgment, which is essentially different from the present case.

On this basis, the applicants find that the case raises such questions on the correct understanding of the concepts used in the Ethnic Equal Treatment Act and the Race Equality Directive, for which there is basis for referring questions to the CJEU, cf. Article 267(2) of the Treaty on the Functioning of the European Union.

It should be noted that the purpose of the prejudicial procedure in Article 267 of the TFEU is to ensure uniform application of EU law in the member states, and that the CJEU for that reason ought to be involved when a case raises question of interpretation of EU law.

In the opinion of the applicants, the raised question of uncertainty of the understanding of EU law has a such nature that a clarification is of importance to the adjudication of the present case, just as the raised questions about the meaning of the concepts in the Race Equality Directive have not already been interpreted by the CJEU. Furthermore, in the opinion of the applicants the questions of EU law cannot with sufficient certainty be decided upon without the involvement of the CJEU.

Building on this, the applicants request that the proceedings be stayed for the purpose of referring the following questions to the CJEU:

> "1) Does the ban on direct discrimination on the basis of racial and ethnic origin in Article 2(2)(a) of Directive 2000/43 preclude legislation and practice such as that in the main proceedings, according to which a housing estate is defined by use of a decisive criterion that entails that there should not be more than 50 percent immigrants or descendants from non-Western countries, and that if there are, the housing estate must reduce common family housing to a share below 40 percent by e.g. sale, and that entails that residents face eviction from their rented flats.
>
> 2) If the first question is answered in the negative, does such legislation and practice – unless objectively pursuing a legitimate aim and the means are appropriate and necessary – then constitute indirect discrimination on the basis of ethnic origin under Article 2(2)(b) of Directive 2000/43?"

Furthermore, to the extent that the Ministry of Transport and Housing does not agree that it is necessary to refer questions to the CJEU, the applicants request that the question of referral to the CJEU be separated for a separate oral formality hearing.

Third-party notice to the Municipality of Copenhagen and Bo-Vita

With reference to the letters of 30 November 2020 to the Municipality of Copenhagen and Bo-Vita, respectively, (presented as **appendix 36** and **appendix 37**) the applicants inform that they have given

third-party notice to the Municipality of Copenhagen and Bo-Vita. The third-party notice has taken place in light of parts of the Ministry of Transport and Housing's response, which appears to involve the interests of the Municipality of Copenhagen and Bo-Vita in the present case.

The applicants note that the Ministry of Transport and Housing's argument that it – possibly – does not see itself as the correct respondent in the present case, cf. the above stated, does not for the time being give cause for further actions on the part of the applicants.

APPENDICES:

Appendix 32: Email of 23 September 2020 from Steffen Boel Jørgensen, Bo-Vest/Bo-Vita

Appendix 33: Copy of article: Even Høydahl, Statistics Norway, *"Vestlig og ikke-vestlig – ord som ble for store og gikk ut på dato"*, 8 October 2008

Appendix 34: Report, 2020, *"Den demografiske udvikling i Mjølnerparken sammenlignet med tre SUB-områder i perioden 2013-2019"*, Centre for Alcohol and Drug Research, Department of Psychology and Behavioural Sciences, Aarhus University

Appendix 35: Excerpt of CIA's World Factbook, Somalia

Appendix 36: Letter of 30 November 2020 to the Municipality of Copenhagen

Appendix 37: Letter of 30 November 2020 to Bo-Vita