

REQUEST FOR PRELIMINARY REFERENCE

1. In their capacity as third party intervenors, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (“Special Rapporteurs”) support the request for a reference to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling.
2. In particular, the Special Rapporteurs respond to the Ministry of Interior and Housing (“Ministry”)’s reply of 13 June 2022 as follows. The Special Rapporteurs reserve the right to make further comments on the wording of questions to the CJEU.

DIRECT DISCRIMINATION

Racial or ethnic origin

3. A key issue of dispute between the Ministry and the other parties in this matter is whether or not “non Western” background is encompassed by the concepts of “racial” or “ethnic origin” for the purposes of Council Directive 2000/43/EC (“Race Equality Directive”).
4. The Special Rapporteurs note with approval that the Ministry accepts that, with regard to direct discrimination under the Race Equality Directive, there is no requirement to establish that a particular ethnic origin is being treated less favourably and that it is sufficient to establish that account has been taken of ethnic origin.
5. However, the Special Rapporteurs further note that:
 - a) the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the Race Equality Directive where the Eastern High Court considers that a decision on the question is necessary to enable it to give judgment;¹ and
 - b) questions remain between the parties about the correct interpretation of racial or ethnic origin in the context of “non-Western” background.
6. As noted by the Ministry, in the *Jyske Finans* case “on the question of direct discrimination, the CJEU assessed in paragraphs 16-25 whether there was a direct and inextricable link between the applicant's country of birth and his possible ethnic origin. In so doing, the CJEU was able to determine whether the credit institution had *taken account of* ethnic origin, which is precisely what determines whether there is direct discrimination.”² The Ministry further notes that this was an “abstract and conceptual” assessment.
7. This type of “abstract and conceptual” assessment by the CJEU is necessary in this matter also. The Special Rapporteurs disagree with the Ministry’s position that the Eastern High Court can make such an assessment by simply replacing “*country of birth*” (as in the *Jyske Finans* case) with “*country of birth of parents*” or “*nationality of parents*.” This does not take into account other relevant factors as further detailed in the Special Rapporteurs’ pleadings such as the (undisputed) particular grouping of countries included within the concept of “Western”.
8. The UN Special Rapporteurs submit that the questions to be considered – by the CJEU – include:

¹ Treaty on the Functioning of the European Union, Article 267 (ex Article 234).

² The “*Jyske Finans*” case citation is CJEU, C-668/15, *Jyske Finans A/S v Ligebehandlingsnævnet*, ECLI:EU:C:2017:278, Judgement of 6 April 2017.

“Should the prohibition on direct discrimination on grounds of racial or ethnic origin in Article 2(2)(a) of Directive 2000/43 be interpreted as precluding less favourable treatment on grounds of “non-Western” background as characterised by the Danish State?”

“Should “apparently neutral provision, criterion or practice” as it appears in Article 2(2)(b) of Directive 2000/43 be interpreted as not applying to the criterion of “non-Western” background as characterised by the Danish State (and in related provisions and practices)?”

Less favourable treatment and comparable situation

9. The Ministry’s position is that no questions are required on the issues of less favourable treatment and comparable situation. The Special Rapporteurs note that:
 - a) the CJEU’s caselaw is clear that stigmatisation constitutes less favourable treatment;³
 - b) as set out in the Special Rapporteurs’ pleadings, evictions and threats to security of tenure have long been recognized as serious violations of international human rights law. Similarly, the loss of one’s home has been recognised by the CJEU (and the European Court of Human Rights and the Eastern High Court in this case) as an extreme form of interference with fundamental rights;⁴ and
 - c) the definitions of vulnerable housing estates, ghettos and tough ghettos are also clear, as set out in the Special Rapporteurs’ pleadings.
10. In these circumstances, the Eastern High Court may not consider it necessary to refer to the CJEU on these matters.

INDIRECT DISCRIMINATION

11. In the event that it is decided that direct discrimination does not apply, questions arise in relation to indirect discrimination including the following.

Racial or ethnic origin and particular disadvantage

12. There is a dispute between the parties regarding the correct interpretation of “racial” and “ethnic origin” in the context of indirect discrimination.
13. The Ministry has stated in its response of 13 June 2022 that it is clear that a particular ethnic origin must be put at a disadvantage and in its earlier pleadings rejects the various statistics that have been presented by the plaintiffs. In particular, the Ministry has referred to *Jyske Finans* in support of its positions that neither “non-Western” background nor Lebanese origin or descent are of relevance to “particular ethnic origin.”
14. However, the *Jyske Finans* case cannot be taken as clear law in this context as it did not explore the “non-Western” background category or statistics such as those relating to people of Lebanese origin and descent. As demonstrated in the Ministry’s excerpts from the case in its earlier pleadings, the

³ CJEU, Case C-83/14, *Chez Razpredelenie Bulgaria v Komisia*, ECLI:EU:C:2015:480, Judgment of 16 July 2015, paragraph 87.

⁴ CJEU Case C-34-13, *Kušionová v. SMART Capital, a.s.*, Judgment of 10 September 2014, ECLI:EU:C:2014:2189 (*Kušionová*), paras. 63-65 and European Court of Human Rights, *McCann v. United Kingdom*, Judgment of 13 May 2008, para. 50.

grouping of countries (for example) in the *Jyske Finans* case was different to those in the categories of “Western” and “non-Western.”

15. The UN Special Rapporteurs submit that the questions to be considered by the CJEU include:

“Is the expression “racial or ethnic origin” as used in Article 2(2)(b) of Directive 2000/43 to be interpreted as covering a) “non-Western” background as characterised by the Danish State and/or b) populations such as those of Lebanese or Somali origin and descent?”

Objective justification

16. The Special Rapporteurs note that the CJEU has provided preliminary rulings on the correct interpretation of objective justification including what constitutes a “legitimate aim” in this regard.⁵ The Special Rapporteurs are not aware of CJEU caselaw having previously ruled on, for example, the difference between voluntary clustering and residential segregation as set out in the Special Rapporteurs’ pleadings.

17. If the Eastern High Court considers it necessary to refer to the CJEU on the issue of objective justification, the questions to be considered should therefore include:

“Can indirect differential treatment entailing the eviction of residents be objectively justified under Article 2(2)(b) of Directive 2000/43 where it is demonstrated that the explicit aim of the underlying legislation is to change the racial or ethnic composition of a housing community ?”

18. In the performance of their mandates, the Special Rapporteurs are accorded certain privileges and immunities as experts on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on 13 February 1946. This submission is provided on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations, to which Denmark has been a party since 10 June 1948. Authorization for the positions and views expressed by the Special Rapporteurs, in full accordance with their independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

⁵ See, for example, *Chez Razpredelenie Bulgaria v Komisia*, ECLI:EU:C:2015:480, Judgement of 16 July 2015, paragraph 114.