Pleading B

On referral for a preliminary ruling

To the Eastern High Court, 14th Chamber.

In case no. BS-27824/2020-OLR:

[ ]
(*all represented by attorney Eddie Omar Rosenberg Khawaja*)

versus

The Ministry of the Interior and Housing
(*represented by Peter Biering*)

1. BACKGROUND

By order of 26 April 2022, the Eastern High Court has set a time-limit for the parties to submit their final observations on the question of referral to the CJEU for a preliminary ruling.

By Pleading 3 of 17 May 2022, the plaintiffs maintained the request for a preliminary ruling and formulated six questions, which they wished to refer to the CJEU. The Danish Institute for Human Rights supported the request by Third Party Intervention II of 16 May 2022, as did attorney Jytte Lindgård in Pleading C of 23 May 2022.

The Ministry of the Interior and Housing maintains its objection to the plaintiffs' request for a preliminary ruling and refers to its remarks in paragraph 4.2 of its response of 1 September 2020, paragraph 6 of its rejoinder of 4 January 2021, its letter of 10 January 2022 and its communication of 7 March 2022 on the case portal, with the following additions.

2. A PRELIMINARY RULING IS NOT NECESSARY

The Ministry of the Interior and Housing agrees with the applicants that it follows from Article 267 of the TFEU that the Eastern High Court, as the court of first instance, is not obliged to refer questions for a preliminary ruling to the CJEU.

It is therefore the optional referral provided for in Article 267(2), which is relevant in the present case.

This means that the Eastern High Court must assess whether a referral for a preliminary ruling is *necessary* in order to clarify a *reasonable doubt* as to the interpretation of the Racial Equality Directive[1], which is *relevant* to the decision in the present case.

The Ministry considers that the plaintiffs' request for a preliminary ruling does not meet those conditions, see immediately below.

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

If the Eastern High Court nevertheless decides to refer the matter for a preliminary ruling, the Ministry of the Interior and Housing reserves the right to make specific comments on the wording of questions to the CJEU within the themes that the Eastern High Court will refer.

2.1 On the background for the request for a preliminary ruling

As the Ministry of the Interior and Housing understands Pleading 3 of 17 May 2022, the plaintiffs have stated three reasons in particular for their request for a preliminary ruling.

- Firstly, that there is doubt as to whether it is a precondition for a finding of *direct* discrimination that it can be established that a *particular ethnic origin* is being treated less favourably.
- Secondly, that there are doubts as to whether it is a prerequisite for a finding of *indirect* discrimination that it can be established that a *particular ethnic origin* is being treated less favourably.
- Thirdly, that it is unclear from the case law of the CJEU whether direct discrimination on grounds of ethnic origin can be *justified*.

The Ministry of the Interior and Housing has not argued the first and third points in the present case and considers for that reason alone that a reference for a preliminary ruling on these issues is out of the question.

The Ministry also considers that the three issues do not give rise to reasonable doubts in the case justifying a preliminary ruling, see paragraphs 2.1.1-2.1.2, immediately below.

2.1.1 The determination of a particular ethnic origin

As regards the first two reasons for the plaintiffs' Pleading 3, the plaintiffs submit that there are doubts as to whether it is a prerequisite for a finding of discrimination – both direct and indirect – that it be established that a *particular ethnic origin* is being treated less favourably.

The Ministry of the Interior and Housing disagrees and believes that it is crucial to distinguish between direct and indirect discrimination.

2.1.1.1 Direct discrimination

In the view of the Ministry of the Interior and Housing, there is no doubt that it is not a requirement for a finding of direct discrimination in the present case that it can be shown that a particular ethnic group is being treated less favourably.

For this reason, the Ministry has not argued it in the case in support of the direct discrimination claim, as is clear from the Ministry's response of 1 September 2020, e.g. paragraph 4.3, which contains a summary of the Ministry's arguments.

That it is not a requirement for a finding of direct discrimination in the present case is clear from the wording of the Ethnic Equal Treatment Act[2] and the Racial Equality Directive, where the phrase *"would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons"* appears only in Section 3(3) of the Act and Article 2(2)(b) of the Directive, which deals with indirect discrimination.

[2] The latest consolidated act is Consolidated Act No. 438 of 16 May 2012.

It also follows from the case law of the CJEU, which does not give rise to doubt.

The Ministry understands the plaintiffs' argumentation to mean that in the Jyske Finans judgment of 6 April 2017, C-668/15, EU:C:2005:753, the CJEU applied for the first time a criterion that, inter alia, direct discrimination must be linked to a particular ethnic origin, which is a departure from previous case law, see for example the CHEZ judgment of 16 July 2015, C-83/14, EU:C:2015:480.

The Ministry of the Interior and Housing does not agree.

In the Jyske Finans case, the Western High Court had referred three questions to the CJEU. The first was whether the fact that the applicant had been required to produce additional identification because his driving licence indicated that he was born in a third country constituted direct discrimination. The other two questions concerned whether the practice described constituted indirect discrimination.

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.

In this – abstract and conceptual – assessment, the CJEU referred to paragraph 46 of the CHEZ judgment, which the CJEU applied directly in its conclusion that there was no direct discrimination, see paragraphs 17-20 of the Jyske Finans judgment.

The CJEU has therefore not deviated from the CHEZ judgment, but rather continued and clarified it. It should also be noted that the CHEZ judgment was delivered by 13 judges of the Grand Chamber of the CJEU, while the Jyske Finans judgment was delivered by five judges of the First Chamber of the CJEU.

It is true – as the plaintiffs have argued – that the Danish language version of the Jyske Finans judgment uses the word *"particular"* in paragraphs 16 and 20[3] in relation to the assessment of direct discrimination. In the Ministry's view, however, this is linked to the fact that the case concerned only one applicant with one specific country of birth and one possible ethnicity.

In any event, it is clear from paragraphs 16-25 of the judgment that it was not part of the CJEU's assessment whether the applicant could show that his country of birth was linked to a particular ethnic origin. Indeed, the CJEU found precisely that – in general terms – there was no direct and inextricable link between the concepts of "country of birth" and "ethnic origin", see paragraph 20 of the judgment.

According to the Ministry of the Interior and Housing, this conclusion is decisive for the question in the present case of whether Section 61a(2) of the Common Housing Act - and the criterion "immigrants and descendants from non-Western countries" – is linked to the concept of "ethnic origin".

Here, the Eastern High Court must make an assessment following exactly the same approach as the CJEU did in the Jyske Finans judgment, only where *"country of birth"* is replaced by *"country of birth of parents"* or *"nationality of parents"*, which are precisely the decisive criteria for whether a person belongs to the category *"immigrants and descendants from non-Western countries"* in Section 61a(2) of the Common Housing Act.

[3] The plaintiffs have referred to paragraph 33 of the judgment, which, however, concerns indirect discrimination.

This is an assessment that the Eastern High Court can easily make itself. In this respect, reference is made to paragraph 4.2.2 of the Ministry's response.

2.1.1.2 Indirect discrimination

As regards indirect discrimination, the Ministry of the Interior and Housing considers that it is quite clear that it is a condition that it can be established that a particular ethnic origin is treated less favourably.

In support of their request for referral, the plaintiffs argue that the Jyske Finans judgment is the first example of the CJEU imposing this condition. The Ministry does not agree.

Thus, in the CHEZ judgment, the Court of Justice of the European Union stated – in answer to question 7 – that the condition in Article 2(2)(b) of the Racial Equality Directive of "particular disadvantage" must be understood as *"meaning that it is particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue"*, see paragraph 100.

This premise has since been repeated, for example, in the Heiko Jonny Maniero judgment of 15 November 2018, C-457/17, EU:C:2018:91, paragraphs 47 and 48, where the CJEU further clarified the following:

> *"Such a concept therefore applies only where the alleged discriminatory measure has the effect of placing a particular ethnic origin at a disadvantage. In addition, for the purposes of ascertaining whether or not there is unfavourable treatment, it is necessary to carry out, not a general abstract comparison, but a specific concrete comparison, in the light of the favourable treatment in question (judgment of 6 April 2017, Jyske Finans, C-668/15, EU:C:2017:278, paragraphs 31 and 32)."* (emphasis added)

The Ministry believes that the CJEU's reading of the issue, including in the Jyske Finans judgment, is very clear, as best illustrated by the following premises of the judgment:

> *"31. Nonetheless, as observed in paragraph 27 above, the concept of 'indirect discrimination' within the meaning of Article 2(2)(b) of Directive 2000/43 is applicable only if the allegedly discriminatory measure has the effect of placing a person of a particular ethnic origin at a disadvantage.*
>
> *32. As the Advocate General observed in point 64 of his Opinion, for the purposes of ascertaining whether a person has been subject to unfavourable treatment, it is necessary to carry out, not a general abstract comparison, but a specific concrete comparison, in the light of the favourable treatment in question.*
>
> *33. It follows that the argument that the use of the neutral criterion at issue in the main proceedings, namely a person's country of birth, is generally more likely to affect persons of a 'given ethnicity' than 'other persons' cannot be accepted."* (emphasis added)

There is no linguistic difference in the English language version, where paragraph 31 reads as follows:

"31. Nonetheless, as observed in paragraph 27 above, the concept of 'indirect discrimination' within the meaning of Article 2(2)(b) of Directive 2000/43 is applicable only if the allegedly discriminatory measure has the effect of placing a person of a particular ethnic origin at a disadvantage." (emphasis added)

Nor is there any difference between the French and German language versions.

As stated in paragraph 4.2.3.1 of the Ministry's response, the highlighted paragraphs of the Jyske Finans judgment refer to Advocate General Wahl's Opinion in the case, in which the Advocate General addresses in detail the issue, which the plaintiffs wish to have referred, including the difference between the language versions of the Directive:

"60. Assuming for the sake of argument that the Kingdom of Denmark is correct to claim that persons not born in that Member State are not generally of 'Danish ethnic origin', that is not sufficient for a finding of indirect discrimination under Article 2(2)(b) of Directive 2000/43. Indeed, in order to be operative, the concept of indirect discrimination under that provision requires that the alleged discriminatory measure has the effect of placing a particular ethnic origin at a disadvantage. Put differently, that provision requires identifying the particular ethnic origin (or origins, in case a practice affects several distinct ethnic communities) to which the protection under that directive applies and which has suffered a less advantageous treatment. Unlike the view expressed by the Kingdom of Denmark above at point 58, that provision cannot be understood to confer (negative) protection against measures which arguably place a given ethnic origin at an advantage, without also identifying a specific ethnic origin which is put at a disadvantage. In that sense, although the English and German wordings of Article 2(2)(b) of Directive 2000/43 might be considered inconclusive in that regard, other official language versions use more precise terms which clarify the meaning of that provision (21) and find support in the purpose and general scheme of the directive. (22) That purpose is, according to recital 17 thereof, 'to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin' (emphasis added). It would run counter to the general scheme of Directive 2000/43 simply to apply Article 2(2)(b) thereof in the abstract, as every single human being has an ethnic origin, even though that origin might yet have to be properly uncovered." (emphasis added)

2.1.2 The justification of direct discrimination

2.1.2.1 Not contended in the case

As regards the plaintiffs' third reason, the Ministry of the Interior and Housing considers that it is quite clear that direct discrimination on grounds of racial or ethnic origin cannot be justified by the pursuit of objective objectives, except in certain specifically defined cases.[4]

The Ministry of the Interior and Housing has therefore not argued that it could be justified if the Eastern High Court were to find that direct discrimination has occurred, see for example paragraph 4.3 of the Ministry's response, which contains a summary of the Ministry's arguments.

[4] This applies to Article 4 of the Racial Equality Directive (on occupational requirements), which has been transposed into Danish law in Section 6(2) of the Act on the Prohibition of Discrimination in the Labour Market, cf. most recently Consolidated Act No 1001 of 24 August 2017, and Article 5 of the Directive (on affirmative action), which has been transposed into Section 4 of the Ethnic Equal Treatment Act.

It must therefore be based on a misunderstanding when the plaintiffs and the Danish Institute for Human Rights both state that this is a view put forward by the Ministry.

2.1.2.2 The case law of the CJEU does not give rise to doubts
That direct discrimination on grounds of race and ethnicity cannot be justified follows from the wording of Section 3(2) and (3) of the Ethnic Equal Treatment Act and from Article 2(2)(a) and (b) of the Racial Equality Directive.

It is also explicitly stated, for example, in the special comments to Section 3(2) of the Ethnic Equal Treatment Act, where it is written:

> *"Unlike indirect discrimination, direct discrimination cannot be justified on the grounds of objective reasons. Direct discrimination therefore exists irrespective of whether the discrimination on grounds of racial or ethnic origin has taken place in order to pursue otherwise objective aims."* (emphasis added)

The same is stated in section 6.2 of Parliamentary Report No 1422 (2002) on the transposition into Danish law of the Racial Equality Directive, where the provisions of the Directive are reviewed. This refers to the direct discrimination rule in Article 2(1) of the Directive:

> *"Direct discrimination on grounds of racial or ethnic origin - unlike indirect discrimination – cannot be justified by the pursuit of an objective, without prejudice to Article 4 discussed below."* (emphasis added)

The Ministry of the Interior and Housing does not consider that the plaintiffs are right in that the CJEU in paragraphs 81-83 of the CHEZ judgment has assumed (or implied) that direct discrimination can be justified.

Indeed, in the paragraphs cited by the plaintiffs (paragraphs 81-83) of Pleading 3 of 17 May 2022, the CJEU simply stated that it is for the national courts to make the specific assessment of whether the measures taken by the company CHEZ RB in the case at hand in certain districts of Bulgaria constituted direct or indirect discrimination against Bulgarian citizens of Roma origin.

In this context, the CJEU laid down, in paragraphs 81-83, a number of circumstances which national courts could take into account in that assessment, but did not address the question of whether there was direct or indirect discrimination, let alone whether such discrimination could be justified.

2.2 The specific questions
In the light of the above observations, the comments of the Ministry of the Interior and Housing on the specific questions, which the plaintiffs (section 2.2.1), the Danish Institute for Human Rights (section 2.2.2), and attorney Jytte Lindgård (section 2.2.3) wish to refer to the CJEU, are set out below.

2.2.1 The plaintiffs' questions
With regard to question 1 by the plaintiffs, reference is made to the observations in section 2.1.1 above in support of the view that it is unnecessary to refer the question. It is thus clear that, in order to establish indirect – but not direct – discrimination, it is necessary to show that a particular ethnic group

is disadvantaged. By the same considerations, the Ministry has not contended that there is no direct discrimination.

By question 2, the plaintiffs are in effect asking the CJEU to make part of the subsumption that it is incumbent upon the Eastern High Court to make in relation to the issue of direct discrimination, namely whether the concept of 'immigrants and descendants from non-Western countries' in Section 61a(2) of the Common Housing Act – which is assessed on the basis of a person's parents' place of birth and nationality – is directly and inextricably linked to "ethnic origin" as it appears in the Racial Equality Directive.

Reference is made to the comments in section 2.1.1, above, in support of the view that the assessment in question does not involve any reasonable doubt as to interpretation but is merely a question of application of the law and should not, for that reason, be referred.

It should also be noted that the plaintiffs themselves have stated that the question is relevant only if question 1 can be answered in the affirmative.

As regards question 3, it should be noted, first of all, that the question of whether the plaintiffs can be said to have been treated less favourably is undoubtedly relevant to the assessment of whether direct discrimination has occurred in the present case. This is directly apparent from the wording of Section 3(2) of the Ethnic Equal Treatment Act and Article 2(2)(a) of the Racial Equality Directive and is not something that the Eastern High Court needs to refer to the CJEU.

Whether the residents of Mjølnerparken have in fact been treated less favourably because they live in rented accommodation in a common housing estate, which is required to draw up and comply with a development plan pursuant to section 168a(2) of the Common Housing Act, in conjunction with section 61a(2), is part of the subsumption which the Eastern High Court must make. As stated in section 4.2.2.1 of the Ministry's response, the special comments to section 3(2) of the Ethnic Equal Treatment Act, for example, describe in more detail how the assessment can be made.

As regards question 4, see the comments in section 2.1.1 above in support of the view that it is unnecessary to refer the question to the CJEU. The assessment of direct discrimination thus concerns whether the category "immigrants and descendants from non-Western countries" in Section 61a(2) of the Common Housing Act is directly and inextricably linked to the concept of "ethnic origin" as it appears in the Ethnic Equal Treatment Act and the Racial Equality Directive.

With question 5, the plaintiffs are in fact asking the CJEU to carry out part of the subsumption, which it is the duty of the Eastern High Court to make, namely whether Section 61a(2) of the Common Housing Act, in conjunction with Section 168a(2), places residents in certain common housing estates (e.g. Mjølnerparken) at a disadvantage compared with residents in other common housing estates, and whether it is of significance for the assessment that rehousing is offered in the same housing estate.

As stated above, the special notes to Section 3(2) of the Ethnic Equal Treatment Act, for example, describe in more detail how the assessment can be made.

With regard to question 6, reference is made to the comments in section 2.1.2, above, in support of the view that it is unnecessary to refer the question to the CJEU. It is therefore clear that direct

discrimination on the grounds of racial and ethnic origin cannot be justified and is therefore not something that the Ministry of the Interior and Housing has contended in the case.

2.2.2 Questions raised by the Danish Institute for Human Rights

The Danish Institute for Human Rights has identified six questions in its Third Party Intervention II, which it considers should be submitted to the CJEU. The six questions are largely identical to the plaintiffs' questions, although they are worded and numbered differently.

The Ministry of the Interior and Housing makes the following comments on the questions:
Question 1 appears to be similar in content to the plaintiffs' question 2.
Question 2 appears to be similar in content to the plaintiffs' question 3.
Question 3 appears to be similar in content to the plaintiffs' question 4.
Question 4 appears to be similar in content to the plaintiffs' question 5.
Question 5 appears to be similar in content to the plaintiffs' question 6.

By question 6, the Danish Institute for Human Rights is, in effect, asking the CJEU to make the specific subsumption in the case as to whether the plaintiffs have suffered indirect discrimination. As stated in paragraph 4.2.3 of the Ministry of the Interior and Housing's response, there is no doubt – let alone reasonable doubt – as to how the assessment of whether the plaintiffs have been indirectly discriminated against should be made. This is therefore an application of the law. which should be made by the Eastern High Court and the question should be dismissed on that basis alone.

It is noted in this respect that the plaintiffs themselves have not argued that the issue of indirect discrimination is one that should be referred to the CJEU, see section 2.1, above.

2.2.3 Questions from Attorney Jytte Lindgård

In pleading C of 23 May 2022 in the cases concerning Ringparken in Slagelse (file nos. BS-26702/2020-OLR, BS-26704/2020-OLR, BS-26705/2020-OLR and BS-26706/2020-OLR), which are being dealt with in connection with the present case as regards the question of a preliminary ruling, Attorney Jytte Lindgård has set out eight questions which she considers should be referred to the CJEU on behalf of her clients.

The eight questions are virtually identical to the applicants' questions, albeit worded and numbered differently. The Ministry of the Interior and Housing has the following comments on the questions:
Question 1 is identical to the plaintiffs' question 1.
Question 2 is identical to the plaintiffs' question 2.
Question 3 is identical to the plaintiffs' question 3.

In question 4, attorney Jytte Lindgård asks the CJEU to rule on the significance for the question of direct discrimination that foreigners born in a Western country are treated less favourably than residents of other housing estates.

The Ministry of the Interior and Housing considers that the issue is covered by the plaintiffs' questions 2 and 3, since it is precisely the country of birth and citizenship of a person's parents that determines whether they fall within the category of "immigrants and descendants from non-Western countries" in Section 61a(2) of the Common Housing Act.

For this reason, reference is made to the comments in section 2.2.1, above.

Question 5 is identical to the plaintiffs' question 4.
Question 6 is identical to the plaintiffs' question 5.
Question 7 appears to be similar in content to the plaintiffs' question 6.
Question 8 is identical to the Danish Institute for Human Rights' question 6.

3. JOINT PROCEEDINGS

By order of 26 April 2022, the Eastern High Court decided to hear the present case jointly with the cases concerning Ringparken in Slagelse as regards the question of preliminary referral, in accordance with Section 254(1) of the Administration of Justice Act.

The Ministry of the Interior and Housing requests that the joint proceedings in the present case and the Ringparken cases continue during the further proceedings, even if the Supreme Court decides that no preliminary reference should be made. Please refer to the comments on the joint proceedings in the Ministry's letter of 4 December 2020 and in the rejoinder of 4 January 2021.

Copenhagen, 13 June 2022

Peter Biering
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