Case No. 53 9 August 2022

Pleading 4

(preliminary reference)

to the Eastern High Court in case BS-27824-OLR

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versus

The Ministry of Interior and Housing

Pleading C of 8 July 2022 by the Ministry of Interior and Housing gives cause the following additional remarks:

The plaintiffs continue to consider that the questions for the CJEU, as drafted by the third-party interveners, UN Special Rapporteurs E. Tendayi Achiume and Balakrishnan Rajagopal, are necessary and appropriate for submission.

What the defendant contends in Pleading C of 8 July 2022, including in the light of the judgment of the 21st chamber of the Eastern High Court reproduced in UfR 2022.3593 Ø, does not change this.

The plaintiffs counter that both pleading C and UfR 2022.3593 Ø, underline a need for the CJEU to be given access to provide clarity on the issues raised.

Direct discrimination (question 1 and 2)
The plaintiffs agree that direct discrimination, including in light of the case law of the CJEU, does not require that a group of a particular ethnic origin be affected.

In Pleading C, however, the defendant now argues that the questions on direct discrimination raised by the third-party intervener and endorsed by the plaintiffs should have been settled by the Eastern High Court in UfR 2022.3593 Ø.

In this regard, it is stated in Pleading C, inter alia, that:

> "However, the High Court had to decide whether the terminations constituted indirect discrimination, as the plaintiffs considered that the housing association had selected the persons to be terminated on the basis of whether they belonged to the category *"immigrants and descendants from non-Western countries"*, as stated in Section 61a(2) of the Common Housing Act.
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> The majority of the High Court found that this was not proven. However, all three judges agreed that it was in principle immaterial, given that the term "immigrants and descendants from non-Western countries" in Section 61a(2) of the Common Housing Act does not refer to a community of the same ethnic origin, see page 48 of the judgment:
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> > *"Since "immigrants and descendants from non-Western countries" does not in itself refer to a community of the same ethnic origin, and since there is no information before the High Court as to the ethnic affiliation of the residents of the terminated tenancies and of the other tenancies of the housing association, we consider that for this reason alone it has not been proved that the adoption of the overall plan or the specific selection of the tenancies to be terminated in connection with its implementation constituted indirect discrimination in violation of the Ethnic Equal Treatment Act. For the same reason, no circumstances have been shown which give rise to the presumption that indirect discrimination on grounds of ethnic origin was exercised."* (emphasis added)
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> For this reason alone, the Ministry of Interior and Housing considers that it is unnecessary to refer the third-party intervener's question 1 and 2 to the CJEU."

The plaintiffs observe in this respect that the paragraphs quoted from UfR 2022.3593 Ø do not entail that the reference of the questions pertaining to direct discrimination should (now) be unnecessary, since the plaintiffs observe that the questions pertain to whether the application of the term "non-Western immigrants and descendants" in the context, in which it is defined, does in fact in itself constitute direct discrimination.

This question has not been addressed in UfR 2022.3593 Ø, nor does the quotation in Pleading C relate to the question.

The plaintiffs argue, first, that the High Court is clearly addressing only the issue of indirect, rather than direct, discrimination in the quotation.

Secondly, it is also unclear whether the use of the criterion "non-Western immigrants and descendants" is in itself an expression of the ethnic origin covered by the concept, as defined in Article 2(2)(a), as opposed to the use of a country of origin criterion, see further below.

The plaintiffs therefore continue to consider it necessary to refer questions 1 and 2 proposed by the third-party intervener.

Indirect discrimination (question 3)

The defendant further invokes Jyske Finans, Case C-668/15, EU:C:2005:753, and UfR 2022.3593 Ø, and contends that the draft questions on indirect discrimination, as proposed by the third-party intervener and endorsed by the plaintiffs, are not necessary.

In this regard, it is stated in Pleading C, inter alia, that:

> "In the Jyske Finans judgment, the CJEU stated – quite generally and very clearly indeed – first, that ethnic origin cannot be determined solely on the basis of one criterion (such as nationality or national origin, to which the third-party intervener refers) and, second, that the place of birth specifically cannot in itself form the basis for a general presumption of membership of a particular ethnic group, see paragraphs 19 and 20 of the judgment.
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> Thus, the CJEU has established that a person's ethnic origin must be based on a range of elements, some of which are objective and others subjective, see paragraph 19. This includes, in particular, the person's nationality, religious beliefs, language, cultural background, traditions and place of residence, see paragraph 46 of the CJEU judgment of 16 July 2015, CHEZ Razpredelenie Bulgaria, C-83/14, EU:C:2015:480.
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> In this light – and in view of the judgment of the High Court of 27 June 2022 (BS-47813/2020-OLR and others), as mentioned above – the Ministry of Interior and Housing does not consider it necessary to refer to the CJEU the question of whether having a non-Western background – including a Lebanese or Somali background – is included in the determination of racial or ethnic origin, as suggested by the third-party intervener in their question 3."

The plaintiffs find that the defendant's argument precisely shows that there is a lack of clarity in the understanding of EU law.

The defendant submits that a preliminary ruling of the CJEU naturally deals only with questions of interpretation of EU law relating to the facts, which are before the national courts in the main proceedings.

The plaintiffs generally agree, but the boundaries between legal and factual questions of interpretation are blurred at the CJEU.

Nevertheless, the defendant has consistently maintained in its pleadings in the main proceedings that the case-law of the CJEU is clear and that there is no doubt as to how EU law applies in the present case, since the facts of the present case, as far as the disputed criteria ("country of birth" and "non-Western immigrants and descendants") are concerned, are identical to the *Jyske Finans* case.

The plaintiffs note that this is not clearly apparent from the case-law of the CJEU, and the specific facts highlighted by the plaintiffs relating to the concept of non-Western background and origin are thereby disregarded.

The plaintiffs and the third-party interveners have clearly argued in all their pleadings that the concept of "non-Western immigrants and descendants" does not relate to just one criterion, and in particular, that it does not relate to just nationality or national origin – let alone place of birth as in the *Jyske Finans* case.

The defendant has consistently argued in their pleadings that it is not necessary for the High Court (or the CJEU) to rule on the many other issues raised by the plaintiffs and third-party interveners, which show a direct and inextricable link to race and ethnic origin, again on the basis that the *Jyske Finans* case has clarified these issues.

Nevertheless, the plaintiffs consider that the CJEU's "abstract and conceptual assessment" in the *Jyske Finans* case, including what is alleged by the defendant in pleading B, does not constitute a position on such factors and their importance for the determination of when a (sufficiently) particular ethnic group is affected.

The same is the case in UfR 2022.3593 Ø, where the High Court's assessment was limited to the definitions of "Western"/"non-Western" countries, immigrants and descendants rather than all the elements set out in the plaintiffs' and third-party interveners' respective pleadings and submissions in the present case on the concept.

The plaintiffs further note that an essential limitation of UfR 2022.3592 Ø appears to have been that no information was available to the High Court on the ethnic affiliation of the residents of the terminated tenancies and the other tenancies of the housing association.

In the present case, statistical data are available which reveal precisely this. Indeed, it appears from the defendant's own data submitted that, for example, 95 % of those with a Lebanese background are "Arabs". This fact may of course be taken into account by the CJEU in its more general and conceptual assessment.

Moreover, the *Jyske Finans* case did not contain such elements and therefore does not clarify the understanding of EU law.

More generally, therefore, it remains the plaintiffs' view that the question of the correct application of the "same ethnic origin" requirement for indirect discrimination is unclear in EU law.

On the contrary, the defendant submits, with reference to UfR 2022.3592 Ø, that there is no doubt as to the interpretation of Article 2(2)(b) of Directive 2000/43 and that there is a requirement under EU law that the group concerned must constitute a community of the same ethnic origin.

In this regard, the plaintiffs note that the judgment of the High Court, as regards this understanding of when indirect discrimination has occurred, is seen to refer only to the CJEU judgment of 6 April 2017, Jyske Finans, Case C-668/15, EU:C:2005:753.

On this, the Eastern High Court states that:

> "In assessing whether there is indirect discrimination against persons on grounds of their "ethnic origin", it should be noted that this term is not defined in the Ethnic Equal Treatment Act, but that the special remarks to Article 3(2) of the Act state that it means "a general affiliation to a group of persons defined on the basis of common history, traditions, culture or cultural background, language, geographical origin, etc." In its judgment of 6 April 2017 in case C-668/15 (Jyske Finans A/S) concerning the underlying directive, the CJEU stated that ethnic origin cannot be determined solely on the basis of one criterion and that a person's place of birth cannot in itself provide a basis for a general presumption of belonging to a particular ethnic group, so that it can be established that these two concepts are directly and inextricably linked."

Accordingly, it is argued that "immigrants and descendants from non-Western countries" does not in itself refer to a population group of the same ethnic origin, which is assumed to be the precondition for indirect discrimination on grounds of ethnic origin.

Such a condition that the same ethnic origin must be affected was referred to by the CJEU as a "particular" ethnic origin applied in the Jyske Finans case, in order for indirect discrimination to occur.

The requirement was reiterated by the CJEU in Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV, Case C-457/17, ECLI:EU:C:2018:912, which concerned the issue of indirect discrimination on grounds of ethnic origin by a German foundation awarding scholarships only to applicants who had passed a legal examination in Germany.

The CJEU reiterated the requirement in Land Oberösterreich, Case C-94/20, ECLI:EU:C:2021:477, which concerned the issue of indirect discrimination on grounds of ethnic origin by requiring a basic knowledge of German for entitlement to housing benefits.

The CJEU has thus directly linked the requirement to main proceedings concerning a neutral country of birth criterion (Jyske Finans case), a neutral education criterion (Maniero case), and a neutral language requirement (Land Oberösterreich case).

The plaintiffs therefore still do not find it clear whether the requirement of a certain ethnic origin can be derived from EU law, as concluded in general by the Eastern High Court in UfR 2022.3593 Ø, when it is linked to a criterion such as "immigrants and descendants from non-Western countries".

It follows from Advocate General Wahl's Opinion in the Jyske Finans case and the subsequent judgment of the CJEU that the requirement that a particular ethnic origin be affected by a neutral requirement or practice is linked to the fact that Directive 2000/43 does not provide negative protection against discrimination, see Opinion at paragraph 60 and CJEU judgment at paragraphs 28, 29 and 33.

It was thus not sufficient in the case to point out that the discrimination resulted in preferential treatment for persons of "ethnic Danish origin".

Against this background, it is unclear whether the requirement to positively identify a "particular" ethnic origin that is disadvantaged applies in all cases or is only highlighted by the CJEU in situations such as the Jyske Finans case, where the requirement was linked to a practice that negatively favoured ethnic Danish loan applicants, in the Maneiro case, where the requirement favoured German candidates, or in the Land Oberösterreich case, where the requirement favoured native German speakers.

It is then unclear whether the same requirement applies in the case of discrimination which positively affects persons with several specific and delimited (non-Western) countries of birth, as opposed to the negative delimitation in the above-mentioned cases.

Against this background, the plaintiffs consider that there is still – and now after the Eastern High Court's judgment in UfR 2022.3593 Ø all the more – a lack of clarity regarding the understanding of EU law.

The plaintiffs therefore consider that the third-party intervener's question 3 is not unnecessary in the light of the Jyske Finans case or UfR 2022.3592 Ø.

Justification of indirect discrimination (question 4)
Finally, the defendant contends that the issue of justification for any indirect discrimination should be dismissed because there is evidentiary disagreement as to the purpose of the underlying legislation and regulation of ghetto-listed housing estates, which would be particularly relevant in light of UfR 2022. 3592 Ø – as stated in pleading C in the light of the court's conclusion *"that the term 'immigrants and descendants from non-Western countries' in Section 61a(2) of the Common Housing Act does not in itself refer to ethnic origin"*.

The plaintiffs note in this regard that the question can only be answered if the CJEU were to answer question 3 in the affirmative.

Accordingly, it appears that there is no such doubt about what can be read in the explanatory memoranda to the legislation on the introduction of the concept of "immigrants and descendants from non-Western countries", in parallel society packages, and moreover about the intention behind regulating a housing estate, that the CJEU can, in general and independently of the parties' positions on the aim of the legislation, interpret the framework for justifying indirect discrimination, including by drawing on the case law of the European Court of Human Rights.

Moreover, the fact that – if this is the case – there may be, as the defendant argues, "a wealth of case law establishing that the aim of promoting successful integration constitutes an overriding reason relating to the public interest within the meaning of EU law, and that Member States enjoy a wide margin of appreciation" in this regard does not change the fact that the pursuit of such an aim must be objective and proportionate, see European Court of Human Rights, J.D. and A v United Kingdom, judgment of 24 October 2019.

The plaintiffs also refer to the ongoing references from Danish courts concerning the EU-Turkey agreement complex and immigration law, see e.g. Genc, Case C-561/14, ECLI:EU:C:2016:247, A, Case C-89/18, ECLI:EU:C:2019:580, and the pending preliminary ruling case C-279/21.

Answering question 4 would be helpful in highlighting the unclear EU legal framework for pursuing, for example, successful integration as an overriding public interest in regulating housing areas.

Copenhagen, 9 August 2022

[SIGNED]

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