ORDER BY THE EASTERN HIGH COURT
given on 30 June 2023

BS-26702/2020-OLR, BS-26704/2020-OLR,
BS-26705/2020-OLR, and BS-26706/2020-OLR
(14th Chamber)
Slagelse Almennyttige Boligselskab,
Branch Schackenborgvænge
(attorney Henrik Qwist)

v

Defendant 1
Defendant 2
Defendant 3 and
Defendants 4 and 5
(all represented by attorney Jytte Lindgård)

Third party interveners:
BL – Danmarks Almene Boliger
(attorney Lisbet Vedel Thomsen)
and
The Danish Institute for Human Rights

and

BS-27824/2020-OLR
(14th Chamber)
Plaintiff 1
Plaintiff 2
Plaintiff 3
Plaintiff 4
Plaintiff 5
Plaintiff 6
Plaintiff 7
Plaintiff 8
Plaintiff 9
Plaintiff 10
Plaintiff 11 and
Plaintiff 12
(all represented by attorney Eddie Khawaja)

v

The Ministry for Social Affairs, Housing, and the Elderly
(previously the Ministry of Interior and Housing,
previously the Ministry of Transport and Housing)
(attorney Peter Biering)

Third-party interveners:
The Danish Institute for Human Rights
and
UN Special Rapporteurs
E. Tendayi Achiume and Blakrishnan Rajagopa
(both represented by attorney Eddie Khawaja)

Order given by High Court judges Benedikte Holberg, Mikael Friis Rasmussen, and Rikke Skovby.

Introduction

1. In accordance with Article 267(2), in conjunction with paragraph (1), of the Treaty on the Functioning of the European Union (TFEU), the Eastern High Court has decided to request a preliminary ruling from the CJEU on the interpretation of Article 2(2)(a) and (b) of Directive 2000/43/EC (Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin).

2. Similar questions are also being considered in a number of other cases before Danish courts, including seven cases before the Supreme Court and two cases before the Court of Aarhus. On 19 December 2022, the Supreme Court decided to stay the cases pending before the Supreme Court to await the CJEU's consideration of preliminary questions in these cases.

The circumstances and history of the cases

3. The preliminary referral concerns, in total, five individual cases.

4. The cases BS-26702/2020-OLR, BS-26704/2020-OLR, BS-26705/2020-OLR, and BS-26706/2020-OLR, which are being considered jointly, concern the validity of the termination of five tenants in the housing branch Schackenborgvænge in the housing estate Ringparken in Slagelse.

5. Case BS-27824/2020-OLR, which has been filed by 11 tenants from the housing estate Mjølnerparken in Copenhagen, concerns the lawfulness of the approval by the Ministry for Social Affairs, Housing, and the Elderly (at the time: the Ministry for Transport and Housing) of the development plan for the area.

6. The cases have all been referred to the High Court for consideration in first instance, as they have been deemed to raise issues of a principled nature.

7. It is a central theme in all of the cases whether the Danish rules on development plans to reduce common family housing in so-called “transformation areas” (previously “tough ghetto area”) as defined in Section 168a and Section 61a(4), in conjunction with subsections (2) and (1), see further below, constitutes discrimination on the basis of ethnic origin in violation of the Ethnic Equal Treatment Act and the underlying directive (Directive 2000/43).

8. Consolidated Act No. 1877 of 27 September 2021 on Common Housing (the Common Housing Act) thus prescribes that common housing branches, which own a common housing estate, must draw up a development plan together with the municipal council for the common housing estates designated “transformation areas”. The Minister of Interior and Housing must approve the development plan.

9. Under Section 61a(4) of the Common Housing Act, a common housing estate is designated a "transformation are" (previously "tough ghetto area"), when it for the last five years has fulfilled the conditions for being a "parallel society" (previously "ghetto").

10. Under Section 61a(1) and (2) of the Common Housing Act, a "parallel society" is a housing estate that meets at least two out of four criteria about the residents' attachment to the labour market, crime rate, level of education, and average income, and where more than 50 % of the residents are "immigrants and descendants from non-Western countries".

11. In the development plan, the housing association and the municipal council must explain how the share of common family housing will be reduced to a maximum of 40 % of the total housing stock by 1 January 2030.

12. It is left to the common housing association and the municipal council to decide how to achieve the reduction in the individual housing estate. It is stated in the preparatory works (the explanatory memorandum) to the Common Housing Act, however, that the reduction can be achieved, for example, by converting common family housing into student or senior housing, by constructing private housing, or by acquiring, selling, or demolishing common family housing.

13. The development plan may consequently result in tenants living in the common housing estate being terminated. The consequences for the individual tenants in the cases are described below.

The Schackenborgvænge cases

14. Schackenborgvænge is a common housing branch in the housing estate Ringparken in Slagelse. Ringparken consists of a total of five housing branches, of which four branches are part of the housing association FOB, whereas Schackenborgvænget, which this case concerns, is a branch of Slagelse Almennyttige Boligselskab (SAB). Schackenborgvænge consists of 136 common housing units.

15. Effective from 1 December 2018, Ringparken was designated a "tough ghetto area", as defined in Section 61a(4) of the Common Housing Act (according to current legislation: a "transformation area"), since the housing estate fulfilled all four conditions in Section 61a(1) about the residents attachment to the labour market, crime rate, level of education, and average income, and since 55.6 % of the residents, at the same time, belonged to the category "immigrants and descendants from non-Western countries", as laid down in Section 61a(2) of the Common Housing Act.

16. In accordance with Section 168a(1) of the Common Housing Act, FOB, SAB, and the Municipality of Slagelse drew up a development plan for Ringparken, which was approved by the municipal council on 27 May 2019. The development plan entails a reduction of the share of common family housing to 40 %, which for Schackenborgvænge means that some units will be converted into student housing, common family housing will be demolished, and new private units will be constructed.

17. In June 2019, SAB decided to sell four housing blocks in Schackenborgvænge (136 common housing units) to a private investor. Since this was not in accordance with the development

plan approved by the Municipality of Slagelse, the development plan was updated and approved by the municipality on 26 August 2019.

18. Also on 26 August 2019, the municipality approved "Letting criteria for letting of properties in vulnerable housing estates in the Municipality of Slagelse, which are sold to private investors" in accordance with Section 27c of the Common Housing Act. The Municipality of Slagelse formulated the final letting criteria on 17 September 2019. The document contains provisions on what it takes for tenants to keep living on the property after a sale. A certain level of income is required, and the tenant and the tenant's partner cannot have committed crime within the last six months.

19. The development plan – and the sale of the branch Schackenborgvænge – was approved by the Transport, Construction and Housing Authority on 14 January 2020.

20. On 17 February 2020, SAB terminated 17 tenancies in Schackenborgvænge, including the five defendant tenants. The terminations were made in accordance with the approved letting criteria, and the terminated tenants were reportedly not selected based on a criterion of whether they are "immigrants or descendants from non-Western countries".

21. About the individual tenants, it may be noted that Defendant 1 has lived in a family unit in Schackenborgvænge since 15 October 2012. She was born in Turkey and is a Danish citizen. She has not accepted the offer of permanent rehousing.

22. Defendant 2 has lived in a family unit in Schackenborgvænge since 15 April 2013. There is no information about her place of birth, whether her parents are immigrants, or whether she has acquired Danish citizenship. She has not accepted the offer of permanent rehousing.

23. Defendant 3 has lived in a family unit in Schackenborgvænge since 1 November 2017. She was born in Bosnia and is a Bosnian citizen. She has not accepted the offer of permanent rehousing.

24. Defendant 4 and Defendant 5 have lived together in a family unit in Schackenborgvænge since 1 September 2017. Defendant 4 was born in Syria, whereas Defendant 5 was born in Lebanon. Both of them have acquired Danish citizenship. In 2022, they moved to a private rental unit.

25. The defendant tenants all objected to the terminations, and on 7 May 2020, SAB brought an action against them on 7 May 2020, claiming that they must acknowledge that the branch's terminations of the tenancies were lawfully decided and meet the conditions in Section 85(1)(2) of the Common Housing Rent Act, in conjunction with Section 61a(1) of the Common Housing Act. Furthermore, the housing association claims that the defendants must vacate the premises as soon as possible on a date determined by the court.

26. The five defendants have filed a claim for acquittal and a claim that SAB must acknowledge that Section 61a of the Common Housing Act is invalid.

27. From 1 December 2021 onwards, Ringparken has no longer constituted a transformation area, since the housing estate no longer meets the criteria concerning the share of residents without attachment to the labour market, the share of residents convicted of certain types of crime, and the residents' average income. However, SAB remains obliged to implementing the approved development plan for the area.

The Mjølnerparken case

28. Mjølnerparken is a common housing branch in Copenhagen and part of the housing association Bo-Vita. Mjølnerparken consists of 528 family units and 32 student units divided across four blocks.

29. Since 1 December 2018, Mjølnerparken has been designated a “tough ghetto area” (now “transformation area”), as the housing estate since then has met three of the four criteria in Section 61a(1) of the Common Housing Act, and because about 80 % of the residents in the area belong to the category “immigrants and descendants from non-Western countries”, as laid down in Section 61a(4), in conjunction with subsection (2), of the Common Housing Act. Mjølnerparken continues to be designated a “transformation area”.

30. Bo-Vita therefore drew up a development plan for the area dated 8 May 2019 in accordance with section 168a(1) of the Common Housing Act.

31. The development plan entails a continuation of a so-called overall plan for the housing estate, which was decided on 10 September 2015. In addition to what was, as already contained in the overall plan, the development plan entails a reduction of common family housing to 40 % or 226 units in the housing estate, which will happen through sale of block 2 and 3. It should be noted that a case is pending before the rent tribunal, which has been filed by the plaintiffs in this case against the housing association Bo-Vita, which concerns the basis for the terminations.

32. The development plan was approved by the Municipality of Copenhagen on 20 June 2019 and by the Ministry of Transport and Housing (now the Ministry for Social Affairs, Housing, and the Elderly) on 10 September 2019.

33. On 22 December 2021, Bo-Vita informed on its website that Bo-Vita had agreed to sell the flats in block 2 and 3. By law, it is Bo-Vita's responsibility to terminate the tenants in the blocks in question.

34. On 2 June 2022, the Municipality of Copenhagen approved the sale, and on 4 January 2023, the sale was also approved by the Social Affairs and Housing Authority. On 21 April 2023, some of the plaintiffs brought a separate action before the City Court of Copenhagen concerning the validity of this approval.

35. The plaintiffs in this case all are or have been residing in block 2 and 3.

36. Plaintiff 1 has lived in a family unit in Mjølnerparken since 1994. He was born in Pakistan and has acquired Danish citizenship. Currently, he is rehoused outside Mjølnerparken and has been offered rehousing in block 4 of Mjølnerparken, which he has accepted.

37. Plaintiff 2 has lived in a family unit in Mjølnerparken since 1995. He was born in Lebanon and has Danish citizenship. Currently, he is rehoused outside Mjølnerparken and has been offered rehousing in block 4 of Mjølnerparken, which he has accepted.

38. Plaintiff 4 has lived in a family unit in Mjølnerparken since 1987. He was born in Pakistan and has Danish citizenship. Currently, he is rehoused outside Mjølnerparken and has been offered rehousing in block 4 of Mjølnerparken, which he has accepted.

39. Plaintiff 5 has lived in a family unit in Mjølnerparken since 2022. He was born in Syria and has Danish citizenship. He has not been terminated to date and therefore continues to live in his rental unit.

40. Plaintiff 6 has lived in a family unit in Mjølnerparken since 2002. She was born in Syria and has Danish citizenship. She has not been terminated to date and therefore continues to live in her rental unit.

41. Plaintiff 7 has lived in a family unit in Mjølnerparken since 1994. He was born in Syria and was a stateless Palestinian until he was granted Danish citizenship. As part of the development plan, the tenancy was terminated as of 1 November 2022 by Bo-Vita. He has accepted rehousing outside of Mjølnerparken.

42. Plaintiff 8 has lived in a family unit in Mjølnerparken since 1994. He was born in Syria and was a stateless Palestinian until he was granted Danish citizenship. As part of the development plan, the tenancy was terminated as of 1 November 2022 by Bo-Vita. He has accepted rehousing outside of Mjølnerparken.

43. Plaintiff 9 has lived in Mjølnerparken since 2002 and rented a family unit in block 2 of Mjølnerparken. She was born in Libya and has Danish citizenship. As part of the development plan, the tenancy was terminated as of 1 November 2022 by Bo-Vita. She has accepted rehousing outside of Mjølnerparken.

44. Plaintiff 10 has lived in a family unit in Mjølnerparkn since 2014. She was born in Denmark and has Danish citizenship. As part of the development plan, the tenancy was terminated as of 1 November 2022 by Bo-Vita, to which Plaintiff 10 objected. Currently, a case about this is pending before the rent tribunal in Copenhagen. At the moment, she is temporarily rehoused in Mjølnerparken.

45. Plaintiff 11 has lived in a family unit in Mjølnerparken since 2012. She was born in Denmark and has Danish citizenship. As part of the development plan, the tenancy was terminated as of 1 November 2022 by Bo-Vita. She has accepted rehousing outside of Mjølnerparken.

46. Plaintiff 12 has lived in Mjølnerparken his entire life and rents a family unit. She was born in Denmark and has Danish citizenship. Her parents were both born in Lebanon and have Danish citizenship. She has, to date, not received a notice of termination.

47. On 27 May 2020, the plaintiffs brought an action against the Ministry for Social Affairs, Housing, and the Elderly (the Ministry of Interior and Housing, at the time) submitting the claim that the ministry's approval of 10 September 2019 of the development plan for Mjølnerparken is invalid, including because the plan is based on Section 61a(4) of the Common Housing Act.

48. The Ministry has submitted a claim for acquittal.

The arguments of the parties concerning discrimination

The Schackenborgvænge cases

49. The plaintiff, SAB, has *inter alia* contended that the termination of the defendants' tenancies was made with legal basis in Section 85(1)(2) of the Common Housing Rent Act, according to which a landlord may terminate the tenancy agreement, when a property situated in a vulnerable housing estate, as defined in Section 61a(1) of the Common Housing Act, or in a housing estate covered by a development plan is transferred in part or in whole.

50. SAB had no influence on the fact that the area on 1 December 2018 was categorised as a "tough ghetto area" (now "transformation area"), and the housing association is obliged to comply with the rules in the Common Housing Act, including Sections 168a and 168b about reducing the share of common family housing to a maximum of 40 % in "transformation areas".

51. For that reason, SAB has jointly with FOB and the Municipality of Slagelse drawn up a development plan in accordance with Section 168a of the Common Housing Act. The development plan has been approved by *inter alia* the general assembly of SAB, the Municipality of Slagelse, and the Ministry.

52. Consequently, Schackenborgvænge has been sold to Estate Invest A/S, which has been approved by all authorities. The terminations themselves were made based on the letting criteria that the Municipality of Slagelse decided on 26 August 2019 under Section 27c of the Common Housing Act. The plan has had the desired effect, as Ringparken as of 1 December 2021 no longer constitutes a "transformation area".

53. The terminations do not constitute unlawful discrimination in violation of Section 3 of the Ethnic Equal Treatment Act. Neither direct nor indirect discrimination on the basis of the tenants' ethnic origin has occurred. SAB has not selected the 17 tenants, who have been terminated, on the basis of the tenants' racial or ethnic origin. The criteria for the terminations have, on the one hand, been the income of the tenants, and on the other, whether the tenant or other persons in the tenant's household has committed crime within the last six months. The criteria resemble the municipal rules of housing allocation in Section 59(6)(1) of the Common Housing Act.

54. It follows from Article 3(2) of the Race Equality Directive that the Directive does not cover discrimination on the basis of nationality, but only discrimination on the basis of racial or ethnic origin. It is also acknowledged that some states in certain areas have an interest in and a need for discriminating on the basis of nationality.

55. The concept of "immigrants and descendants from non-Western countries" in Section 61a(2) of the Common Housing Act is a concept of nationality, since "non-Western countries" are defined as: "all other countries than Western" and thus includes more than 155 countries. About 940,000,000 persons currently live in Western countries, whereas about 7,060,000,000 persons live in non-Western countries. Thus, the population in the non-Western countries of the world makes up about 88.25 % of the world's population.

56. The defendant tenants have *inter alia* contended that SAB is obliged to obey Danish law, except when Danish law violates international obligations.

57. In this case, direct discrimination has occurred. Section 61a of the Common Housing Act is not in accordance with the Race Equality Directive.

58. The purpose of the Directive is to establish the framework for combatting discrimination based on race or ethnicity or ethnic origin in order to promote the principle of equality in the member states.

The Mjølnerparken case

59. The plaintiff tenants have *inter alia* contended that the concept of "racial or ethnic origin" in Article 2(2)(a) of the Race Equality Directive is to be interpreted as to include the criterion of "immigrants and descendants from non-Western countries", and that the provision prevents that a group of residents – both Western and non-Western – in a housing estate may be terminated on the grounds that *inter alia* the share of "immigrants and descendants from non-Western countries" exceeds 50 %.

60. It can be derived from *inter alia* the CJEU's judgement in case C-688/15, *Jyske Finans*, para. 16, that the concept of "racial or ethnic origin" in Article 2(2)(a) of the Directive includes "immigrants and descendants from non-Western countries", *inter alia* because of the direct and inextricable link between this categorisation and the concept of "racial or ethnic origin" and the classification of persons belonging to "Western" and "non-Western countries" as well as "immigrants" and "descendants" from these countries. All Western countries have majority populations that are considered white.

61. The concrete application and usage of the concept of "immigrants and descendants from non-Western countries" contain numerous references directly to the residents' ethnic origin and alleged general characteristics, see i.e. the policy proposal underlying the introduction of Section 61a in the Common Housing Act, "One Denmark without Parallel Societies – No Ghettos by 2030".

62. It follows from the caselaw of the CJEU that direct discrimination occurs when one or more groups – as is the case for the affected tenants in Mjølnerparken – are stigmatised by actions based on their ethnic origin and are subjected to less favourable treatment than others by losing their rental flats.

63. In this context, it is irrelevant that the affected group of residents in Mjølnerparken consists of both persons with "Western" and "non-Western" background, see in that direction CJEU's judgment in case C-83/14, *CHEZ Razpredelenie Bulgaria AD*, para. 56.

64. The concept of "persons of a particular racial or ethnic origin" in Article 2(2)(b) of the Directive concerning indirect discrimination is also to be interpreted as to include the criterion of "immigrants and descendants from non-Western countries", and that the provision, for that reason, prevents that a group of residents in a housing estate may be terminated on the grounds that *inter alia* the share of "immigrants and descendants from non-Western countries" exceeds 50 %. The condition is not an "apparently neutral criterion" as required by Article 2(2)(b).

65. However, if – notwithstanding the above – it is assumed that it is an "apparently neutral provision, criterion or practice", it is submitted that the criterion does indeed sufficiently

concern persons of a "particular" racial or ethnic origin. The group of residents with a non-Western background makes up over 80 % of the residents in the housing estate.

66. Even if it is assumed that the criterion itself cannot be considered to affect persons of a particular racial or ethnic origin within the meaning of Article 2(2)(b), it is submitted that the concrete statistical data shows that the largest resident groups affected by the development plan for Mjølnerparken have Lebanese or Somali background, which is a particular racial or ethnic group.

67. Furthermore, it is submitted that the use of the criterion does not pursue a legitimate aim. The purpose is thus to reduce the number of common family units in order to make the area into an "attractive neighbourhood", including by ensuring mixed housing and consequently a changed resident composition. When compared with the underlying purpose of "eradicating ghettos", which are decisively determined by the fact that more than 50 % of the residents in an area have non-Western background, it is seen that the real purpose of the approval of a development plan is to ensure the removal of residents with non-Western background. Indeed, the loss of a family home has been acknowledged by the CJEU to be an extreme encroachment on fundamental rights.

68. A number of the plaintiffs have been terminated from their tenancies or have as part of the implementation of the development plan vacated their rental flats. Already as a consequence of the approval of the development plan, their rights have been encroached upon, as they have been stigmatised, and they have been or risk being evicted from their rental flats.

69. The defendant, the Ministry for Social Affairs, Housing, and the Elderly, has contended *inter alia* that "ethnic origin" in Directive 2000/43 must be interpreted as to not include the category "immigrants and descendants from non-Western countries".

70. Thus, it does not constitute direct discrimination within the meaning of Article 2(2)(a) that Section 168a of the Common Housing Act requires the common housing associations in a housing estate categorised as a "transformation area" (previously "tough ghetto area") to draw up a development plan for the housing estate. This applies notwithstanding that in Section 61a(2) of the Common Housing Act, it is a separate requirement for the categorisation of a "transformation area" that more than 50 % of the residents in the area are so-called "immigrants and descendants from non-Western countries".

71. The category "immigrants and descendants from non-Western countries" has been developed by Statistics Denmark for statistical purposes and appears several places in Danish law. The assessment of whether a person belongs to the category is made solely on the basis of the person's place of birth and the person's parents' place of birth and/or citizenship.

72. In the case *C-83/14, CHEZ Razpredelenie Bulgaria AD*, para. 46, the CJEU clarified that the concept of "ethnic origin" is based on the perception that social groups are characterised *inter alia* by having the same nationality, religious conviction, language, cultural background, traditions, and place of living.

73. The CJEU has continued this practice in C-688/15, *Jyske Finans*, where it was established that a person's place of birth itself cannot be decisive for the determination of a person's ethnic origin, see para. 18. Thus, ethnic origin cannot be determined on the basis of one criterion

alone, but rather based on an array of elements, some of which being of an objective nature and others of a subjective nature, see para. 19.

74. The very wide range of people included in the category "immigrants and descendants from non-Western countries" have no commonalities in terms of nationality, language, cultural background, traditions, and place of living, or common customs, beliefs, traditions, and characteristics stemming from a shared or presumed shared past.

75. Thus, there is no direct and inextricable link between the category "immigrants and descendants from non-Western countries" in Section 61a(2) of the Common Housing Act – which comprises more than half of the Earth's population – and the concept of "ethnic origin" within the meaning of Directive 2000/43.

76. The rule in Section 168a(1) of the Common Housing Act, in conjunction with Section 61a(2) of the Act, also does not constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/43.

77. The plaintiffs have only presented statistics showing that the largest groups of residents in Mjølnerparken have Lebanese and Somali background. Also in this regard, the plaintiffs confuse "ethnic origin" with "nationality", which undoubtedly is not covered by Directive 2000/43, as laid down in Article 3(2).

78. Finally, Section 61a(2) of the Common Housing Act applies without distinction to all persons belonging to the category "immigrants and descendants from non-Western countries", which was decisive for the CJEU in C-688/15, *Jyske Finans*, para. 29. Reference is also made to the European Court of Human Rights' judgement of 28 May 1995, Abdulaziz, Cabales, and Balkandali v the United Kingdom, No. 9214/80, 9473/81, and 9474/81, para. 85.

79. In any event, the purpose of the rules in the Common Housing Act is to ensure successful integration, which constitutes an overriding reason in the public interest under EU law, cf. C-561/14, *Caner Genc v. Integrationsministeriet*, paras. 54-56. Finally, the rules are proportionate in that they are both appropriate and necessary as measures to promote integration.

The third-party interveners

80. The Danish Institute for Human Rights is a third-party intervener in both cases in support of the tenants. Furthermore, BL – Danmarks Almene Boliger is third-party intervener in support of SAB, whereas the UN Special Rapporteurs on contemporary forms of racism etc. and adequate housing etc., respectively, are third-party interveners in support of the tenants in the Mjølnerparken case.

81. The Danish Institute for Human Rights has *inter alia* argued that the approval of the development plan (Mjølnerparken) and the termination of the tenancies (Schackenborgvænge) constitute direct discrimination on the basis of ethnic origin in violation of Section 3(1), in conjunction with subsection (2), of the Ethnic Equal Treatment Act, because the criterion "immigrants and descendants from non-Western countries" has been taken into consideration, and because this criterion is directly and inextricably linked to ethnic origin. Thus, ethnicity is decisive for the decision to implement measures entailing less favourable treatment, and the less favourable treatment is carried out on grounds that relate to ethnic

origin, see CJEU's judgement in case C-83/14, *CHEZ Razpredeleine Bulgaria AD*, paras. 76, 91, and 95.

82. Direct discrimination on the basis of ethnic origin does not – as opposed to indirect discrimination – require that a "particular" ethnic group can be identified.

83. The criterion of "immigrants and descendants from non-Western countries" is directly and inextricably linked to ethnic origin. It is stated several times in the preparatory works that the legislature intends to address problems with a specific group of people based on ethnic origin. The purpose of the criterion is to target a specific group of people in Denmark, who according to the preparatory works distinguish themselves from the Danish population because of their norms and values, which relate to the citizens' descent, national, family, and cultural affiliation and origin. Such a categorisation of the population is a categorisation of ethnic origin, see the CJEU's judgement in C-83/14, *Razpredelenie Bulgaria AD*, para. 46. It is irrelevant that the criterion also affects a group of persons with several different ethnic origins.

84. The tenants in these cases are being treated less favourably than residents in other common housing estates that are not classified as a "tough ghetto" (now "transformation area"), partly because the residents risk eviction from their current homes, partly because the classification as "ghetto" or "parallel society" is stigmatising.

85. It follows from human rights law and caselaw that the home is of fundamental importance.

86. Moreover, it follows from *inter alia* the CJEU's judgement in case C-83/14, *CHEZ Razpredelenie Bulgaria AD*, paras. 64-69, that the requirement about less favourable treatment cannot depend on a particularly "serious" inconvenience.

87. The risk of forced and permanent eviction of the tenants from their homes constitutes less favourable treatment within the meaning of the law. The home and the home's location create the framework for family and private life and has a bearing on their social and cultural networks as well as their feeling of belonging and safety. The fact that rehousing has been offered does not change this.

88. Furthermore, stigmatisation, stereotyping, and prejudices are according to the caselaw of the CJEU completely central elements in the assessment of discrimination.

89. The direct discrimination cannot be justified with reference to legitimate interests – except in situations where a positive legal basis exists or in the case of affirmative action.

90. The UN Special Rapporteurs have argued that "immigrants and descendants from non-Western countries" is not a neutral category but is based on descent, racial, ethnic, and national origin, and that the categorisation gives rise to direct and indirect racial discrimination.

91. The international human rights define the prohibition of racial discrimination broadly, see Article 1(1) in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

92. The use of the category "non-Western" to set housing development policy and subject tenants to displacement from their homes, which is neither necessary nor justified, is a violation of Denmark's legal obligations under ICERD and ICESCR (the International Covenant on Economic, Social and Cultural Rights).

93. The division of "Western" and "non-Western" and the use of the latter category as the basis for housing redevelopment as well as for distinguishing between "vulnerable housing estates", "ghettos", and "tough ghettos" constitute prohibited direct discrimination based on descent and national or ethnic origin. Although the category of countries constituting "Western" countries is geographically incoherent, it consists primarily of European nations and European settler nations where the majority of the citizens are white. The countries on the "non-Western" list, conversely, consist of primarily non-white nations, including all the world's Muslim-majority nations. "Vulnerable housing estates" with socioeconomic indicators identical to the "ghettos" are – as opposed to areas where more than 50 % of the citizens are "non-Western" – not subjected to expanded redevelopment obligations, if it concerns a community with a majority of "Western" residents. Thus, it is a targeted distinction based on the areas' ethnic composition. The fact that the category "non-Western" includes persons of several national or ethnic origins does not exclude racial discrimination, see i.e. CERD's decision in the case *Murat Er v Denmark* (CERD/C/71/D/40/2007).

94. Moreover, the tenants are being subjected to racial discrimination in the form of a violation of the right to housing. Non-discrimination and equal treatment are fundamental principles in the right to adequate housing, which have been laid down in Article 11 of the ICESCR. Further reference is made to Article 2(2) as well as Article 5(e)(iii) of the ICERD.

95. The tenants' legal security of tenure and the location and adequacy, which are some of the seven core components in the right to adequate housing laid down in General Comment No. 4 by the UN Committee on Economic, Social and Cultural Rights, are threatened in these cases, solely because they are – or live next to – "non-Western" residents in "tough ghetto areas".

The law

Danish rules

<u>The Common Housing Act</u>

96. The current Common Housing Act (Consolidated Act No. 1877 of 27 September 2021 with subsequent amendments) contains *inter alia* the following provisions:

Section 61 a. Vulnerable housing estate shall be taken to mean an area where at least two of the following four criteria are met:

1) The share of residents aged 18-64 without connection to the labour market or the educational system exceeds 40 %, calculated as an average of the last two years.
2) The share of residents convicted of violations of the Criminal Code, the Weapons Act, or the Controlled Substances Act exceeds three times the national average, calculated as an average of the last two years.
3) The share of residents aged 30-59 with only primary education exceeds 60 %
4) The average gross income for taxpayers aged 15-64 in the area, excluding students, is less than 55 % of the average gross income for the same group in the region.

Subsection (2). Parallel society shall be taken to mean a housing estate where the share of immigrants and descendants from non-Western countries exceeds 50 %, and where two of the criteria in subsection (1) are met.

Subsection (3). Housing estate within the meaning of subsections (1) and (2) shall be taken to mean physically adjoining title numbers, which in 2010 were owned by common housing associations and had at least 1,000 residents in total. The Minister for Interior and Housing can approve that a housing estate is divided, and that other title numbers, which physically adjoin the title numbers mentioned in the first sentence, are included in the housing estate.

Subsection (4). Transformation area shall be taken to mean a housing estate, which for the last five years has fulfilled the conditions in subsection (2).

Subsection (5). On 1 December every year, the Minister for Interior and Housing announces, which areas fulfil the conditions in Subsections (1), (2), and (4), as well as Section 61b.
…

Section 168a. The common housing association and the local council must jointly draw up a development plan for a tough ghetto area, as defined in Section 61a(4). The joint development plan shall have as its aim before 1 January 2030 to reduce the share of common family housing to a maximum of 40 % of all housing in the transformation area in question, as defined in Section 61a(4). When calculating the total number of units in the area in question, units, which have been demolished since 2010 and not replaced by other common family housing, can be included. Commercial spaces are included in the calculation of the number of units, so that every 75 square metres of commercial area count as one housing unit.

Subsection (2). Development plans within the meaning of subsection (1) are subject to approval by the Minister for Interior and Housing."

97. The current terminology in Section 61a was introduced by Act No. 2157 of 27 November 2021 amending the Common Housing Act, the Common Housing Rent Act, and the Municipal Housing Allocation Act. The term "parallel society" thus replaced "ghetto", whereas the term "transformation area" replaced the term "tough ghetto area". Only the terminology was changed.

98. Section 61a was introduced by Act No. 1610 of 22 December 2010. At the time, several criteria had to be met for a housing estate to be characterised as a "ghetto area". The criterion that the share of immigrants and descendants from non-Western countries should exceed 50 % was one possible criterion and not necessary condition for an area to become a "ghetto area".

99. In the general remarks to Bill No. L60 of 17 November 2010, which underlies the above-mentioned amendment act, the following is stated:

"**1. Background and purpose of the bill**
Today, there are a number of housing estates that are so challenged that they fall into the category of ghetto areas. These are areas where a large proportion of residents are unemployed. Where a relatively large number of residents are criminals and where many have an immigrant background. In such an area, it can be more difficult for foreigners to integrate into Danish society. Against this background, the Government and Dansk Folkeparti have, as

part of the agreements for the Finance Act 2011, entered into an agreement that foreigners, with the exception of foreign students, from countries outside the European Union (EU), the European Economic Area (EEA) and Switzerland, cannot be assigned housing in such areas. The bill also contains a definition of what is meant by a ghetto area. This proposal is part of the agreement on strengthening efforts in ghetto areas and on the use of the common housing sector's funds. The agreement was made between the Government, Dansk Folkeparti and Radikale Venstre on 8 November 2010. Liberal Alliance has joined the agreement.

…

2.2.2. Proposals concerning the definition of ghetto areas

In the overall effort to address ghettos and vulnerable housing estates, there is a need to target some initiatives to the most vulnerable housing estates – the ghetto areas. When defining a ghetto area, it is proposed that emphasis be placed on three factors in the areas: the proportion of immigrants and descendants from non-Western countries, the proportion without labour market attachment and the proportion convicted of violations of the Criminal Code, the Weapons Act or the Controlled Substances Act, each of which indicates that there is a social and societal problem that deviates so much from the general picture in Denmark that there is a need to make a special effort."

100. The definition of a ghetto area was changed by Act No. 1609 of 26 December 2013 amending the Common Housing Act. In the explanatory memorandum, see Bill No. L45 of 31 October 2013, the following is stated about the reason for the change:

"**3.1.2. Proposal for a new definition of ghetto areas**

In order to ensure a broader approach to the definition of ghetto areas, it is proposed that the current three criteria be supplemented with two new criteria relating to education and income. The current criteria remain essential. The integration of immigrants and descendants from non-Western countries in vulnerable housing estates is a focal point. It is important that residents in the housing estates socialise across ethnic origins. If not, it can become more difficult to understand each other culturally and linguistically, and prejudices, negative attitudes, and a dangerous division into 'them' and 'us' can easily arise. This threatens the cohesion of society. A high concentration of citizens with foreign ethnic origins is thus a signal that focus should be placed on this area. It is proposed that the proportion of immigrants and descendants from non-Western countries continue to be used as a measure of integration with a threshold value of 50 %.

…"

101. The current system with development plans etc. was introduced by Act No. 1322 of 27 November 2018 amending the Common Housing Act, the Common Housing Rent Act, and the Rent Act. It was in this context that it was introduced as a necessary condition to constitute a "ghetto area" that the share of immigrants and descendants from non-Western countries exceeds 50 %.

102. Prior to the bill that lead to the amendment in question, see further below, the government at the time had in March 2018 drafted a policy proposal titled "One Denmark without Parallel Societies – No Ghettos by 2030". In the policy proposal, *inter alia* the following is stated:

"The Danish government wants a cohesive Denmark. A Denmark based on democratic values such as freedom and the rule of law. Equality and open-mindedness. Tolerance and equality. A Denmark where everyone participates actively.

In the last 40 years or so, Denmark's ethnic composition has changed significantly. In 1980, there were 5.1 million people in Denmark. Today, we are close to 5.8 million. The growth in the population comes from outside Denmark. Both immigrants and descendants of immigrants. The majority of the new Danes have a non-western background.

In 1980, there were around 50,000 people with a non-western background in Denmark. Today, there are almost half a million, see figure 1. This corresponds to an increase from around 1 % of the population to around 8.5 %.

Fortunately, many immigrants are doing well. In companies across the country, day-to-day co-operation between colleagues runs smoothly. Many immigrants actively participate in the local sports club, our many associations, and Danish society in general. They should continue to do so.

But there are too many who do not actively participate. Parallel societies have emerged among people with non-Western backgrounds. Too many immigrants and descendants have ended up without a connection to the surrounding society. Without education. Without a job. And without sufficient Danish language skills.

What has gone wrong? At least three things.

Firstly:
The individual immigrant has the greatest responsibility. To learn Danish. To get a job and become part of the local community. To integrate in their new home country. Far too few have seized the opportunities that Denmark offers. Despite the fact that Denmark is a society with security, freedom, free education, and good job opportunities.

Secondly:
For too many years, we as a society have not made the necessary demands. We have had far too low expectations of the refugees and immigrants who came to Denmark. We have not made sufficiently firm demands for jobs and self-sufficiency. As a result, too many immigrants have ended up in long-term passivity.

Thirdly:
For decades, we have let too many refugees and reunited family members into Denmark who have not been integrated into Danish society. And they have been allowed to cluster together in ghetto areas with no contact to the surrounding community. Even after many years in Denmark. Because we have not made clear demands to become part of the Danish community.

The problems are obvious. Children, young people, and adults who live their lives in Denmark. But who have no real contact with Danes and Danish society.

Holes have been punched in the map of Denmark. Many people live in larger or smaller isolated enclaves. Here, far too many of the citizens do not take sufficient responsibility. They do not actively participate in Danish society and the labour market. We have a group of citizens who have not taken Danish norms and values to heart. Where women are considered less worthy than men. Where social control and lack of equality set narrow limits on the individual's free self-expression.

We see communities where, in some cases, a downward spiral occurs, resulting in counterculture.

Parallel societies are a major strain on the cohesion of society and the individual.

- It is a threat to our modern society when freedom, democracy, equality, and tolerance are not accepted as fundamental values. And when rights and duties do not go hand in hand.

- Insecurity in vulnerable housing estates contributes to pushing well-resourced citizens out of the areas. This makes it harder to attract new residents.

- It inhibits children and young people's opportunities when they grow up without learning proper Danish.

- It is a serious encroachment on the individual's freedom and opportunities for fulfilment when social control is exercised against women and young people. And when there is domestic violence.

- It is an economic burden when citizens do not participate in the labour market.

The latest figures from the Ministry of Finance show that immigrants and descendants of non-Western backgrounds cost Denmark DKK 36 billion in 2015. Danish taxpayers could have saved almost DKK 17 billion if non-Western immigrants had been employed to the same extent as Danes.
…"

103. The following is stated in the bill (No. L38 of 3 October 2018):
"1. Introduction
On 1 March 2018, the Government presented the proposal "One Denmark without Parallel Societies - No Ghettos by 2030". Based on the Government's proposal, on 9 May 2018 the Government (Venstre, Liberal Alliance and Det Konservative Folkeparti) entered into an agreement with Socialdemokratiet, Dansk Folkeparti and Socialistisk Folkeparti on housing initiatives to counteract parallel societies, and on 11 May 2018 entered into an agreement with the same parties on a ban on moving into the toughest ghetto areas for recipients of social benefits.

The parties agree that radical physical changes must be made to the ghetto areas and a preventive effort must be made in the vulnerable housing estates so that they do not develop into ghetto areas. The new opportunities and obligations build on and expand the existing efforts underway in the ghetto areas
…
2.1.2. Deliberations and proposed scheme by the Ministry of Transport, Building, and Housing
In connection with the efforts against parallel societies, the Ministry of Transport, Building, and Housing believes that the ghetto criteria must be updated and consolidated. That will make the criteria more robust. At the same time, it must be ensured that the efforts are

targeting the right areas, and therefore it is necessary to categorise the vulnerable housing estates and on that basis define the more socially deprived ghetto areas.

…

Based on the proposal for the demarcation of vulnerable housing estates, the more socially deprived ghetto areas will be defined. In Section 61a(2) of the Common Housing Act, it is proposed that a ghetto area shall be taken to mean a housing estate, where the share of immigrants and descendants from non-Western countries exceeds 50 %, and where two of the above-mentioned four criteria are met. Thus, ghetto areas will be a subset of vulnerable housing estates. With the categorisation, it is emphasised that the central challenge in the ghetto areas is the lack of integration of immigrants and descendants from non-Western countries.

Finally, it is proposed to categorise a subset of those ghetto areas, which have been ghetto areas for a number of years. The purpose is to target selected initiatives at this subset to ensure an intensive and focused effort in those ghetto areas, which for a number of years have been characterised by massive social problems. A tough ghetto area shall be taken to mean a housing estate, which for the last four years have met the criteria for being a ghetto area, as defined in Section 61a(4)."

104. The concepts of "immigrants", "descendants", "Western", and "non-Western" have not been defined in the Common Housing Act or its preparatory works. Statistics Denmark has prepared the following definitions for statistical purposes, which are undisputedly also used when calculating the number of "immigrants and descendants from non-Western countries" living in a common housing estate.

"**Immigrants**

Immigrants are born abroad. Neither parent is both a Danish citizen and born in Denmark. If there is no information about either parent and the person was born abroad, the person is also considered an immigrant.

Descendants

Descendants are born in Denmark. None of the parents are both Danish citizens and born in Denmark. If there is no information on either parent, and the person is a foreign citizen, the person is also considered a descendant. When one or both parents born in Denmark obtain Danish citizenship, their children will not be classified as descendants, but as persons of Danish origin. However, if Danish-born parents both maintain foreign citizenship, their children will be classified as descendants.

…

Western countries

Western countries include the EU, Andorra, Australia, Canada, Iceland, Lichtenstein, Monaco, New Zealand, Norway, San Marino, Switzerland, the UK, the USA and the Vatican City State.

Non-Western countries

Non-Western countries include the European countries of Albania, Bosnia and Herzegovina, Belarus, Yugoslavia, Kosovo, Macedonia, Moldova, Montenegro, Russia, Serbia, the Soviet Union, Turkey and Ukraine. All countries in Africa, South and Central America and Asia. All countries in Oceania (except Australia and New Zealand) and stateless persons."

The Ethnic Equal Treatment Act (Consolidated Act No. 438 of 15 May 2012 on ethnic equal treatment with subsequent amendments)

105. The rules in Article 2(2)(a) and (b) of Directive 2000/43 have been implemented in Section 3 of the Danish Ethnic Equal Treatment Act with the following wording:

"**Section 3.** It is unlawful to subject another person to direct or indirect discrimination on the basis of their own or a third person's racial or ethnic origin
Subsection (2). Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.
Subsection (3). Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
…"

EU law

106. Reference is made to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 1 and Article 2(1) and (2). Moreover, reference is made to the CJEU's judgement of 16 July 2015 in case C-83/14, CHEZ Razpredelenie Bulgaria (EU:C:2015:480), paras. 46-60, judgement of 6 April 2017 in case C-668/15, Jyske Finans (EU:C:2017:278), paras. 17-20, and judgement of 10 June 2021 in case C-94/20, Land Oberösterreich (EU:C:2021:477).

Context of the preliminary referral

107. A central theme in the cases is whether it is discrimination on the basis of ethnic origin in violation of the Ethnic Equal Treatment Act and the underlying directive (Directive 2000/43) that under Section 168a(1), a reduction of common family housing must take place in so-called transformation areas (previously "tough ghetto areas"). A transformation area is defined as a housing estate, which for the last five years has had a resident composition where more than 50 % are "immigrants and descendants from non-Western countries", and where at least two out of four criteria relating to the residents' attachment to the labour market, crime rate, level of educations, and average income are also met, in accordance with Section 61a(4), in conjunction with subsections (2) and (1).

108. The tenants have submitted that the termination of their tenancies or the decision on the development plan constitutes direct discrimination on the basis of ethnic origin, including that the criterion in Section 61a(2) in itself is in violation of the Race Equality Directive. In this context, the tenants have contended that "immigrants and descendants from non-Western countries" are covered by the Directive's definition of "ethnic origin". Alternatively, indirect discrimination has occurred since the practice that the tenants are being terminated affects persons of a "particular racial or ethnic origin".

109. In response, SAB and the Ministry have argued, *inter alia*, that the criterion "immigrants and descendants from non-Western countries" is not covered by the concept of "ethnic origin" or "particular ethnic origin" in Article 2(2)(a) and (b) of the Directive.

110. It is undisputed that the term "non-Western countries" includes all countries other than the EU countries, Andorra, Iceland, Lichtenstein, Monaco, Norway, San Marino, Switzerland, the Vatican City State, Canada, USA, Australia, and New Zealand. It is furthermore undisputed that the term originates from Statistics Denmark, which defines an "immigrant" as a person born abroad to parents none of whom are both born in Denmark and Danish citizens, and a "descendant" as a person born in Denmark to parents none of whom are both born in Denmark and Danish citizens.

111. According to the caselaw of the CJEU, see judgement of 16 July 2015 I case C-83/14, *CHEZ Razpredelenie Bulgaria AD*, para. 46, and judgemtn of 6 April in case C-668/15, *Jyske Finans*, in particular paras. 17-20, the concept of "ethnic origin" social groups characterised *inter alia* by having the same nationality, religious conviction, language, cultural background, traditions, and place of living. "Ethnic origin" cannot be determined on the basis of one criterion alone, but rather based on an array of elements, some of which being of an objective nature and others of a subjective nature.

112. It also follows from the judgement of the CJEU of 16 July 2015 in case C-83/14, *CHEZ Razpredelenie Bulgaria AD*, that the concept of "discrimination on grounds of ethnic origin" in Article 2(1) must be interpreted as applying without distinction as to whether the contested measure affects persons of a given ethnic origin or whether it affects persons who, without being of that origin, are, together with the former, treated less favourably or placed at a particular disadvantage as a result of the measure.

113. Furthermore, it follows from the judgement of the CJEU of 10 June 2021 in case C-94/20, *Land Oberösterreich*, that the term "particular disadvantage" in Article 2(2)(b) must be understood as meaning that it is mainly persons of a particular ethnic origin who are placed at a disadvantage by the contested measure.

114. The Eastern High Court finds that it is not possible on the basis of the wording of Article 2 or the caselaw of the CJEU to establish whether the concepts of "ethnic origin" or "particular ethnic origin" in Article 2(2)(a) and (b), respectively, under the circumstances of the case – where the Danish Common Housing Act requires a reduction of common family housing in so-called transformation areas, and where a condition for this categorisation is that more than 50 % of the residents in the housing estate are "immigrants or descendants from non-Western countries" – must be interpreted to cover a group of persons categorised as "immigrants and descendants from non-Western countries".

115. Moreover, the Eastern High Court finds it unclear whether Article 2(2)(a) and (b), if so, should be interpreted as meaning that the scheme described in the case then constitutes direct or indirect discrimination.

116. As a clarification of these questions is of crucial importance to the outcome of the current cases, the High Court finds it necessary to refer the following questions to the CJEU.

It is ordered:

that the following questions be referred to the CJEU for a preliminary ruling:

1) Should the concepts of "ethnic origin" and "particular ethnic origin" in Article 2(2)(a) and (b), respectively, in Directive 2000/43 be interpreted so that these concepts under the

circumstances of the case – where the Danish Common Housing Act requires a reduction of common family housing in so-called transformation areas, and where a condition for this categorisation is that more than 50 % of the residents in the housing estate are "immigrants or descendants from non-Western countries" – cover a group of persons who are categorised as "immigrants and descendants from non-Western countries"?

2) If the first question is answered in the affirmative wholly or in part, should Article 2(2)(a) and (b) then be interpreted as meaning that the scheme described in the case constitutes direct or indirect discrimination?