

Discrimination on grounds of racial or ethnic origin

CJEU case law with focus on Case C-417/23

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1

The Dispute of the Danish "Ghetto cases"

The Danish Law on social housing - Regulation of "Ghetto Areas"

Section 61 a and the three types of public housing areas.

First, a **'vulnerable housing area'** is an area that fulfils at least two of the following four criteria ('the socioeconomic criteria'):

1. The proportion of residents aged between 18 and 64 with no link to the labour market or education is over 40%, calculated as the average over the last two years.
2. The proportion of residents convicted of offences under the Criminal Code, the Weapons Act or the Drugs Act is at least three times the national average, calculated as the average over the last two years.
3. The proportion of residents aged between 30 and 59 with only primary education exceeds 60%.
4. The average gross income of taxpayers aged between 15 and 64 in the area, excluding those seeking education, is less than 55% of the average gross income for the same group in the region.

Second, a **'parallel society' (formerly 'ghetto')** is an area which fulfils two of the four socioeconomic criteria, much like a vulnerable housing area, but where, in addition, more than 50% of the residents are 'immigrants and their descendants from non-Western countries'.

Third, a **'transformation area' (formerly 'hard ghetto')** is an area which has fulfilled the parallel society criteria for the last five years.

2

The Dispute of the Danish "Ghetto cases"

The Danish Law on social housing - Regulation of "Ghetto Areas"

The terms '*immigrants and their descendants* from non-Western countries'

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

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

An '**immigrant**' is a person born abroad and neither of whose parents were born in Denmark or is a Danish citizen.

A '**descendant**' is a person who was born in Denmark, but which does not have a parent who is both a Danish citizen and born in Denmark, or whose parents, even if they were born in Denmark and acquired Danish nationality, also retain their foreign nationality.

3

The Dispute of the Danish "Ghetto cases"

The Danish Law on social housing - Regulation of "Ghetto Areas"

Section 168 b - Consequences of Classification as a (hard) Ghetto Area

-> "Public family homes" in the area must be reduced to max. 40 %

- Selling public housing to private owners/investors
 - Demolishing public housing units
- Termination and rehousing of previous tenants



4

'World's coolest neighbourhood'

The purpose of the legislation

-> Legislator's Concerns:

That "immigrants from non-Western countries and their descendants live in isolated enclaves and do not adopt Danish norms and values."

That "a decisive effort must be made to address the significant integration challenge, where a group of immigrants and their descendants have not embraced Danish values and remain isolated."

That "the strong population growth of citizens of non-Western origin has created a breeding ground for parallel societies, where Danish values and norms are not primary."



5

Protection Against Ethnic Discrimination in an EU Context

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

Key Points - The aim and scope of the Directive

Preamble

- "(...) combating discrimination against groups such as **ethnic minorities**"
- (...) refer to the initiatives of the European Council, the Council and the Commission to **fight 'racism and xenophobia'**. The fight against xenophobia is, therefore, an element of **the development of tolerant societies**"

Article 1

- "The purpose of this Directive is to lay down a framework **for combating discrimination on the grounds of racial or ethnic origin**, with a view to putting into effect in the Member States the principle of equal treatment.

6

Protection Against Ethnic Discrimination in an EU Context

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

Key Points - The aim and scope of the Directive

Article 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”
- “**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.

Article 3

- “The directive **applies to** all persons and to all sectors of activity, regarding: (...) access to and supply of goods and services, including housing.
- The directive **does not cover** difference of treatment based on nationality, or the conditions of entry and residence for citizens from non-EU countries.

7

25.9.2023 EN

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C 338/11

⌋ KHAWAJA
LAW FIRM

Request for a preliminary ruling from the Østre Landsret (Denmark) lodged on 6 July 2023 — Slagelse Almennyttige Boligselskab — Afdeling Schac , RK v MV, EH, LI, AQ, LO,

CJEU case C-417/23

(Case C-417/23

iborgvænge)

Language of the case: Danish

What were the questions referred to the CJEU?

Referring court

Østre Landsret

Questions referred

1. Must the term ‘ethnic origin’ in Article 2(2)(a) and (b) of Directive 2000/43 ⁽¹⁾ be interpreted as meaning that that term, in circumstances such as those in the present case — where, under the Danish Law on social housing, there must be a reduction in the proportion of social family housing in ‘transformation areas’, and where it is a condition for categorisation as a transformation area that more than 50 % of residents in a housing area are ‘immigrants and their descendants from non-Western countries’ — covers a group of persons defined as ‘immigrants and their descendants from non-Western countries’?
 2. If the answer to the first question is wholly or partly in the affirmative, must Article 2(2)(a) and (b) be interpreted as meaning that the scheme described in this case constitutes direct or indirect discrimination?
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2. If the answer to the first question is wholly or partly in the affirmative, must Article 2(2)(a) and (b) be interpreted as meaning that the scheme described in this case constitutes direct or indirect discrimination?

8

The central issues in the case

Q1 "Non-western immigrants and descendants" – ethnic origin? CJEU case law

CHEZ Razpredelenie Bulgaria (C-83/14) – The first definition of and introduction of “stereotypes”

“46 (...) Indeed, **the concept of ethnicity**, which has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community (...).

82 (...) the KZD, CHEZ RB asserted that in its view the damage and unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin. Such assertions could in fact suggest that the practice at issue is **based on ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds.**”

The central issues in the case

Q1 "Non-western immigrants and descendants" – ethnic origin? CJEU case law

Feryn (C-54/07) – A “non-homogeneous group that is treated less favourably”

“16 (...) acting on the basis of the public statements of the director of Feryn to the effect that his undertaking was looking to recruit fitters, but that it could not employ **‘immigrants’** because its customers were reluctant to give them access to their private residences for the period of the works.

34 (...) that public statements by which an employer lets it be known that under its recruitment policy it **will not recruit any employees of a certain ethnic or racial origin** are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43.”

The central issues in the case

Q1 "Non-western immigrants and descendants" – ethnic origin? CJEU case law

Jyske Finans (C-668/15) - discrimination based on "country of birth"?

"19 **Ethnic origin cannot be determined on the basis of a single criterion** but, on the contrary, is based on a whole number of factors, some objective and others subjective. Moreover, it is not disputed that a country of birth cannot, in general and absolute terms, act as a substitute for all the criteria set out in paragraph 17 above.

20 As a consequence, a person's country of birth cannot, in itself, justify a general presumption that that person is a member of **a given ethnic group such as to establish the existence of a direct or inextricable link between those two concepts.**"

11

Top EU court adviser finds Denmark's 'ghetto law' is direct discrimination

If European court of justice agrees, 'parallel societies' policy could violate EU law, putting onus on Copenhagen to change it

Opinion of Advocate General Capeta

- delivered on
13 February 2025



📍 The Mielnerparken estate in Copenhagen. The case was referred to the ECJ after tenants

12

Opinion of Advocate General Capeta - 13 February 2025

Does the distinction between Western and non-Western immigrants and their descendants fall **within the concept of 'ethnic origin'**?

The term 'ethnic origin' – the division between 'us' and 'them'

"69. Therefore, the use of the term 'ethnic origin' in the Race or Ethnic Origin Directive should be read together with the term 'race', as referring to a social construct – a perception in a given society of the existence of **a group that is recognizable as different** on the basis of certain socio-cultural characteristics, such as language, literature, music, customs or similar.

73. In such a context, the notion of 'ethnic origin' may be understood as referring to a perception of a person or of **a group of persons as strangers or foreigners**. As such, a division on the ground of 'ethnic origin' can be understood as **a division between 'us' and 'them'**; the dividing line being dependent on certain physical and socio-cultural characteristics or, at least, on the **perception** that differences in those characteristics exist.

74. The development of a society that is *tolerant* to ethnic differences would entail the recognition of **equal rights for 'them', despite the belief or perception that 'they' possess different characteristics to 'us'.**"

13

Opinion of Advocate General Capeta - 13 February 2025

A non-homogeneous group that's defined negatively

"86. What unites (immigrants and their descendants from non-Western countries), (...) is rather **the perception by the Danish legislature that this group does not possess the characteristics of the other group, that is, of 'Westerners'**.

89. Thus, in terms of ethnic origin, **the 'non-Western' group is negatively defined** (...). That definition, on the grounds of exclusion, however, does not negate the fact that **the distinction between the two groups is made on the basis of the criterion of 'ethnic origin'**.

91. (...) the directive covers situations not only in which a specific ethnic group is treated less favourably, but also where diverse groups are placed in a disadvantaged position, if the criterion on the basis of which that occurs is that group's 'ethnic origin'.

92. If 'ethnicity' is understood as a division into 'us' and 'them', and if the Race or Ethnic Origin Directive is interpreted as aiming to provide 'them' with equal rights in 'our' societies, (...) **that directive must be applicable whenever persons are treated less favourably simply because of their perceived ethnic 'otherness'.**"

14

Opinion of Advocate General Capeta - 13 February 2025

The 'Western/non-Western' criterion used by Danish legislation is based on ethnic origin

"97. In the present case, 'immigrants and their descendants from non-Western countries' are placed in a different group from immigrants and their descendants from Western countries on the basis of **several factors that point to the fact that the perceived ethnic origin was a reason for distinguishing between the two: nationality, place of birth and descent.**

101. The fact that the 'immigrants and their descendants from non-Western countries' are in **themselves not a homogenous ethnic group is irrelevant** if the criterion according to which they were placed in that group is that of ethnic origin.

103. On the basis of the foregoing, I propose that the Court find that **the distinction between 'Western' and 'non-Western' immigrants and their descendants is based on ethnic origin.**"

15

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Does the 'Western/non-Western' criterion results in direct or indirect discrimination?

The difference and **why** it matters

"107. **Direct discrimination occurs** when such adverse treatment is based directly on ethnic origin. To establish direct ethnic discrimination, it is necessary to establish that a person (or a group of persons) is treated *less favourably* than another person (or group of persons) **based on the criterion** of ethnic origin.

108. **Indirect discrimination** occurs when the adverse treatment of an ethnic group results from an apparently neutral measure.

110. The most important consequence of finding that a rule or practice results in **direct discrimination** is that such a rule or practice cannot, in principle, be justified, whereby it is **automatically prohibited.**"

16

Opinion of Advocate General Capeta - 13 February 2025

Two reasons to consider that the Danish legislation is direct discrimination

1. Unilateral termination of the leases

“128. The development plans at issue have led, or might lead, to a termination of leases in public housing units, thus depriving the tenants of their homes.

132. That is to say, **the relevant comparator** to conclude whether there exists *less favourable* treatment in this case are the tenants in public housing units in other vulnerable social housing areas, such as those defined by Paragraph 61a(1) of the Law on Public Housing.

These areas are comparable, as they also fulfil two or more of the socioeconomic criteria (...). **However, the tenants of vulnerable areas are not exposed to a risk of losing their home,** contrary to those living in transformation areas. **The only difference between the two areas is that the population of vulnerable areas consists of less than 50% of immigrants and their descendants from non-**

Western countries.”

17

Opinion of Advocate General Capeta - 13 February 2025

Two reasons to consider that the Danish legislation is direct discrimination

1. Unilateral termination of the leases

“133. Therefore, even if adequate rehousing is offered to tenants in transformation areas, they are still treated less favourably in relation to tenants in comparable areas, the majority population of which are ‘Western’ residents. **The former risk their leases being terminated, whereas the latter do not face such a risk at all.**

137. In the present case, **the non-Western ethnic origin of the tenants was determinative in the obligation to adopt development plans.** The obligation to adopt such a plan creates the risk of losing one’s home, thus putting tenants living in transformation areas in a less favourable position than tenants living in vulnerable areas.

39. The difference in treatment, therefore, exists *because of* the ethnic criterion, which is **a clear case of direct discrimination.”**

18

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Two reasons to consider that the Danish legislation is direct discrimination

2. Stigmatisation

"148. For the purposes of this discussion, I understand stigmatisation to mean **that members of an ethnic group are attributed socially reproachable characteristics solely on the basis of their membership** or perceived membership of that group.

150. **Similarly, legislation might be understood as discriminatory** on the grounds of ethnic origin if it is based on generalised stereotypes and prejudices about an ethnic group.

151. (...) **The Danish Government's strategy**, (...) According to that document, those persons do not participate and do not even try to participate actively in Danish society and the labour market. They do not adhere to Danish values; for instance, women being considered inferior to men, and social control and lack of equality imposing narrow limits to individuals' freedom of expression. What is therefore at issue, that strategy stated, is 'the negative spiral of counter-culture'."

19

Opinion of Advocate General Capeta - 13 February 2025

Two reasons to consider that the Danish legislation is direct discrimination

2. Stigmatisation

"152. By generalising those characteristics perceived as negative and unacceptable in Denmark and attributing them to all immigrants and their descendants from non-Western countries, the Danish

146. There is a saying that **'the road to hell is paved with good intentions'**. The effort to diversify neighbourhoods might indeed be well intended. Nevertheless, such diversification cannot be achieved by placing an already disadvantaged ethnic group in a less favourable position. However, in the present situation, the Danish legislation does precisely that.

the members of the group of non-Western immigrants and their descendants to find a job, acquire respect and participate on equal footing in Danish society."

20

Opinion of Advocate General Capeta - 13 February 2025

In conclusion (for now) ...

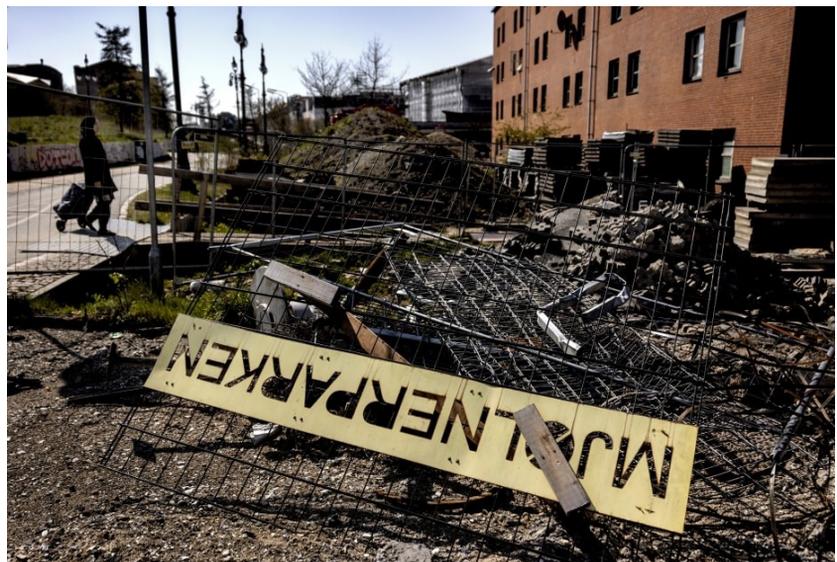
"157. (...) the Danish legislative scheme, understood as the Law on Public Housing together with the development plans that must be adopted on the basis **of the law, seems therefore to directly discriminate on the basis of an ethnic criterion ('non-Western')**.

- First, **that scheme brings all persons related to such a criterion to a precarious position in relation to the security of their right to a home**, thus resulting in their less favourable treatment in comparison to tenants of other comparable neighbourhoods.
- **Second, it stigmatises the ethnic group whose structural disadvantage in their ability to integrate into Danish society was recognised**, thus curtailing rather than enhancing their chances of integrating into that society."

21

What is next?

Questions?



22