

# Discrimination on grounds of racial or ethnic origin: CJEU case law with focus on Case C-417/23

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Copenhagen and other cities are planning mass housing evictions in a 'social experiment' to encourage integration



📷 A housing estate in Mjølnerparken, Copenhagen – the district is on the Danish government's 'ghetto list'. Photograph: Andrew Kelly/Reuters

The Guardian, 11 March 2020

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## Danish "Ghetto Deal" of 2018: No ghettos by 2030

In 2018, the Danish Government published a strategy entitled 'A Denmark without parallel societies – No ghettos by 2030'. It emphasized the desire for a cohesive Denmark '**without parallel societies' among people with a non-Western background**

The term 'ghetto' was applied to residential areas in which more than 50% of the inhabitants were classified as immigrants or descendants from non-Western countries, and which additionally met at least two of four socio-economic criteria relating to unemployment rates, crime levels, average income, and educational attainment



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## Consequences of being categorized as a “Ghetto”

Byrummonitor



Foto: Finn Frandsen

Byrummonitor, 24 June 2025

Byrummonitor



Arkivfoto. Omdannelse af karréer i Mjølnerparken på Nørrebro i januar 2024. I april 2024 var de første nye lejeboliger klar til udlejning som led i en udviklingsplan.

Byrummonitor, 14 February 2025

Homes have been demolished, residents have had their leases terminated, and public housing has been converted into private rental housing

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## EU non-discrimination law – Race Directive

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

Preamble:

- “combating discrimination against groups such as ethnic minorities” (Rec. 8)
- “development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin” (Rec. 12)

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”

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## Scope of the Race Directive

- Personal scope: "**all persons**, as regards both in the public and private sectors, including public bodies" (Art. 3.1)
  - Applies to natural and legal persons (Rec. 16)
  - Applies to EU and third country nationals (Rec. 13)
  - BUT: nationality exception (Art. 3.2)
- Material scope (Art.3.1):
  - Employment, self-employment, and vocational training
  - Membership of trade unions/employers' associations
  - Social protection and social advantages
  - Education
  - Access to and supply of goods and services, including housing

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## Concept of "racial or ethnic origin".

- Race Directive applies to "discrimination on grounds of racial or ethnic origin" (Art. 1)
- The Directive does not include a definition of "racial or ethnic origin"
- Rec. 3: reference to **international conventions**, including:
  - International Convention on the Elimination of All Forms of Racial Discrimination
  - European Convention on Human Rights
- Concept interpreted in several rulings of the CJEU (Feryn, Chez, Jyske Finans)

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# The Danish "Ghetto laws"

**Law on public housing Section 61a** defines three types of public housing areas:

- A **'vulnerable housing area'** is an area that fulfils at least two of 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, excluding those seeking education, is less than 55% of the average gross income for the same group in the region
- A **'parallel society'** (formerly 'ghetto') is an area which fulfils two of the four socioeconomic criteria, like a vulnerable housing area, but where, in addition, more than 50% of the residents are 'immigrants and descendants from non-Western countries'
- A **'transformation area'** (formerly 'hard ghetto') is an area, which has fulfilled the parallel society criteria for the last five years

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# The Danish "Ghetto laws"

**The terms 'immigrants and 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 was born in Denmark or is a Danish citizen
- A 'descendant' is a person who was born in Denmark but 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

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# Purpose of the Danish legislation

## Legislator's Concerns:

- "Immigrants from non-Western countries and their descendants live in isolated enclaves and do not sufficiently adopt Danish norms and values"
- "There is a need to address the significant integration challenge, where a group of immigrants and their descendants have not embraced Danish values and isolate themselves in parallel societies"
- "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"

## Demonstration i KBH, Århus og Odense

september 2018



www.almenmodstand.dk

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www.almenmodstand.dk

## The development plans giving rise to the Danish "Ghetto cases"

- The Law on public housing Section 168 b requires a public housing association owning a "transformation area" (formerly "hard ghetto") to draw up a **development plan** setting out how the proportion of public housing units in the transformation area is to be reduced to **40% by 1 January 2030**
- This may include the sale of properties to private developers, demolition, or conversion of family housing into housing for young people. In such cases, the leases of the previous tenants **must be terminated**
- Tenants who found themselves in such a situation in two transformations areas — the Schackenborgvænge estate in Slagelse, and Mjølnerparken estate in Copenhagen — were challenging the **legality of development plans adopted on the basis of the Danish legislation**

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## Referring questions from the Eastern High court in Denmark

- Does the term **ethnic origin** cover a group of persons defined as “immigrants and their descendants from non-Western countries”?
- If so, does the scheme described in the case constitute **direct or indirect discrimination**?

Request for a preliminary ruling from the Østre Landsret (Denmark) lodged on 6 July 2023 – Slagelse Almennyttige Boligselskab - Afdeling Schackenbergvænge, XM, ZQ, FZ, DL, WS, JI, PB, VT, YB, TJ, RK v MV, EH, LI, AQ, LO, Social-, Bolig- og Ældreministeriet

(Case C-417/23, Slagelse Almennyttige Boligselskab - Afdeling Schackenbergvænge)

Language of the case: Danish

Referring court

Østre Landsret

Parties to the main proceedings

Applicants: Slagelse Almennyttige Boligselskab - Afdeling Schackenbergvænge, XM, ZQ, FZ, DL, WS, JI, PB, VT, YB, TJ, RK

Defendants: MV, EH, LI, AQ, LO, Social-, Bolig- og Ældreministeriet

Questions referred

Must the term ‘ethnic origin’ in Article 2(2)(a) and (b) of Directive 2000/43<sup>1</sup> 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’?

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?

<sup>1</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

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## CJEU case law: ”Non-western immigrants and their descendants”

Firma **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.”

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## CJEU case law: "Non-western immigrants and their descendants"

**CHEZ Razpredelenie Bulgaria (C-83/14)** – Definition of "ethnicity" 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 (...) 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."

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## CJEU case law: "Non-western immigrants and their descendants"

**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."

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## Opinion of Advocate General Capeta on the term “ethnic origin”

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OPINION OF ADVOCATE GENERAL  
ČAPETA  
delivered on 13 February 2025 (1)

Case C-417/23

### 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’.”

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## Opinion of AG Capeta on “ethnic origin”

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### A non-homogeneous group that is defined negatively:

“86. What unites that group (“non-Westerners”) (...) 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 as a group *not possessing* certain ethnic characteristics(...). 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. (...) 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, then, in order to live up to its purpose, that directive must be applicable whenever persons are treated less favourably simply because of their perceived ethnic ‘otherness.’”

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# Opinion of AG Capeta on “ethnic origin”

## Key-finding 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.”



Students demonstrate against the announced sale of buildings in the Mjølnerparken complex in Copenhagen, Denmark. © Scarpis, Skærbillede

[www.justiceinitiative.org](http://www.justiceinitiative.org)

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## Direct or indirect discrimination?

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

**Indirect** discrimination occurs when the **adverse treatment** of an ethnic group results from an apparently neutral measure, unless the practice can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary

The most important **consequence of finding direct discrimination** is that the rule or practice cannot be justified, whereby it is automatically prohibited

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**Capeta's reason to consider direct discrimination**

**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.

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

Picture from Vollsmose (Odense) - New York Times, 26 October 2023

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## Capeta's reason to consider direct discrimination

### 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.’”

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## Conclusion I from Capeta

Capeta suggest the following conclusion:

“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.”

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## Conclusion II from Capeta

Capeta suggests that the influence of the Danish law on the termination of leases should at least be interpreted as **indirect discrimination**

However:

“170. (...) I am sceptical that the Danish public housing legislation can be justified by the aim of enabling integration of the ‘immigrants and their descendants from non-Western countries’. In any case, as I have already explained, I do not find it convincing that the influence of the ‘Western/non-Western’ criterion used by by the Law on Public Housing on the termination of leases can be construed as representing a neutral rule.

171. Therefore, I propose that the Court find that the situation such as the one created by the Law on Public Housing in Denmark is direct, rather than indirect, discrimination.”

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# Reflections on Case C- 417/23

- Compelling legal reasons to expect that the **CJEU will follow the opinion by the Advocate General Capeta**
- The CJEU is likely to find **direct discrimination based on ethnic origin (the 'Western/non-Western' criterion)** – and at least indirect discrimination
- What will be the consequences in Denmark?
  - Change of the law on public housing and numerous other legislation using the 'Western/non-Western' criterion
  - Litigation on compensation