A Victory Against Denmark's "Ghetto Package" and 'Area-Based Discrimination'

By Susheela Math, Lead of the Open Society Justice Initiative's work challenging the "Ghetto Package"

On 13 February 2025, Advocate General Ćapeta issued her highly anticipated opinion on the application of the Race Equality Directive to Denmark's "Ghetto Package" of legislation. The opinion has significant and extensive implications not just for Denmark but also for discrimination law and the right to housing across the European Union.

Background

The opinion followed a hearing that took place on 30 September 2024 before the Grand Chamber of the Court of Justice of the European Union on two joined cases, one of which was brought by residents from Mjølnerparken, Copenhagen.[1]

As previously reported in Housing Rights Watch, the residents are challenging ministerial approval of a development plan entailing the sale of over 200 family homes in their neighbourhood. The plan was imposed under Denmark's "Ghetto Package" of laws. This legislation was passed in 2018 with the stated aim of "eradicating ghettos:" residential areas with the hallmark feature that the majority of their residents are classed as being of "non-Western" background.

One of the Package's key provisions is a requirement to reduce "common family housing" (independent, not-for-profit housing) in "tough ghettos" (areas that have met the criteria of a ghetto for five years) to a maximum of 40% by the year 2030. 15 areas including Mjølnerparken were classed as "tough ghettos" when the legislation was introduced.

The reduction can take place through means such as demolition and sale. This has led to thousands of people across the country losing – or being in the process of losing – their homes, including through evictions.

A long and rocky road...

Around 50 Danes made the journey to the hearing in Luxembourg, most of them by way of a lengthy bus trip. The tireless efforts and bravery of residents, activists, campaigners, and community organisations to stand up to racial discrimination and economic injustice were on full display both outside and inside the courthouse.

The bus journey was symbolic of the long and rocky road to this stage of the litigation. The hearing was the culmination of years of work, with the Open Society Justice Initiative's involvement having commenced back in the summer of 2018. The Mjølnerparken residents' case, supported by the

[1] Case C-417/23 *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge v MV, EH, LI, AQ and LO, joined parties: BL – Danmarks Almene Boliger,Institut for Menneskerettigheder and XM, ZQ, FZ, DL, WS, JI, PB, VT, YB, TJ, RK v* Social-, Bolig- og Ældreministeriet, joined parties: Institut for Menneskerettigheder, FN særlige rapportør E. Tendayi Achiume, FN særlige rapportør [Balakrishnan Rajagopal]

Open Society Justice Initiative along with local counsel Eddie Khawaja and subsequently also Petra Fokdal, was filed almost five years ago in May 2020. It seeks declaratory relief that the Ministry's approval of the development plan is racially discriminatory and that it violates other fundamental rights, including the right to respect for home under Article 8 of the European Convention on Human Rights.

Much progress was made along the way, including:

- condemnations from domestic and international treaty and human rights bodies, including United Nations ("UN") Committees and the European Commission against Racism and Intolerance ("ECRI");
- early victories in the Danish Eastern High Court confirming that the residents have legal standing, and that the loss of a home is a fundamental intrusion of rights;
- an urgent appeal from three UN Special Rapporteurs asking the Danish State to halt the sale in Mjølnerparken pending resolution of the case; and
- third party interventions in favour of the residents' position by the Danish Institute for Human Rights and the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context.

Nevertheless, successive Danish governments insisted on pushing ahead with the implementation of the legislation, with devastating impacts on residents including those of Mjølnerparken.[2] The sale has proceeded and all residents within the two targeted blocks have received eviction notices. The majority have experienced great distress, and for some who are former refugees, re-traumatisation. For all of them, their lives will never be the same.

In particular, despite having repeatedly referred to "ethnic origin" outside of court including in legislative documentation and the media, the State's position in the litigation has been to deny that "non-Western" background has anything to do with ethnic origin. The residents thus sought a reference to the Court of Justice of the European Union ("CJEU") for a preliminary ruling on the correct application of the Race Equality Directive ("Directive"). This was granted by the Danish Eastern High Court in 2022, with the referral questions focusing on whether:

a) "non-Western" background constitutes "ethnic origin" under the Directive; and, if so, whether
b) the legislative scheme is directly or indirectly racially discriminatory.

What did the Advocate General conclude?

[2] While the terminology of "tough ghettos" has been changed to "transformation areas," the substance of the law remains the same and the indication in the explanatory documentation was that the terminology changes were not for the benefit of existing residents but rather to attract others to these areas. The legislation was also expanded with the goal of having a maximum of 30% of those of "non-Western" background in any housing estate.

The Advocate General's opinion firmly supports the residents' position that both of the referral questions must be answered in the affirmative. Namely, she is of the view that ***"non-Western"*** background ***constitutes ethnic origin*** and that the scheme requiring the reduction of housing is ***directly racially discriminatory***.

Five key takeaway points are particularly worthy of note:

1. **The scope of the Directive includes "common" and public housing**

"Common housing" (which has been incorrectly translated in the English version of the opinion to "public housing") is a particularly Danish form of housing based on principles of democracy, egalitarianism and affordable housing for all. It is non-profit housing run by housing associations that are intended to be self-governing and independent. The residents pay rent and the housing associations pay annual contributions to the National Building Foundation. The funds are used for matters such as the construction, renovation or demolition of buildings, as well as for social projects such as activities for children.

The European Commission cast doubt on whether common housing falls under Article 3(1)(h) of the Directive, which makes it clear that racial discrimination is prohibited in the context of access to and supply of goods and services which are available to the public, including housing.

The Advocate General's view, however, is that common housing does fall within Article 3(1)(h). She noted (*inter alia*) that it represents 20% of the total number of households in Denmark and that it is built and rented out by housing associations which are not-for-profit organisations whose aim is to offer affordable housing to all inhabitants of Denmark by registering on waiting lists. In addition, while the rent is lower than market price – as it is solely meant to cover the costs of operation/maintenance – tenants pay full rent.

This situation can therefore be distinguished from the judgment in *État belge v Humbel and Edel*.[3] In that case, the CJEU held that the provision of courses under the national education system did not constitute a "service" because the essential characteristic of renumeration was missing, as:

- the State, in establishing and maintaining such a system, was not seeking to engage in gainful activity but was fulfilling its duties towards its own population in the social, cultural and educational fields; and
- the system in question was, as a general rule, funded from the public purse and not by pupils or their parents.

More generally – and of potentially wider application across Europe – the Advocate General clarified that public housing falls within the scope of the Directive. In particular, while the Directive is stated to apply "[w]ithin the limits of the powers conferred upon the Community" and public housing is not policy area that the Treaties confer to the regulatory competence of the

[3] Judgment of the Court of Justice of September 27, 1988, *État belge v Humbel and Edel*, 263/86, EU:C:1988:451.

European Union, where a Member State chooses within its own competence to regulate public housing, those rules must not be discriminatory.

2. The Directive applies to the 'othering' of groups

In claiming that "non-Western" background is covered by the Directive, the residents argued that there is a direct and inextricable link between "non-Western" background and racial or ethnic origin because of its definition, characterisation and usage:

a) The definition is not geographically coherent, as the grouping of "Western" countries contains Australia and New Zealand, and all of the countries included in the grouping have majority white populations.
b) The definition of "non-Western" background includes "descendants," with the effect that the categorisation can last for multiple generations and demonstrating an emphasis on inherited characteristics and extraction rather than neutral factors such as place of birth.[4]
c) Those of "non-Western" background are characterised as a homogenous ethnic group with common ascribed features including in relation to ethnic factors such as language, tradition, religious values and other 'norms,' with the same 'problems' and traits/tendencies to engage in negative lifestyles. The oral and written statements made by Danish governments further disclose that stereotypically "non-Western" people or lifestyles are not considered to be "Danish."

The State has consistently counter-argued that "non-Western" background does not constitute ethnic origin because it is too broad. The Advocate General's opinion, though, is clear that it is covered by the Directive, not least because:

"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."

Crucially, she noted that both race and ethnic origin are social constructs and that subjective factors such as the *perceptions* of a dominant group that others do not possess their ethnic characteristics might contribute to the conclusion that the different treatment imposed upon the others is motivated by "ethnic origin."

It is therefore irrelevant "that the 'immigrants and their descendants from non-Western countries' are in themselves not a homogenous ethnic group if the criterion according to which they were placed in that group is that of ethnic origin." In this case, several factors pointed "to the fact that the perceived ethnic origin was a reason for distinguishing between the two: nationality, place of

[4] Only those with a parent who was born in Denmark and has Danish citizenship (being born in Denmark does not automatically result in the granting of Danish citizenship, which is notably difficult to obtain) can escape the categorisation - even if they themselves are born in Denmark and are Danish citizens.

birth and descent" and "the Danish legislature seemed to understand [the]… division as one that is established on the grounds of ethnicity."

This approach commendably acknowledges the realities of racial discrimination. In 2022, having regard to the Directive and the work of ECRI, the European Parliament acknowledged (as does the Directive and the Advocate General) that the concept of 'race' is a social construction and declared that the use of the concept of 'racialisation' has the potential to aid understanding of the processes underpinning racism and racial discrimination.[5]

It stated that racialised groups are ascribed "certain characteristics and attributes that are presented as being innate to all members of each group concerned, based on characteristics, such as skin colour, ethnic or national origin or religion, or perceived membership of a specific group." Similarly, a sub-group of the EU Commission's High Level Group on Non-discrimination, Equality and Diversity has noted that "[i]deas about race/racial origin are often ascribed to or imposed on people, and individuals or groups can be racialised by others in ways that negatively affect their experiences and how they are treated. The social construct of race/racial origin is distinct from but may overlap with how people identify themselves, which can be much more varied and complex."[6]

ECRI further elaborates "racialisation" as the "process of ascribing characteristics and attributes that are presented as innate to a group of concern to it and of constructing false social hierarchies in racial terms and associated exclusion and hostility."[7] It notes that the "process of racialisation has contributed to spread prejudices, deepen inequalities and legitimise exclusion and hostility against specific groups in the most egregious forms;" and that "European history is replete with examples of racialisation of persons belonging to certain communities, including, but not limited to, Black persons, Roma and Travellers, some religious groups such as Jews, Muslims and Sikhs, and indigenous peoples."

The Advocate General's opinion makes it clear that the Directive will apply wherever groups are 'othered' in these ways.

3. Security of tenure matters – no matter who it affects

The Advocate General's approach also fits with the CJEU's established caselaw recognising discrimination regardless of whether the victim possesses the protected characteristic in question.

The Danish State and the European Commission had argued that there was no direct discrimination because individual eviction notices were not based on a resident's particular

[5] European Parliament, Resolution on racial justice, non-discrimination and anti-racism in the EU (2022/2005(INI)), 10 November 2022, Recital B ("Resolution"). Recital 6 of the Directive states that the "European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories."

[6] European Commission, High Level Group on Non-discrimination, Equality and Diversity, *Guidance note on the collection and use of equality data based on racial or ethnic origin*, Subgroup on Equality Data, September 2021, page 8.

[7] ECRI's opinion on the concept of "racialisation" (adopted at ECRI's 87th plenary meeting on 8 December 2021) ("ECRI Opinion"), para. 5.

ethnicity. However, the Advocate General concluded that direct discrimination had occurred because the ethnic criterion of "non-Western" background was determinative of the obligation to adopt development plans to reduce common family housing to a maximum of 40%.

She explained that 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" (neighbourhoods with the same socio-economic factors but without a majority of residents classed as having "non-Western" background). She emphasised that the scheme therefore puts those residents in "a **precarious position in relation to the security of their right to a home**." In other words, the only reason the residents were at risk of an eviction notice was because of the "non-Western" background criterion and this risk is sufficient to constitute "less favourable treatment" for the purposes of the Directive. This finding echoes the arguments of many of the parties at the hearing and underscores the importance of the right to security of tenure as stressed by the UN Special Rapporteurs.

The key consideration was that the less favourable treatment was based on the ethnic criterion: it was irrelevant that "ethnic Danes" also received eviction notices. The Advocate General made it clear that such "collateral victims" are included within the Directive's protections and indeed stated that no victim at all needs to be identified.

4. Stigmatisation on grounds of ethnic origin constitutes discrimination

As in the earlier CJEU case of *CHEZ*, the Advocate General determined that stigmatisation was the second ground for her view that the residents had suffered less favourable treatment to those in comparable areas.[8] In that case, the CJEU also noted that factors to be taken into consideration in assessing whether there is a presumption of discrimination include assertions that suggest that "the practice at issue is based on ethnic stereotypes or prejudices."

The rhetoric of Danish politicians and lawmakers in relation to those of "non-Western" background has been dominated by assumptions, generalisations and stereotypes. As the Advocate General noted, these include that those of "non-Western" background "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." The Advocate General noted that "[b]y generalising those characteristics perceived as negative and unacceptable in Denmark and attributing them to all immigrants and their descendants from non-Western countries, the Law… seems not only to be based on prejudice, but it also contributes to the perpetuation of that stereotyping and stigmatisation." She stated that 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.

[8] *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480

The importance of reaffirming stigmatisation as a form of a less favourable treatment cannot be overstated. Its brutal impact can crush every sphere of the lives of those who are subjected to it. In the words of a former resident of Mjølnerparken, Iman Aljanaby:

"My dad is a doctor, and my mother is in biotech. No matter what I achieve, I will never be perceived as part of society, but I will remain "non-Western." It is devastating to be stigmatised and discriminated in this way in a country which I believed had modern values and freedom of education, in a country where I was born and raised."

5. Integration cannot be used as an excuse to discriminate

As the Advocate General is of the opinion that the legislative scheme constitutes direct discrimination, she did not consider the possibility of indirect discrimination in detail. She did, however, make very important remarks on the concept of integration in this context.

Unlike direct discrimination, which cannot be justified unless very particular and narrow exceptions apply (which are not of relevance in this case), indirect discrimination is permitted where the relevant provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The Danish State, including at the hearing, has often said that the intention of the "Ghetto Package" and the reduction of common family housing in "tough ghetto/transformation areas" is to promote integration. The Advocate General stated that she was sceptical that the scheme could be justified by that aim, noting that in fact "[b]y perpetuating stigmatisation on ethnic grounds, [the legislation] makes it more difficult for 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." Significantly, if a structural inequality does exist, this "cannot be resolved by discriminating against the ethnic group that already finds itself in a more difficult position."

More generally, the Advocate General's opinion contains reminders that, when considering whether housing measures can be justified in the context of indirect discrimination, factors to be considered include:

- whether the aim could be achieved by measures that are less restrictive for the housing rights of the tenants at issue; and
- the correct balancing of the value of such an aim against the intensity of interference with housing rights.

Next steps

The Advocate General's opinion is non-binding and we continue to await the judgment of the Grand Chamber. Nonetheless, it is a hugely significant milestone for the residents, who have been fighting for years to save their homes and community, and for recognition that what has happened to them and thousands of others across Denmark is unlawful. It vindicates all of the arguments that have been made in the litigation and is also completely in line with the conclusions of international treaty monitoring bodies, the Danish Institute of Human Rights, the UN Special Rapporteurs and the Kingdom of Spain.

The opinion is a strong signal that Denmark should finally do the right thing and end this egregious racial discrimination now by abolishing the "Ghetto Package" and the "non-Western" background classification without further delay.

More broadly, with rising Islamophobia across the region, coupled with an increase in "area-based discrimination," the opinion could not be better news for the upholding of fundamental EU values such as non-discrimination and the right to secure homes.

Area-based discrimination arises where majority ethnic-minority neighbourhoods are targeted with housing or law enforcement measures on the basis of justifications that may appear neutral at first glance – such as better socio-economic protections – but often serve as masks for prejudice. Any European countries with further such plans should pay careful attention: Advocate General Ćapeta's opinion is a very good indicator that the racialisation and penalisation of Muslims and other minority groups in this way will not be tolerated by the EU. This includes using proxy wording for ethnic origin or treating racialised groups as second-class citizens in the name of integration.

Susheela Math was Senior Managing Litigation Officer at the Open Society Justice Initiative until March 2025 and led its work challenging measures under the "Ghetto Package" throughout its involvement, from August 2018 to December 2024.