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CURRENT DEVELOPMENTS: CASE COMMENT

Addressing Xenophobia in EU Law: Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge (C-417/23)

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Abstract

This case note examines the decision of the Court of Justice of the European Union in Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge, where the Court found that a distinction between westerners and non-Westerners constituted discrimination under the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The case note shows that while the finding in this case does help address xenophobia under the Directive 2000/43, the interpretive moves made by the Court in reaching this finding are normatively weak in five respects: (i) the meaning of ethnic origin, (ii) the distinction between direct and indirect discrimination, (iii) the meaning of xenophobic discrimination, (iv) the recognition of structural harm, and (v) the use of the narrative of integration in European policy.

Keywords: Directive 2000/43; Discrimination on the basis of racial or ethnic origin; direct discrimination; indirect discrimination; xenophobia

Introduction

Can a distinction between 'Westerners' and 'Non-Westerners' constitute discrimination on the basis of ethnic origin? The Court of Justice of the European Union (CJEU) answered this question in the affirmative in its recent decision in the case of *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge.*[1] In doing so, the Court confirmed that EU law prohibits xenophobia when it coincides with discrimination under Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.[2]

The case note examines the facts, issues, and reasoning which led to this outcome. It then explores what the Court accomplished, and at the same time left wanting, in reaching this outcome. In particular, it argues that while the outcome is satisfactory, the reasoning which led to the outcome is normatively suspect in at least five respects: (i) the conflation of ethnic origin with racial origin; (ii) the blurring of the distinction between direct and indirect discrimination; (iii) the insubstantial recognition of the harm entailed in xenophobic discrimination; (iv) the partial focus on materiality which excludes a consideration of structural harm; (v) the continuing availability of integration as a justification for housing policy.

[1]ECJ 18 December 2025, Case C-417/23 *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge*m (hereafter *Slagelse*).

[2]ECJ 10 July 2008, Case C-54/07 *Firma Feryn* (hereafter *Firma Feryn*); ECJ 6 April 2017, Case C-668/15 *Jyske Finans* (hereafter *Jyske Finans*).

Clarity over these aspects will be necessary for not only the effective implementation of EU equality law but also countering the rise of xenophobia and anti-immigration discourse across Europe.

1. The case

(a) Facts

The dispute concerned the Danish Government's consolidated Law No 1877 on, inter alia, public housing (Law on Public Housing) of 27 September 2021. The law sought to regulate housing in 'transformation areas' (previously called 'hard ghetto areas'[3]) which were characterised, inter alia, by the fact that, during the last five years, the proportion of 'immigrants from non-Western countries and their descendants' resident in these areas had exceeded 50%. The law required demolition or sale of properties in such areas with the aim of reducing the percentage of public family housing units.

(b) Issue

The legal issue, as referred to the CJEU for a preliminary ruling by Østre Landsret (High Court of Eastern Denmark), was whether the provisions relating to transformation areas in the Danish Law on Public Housing constituted direct or indirect discrimination on the basis of ethnic origin under Article 2(2)(a) and Article 2(2)(b) of Directive 2000/43.

(c) Decision

The Court began its analysis by clarifying a preliminary point about the material scope of Directive 2000/43. It confirmed that the dispute fell within the scope of Directive 2000/43 since according to Article 3(1)(h) of Directive 2000/43, the directive applies 'to all persons, as regards both the public and private sectors, including public bodies, in relation to access to and supply of goods and services which are available to the public, including housing'.[4] Importantly, the Court clarified that this material scope included economic services such as letting immovable property for housing, irrespective of whether the services were rendered for profit or not.[5]

The Court then considered the main question of whether the use of the criterion 'immigrants from non-Western countries and their descendants' in the Danish Law on Public Housing contravened Directive 2000/43, first as direct discrimination, and then second, in the alternative, as indirect discrimination.

(i) Direct discrimination

At the outset, the Court considered the meaning of ethnic origin in Directive 2000/43. It recognised that, although ethnic origin is not defined or explained in the text of Directive 2000/43 itself, in the Court's previous case law, it had expounded on the meaning of ethnic origin as referring to 'societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds'.[6] The Court emphasised the use of the phrase 'in particular'.[7] It insisted that the list of characteristics determinative of ethnic origin was non-exhaustive and that 'ethnic origin cannot be determined on the basis of a single criterion, but, on the contrary, is based on a whole number of factors,

[3] *Slagelse*, above n 1, para [16].
[4] Ibid, para [53].
[5] Ibid, paras [55]–[62].
[6] Ibid, para [72], citing ECJ 16 July 2015, Case C-83/14 *Chez/Nikolova*, para [46] (hereafter *Chez/Nikolova*) and *Firma Feryn*, above n 2, para [17].
[7] *Slagelse*, above n 1, para [73].

some objective and others subjective'.[8] It thus found that in the absence of a definition of ethnic origin, 'the concept must be defined on the basis of a combination of criteria such as those referred to'.[9]

The question that arose was whether 'non-Western' status, which ostensibly referred to nationality or national origin, could also indicate ethnic origin in combination with the list of characteristics above.

On the face of it, the impugned law established a difference in treatment based primarily on the proportion of 'immigrants from non-Western countries and their descendants'.[10] In the context of the Danish Law on Public Housing, 'immigrant' meant a person not born in Denmark and neither of whose parents was both (i) born in Denmark and (ii) a Danish national.[11] Likewise, 'descendant' meant a person who was born in Denmark but neither of whose parents was both (i) born in Denmark and (ii) a Danish national, or whose parents, even if they were born in Denmark and acquired Danish nationality, both also retained a foreign nationality.[12] Finally 'non-Western countries' were all countries excluding the Member States of the EU, Andorra, Iceland, Liechtenstein, Monaco, Norway, San Marino, Switzerland, the UK, Vatican City, Canada, the US, Australia and New Zealand.

References to immigrants, descendants, and non-Western countries in the impugned criterion, were thus references to place of birth (national origin), nationality, and nation states. They had no direct link to ethnic origin.[13]

The Court noted that both Recital 13 and Article 3(2) made clear that Directive 2000/43 did not cover 'differences of treatment based on nationality, since a person's nationality cannot, in itself, give rise to a presumption of belonging to a particular ethnic group'.[14] Yet, it was clear to the Court that these provisions did not 'prevent nationality or the criteria underlying its grant from being taken into account, among other factors, for the purposes of defining the parameters of "ethnic origin"'.[15] In fact, 'common nationality' *was* one of the characteristics relevant to the determination of ethnic origin.[16] Similarly, while a person's country of birth was not determinative of their ethnic origin, it too could be taken into account in determining ethnic origin.[17] Ultimately, the Court concluded that:

> even though neither the criterion of a person's nationality nor that of his or her country of birth is sufficient, in itself, to justify such a presumption of belonging to an ethnic group, both may be taken into account, together with other factors, for the purpose of assessing whether there is direct discrimination on the basis of 'ethnic origin' within the meaning of Directive 2000/43.[18]

The Court held that it was in light of this that the referring court had to examine whether a general criterion such as 'immigrants from non-Western countries and their descendants', which did not refer to ethnic origin on the face of it, was based on ethnic origin in fact. If the court found that: (i) the difference in treatment was based on ethnic origin, it had to then determine whether it led to (ii) less favourable treatment of a person (iii) in comparison with another person of a different ethnic group in a similar situation. Only when all three conditions are satisfied is direct discrimination established under Article 2(2)(a).

To the Court, based on its analysis of the meaning of ethnic origin, the first condition seemed satisfied though its final determination was up to the referring court.

The second condition also seemed satisfied because of the less favourable treatment of the residents in transformation areas. The Danish Law on Public Housing specifically required the reduction of public

[8]Ibid, citing *Jyske Finans*, above n 2, paras [18], [19].
[9]Ibid, para [74].
[10]Ibid, para [93].
[11]Ibid, para [93].
[12]Ibid, para [97].
[13]Ibid, paras [90], [99].
[14]Ibid, para [81].
[15]Ibid, para [82].
[16]Ibid.
[17]Ibid, paras [83], [84], citing *Jyske Finans*, above n 2, para [18].
[18]Ibid, para [86].

family housing units in transformation areas to a maximum of 40%. As the transformation area was comprised of majority 'immigrants from non-Western countries and their descendants', it exposed its residents, mainly those considered non-Western, to the risk of losing their homes.[19] In addition to this material harm, the requirement carried the risk of expressive harm in designating an area as 'transformation area' (previously known as 'hard ghetto area'), which could itself be offensive and stigmatising.[20]

The third condition too seemed satisfied since residents of transformation areas were in a comparable situation to residents of non-transformation, but similarly vulnerable residential, areas but for the impugned criterion (ie that the proportion of immigrants from non-Western countries and their descendants in the latter had not exceeded 50%).[21]

With this, the Court concluded that, subject to the assessment of the referring court, the use of the criterion 'immigrants from non-Western countries and their descendants' constituted direct discrimination under Article 2(2)(a) of Directive 2000/43.[22]

(ii) Indirect discrimination

According to the Court, if the referring court found that the impugned criterion did not constitute direct discrimination, it would still have to ask whether it constitutes indirect discrimination under Article 2(2)(b). The Court held that this question too could be answered in the affirmative as the impugned criterion constituted (i) an apparently neutral provision, criterion or practice (ii) that put persons of an ethnic origin at a particular disadvantage (iii) compared with other persons, and (iv) that it was not objectively justified, appropriate or necessary.[23]

The Court focused its indirect discrimination analysis mainly on the fourth condition to assess whether the impugned criterion was proportionate.

According to the Court, in principle, integration of third-country nationals in the EU, as the Danish Government argued, could be considered an objective aim of a legislation.[24] But since the impugned criterion – 'immigrants from non-Western countries and their descendants' – included not only third-country nationals but also nationals of a Member State, ie Denmark, the Court held that 'in so far as it applies to nationals of Member States, the national legislation at issue in the main proceedings cannot be justified by that objective'.[25] Likewise, the impugned criterion could not be considered appropriate if it actually led to loss of housing.[26]

Similarly, it could neither be considered necessary nor proportionate in a strict sense if the 'disadvantages caused by that legislation are disproportionate to the objectives pursued and whether that legislation unduly prejudices the legitimate interests of the residents of transformation areas'.[27]

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[19]Ibid, paras [116], [123].

[20]Ibid, para [126]; *Chez/Nikolova*, above n 6, para [87]. As Sarah Ganty and Karin de Vries argue, the rebranding of 'hard ghetto areas' to 'transformation areas' was 'a linguistic shift seemingly intended to soften the perception of policies that continue to raise serious human rights concerns': S Ganty and K de Vries 'Manufacturing integration: ethnic engineering in the Danish "Ghetto Case"', *Verfassungsblog* (25 March 2025) https://verfassungsblog.de/denmark-ghetto-law/. As E Tendayi Achiume (Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance), Balakrishnan Rajagopal (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), and Fernand de Varennes (Special Rapporteur on minority issues) also argued, 'Labelling neighbourhoods "ghettos" and "tough ghettos" on the basis of the percentage of "non-Western" immigrants and descendants raises serious concerns of discrimination based on race, ethnicity, national origin, and other protected grounds': 'UN human rights experts urge Denmark to halt contentious sale of "ghetto" buildings' (23 October 2020) https://www.ohchr.org/en/press-releases/2020/10/un-human-rights-experts-urge-denmark-halt-contentious-sale-ghetto-buildings#:~:text=Geneva%20(23%20October%202020)%20%E2%80%93,%2C%20UN%20experts*%20said%20today.

[21]*Slagelse*, above n 1, para [113].

[22]Ibid, para [129].

[23]Ibid, para [175].

[24]Ibid, para [149].

[25]Ibid, para [151].

[26]Ibid, para [161].

[27]Ibid, para [165].

Given that ultimately the impugned criterion and the Danish Law on Public Housing as such led to 'the loss of one's home [which] is a most extreme form of interference with the right to respect for the home',[28] the Court was clear that the proportionality test could not be satisfied to avert the charge of indirect discrimination under Article 2(2)(b) of Directive 2000/43.

2. Analysis

Directive 2000/43, though in force for over 25 years, has been invoked just 14 times before the CJEU.[29] This is an underwhelming record in comparison with the CJEU's vast case law on other grounds like gender and age.[30]

Despite this, the present case has confirmed that Directive 2000/43 *can* be potent when invoked. This section delineates five interpretive moves made by the Court that reflect this. Appreciating them allows appreciating the Court's interpretive vision but also some interpretive blind spots with equally potent implications.

First, the lynchpin of the Court's finding in the present case is its broad understanding of the meaning of ethnic origin under Directive 2000/43. An open-ended understanding of ethnic origin allowed the Court to conclude that a reference to non-Westerners could be a reference to ethnic origin. But it is doubtful whether this understanding of ethnic origin was necessary in this case. As Advocate General Ćapeta's Opinion makes clear, the Danish legislature was drawing a distinction between Westerners and non-Westerners on the basis that the former was a group that was believed to naturally belong to and was hence better integrated in Denmark as opposed to the latter. In doing so, the Danish legislature was essentialising two vast and heterogenous groups by marking one as inherently or innately possessing some characteristics and hence being superior or inferior as compared to the other.[31]

This is straightforwardly racism qua the process of racialisation.[32] Racism, as Sandra Fredman argues, is 'not about objective characteristics, but about relationships of domination and subordination, about hatred of the "Other" in defence of "Self" perpetuated and apparently legitimated through images of the "Other" as inferior, abhorrent, even subhuman'.[33] This understanding of racism is closely aligned with xenophobia, as is explicitly acknowledged in Directive 2000/43,[34] and, as Evelyn Ellis and Phillipa Watson argue, show 'that the directive is primarily targeted at discrimination against racial groups (whatever they may be) whose origin is outside the EU'.[35]

Slagelse was an instance of racism or discrimination based on racial origin because the Danish legislature was marking out groups as inherently superior or inferior based on their origin (nationality, nation-states or national origin). In addition, this process of racialisation was xenophobic because it was for the purpose of demarcating those who belonged and those who did not belong to a space or a community.

[28]Ibid, para [170].

[29]G de Búrca and V Passalacqua 'The curious absence of race discrimination litigation in EU law', European University Institute, Law Department, Working Paper 2025/15.

[30]Ibid, p 2; S Atrey 'Race discrimination in EU law after *Jyske Finans*' (2018) 55 Common Market Law Review 625; C Hermanin 'Whither judicial Europeanization? The case of the Race Equality Directive' in B De Witte et al (eds) *National Courts and EU Law: New Issues, Theories and Methods* (Cheltenham: Edward Elgar, 2016); M Möschel, 'Race discrimination and access to the European Court of Justice: *Belov*' (2013) 50 Common Market Law Review 1433.

[31]AG Ćapeta's Opinion in *Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge*m, Case C-417/23, 13 February 2025 para [73]: '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'.

[32]Council of Europe, European Commission Against Racism and Intolerance 'ECRI's Opinion on the Concept of "Racialisation"' (adopted at ECRI's 87th plenary meeting on 8 December 2021), paras [3], [5].

[33]S Fredman 'Equality: a new generation' (2001) 40 Industrial Law Journal 145 at 148.

[34]Directive 2000/43, Recitals 7, 10, 11.

[35]E Ellis and P Watson *EU Anti-Discrimination Law* (Oxford: Oxford University Press, 2nd edn, 2012) p 34.

Slagelse was not a case of discrimination on the basis of ethnic origin, because, as Mark Bell argues, ethnic origin is squarely about 'a shared, common origin'.[36] It is unclear whether the Danish legislature was relying on a construction of ethnic groups as 'communities based on selective memory and perceived common heritage'.[37] But it is amply clear that the Danish legislature was racialising – inscribing a racial order and hierarchy – in turn based on ideas of belongingness and integration. Racism and xenophobia were thus deeply intertwined in this case.

Rather, the referring court, the Advocate General, and the CJEU all classified the case as a case of discrimination based on ethnic origin by conflating ethnic origin with racial origin.[38] It is arguable that in classifying it as such, at worst, they produced, and at best, they reproduced, myths about ethnic groups, where no communities or social groups classifiable on the basis of common or shared ethnicity existed in the first place. *Slagelse* confirms EU law's reticence in engaging with the concept of race and racial origin and instead preferring to use ethnicity or ethnic origin, even when the latter are a poor fit.

Secondly, the Court was unequivocal that the present case was a case of direct discrimination on the basis of ethnic origin, and indirect discrimination only in the alternative. But in insisting on direct discrimination, the Court seems to collapse the distinction between direct and indirect discrimination. According to Directive 2000/43, direct discrimination is difference in treatment '*on grounds of* racial or ethnic origin'. In contrast, indirect discrimination is 'taken to occur where an apparently *neutral* provision, criterion or practice' disproportionately impacts people on grounds of their racial or ethnic origin. One distinction between the two forms of discrimination is that while direct discrimination is explicitly based *on grounds of* racial or ethnic origin, indirect discrimination is based on a *neutral* ground.[39]

In this case, the discrimination was explicitly based on non-Western status. On the face of it, non-Western status is not ethnic origin but a neutral reference. Following Advocate General Ćapeta's Opinion, the Court understood an explicit reference to non-Western status *as* a reference to ethnic origin.[40] Both Advocate General Ćapeta and the Court were clear that this was not because of any intention on the part of the Danish legislature to discriminate but because, objectively, the reference to non-Western status in this case was based on the legislator's reliance on ethnic criterion.[41]

This reasoning considers direct discrimination to be about the real or actual reason on which a distinction is based rather than the explicit criterion used in making the distinction. This shift to reasoning from language is a critical shift in discrimination jurisprudence which brings covert or proxy discrimination squarely within the ambit of direct discrimination.

While this is not objectionable per se, it is worth noting that it does collapse the distinction between direct and indirect discrimination in that, ordinarily, it is the latter and not the former which is meant to catch discrimination which is, on the face of it, apparently neutral.[42] Instead, the Court's decision in *Slagelse* clarifies that even racial discrimination based on apparently neutral grounds or proxies (such as non-Western status) are meant to be caught by direct not indirect discrimination.[43]

[36]M Bell *Racism and Equality in the European Union* (Oxford: Oxford University Press, 2009) p 9.

[37]Ibid.

[38]I Solanke 'Comment on the Danish Law on Public Housing Case: forced evictions in all but name?', European Law Studies, Research Paper in Law 02/2025, College of Europe, pp 18–21.

[39]This distinction is maintained strictly in the jurisprudence of the ECtHR, especially in cases of racial discrimination even when the text of Art 14 of the European Convention on Human Rights does not distinguish between direct and indirect discrimination. See *Biao v Denmark* (2017) 64 EHRR 1 paras [101]–[106] (hereafter *Biao*).

[40]AG Ćapeta's Opinion, above n 31, paras [138], [139]: 'the relevant Danish legislation *expressly* relies on the ethnic distinction between Western and non-Western residents. The difference in treatment, *therefore*, exists *because of* the ethnic criterion, which is a clear case of direct discrimination'.

[41]Ibid, para [140]; *Slagelse*, above n 1, paras [105], [106].

[42]FK Thomsen 'Stealing bread and sleeping beneath bridges – indirect discrimination as disadvantageous equal treatment' (2015) 2 Moral Philosophy and Politics 299.

[43]A similar approach was adopted by Pinto De Albuquerque J in his concurring opinion in *Biao*, above n 39, para [7]. See M Moschel 'The Strasbourg Court and indirect race discrimination: going beyond the education domain' (2017) 80 Modern Law Review 11.

The CJEU had done a similar thing in *Chez/Nikolova* by considering a distinction made between districts (a neutral criterion) to be a distinction based on ethnic origin and hence constituting direct discrimination against Roma.[44] In that case, it was clear that the distinction between districts was indeed 'introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned'.[45] As the CJEU summed up in *Jyske Finans*, equating a criterion (such as place of birth) with ethnicity requires 'a direct or inextricable link between those two concepts'.[46] The evidence in *Slagelse* brought up the connection of non-Western status with a range of characteristics, including nationality, nation-states, and national origin. This should have made it difficult for the Court to draw as direct or inextricable a link between non-Western status and ethnicity as was possible between districts and ethnicity in *Chez/Nikolova*. Yet, the Court was unencumbered in classifying *Slagelse*, in the main, as a case of direct as opposed to indirect discrimination.

Thirdly, while the Court's finding is clear that references to non-Western status can be references to ethnic origin in combination with other characteristics; it is less clear about the nature of such discrimination. More than clarity over the specific grounds which independently or in combination comprise non-Western status and in turn ethnic origin, clarity was required over the specific discriminatory harm resulting from the reliance on a strikingly xenophobic distinction between Westerners and non-Westerners. While the Court was clear about the former, it said too little about the latter.

Xenophobic references to non-Westerners, outsiders, or foreigners signal the harm of disbelongingness.[47] These references have the effect of excluding people from the social, cultural, economic, and political life of communities (villages, towns, cities or nation-states).[48] This harm, though, was left unarticulated even when the case was squarely a case of xenophobic discrimination (which coincided with racial discrimination as explained above).[49] This is not surprising given that, as Chris McCrudden observes, the Court is 'generally notoriously unforthcoming in articulating the deeper principles that may be driving its approach to anti-discrimination law', especially in cases concerning Directive 2000/43.[50] What *is* surprising in this case is that, although the case is patently drawing a xenophobic distinction ('immigrants from non-Western countries and their descendants'), xenophobia is not even named even though Directive 2000/43 mentions the concept explicitly.[51]

Fourthly, and relatedly, the Court *did* develop a strongly material conception of discrimination which it identified as the higher risk of early termination of leases and eviction, and eventually the loss of homes. Yet, it is arguable that this material conception was individualised and does not recognise the structural harm of the reduction in affordable not-for-profit public housing stock.[52] The impact of the impugned criterion was not only the loss of homes but the overall reduction of affordable homes. In mandating demolition or sale of family units, the Danish law promoted commodification of public housing.[53] The Court did not identify this structural harm and instead made racialised harm entirely about the material conditions of racialised groups rather than about conditions of political economy.

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[44] *Chez/Nikolova*, above n 6.

[45] Ibid, para [91]; S Atrey 'Redefining frontiers of EU discrimination law' [2017] Public Law 185, 187.

[46] *Jyske Finans*, above n 2, para [20].

[47] S Atrey 'Xenophobic discrimination' (2024) 87 Modern Law Review 80.

[48] ibid; E Tendayi Achiume 'Beyond prejudice: structural xenophobic discrimination against refugees' (2014) 45 Georgetown Journal of International Law 323; E Tendayi Achiume 'Governing xenophobia' (2018) 51 Vanderbilt Journal of Transnational Law 333.

[49] Cf AG Ćapeta's Opinion, above n 31, para [73], which acknowledges this to a limited extent in terms of 'othering'. See S Steininger 'They not like us: why the Danish "Ghetto Law" violates EU law' *Verfassungsblog* (10 March 2025), available at https://verfassungsblog.de/they-not-like-us/.

[50] C McCrudden 'The new architecture of EU equality law after CHEZ: did the Court of Justice reconceptualise direct and indirect discrimination?' (2016) European Equality Law Review 1 at 15. See also Atrey, above n 30, at 637, 640.

[51] Directive 2000/43, Recitals 7, 10, 11. See also EU Anti-racism Action Plan 2020–2025.

[52] S Atalay 'When context disappears: a critique of the CJEU's judgment in Slagelse Almennyttige Boligselskab, Afdeling Schackenborgvænge' *Verfassungsblog* (5 January 2026), available at https://verfassungsblog.de/when-context-disappears/.

[53] BS Risager 'Territorial stigmatization and housing commodification under racial neoliberalism: the case of Denmark's "Ghettos"' (2022) 55 Environment and Planning 850.

Fifthly, the Court broadened the scope of application of Directive 2000/43 to include public housing services offered whether for- or not-for-profit. But the Court did not strike down the use of 'integration' in justifying racial and ethnic engineering of public housing. The narrative of integration thus remains available to countries in formulating not just their housing policies specifically but immigration policies more broadly. This is despite clear evidence that the narrative of integration in Europe has served as a cover for xenophobia and has negatively impacted those it professes to serve, ie non-Europeans.[54] In failing to acknowledge this, the Court may have inadvertently permitted the instrumentalisation of public housing for anti-immigration purposes.

Conclusion

As is the case with preliminary rulings, the Court has not decided the dispute in *Slagelse*. It has only provided a binding interpretation of the law applicable to the dispute. The dispute will now be decided by the High Court of Eastern Denmark in light of the Court's interpretation.

This case note has showed that the interpretation of the Court in *Slagelse* is not satisfactory even though its outcome – that the Danish law *did* constitute discrimination under Directive 2000/43 – certainly is. The outcome is satisfactory because it turns a corner on the lack of a similar finding in international law where cases challenging xenophobic discrimination in Denmark have rarely succeeded.[55] In contrast, the EU law's relative openness to finding discrimination under Directive 2000/43 in cases of xenophobic discrimination is notable.[56]

The reasoning which leads to this interpretation is not satisfactory for the five reasons set out in this case note. In sum, the interpretation is not satisfactory because it is normatively weak. The Court neither names nor engages with xenophobia or xenophobic discrimination. It is hard to imagine a more obvious case of xenophobic discrimination, one which explicitly relied on the language of 'immigrants' and 'non-Western countries'. The fixation with classifying *Slagelse* as a case of direct discrimination on the basis of ethnic origin, blinkered the Court's perspective of the issue at stake, which was about shaping belonging in Europe and indeed the very idea of Europe and Europeans. The Court offered too little in this regard and even muddied the interpretation of Directive 2000/43 in other respects relating to the meaning of ethnic origin, the distinction between direct and indirect discrimination, the recognition of structural harm, and the availability of the rhetoric of integration for justifying housing and immigration policy in Europe. How potent the decision in *Slagelse* will actually be in arresting the proliferation of xenophobic and anti-immigration policies across Europe, will thus depend on how closely the interpretive implications of this case are reckoned with.

[54] As Pinto de Albuquerque J observed, integration policies are 'a confused amalgam of misguided, biased assumptions which portray a surreal image of resident foreigners and Danish nationals of foreign origin living in Denmark, and more specifically – and most disturbingly – of those coming from 'non-Western countries', in contrast with an idealised image of ever-faithful Danes, born in Denmark, who live outside the country': *Biao*, above n 39, para [18] (Pinto De Albuquerque J). See also S Saharso 'Who needs integration? Debating a central, yet increasingly contested concept in migration studies' (2019) 7 Comparative Migration Studies 1.

[55] See the record of the UN Committee on the Elimination of Racial Discrimination in cases of xenophobic discrimination against Denmark in S Atrey 'Understanding xenophobia as intersectional discrimination' (2022) 79(3) Washington and Lee Law Review 1007.

[56] *Firma Feryn*, above n 2; cf *Jyske Finans*, above n 2.

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