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Country report

Non-discrimination

Denmark
2019
including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Denmark

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Reporting period 1 January 2018 – 31 December 2018

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EXECUTIVE SUMMARY

1. Introduction

In the 1960s and 1970s, the Danish Parliament debated whether legislation on discrimination in the labour market due to race, religion and other grounds should be enacted. The social partners, i.e. employers' organisations and employees' organisations in the labour market rejected the proposal, arguing that Denmark had a tradition of collective agreements rather than legislation in the labour market. As no such collective agreements on anti-discrimination were concluded, victims of discrimination on grounds of race, ethnicity, sexual orientation and religion were not protected until 1996, when anti-discrimination legislation was finally enacted. A prohibition of discrimination based on age and disability was adopted in 2004.

Up until the 1960s and 1970s the Danish population was relatively homogeneous, and the majority were members of the Evangelical Lutheran Church by conviction, tradition and/or culture. With new groups of migrant workers and the arrival of different groups of refugees, this picture has changed. During the last 50 years, Denmark has become a much more multicultural and multi-ethnic country.

The domestic debate on whether and to what extent international human rights obligations should be followed can be quite fierce. Many politicians are sceptical about the limitations that international obligations impose on their legislative power.

In particular, there has been a growing emphasis on encouraging immigrants and descendants from third countries to explicitly sign up to 'basic Danish values'. In Denmark, the requirement to adapt and assimilate as understood by officials and the general public is stronger than in some of its neighbouring countries.

In Denmark, the most important legal development in 2018 in the area of anti-discrimination law was the adoption of the Act on the Prohibition of Discrimination due to Disability.

In general, the various anti-discrimination acts do not apply to the Faroe Islands and Greenland.

2. Main legislation

Anti-discrimination legislation in Denmark does not consist of one single piece of legislation. It is rather a combination of many acts, which have been introduced or amended when public debate or when international and EU obligations have focused on a specific field of application or a specific vulnerable group. Hence, protection against discrimination is ensured by a web of civil and criminal legislation, ranging from the Constitution to specific acts covering areas outside and inside the labour market, making it a challenge to explain and for the public to understand.

The Danish Constitution provides that no Danish subject shall be deprived of his or her liberty because of his or her political or religious convictions or because of his or her descent. Moreover, no person shall be denied the right to full enjoyment of civil and political rights by reason of their creed or descent, nor shall they for such reasons evade any common civil duty. Furthermore, the Constitution provides that no one shall be liable to make personal contributions to any denomination other than the one to which he adheres. Finally, the Constitution provides that citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done.

The Act on the Prohibition of Discrimination due to Race etc. makes it a criminal offence to refuse, in connection with a commercial or non-profit business, to serve or allow entrance to a person on the basis of race, colour, national or ethnic origin, religious belief or sexual orientation.¹

The Act on Ethnic Equal Treatment aims to ensure protection against discrimination based on race or ethnic origin and to implement the non-employment aspects of the EU Racial Equality Directive.² The Act on Ethnic Equal Treatment includes a prohibition of discrimination on the grounds of racial and ethnic origin as regards access to social protection, including social security and healthcare, social benefits, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry on a particular profession. The Act also includes a prohibition of harassment on the grounds of race and ethnic origin.

The Act on the Prohibition of Discrimination in the Labour Market etc. prohibits direct and indirect discrimination in the labour market based on race, skin colour, religion or faith, political conviction, sexual orientation, age, disability and national, social or ethnic origin.³ The Act prohibits discrimination in connection with recruitment, dismissal, transfer and promotion as well as discrimination with regard to pay and working conditions and also provides protection against harassment. Similarly, employers are not allowed to discriminate among employees as regards access to vocational education and training, continuing training and retraining. The same prohibition applies to people providing guidance and training as well as to those involved in work placement activities and in making rules and decisions about the right to perform professional activities and about membership of workers' and employers' organisations.

The new Act on the Prohibition of Discrimination due to Disability is a civil law, which prohibits direct and indirect discrimination on the ground of disability.⁴ The Act applies to all public and private activities in all areas of society except for areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc. The Act was adopted on 8 June 2018 and entered into force on 1 July 2018.

The discrimination grounds of age, sexual orientation and religion or belief do not currently enjoy protection outside the labour market in Danish civil law. Criminal law covers direct differential treatment with regard to access to public places and services on the grounds of race, colour, national or ethnic origin, religious belief or sexual orientation outside the labour market, but not age or disability. Moreover, criminal law does not cover indirect discrimination, harassment or victimisation.

Denmark has signed and ratified all major human rights conventions except the UN Convention on Migrant Workers and Protocol 12 to the European Convention on Human Rights (ECHR). Denmark has signed but not yet ratified the COE Revised European Social Charter.⁵

¹ Denmark, Act on the Prohibition of Discrimination due to Race etc. (*Lov om forbud mod forskelsbehandling på grund af race etc.*), Consolidated Act No. 626 of 29 September 1987 with later amendments.

² Denmark, Act on Ethnic Equal Treatment (*Lov om etnisk ligebehandling*), Consolidated Act No. 438 of 16 May 2012 with later amendments.

³ Denmark, Act on the Prohibition of Discrimination in the Labour Market etc. (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*), Consolidated Act No. 1001 of 24 August 2017.

⁴ Denmark, Act on the Prohibition of Discrimination due to Disability (*Lov om forbud mod forskelsbehandling på grund af handicap*), Act No. 688 of 8 June 2018.

⁵ Denmark has not accepted the collective complaints protocol to the European Social Charter.

3. Main principles and definitions

Direct discrimination is defined as a situation 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.⁶

Indirect discrimination is deemed to occur where an apparently neutral provision, criterion or practice would put persons of a particular racial or ethnic origin, for example, at a disadvantage compared to 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.⁷

Harassment, instruction to discriminate and victimisation are also prohibited.⁸

Two main exceptions to the prohibition of discrimination apply in the labour market:⁹

1. Employers whose establishments have the aim of promoting a certain political or religious ethos are exempted from the Act's prohibition of discrimination in situations where a certain political or religious requirement is of importance to the particular job in question.
2. If it is of crucial significance that a person has a particular race, political opinion, sexual orientation or national, social or ethnic origin, has a particular skin colour, age or disability or is of a certain religion or belief and if the requirement for such a characteristic is reasonable in relation to the concrete work in question, the employer can apply for a dispensation from the relevant Government minister. After having obtained a statement from the Minister of Labour, the minister may issue a concrete exemption from the prohibition of differential treatment.

Regarding reasonable accommodation for people with disabilities, employers are obliged to adapt the workplace in order to accommodate persons with disabilities, unless this will place a disproportionate burden on the employer.¹⁰ In a recent ruling, the Supreme Court stated that if an employee needs reduced working hours because of a disability, the employer must show a willingness to look into possible accommodations like flexible jobs, part-time jobs, etc. If the employer refuses such accommodations, the courts might conclude that the obligation to provide reasonable accommodation has been violated.¹¹ Reasonable accommodation is only obligatory in the labour market. The new Act on the Prohibition of Discrimination due to Disability does not establish an obligation to provide reasonable accommodation in other areas.

The Danish acts on discrimination distinguish between natural persons and legal persons, and state that only natural persons are protected against direct or indirect discrimination.

Discrimination based on association with an individual is explicitly covered by the Act on Ethnic Equal Treatment and the new Act on the Prohibition of Discrimination due to Disability. Discrimination based on association is not mentioned in the wording of the Act on the Prohibition of Discrimination in the Labour Market etc., but it is covered in case law.

⁶ See Section 1(2) of the Act on the Prohibition of Discrimination in the Labour Market, Section 3(2) of the Act on Ethnic Equal Treatment and Section 5(2) of the Act on the Prohibition of Discrimination due to Disability.

⁷ See Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., Section 3(3) of the Act on Ethnic Equal Treatment and Section 5(3) of the Act on the Prohibition of Discrimination due to Disability.

⁸ See Sections 1(4), 1(5) and 7(2) of the Act on the Prohibition of Discrimination in the Labour Market etc.; Sections 3(4), 3(5) and 8 of the Act on Ethnic Equal Treatment; and Sections 5(4), 5(5) and 9 of the Act on the Prohibition of Discrimination due to Disability.

⁹ See Section 6 of the Act on the Prohibition of Discrimination in the Labour Market etc.

¹⁰ See Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc.

¹¹ Supreme Court judgment of 22 November 2017, Case No. 305/2016.

Discrimination based on a perception or assumption of a person's characteristics is not directly prohibited in Danish law.

Multiple discrimination is not directly covered by legislation. In cases of multiple discrimination, the different discrimination grounds are dealt with individually. Discrimination on more grounds does not involve higher amounts of financial compensation.

4. Material scope

In the public and private labour market, discrimination is prohibited on the grounds of race, colour of skin, religion or faith, political conviction, sexual orientation, age, disability and national, social or ethnic origin according to the Act on the Prohibition of Discrimination in the Labour Market etc. In civil law covering areas outside the labour market, discrimination on the grounds of race and ethnic origin as well as disability is prohibited according to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination due to Disability.

5. Enforcing the law

If the alleged case of discrimination is a criminal matter, the victim should report it to the police.

If the case is a civil matter, the victim can choose to go to:

- 1) Board of Equal Treatment;
- 2) civil courts;
- 3) trade union if it is a case within the labour market;
- 4) a citizens advice service, which exists in some municipalities (advice/assistance);
- 5) the Danish Institute for Human Rights (advice/assistance);
- 6) NGOs (advice/assistance).

Most potential victims of discrimination file complaints with the Board of Equal Treatment.¹² The Board of Equal Treatment covers all protected grounds, (gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin). The Board of Equal Treatment is competent to hear individual complaints related to discrimination in the labour market based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. In addition to employment, the Board also deals with complaints related to discrimination based on disability, race, ethnic origin or gender. Victims of discrimination can be awarded compensation for non-pecuniary damages directly by the Board. The Board is entitled to take the case to court if the discriminating party is not willing to pay.

A. Non-governmental organisations

Trade unions and other membership organisations can represent their members in civil court cases dealing with pay and employment conditions. No particular legislation exists regarding the possibility of NGOs representing victims of discrimination in civil court proceedings. In comparison with trade unions on questions of pay and employment conditions, NGOs do not have the same general legal standing before domestic courts of law in relation to cases of discrimination. Only certified lawyers who have obtained a mandate from the individual victim of discrimination can litigate a case for the civil courts. This means that the NGO can help to examine the case but when it comes to representing and promoting the case before the civil courts, the individual victim of discrimination must get legal representation from a certified lawyer.

¹² Denmark, Consolidated Act No. 1230 of 2 October 2016.

B. Shared burden of proof

The Act on Ethnic Equal Treatment, the Act on the Prohibition of Discrimination in the Labour Market etc. and the Act on the Prohibition of Discrimination due to Disability include provisions on the shared burden of proof, ensuring that the principle of equal treatment is applied effectively. The shared burden of proof implies that when there is a prima facie case of discrimination, the burden of proof shifts back to the respondent.

C. Level of sanctions and monitoring the number of complaints

Statistics on the number of complaints made to the Board of Equal Treatment can be found in the Board's annual report.

The level of compensation for discrimination in the labour market seems effective, proportionate and dissuasive. Outside the labour market, sanctions are so mild that it could be questioned whether they are sufficiently effective, proportionate and dissuasive.

D. Situation testing and statistical evidence used in practice

Statistical evidence has been used in some cases on age and gender discrimination. In a 2015 ruling from the Supreme Court, the Court concluded that statistical information – if authentic and sufficiently significant – can by itself establish an assumption for discrimination because of age.¹³ Situation testing is not regulated in Danish legislation and is primarily used by journalists or NGOs to confirm their presumption that discrimination exists in a specific sector.

6. Equality bodies

*The Institute for Human Rights – The National Human Rights Institution of Denmark*¹⁴

Legal basis

The Institute for Human Rights – The National Human Rights Institution of Denmark (DIHR) has been designated as a body for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Article 13 of the Racial Equality Directive since 2003. The act establishing the DIHR clarified the role of the institute as a separate and independent institution. The act also specifies the role of the DIHR with regard to the promotion of equality and non-discrimination and specifies the mandate of the Institute under the EU directives as a specialised equality body on race and ethnic origin as well as on gender.

Mandate and competences

The DIHR has been given the authority to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination. Also, the DIHR issues a yearly report to the Parliament on the human rights situation in Denmark, which includes the situation of ethnic minorities and persons with disabilities. Finally, the DIHR has the authority to bring complaints to the Board of Equal Treatment in cases that are a matter of principle or of general public interest.

7. Key issues

A number of disturbing anti-foreigner legislative initiatives came through in 2018. The various initiatives were initiated by the Danish Government and supported by parts of the population. They deal with the following topics and will be elaborated upon in Section 11.2:

- adoption of a burqa ban in a public space;

¹³ Supreme Court Judgment No. 28/2015 of 14 December 2015.

¹⁴ Denmark, Consolidated Act No. 553 of 18 June 2012 with later amendments.

- legislation to abolish so-called ghettos and parallel societies by 2030!;
- handshake as a requirement for Danish citizenship;
- initiatives against homeless unregistered migrants causing serious issues of discrimination because of ethnic origin.

As in previous years, there was a profound lack of recognition that discrimination took place in Danish society. The Government, the ministries and other public authorities did not seem to prioritise efforts and initiatives for equality and non-discrimination. On the contrary, the Ministry of Foreigners and Integration seems to boast about the number of times that the Government has tightened various rules on foreigners and immigrants by having a picture on its website of a tracker counting the number of restrictions.

There was a serious lack of statistics and general research on discrimination. The monitoring of case law in Danish courts was severely hindered due to a lack of free public access to case law.

There was no obligation and very limited access to the establishment of positive action measures by employers. Legal barriers made it very difficult in practice for employers to initiate genuine positive action measures.¹⁵

Although there has been a general rise in the number of complaints to the Board since the Board was established in 2009, the visibility of the Board among possible victims of discrimination was still relatively low. This was especially the case for ethnic minority groups and people with disabilities.

The DIHR served as a specialised equality body.¹⁶ However, the obligation set out by the EU directive and Danish legislation to provide assistance to victims of discrimination did not seem to be a priority. The low number of discrimination inquiries illustrated that, for possible victims of discrimination, the DIHR either appeared invisible or there was no general confidence that approaching it would help in concrete terms.

¹⁵ Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc.

¹⁶ Section 2(2) of the Act on the Institute for Human Rights – The National Human Rights Institution of Denmark.

INTRODUCTION

The national legal system

The basic law of Denmark is the current Constitution, which was adopted by referendum in 1953. This is the latest successor to the 1849 Constitution. The Constitution sets out the essential rules governing the most important institutions of the state, the Government, the Parliament and the judiciary, as well as the relationship between these institutions.

National legislative authority rests jointly with the Government and the Parliament.

The legal system is a continental system following primarily German traditions. Fundamental legal principles are laid down by the Constitution in very general terms. Constitutional rules are expounded in laws, while detailed regulation is provided by administrative orders (delegated/secondary legislation). In contrast to the German legal system, however, Denmark has no Constitutional Court. The Supreme Court has traditionally been very reluctant to use its power to annul laws that may contradict the Constitution.

The legal system is structured into legal fields (criminal law, civil law, labour law, administrative law, etc.), and anti-discrimination laws are represented in all fields.

Public authorities are governed by a general principle of equality applicable under administrative law. The general principle has the force of legislation (and not constitutional law) and means that public authorities must treat equal matters with full equality before the law.

The Danish private and public labour market has traditionally been based on the 'Danish model', as it is known. This means a labour market that is largely regulated by collective agreements between the labour market social partners. A specialised Labour Court exists to resolve conflicts between the social partners regarding breaches of collective agreements. Anti-discrimination is also to some degree covered by collective agreements, for example the question of equal pay.

The Board of Equal Treatment was established on 1 January 2009 to deal with individual complaints of discrimination.

The DIHR holds two EU mandates as a specialised equality body on race or ethnic origin as well as on gender. In addition, the Institute monitors the Danish implementation of the UN Convention on Rights of Persons with Disabilities in accordance with Article 33 of the Convention.

Denmark is a member of the Council of Europe and has acceded to the European Convention on Human Rights and all of its protocols, apart from Protocol 12. The European Convention on Human Rights is the only human rights convention currently incorporated in Danish law.

With regard to unincorporated and ratified human rights conventions, it is generally assumed that they constitute a relevant source of law, which may be invoked and must be applied by national courts and administrative authorities.

List of main legislation transposing and implementing the directives

The Act on the Prohibition of Discrimination due to Race etc. (*Lov om forbud mod forskelsbehandling på grund af race m.v.*) is a penal code. It covers the following grounds

of discrimination: race, skin colour, national or ethnic origin, belief and sexual orientation.¹⁷ The Act contains a prohibition of discrimination in the provision of goods or services, and in access to public places or events. The Act was adopted on 9 June 1971 and entered into force on 1 August 1971. The Act was amended in 1987 to include the discrimination ground of sexual orientation.¹⁸

The Act on the Prohibition of Discrimination in the Labour Market etc. (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.*) is a civil law.¹⁹ The Act covers the following grounds of discrimination: race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. The material scope of the Act is the labour market not regulated by collective agreements. The Act was adopted on 24 May 1996 and entered into force on 1 July 1996.

The Act on Ethnic Equal Treatment (*Lov om etnisk ligebehandling*) is a civil law.²⁰ It covers race and ethnic origin only. The material scope of the Act is the following: access to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession. The Act was adopted on 28 May 2003 and entered into force on 1 July 2003.

The Act on the Prohibition of Discrimination due to Disability (*Lov om forbud mod forskelsbehandling på grund af handicap*) is a civil law.²¹ It prohibits direct and indirect discrimination on the ground of disability. The Act applies to all public and private activities in all areas of society except for areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc. The Act was adopted on 8 June 2018 and entered into force on 1 July 2018. The Danish Government aimed to provide the same protection against discrimination due to disability outside the labour market as the existing protection in the labour market. Although the Danish ratification of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) was mentioned in the preparatory work, the implementation of the convention did not seem to be the primary aim of the new law.

The Act on The Board of Equal Treatment (*Lov om ligebehandlingsnævnet*) is a civil law.²² Within the labour market, the Board deals with complaints related to discrimination based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin. Outside the labour market, the Board deals with complaints related to discrimination based on race, ethnic origin, gender and disability. The Act was adopted on 27 May 2008 and entered into force on 1 January 2009.

The Act on the Institute for Human Rights – The National Human Rights Institution of Denmark (*Lov om Institut for Menneskerettigheder – Danmarks Nationale Menneskerettighedsinstitution*) is a civil act.²³ The institute is an independent public body appointed as the National Human Rights Institution (NHRI) of Denmark and holds two EU mandates as a specialised equality body on race or ethnic origin as well as on gender.²⁴ In addition, the institute monitors the Danish implementation of the UN Convention on Rights of Persons with Disabilities in accordance with Article 33 of the Convention.²⁵

The various anti-discrimination acts listed above do not apply to the Faroe Islands and Greenland.

¹⁷ Denmark, Consolidated Act No. 626 of 29 September 1987 with later amendments.

¹⁸ Denmark, Act No. 357 of 3 June 1987.

¹⁹ Denmark, Consolidated Act No. 1001 of 24 August 2017.

²⁰ Denmark, Consolidated Act No. 438 of 16 May 2012 with later amendments.

²¹ Denmark, Act No. 688 of 8 June 2018.

²² Denmark, Consolidated Act no. 1230 of 2 October 2016.

²³ Denmark, Act No. 553 of 18 June 2012 with later amendments.

²⁴ Section 2(2) of the Act No. 553 of 18 June 2012 with later amendments.

²⁵ Decision B15 on the promotion, protection and monitoring of the implementation of the UN Convention on Rights of Persons with Disabilities. Decision B15 was adopted by the Parliament on 17 December 2010.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution of Denmark does not contain a general provision prohibiting discrimination or a general equality clause. The Constitution includes four articles dealing with non-discrimination and these provisions do not apply to the material areas covered by the EU directives. The Danish Constitution only covers one discrimination ground listed in the directives, namely religion.

Section 71(1) of the Constitution provides that 'No Danish subject shall, in any manner whatsoever, be deprived of his liberty because of his political or religious convictions or because of his descent.' As a point of departure, the Section only covers Danish citizens, but the liberty of foreigners is to some extent protected by Section 70: 'No person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he escape compliance with any common civic duty for such reasons.'

Section 68 of the Constitution provides that 'No one shall be liable to make personal contribution to any denomination other than the one to which he adheres.'

Section 67 of the Constitution provides that 'Citizens shall be at liberty to form congregations for the worship of God in a manner which is in accordance with their convictions, provided that nothing contrary to good morals or public order shall be taught or done.'

The constitutional anti-discrimination and equality provisions are directly applicable and can be enforced against private actors as well as against the state.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing the two EU anti-discrimination directives: race, skin colour, religion, political opinion, belief, sexual orientation, age, disability and national, social or ethnic origin.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

In general, the grounds of discrimination are only vaguely defined and described in Danish legislation.

a) Racial or ethnic origin

There is no definition of race in the Act on Ethnic Equal Treatment or in the Act on the Prohibition of Discrimination in the Labour Market etc. implementing the Racial Equality Directive.

The explanatory notes to the above two acts describe race in the following way: 'The term shall be understood in accordance with usual terminology, as specified in national and international law, as well as case law from the Court of Justice of the European Union (CJEU) in relation to the Directive. Race is understood as a general belonging to a group of people being defined on the basis of physical criteria, including colour.'

Anti-discrimination criminal law on hate speech and access to public places was passed in 1971 in order to ratify the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), and consequently the definition of 'racial discrimination' in Article 1 of the ICERD is particularly relevant.

On that basis, race must be understood in accordance with international human rights law as a social construct rather than a biological concept.

Like race, ethnic origin is not defined in the laws implementing the Racial Equality Directive. The explanatory notes to the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market etc. implementing the Racial Equality Directive describe ethnic origin as follows: 'The term is generally understood as the belonging to a group of people, who are defined on the basis of shared history, traditions, culture or cultural background, language, geographical origin, etc.'²⁶

The only legally recognised ethnic minority in Denmark is the German minority in Southern Jutland.²⁷

There is limited Danish case law on the meaning of ethnic origin. However, a preliminary ruling by the CJEU, requested by the Western High Court, illustrates that ethnic origin cannot be determined on the basis of a single criterion.²⁸ On the contrary, ethnic origin is based on a number of objective and subjective factors like common nationality, religious faith, language, cultural and traditional origins and backgrounds. The question for the CJEU was whether credit institutions were allowed to request different documentation from loan applicants depending on whether they were born in an EU/EFTA country or not. The Court determined that the birthplace of a person is only one of several factors determining the ethnic origin of a person. The Court concluded that it was not direct or indirect

²⁶ Ministry of the Interior, Committee on implementation in Danish law of Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Report No. 1455 (2002), p. 264.

²⁷ Denmark, Regulation No. 24 of 7 June 1955 on the general rights of the German minority (Bekendtgørelse nr. 24 af 7/6/1955 angående det tyske mindretals almindelige rettigheder).

²⁸ Judgment of 6 April 2017, *Jyske Finans*, C-668/15.

discrimination because of ethnic origin to request additional identity information from a person who was born outside the EU/EFTA. In 2018, based on the CJEU ruling in *Jyske Finans*, the Board of Equal Treatment reopened a case from 2014.²⁹ The case also dealt with a car loan and whether it was legitimate to request additional documentation from a Danish citizen and loan applicant who was born outside the EU/EFTA. Based on the CJEU ruling, the Board repealed its previous decision and concluded that the request for additional identification did not constitute either direct or indirect discrimination due to ethnic origin.³⁰

b) Religion and belief

The term 'religion' is not defined in the laws implementing the Employment Equality Directive. According to the guidelines for the Act on the Prohibition of Discrimination in the Labour Market etc. religion is understood as formally approved or recognised religions.³¹ A definition may thus be found indirectly through the Danish authorities' practice of approving 'religious communities'. The Ministry of Church Affairs may approve a group of adult citizens (over 18 years) belonging to a particular religion as a religious community or congregation in accordance with the Marriage Act (*Ægteskabsloven*).³²

A Standing Advisory Committee on religious communities (*Det Rådgivende Udvalg vedr. Trossamfund*) is appointed to assess whether the conditions for approval as a religious community are fulfilled. The criteria for approval follow from the Act on Religious Communities outside the Danish National Church (*Lov om trossamfund udenfor folkekirken*).³³ The committee is independent of the ministry and has expertise in religious sociology, religious history, law and theology.

Since religion in the non-discrimination legislation is therefore understood as formally approved or recognised religions, there is a theoretical link between the recognition as a religious community and the possibility to avail oneself of the non-discrimination rules on the ground of religion. In reality, however, because of the wider discrimination ground of belief, the establishment of such a link is not required in practice

'Belief' is not defined in the legislation but is generally assumed to protect a wider area than religion.³⁴ Thus, belief includes religions that are not formally recognised. In short, belief is considered to be a more defined conviction covering something other than formally recognised religions. Examples of belief are atheism and other philosophical orientations.

In 2017, the Board of Equal Treatment dealt with a case about indirect discrimination because of religion.³⁵ In the case, the complainant was a student at a vocational school. The student was a Muslim and argued that new school regulations prohibiting the exercise of religious rituals at the school constituted discrimination based on her religion since it was only Muslim students who exercised religious rituals at the school. The Board evaluated the prohibition based on the justification test and concluded that indirect discrimination because of religion had not taken place. It was never a question for the Board whether the discrimination ground of religion covered manifestations of religious beliefs in public. On the other hand, the decision illustrates that, according to the Board of Equal Treatment, vocational schools are not obliged to assign student facilities for prayer and other religious rituals.

²⁹ Board of Equal Treatment, Case No. 2013-6811-61300 of 29 April 2014.

³⁰ Board of Equal Treatment, Decision No. 9559 of 21 June 2018.

³¹ *Vejledning om Lov om Forbud mod Forskelsbehandling på Arbejdsmarkedet m.v.*, (1 February 2019), p. 55.

³² Since 28 June 2015 the Ministry of Church Affairs has had the competence to approve religious communities. See <http://www.km.dk/andre-trossamfund/>. For selected information in English, see <http://eng.andretrossamfund.dk/>.

³³ Denmark, Act No. 1533 of 19 December 2017 about religious communities outside the Danish National Church (*Lov om trossamfund udenfor folkekirken*).

³⁴ *Vejledning om Lov om Forbud mod Forskelsbehandling på Arbejdsmarkedet m.v.* (1 February 2019), p. 55.

³⁵ Board of Equal Treatment, Decision No. 9647 of 27 April 2017.

c) Disability

Danish legislation implementing the Employment Equality Directive does not contain a definition of 'disability'. But the concept of disability and its content has been the subject of a growing body of case law.

Danish courts and the Board of Equal Treatment focus very much on medical information to establish a disability. The courts and the Board have not seemed to consider the role that environmental factors play in creating a disability. The medical model of disability has to a large extent dominated in Danish case law. However, the Supreme Court landmark ruling from November 2017 has now established that a medical diagnosis is not a requirement to establish a disability covered by discrimination law.³⁶ Instead, a comprehensive assessment must determine whether an employee has a disability or not.

In cases regarding dismissals, the employee has to prove that he or she had a disability at the time of the dismissal.

In the following, the meaning and scope of the concept of disability in Danish anti-discrimination law will be described on the basis of a number of criteria stemming from case law.³⁷

What is the impairment of the individual?

In situations where the condition of the individual is congenital or caused by an accident (for example, visual impairment, paralysis, cerebral palsy), it is generally not difficult to assess whether the individual has a disability covered by the law. In relation to illness, the assessment is less straightforward. However, the CJEU and the Danish Supreme Court have made clarifications illustrating that an illness can result in an impairment, which hinders full participation in professional life on an equal basis with others, and thus constitutes a disability.

Whether an illness is diagnosed or by other means sufficiently documented must be based on a comprehensive evaluation of available information from doctors and other health professionals as well as all other circumstances of the case. However, it is not a requirement that the impairment is caused by a medically diagnosed illness existing at the time of dismissal. This follows from a landmark Supreme Court ruling of 22 November 2017,³⁸ referring to case law from the CJEU.³⁹ The case dealt with a woman who, after having brain surgery, experienced disabling tiredness. She could only work between 12 and 18 hours a week and her fatigue was not expected to improve. The Supreme Court clarified that to have a disability covered by the discrimination law, it is not a requirement that the condition in question is caused by a medically diagnosed illness. Instead, the impairment must be evaluated based on all circumstances of the case, including information from doctors and other health professionals describing the impairment. The ruling also confirmed that the burden of proof rests with the employee. An employee has to prove that he or she has a disability, including that the impairment is of a long-term nature.

In a 2016 ruling, the Eastern High Court dealt with the issue of sequelae/complications stemming from a disorder (in this case diabetes).⁴⁰ The Court found that sequelae must be regarded as individual illnesses that cannot be considered together resulting in one long-lasting limitation. The Court stated that diabetes by itself does not constitute a

³⁶ Supreme Court judgment of 22 November 2017, Case No. 305/2016. Judgment printed in U2018.853H.

³⁷ Board of Equal Treatment, *Notat om handicapbegrebet og praksis om forskelsbehandling på arbejdsmarkedet på grund af handicap* (December 2018).

³⁸ Supreme Court judgment of 22 November 2017, Case No. 305/2016. Judgment printed in U2018.853H.

³⁹ *Ring and Skouboe Werge*, C-335/11 and C-337/11; *Navas*, C-13/05; *Milkova*, C-406/15; *Daouidi*, C-395/15.

⁴⁰ Eastern High Court judgment of 6 December 2016, Case No. B-2828-15.

disability. The Court also argued that, because of the character and the variations of the different complications related to diabetes, the diverse sequelae did not constitute the entire course of an illness, but had to be considered individually.

Most judgments and decisions deal with physical disabilities. However, a growing number of cases relate to psychosocial disabilities.

One such 2017 case dealt with a social worker at a drop-in centre for persons with intellectual disabilities.⁴¹ A social worker started having symptoms because of an aggressive and violent client and eventually received a diagnosis of post-traumatic stress disorder from a specialist doctor. Later she went on sick leave with a diagnosis of stress disorder. When she was dismissed in February 2016, she was still absent because of her illness. A doctor's note from January 2016 stated that she was not fit for duty and that she should remain off work for a number of months. A report from a psychologist in February 2016 concluded that the social worker would be able to return to the labour market gradually and slowly and that it was difficult to provide a more precise time horizon for her return. The Board of Equal Treatment referred to the understanding of disability in CJEU case law C-335/2011 and C-337/2011 (*Ring and Skouboe Werge*) and argued that at the time of the dismissal, there was no real prognosis for the duration of the social worker's illness and no prognosis for the impairments. Thus, the Board concluded that the social worker did not have a disability covered by the Act on the Prohibition of Discrimination in the Labour Market etc. In the *Daouidi* case (C-395/15), the CJEU held that if the duration of an illness is uncertain, it should be regarded as a long-term illness. The decision by the Board does not seem to live up to this element of the disability definition.

Is the impairment limiting the individual?

To constitute a disability, the impairment must constitute a limitation on the individual's participating in professional life on an equal basis with others.

In a 2016 ruling, the question for the City Court of Kolding was whether obesity could be deemed a disability.⁴² In December 2014, the CJEU had issued a preliminary ruling in the case (C-354/13). On that basis, the City Court stated that obesity might constitute a disability. However, in the case in question, the City Court found that according to medical information, the claimant's obesity did not constitute a disability because of the fact that the obesity did not entail a physical limitation that hindered the claimant's participation in professional life. The City Court did not evaluate whether it was the employer's view about the claimant's obesity that led to the dismissal.

In a decision by the Board of Equal Treatment of 10 October 2018, the Board concluded that a woman who was diagnosed with primary progressive sclerosis did not have a disability.⁴³ The woman had received her diagnosis a couple of months before she was dismissed from her position as a family counsellor in a local municipality. Apart from progressive problems with her walk, she had not been experiencing symptoms of her sclerosis when she was dismissed. She was working full-time; she had not been in need of accommodations, and had not been absent from work because of her illness. On that basis, the Board found that the woman had not experienced physical limitations constituting a disability because of her illness. The Board did not establish why the woman was dismissed but only evaluated whether the woman had a disability or not at the time of dismissal and thus concluded that the woman did not have a disability. The actual reason for the dismissal is unclear. The decision illustrated that an illness, which in the future will cause limiting impairments, is not covered by the concept of disability in the Danish anti-discrimination legislation.

⁴¹ Board of Equal Treatment, Decision No. 9925 of 8 August 2017.

⁴² Judgment of 31 March 2016 described on the website of the City Court of Kolding. See <http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/DomafsagtDen31marts2016.aspx>.

⁴³ Board of Equal Treatment, Decision No. 9892 of 10 October 2018.

In a decision by the Board of Equal Treatment of 7 February 2018, the Board concluded that a woman who was diagnosed with anorexia and depression did not have a disability.⁴⁴ The childminder was dismissed from her job because of protracted illness. She had had anorexia for many years and had been able to work without accommodations until she went on sick leave owing to depression. The Board did not find that the anorexia caused a limitation on the childminder's ability to work and thus concluded that it did not constitute a disability. With regard to the depression, the Board argued that her depression had caused fatigue and weight loss as well as months of absence from work. However, based on information from doctors and psychologists, the health of the childminder was improving and at the time of the dismissal, she had informed her employer that she was ready to start working again. On that basis, the Board concluded that at the time of the dismissal, the childminder had not experienced such limitations because of her depression that she had a disability covered by the anti-discrimination legislation. As in the case above, the Board did not assess the actual reason for the dismissal but only evaluated whether the woman had a disability or not at the time of the dismissal. The Board did not find that the childminder had a disability at the time of dismissal and thus did not go into the possible reasons for the dismissal. The actual reason(s) for the dismissal are unclear.

Is the impairment long term?

It follows from case law that the impairment limiting an individual's participation in professional life has to be either lasting or long term to constitute a disability.

Even if, at the time of a dismissal, an illness has not imposed long-term limitations on an individual, it follows from case law that it can still constitute a disability if the limitations based on medical information are expected to be lasting or long term. In the *Daouidi* case (C-395/15), the CJEU held that if the duration of an illness is uncertain, it should be regarded as long term. It can therefore be questioned whether the practice by the Danish courts and the Board of Equal Treatment fully respect this element of the disability definition.

A 2018 ruling by the Eastern High Court dealt with a service engineer working with fire prevention who experienced impairments due to his involvement in a traffic accident.⁴⁵ After a period of sick leave, the service engineer worked reduced hours. He was no longer able to perform certain tasks, and the employer did not find it feasible to ask colleagues to perform these tasks. The service engineer was therefore dismissed. The High Court found that the impairment at the time of the dismissal had not been of a long-term duration. It was therefore necessary for the Court to evaluate the future prognosis to be able to decide whether the service engineer's impairments after the accident constituted a long-term impairment. Based on a comprehensive evaluation of the medical information in the case, the Court found that the prognosis did not support the claim that the service engineer had a long-term impairment. The Court thus concluded that the service engineer did not have a disability.

In a decision by the Board of Equal Treatment of 19 September 2018, the Board evaluated whether a finance assistant had a disability.⁴⁶ The assistant needed rest and reduced screen time after a head trauma and because of her concentration difficulty, she also needed to be able to focus on one thing at a time. The assistant worked part-time due to illness. After 10 months she was dismissed. During the time that the assistant had been ill and was working part-time, she had increased her working hours to 15 hours a week and the prognosis for her working full-time again was estimated to be 18 months. On that basis, the Board did not find that the impairment was long term. Thus, the Board concluded that the finance assistant did not have a disability at the time of dismissal. A period of 18

⁴⁴ Board of Equal Treatment, Decision No. 9167 of 7 February 2018.

⁴⁵ Eastern High Court judgment of 12 October 2018, Case No. B-2847-16.

⁴⁶ Board of Equal Treatment, Decision No. 9848 of 19 September 2018.

months before the finance assistant could work full-time seems long term. It therefore seems peculiar that the Board concluded that the finance assistant did not have a disability.

d) Age

Age is not defined in the legislation implementing the directives but according to the guidelines for the Act on the Prohibition of Discrimination in the Labour Market etc. everybody is protected against discrimination on account of age.⁴⁷ This applies to young age and old age – all ages are protected discrimination grounds.

A decision by the Board of Equal Treatment of 17 January 2018 dealt with a woman who applied for a job as a content marketing manager.⁴⁸ The job applicant was born in 1963 and she received a rejection to her application in a video clip. In the video clip, the employer stated that the woman was among a group of older job applicants. The employer also said that, among other things, the rejection was based on her lack of adaptability. On that basis, the Board found that the complainant had established the necessary facts of possible age discrimination. The Board, however, did not decide in favour of the woman. Based on the employer's information about the position and the employer's evaluation of the complainant's qualifications compared to other applicants (including the applicant who was hired for the job), the Board found that the employer had proven that discrimination had not taken place.

e) Sexual orientation

Sexual orientation is not defined in the legislation implementing the directives. The core area for this criterion is the prohibition of discrimination against heterosexuals and homosexuals. There is very limited case law on the issue. In the literature, the concept is generally also understood to mean other kinds of sexual orientation such as bisexuals, transsexuals, masochists, etc.⁴⁹

2.1.2 Multiple discrimination

In Denmark, multiple discrimination is not prohibited in the law.

In Denmark, there is no civil case law dealing with multiple discrimination. There are, however, cases in which the Board of Equal Treatment has dealt with situations of multiple discrimination. The cases deal primarily with gender in combination with ethnic origin, disability or age.

In Denmark, the following case law deals with multiple discrimination:

A decision by the Board of Equal Treatment of 21 June 2018 dealt with a woman who was dismissed from her job as a teacher due to the need for cost reductions.⁵⁰ She had a flex-job for people with a reduced ability to work and had reduced working hours in a school providing education for adults. The teacher was a wheelchair user and the employer made the decision to dismiss her while she was on maternity leave. She claimed that she had been discriminated against based on both her gender and her disability. The Board assessed the claims of gender discrimination and disability discrimination separately, almost as if two different cases existed. With regard to gender, the Board found that the decision to dismiss was made during the teacher's maternity leave and the employer had not submitted any proof that the teacher's absence had not influenced this decision. With regard to disability, the employer had told the teacher that she was considered to be the

⁴⁷ *Vejledning om Lov om Forbud mod Forskelsbehandling på Arbejdsmarkedet m.v.* (1 February 2019), p. 41.

⁴⁸ Board of Equal Treatment, Decision No. 9086 of 17 January 2018.

⁴⁹ Schwarz, F. and Hartmann, J. J. (2011), *Forbud mod forskelsbehandling på arbejdsmarkedet – forskelsbehandlingsloven*, p. 178.

⁵⁰ Board of Equal Treatment, Decision No. 9560 of 21 June 2018.

least flexible with regard to teaching in locations other than the school in that many of these places were inaccessible. The school had not provided information about the need for flexibility and thus had not proved that the dismissal was objective and proportional. The Board thus concluded that the teacher had been indirectly discriminated against because of both her gender and her disability. The teacher was awarded compensation corresponding to 12 months' salary.

In dismissal cases, the awarding of 6 to 12 months' salary in compensation is common in cases of discrimination on account of a single discrimination ground. Case law seems to imply that the Board does not award higher damages when several discrimination grounds are at stake.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Denmark, discrimination based on a perception or assumption of a person's characteristics is not directly prohibited in national law.

The commentary to Section 3 of the Act on Ethnic Equal Treatment states that the prohibition of differential treatment is applicable irrespective of whether the actual race or ethnic origin of the victim is as assumed by the perpetrator or not. Discrimination based on perceptions or assumptions about a person's race or ethnic origin is therefore prohibited.

Such a statement is, however, not included in the commentary to Section 1 of the Act on the Prohibition of Discrimination in the Labour Market etc.

The landmark Supreme Court ruling from November 2017 opens the way for discrimination based on perceived disability to be deemed illegal according to Danish non-discrimination law.⁵¹ In the case, the Supreme Court explicitly clarified that, in order to have a disability covered by the discrimination law, it is not a requirement that the condition in question be caused by a medically diagnosed illness. Instead, the impairment must be evaluated based on all circumstances of the case, leaving room for discrimination by assumption. In some rulings (for example the obesity ruling),⁵² however, where people with disabilities claim that they were dismissed because of disability, the approach by the courts and the Board of Equal Treatment seems to be an assessment of disability from a purely medical point of view. If, on that basis, the court or the Board finds that the person in question does not have a disability, there is no protection against discrimination, and in these cases, there is no investigation whether the employer regarded the person as a person with a disability and dismissed him or her on that basis.

b) Discrimination by association

In Denmark, discrimination based on association with persons with particular characteristics is prohibited in national law.

It follows from Section 3(1) of the Act on Ethnic Equal Treatment that no person may subject another person to direct or indirect discrimination on grounds of the latter's or a third party's race or ethnic origin.

It follows from Section 6 of the Act on the Prohibition of Discrimination due to Disability that no person may subject another person to discrimination on grounds of the latter's

⁵¹ Supreme Court judgment of 22 November 2017, Case No. 305/2016.

⁵² Judgment of 31 March 2016 described on the website of the City Court of Kolding. See <http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/Domafsagtden31marts2016.aspx>.

relationship to a person with a disability, provided that the discrimination is based on this person's disability.

No such article appears in the Act on the Prohibition of Discrimination in the Labour Market etc. However, discrimination in the labour market based on a third party's disability is prohibited according to case law, which concludes that discrimination by association is covered by the Act.

The most recent Supreme Court case on discrimination by association is a ruling from May 2016.⁵³ The case dealt with a woman who claimed that she had been discriminated against due to the disability of her son who had Asperger's syndrome. She was dismissed from her job as a childminder at a time when she had been on leave for around 14 months to care for her son. The Supreme Court concluded that the son 'suffered from Asperger's syndrome to such a degree that he was covered by the concept of disability' in the Act on the Prohibition of Discrimination in the Labour Market etc. The Court, however, argued that the childminder had not been dismissed because of the disability of her son but because of her long absence from her job. Thus, the dismissal did not constitute direct discrimination because of disability. The Court then assessed whether the childminder had experienced indirect discrimination. The local municipality had to cut the budget because of a declining number of children. According to the Court, it was both objective and proportional that the local municipality did not move children to the childminder whom the children did not know because of the fact that the claimant had been away from her work for a long period of time. On that basis, the Supreme Court concluded that the dismissal of the childminder in question did not constitute indirect discrimination in violation of the Act on the Prohibition of Discrimination in the Labour Market etc.

Based on this Supreme Court ruling as well as CJEU case law, the Board of Equal Treatment is of the opinion in a 2018 memorandum that the prohibition of indirect discrimination only covers employees who themselves have a disability.⁵⁴ Situations where an employee does not have a disability himself or herself but is affected by an action because of a disability of his or her child or another close relative does not seem to be covered by the protection against disability discrimination according to the Board. In its assessment, the Board of Equal Treatment did not consider the CJEU *Chez* case (C-83/14).

2.2 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

In Denmark, direct discrimination is prohibited in national law. It is defined.

Direct discrimination is deemed 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 race or ethnic origin, cf. Section 3(2) of the Act on Ethnic Equal Treatment. Section 5(2) of the Act on the Prohibition of Discrimination due to Disability defines discrimination in the same manner. Section 1(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also defines direct discrimination in this manner referring to the discrimination grounds of race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.

b) Justification for direct discrimination

As a general rule, the law does not permit direct discrimination – not even if it could be argued to be objectively justified and proportionate.

⁵³ Supreme Court judgment of 27 April 2016, Case No. HR-151/2015.

⁵⁴ Board of Equal Treatment, *Notat om handicapbegrebet og praksis om forskelsbehandling på arbejdsmarkedet på grund af handicap* (December 2018), p. 19.

However, Section 7 in the Act on the Prohibition of Discrimination due to Disability regulating areas outside of the labour market does allow for both direct and indirect discrimination based on disability. This is the case if the differential treatment pursues a legitimate aim and is appropriate and necessary to obtain the desired aim.

2.2.1 Situation testing

a) Legal framework

In Denmark, situation testing is not clearly permitted in national law. The law is silent on the issue.

b) Practice

In Denmark, situation testing is not used in practice.

There are examples of journalists, researchers and NGOs that have used situational testing as a way of exposing discriminatory practices, especially by private businesses or in specific sectors of society.

To the author's knowledge, there is no civil court case law on this issue.

2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In Denmark, indirect discrimination is prohibited in national law. It is defined.

Definition of indirect discrimination: Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of a particular racial or ethnic origin, for example, at a disadvantage compared to 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, cf. Section 1(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. and Section 3(3) of the Act on Ethnic Equal Treatment. Section 5(3) of the Act on the Prohibition of Discrimination due to Disability states that indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons with disabilities at a disadvantage compared to other persons.

In a judgment of 8 July 2015, the Eastern High Court concluded that an employee has to experience an actual disadvantage to claim that he or she has been discriminated against.⁵⁵ The case dealt with a woman who had been dismissed from her job with 18 other employees. All dismissed employees had been granted a term of notice of six months – independent of their length of service. The woman argued that she had been indirectly discriminated against due to her age because she was already entitled to a notice period of six months according to her contract and seniority. This was not the case for some of the other dismissed employees. The Court opined that all dismissed employees had been treated equally regardless of their age and seniority and that no one had been given a shorter notice period than they were entitled to according to their contract and seniority. In conclusion, no one had been treated less favourably than others and discrimination had not taken place.

In a decision by the Board of Equal Treatment of 9 August 2018, a complainant had Spanish as his first language.⁵⁶ Among other issues, his complaint dealt with a job advertisement for an exam supervisor position. It was a requirement in the job advertisement that

⁵⁵ Eastern High Court judgment of 8 July 2015, Case No. B-3983-13.

⁵⁶ Board of Equal Treatment, Decision No. 9730 of 9 August 2018.

applicants would be fluent in spoken and written Danish. The Board found that the employer had not provided information about the necessity of this language requirement. The Board described the tasks of an exam supervisor as someone who primarily needs to keep silence and order during exams and, according to the Board, a Danish language requirement was not necessary to perform this job. The language requirement therefore constituted indirect discrimination based on national origin.

b) Justification test for indirect discrimination

According to the justification test, indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of a particular ethnic origin, for example, at a disadvantage compared to 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. Cases of alleged indirect discrimination must be individually assessed. The justification test is compatible with the directives.

The Supreme Court assessed the question of indirect discrimination in a case of a reorganisation in a hospital and the resulting redundancies in a judgment of 12 September 2014 regarding disability.⁵⁷ The case dealt with a nursing assistant who had incapacities in her arm and worked in a flex-job at a large public psychiatric hospital. The hospital had dismissed a large number of employees. The Court found that the dismissal criteria of physical strength and flexibility put the nursing assistant in a worse-off situation than other employees. However, the Court concluded that the differential treatment was legitimate because of the actual change in working tasks after the reorganisation. The Court also stated that the dismissal could not have been avoided by establishing reasonable accommodation. The Court concluded that the dismissal did not constitute indirect discrimination because of disability.

In a landmark judgment from 2004, the Supreme Court found that the dismissal of a female employee for having worn a headscarf for religious reasons in opposition to the rules on clothing did not amount to indirect discrimination. The Court recognised that the prohibition of wearing a headscarf would mainly affect Muslim women but found that differential treatment was objectively justified in the performance of the work.⁵⁸ The judgment seems to accept a very wide area of managerial powers with regard to clothing rules that have a discriminatory effect on ethnic or religious minorities. The wish to appear politically and religiously neutral to the customers was accepted by the Supreme Court as a legitimate purpose. It has previously been questioned whether the rather wide interpretation of 'legitimate purpose' in the headscarf case is compatible with the directives. However, since the 2017 headscarf rulings from the CJEU,⁵⁹ the Danish practice seems to be in line with EU law.

In a decision by the Board of Equal Treatment of 7 February 2018, a woman of Philippine origin was dismissed from her position as a nursery assistant.⁶⁰ She had worked in the day care centre for one and a half years. The day care centre was a 'multicultural' institution and both Danish and English were used when employees were together with the children. The dismissal of the nursery assistant was due to a decision that the institution made to hire employees who were either educated as teachers in preschool classes or who spoke fluent Danish or English. The employer specifically stated that it was the lack of Danish language abilities that was the reason for the dismissal of the nursery assistant. On that basis, the Board stated that the nursery assistant had established facts that possible indirect discrimination because of national origin had taken place. The Board found that the language requirement was objectively justified by the linguistic development of the

⁵⁷ Supreme Court judgment of 12 September 2014, Case No. 163/2013.

⁵⁸ Judgment printed in U2005.1265H.

⁵⁹ *G4S*, Judgment of 14 March 2017, C-157/15. *Micropole*, Judgment of 14 March 2017, C-188/15.

⁶⁰ Board of Equal Treatment, Decision No. 9170 of 7 February 2018.

children. However, after the dismissal of the nursery assistant, the day care centre hired a new employee who was not a pedagogue and who did not speak Danish. Furthermore, the day care centre had not documented that the nursery assistant could not continue in her position speaking English with the children. Thus, the Board concluded that the dismissal was not appropriate and necessary, and the nursery assistant was awarded compensation amounting to nine months' salary.

In 2017, the Board of Equal Treatment dealt with a case about indirect discrimination because of religion as a test case.⁶¹ In typical complaints to the Board, the chairperson and two board members decide the case. In test cases, the chairperson and four board members decide the case. In the case in question, the complainant was a Muslim student at a vocational school, and she argued that new school regulations prohibiting the exercise of religious rituals constituted discrimination based on religion. The school argued that, as a consequence of students reciting their prayers at the school, unrest, conflicts and insecurity had arisen. The Board stated that only Muslim students were performing religious rituals at the school when the new regulations were introduced. However, the Board argued that the regulations were objectively justified by a legitimate aim, which was to secure peace as well as a safe learning environment, taking into consideration the diversity of the students and the teachers. It was furthermore the opinion of the Board that the means were appropriate. The final question for the Board was to evaluate whether the means of achieving the safety aim were necessary. The majority of Board members argued that before the new regulations, there had been episodes where the complainant and other Muslim students had recited prayers in classrooms and in the entrance hall of the school in such a way that it had been an inconvenience to the teachers and the other students. The majority also argued that these episodes had given rise to unrest, conflicts and insecurity. On that basis, the majority of Board members concluded that the prohibition had been necessary and thus that indirect discrimination because of religion had not taken place.

2.3.1 Statistical evidence

a) Legal framework

In Denmark, there is legislation regulating the collection of personal data. The Danish Data Protection Act implementing the GDPR defines sensitive data in accordance with the GDPR by referring directly to Article 9 of the GDPR.⁶² In general, the Danish Data Protection Act has regulated the treatment of sensitive data in accordance with the GDPR.

In the labour market, Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc. contains an even stricter rule than the general Data Protection Act with regard to protecting sensitive data. Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits employers from asking for, obtaining, receiving or using information about the race, skin colour, religion or belief, political opinion, sexual orientation or national, social or ethnic origin of a job applicant or an employee. Neither anonymity nor informed consent or any other exemption will allow an employer to ask about or use such information about ethnic origin, etc.

In Denmark, statistical evidence is permitted by national law in order to establish indirect discrimination. It is permitted by the general admissibility conditions of such evidence in court according to Chapter 32 of the Administration of Justice Act.⁶³

According to the preparatory work for the Act on Ethnic Equal Treatment, the assessment of whether a criterion will place persons of a certain race or ethnic origin at a particular disadvantage can be made on the basis of statistical material which shows that the criteria

⁶¹ Board of Equal Treatment, Decision No. 9647 of 27 April 2017.

⁶² Denmark, Act No. 502 of 23 May 2018 (Data Protection Act). The Act entered into force on 25 May 2018.

⁶³ Denmark, Consolidated Act No. 1284 of 14 November 2018 with later amendments.

actually place the group of persons proportionately at a particular disadvantage to other persons. Furthermore, it is stated that if it is not possible to produce statistical material, the assessment can be made in any other way demonstrating that the criteria are likely to have this effect.

The same statement regarding statistical material and indirect discrimination is not found in the preparatory work for the Act on the Prohibition of Discrimination in the Labour Market etc.

b) Practice

In Denmark, statistical evidence is used in practice to establish indirect discrimination. Typically, the courts and the Board of Equal Treatment require some other information in addition to the statistical evidence to establish facts of possible indirect discrimination.

In civil court cases, statistics have been used primarily in cases of gender and age discrimination. Statistics have not been used in cases of indirect discrimination on account of the other discrimination grounds, except as an argument that a defendant did hire staff with ethnic minority backgrounds and thus, according to the defendant, did not discriminate against ethnic minorities.⁶⁴

The Supreme Court clarified the legal situation with regard to statistical evidence in a judgment of 14 December 2015.⁶⁵ The case dealt with A and B who had been dismissed with three other colleagues from their positions in a Government agency because of workforce reduction. The dismissed employees were all over 50 years of age. A and B claimed that they had been discriminated against because of their age. The Board of Equal Treatment had previously issued a decision in the case stating that the percentage of elderly employees who had been dismissed constituted a disproportionately high percentage of the overall number of employees. On that basis, the Board concluded that the complainants had established facts of possible discrimination and that the employer could not prove that no discrimination had taken place.⁶⁶ The Government agency declined to follow the decision and the Board brought the case against the Government agency to the civil courts. In a judgment of 23 January 2015, the Eastern High Court ruled in favour of the Government agency and held that the documentation of statistical information was not by itself sufficient to establish facts from which it could be assumed that discrimination had taken place.⁶⁷ The Eastern High Court ruling was appealed and the Supreme Court stated that statistical information about the age and age distribution of dismissed employees can be included when assessing whether an assumption for discrimination has been established. The Supreme Court referred to a case of the CJEU (C-127/92 – *Enderby*) and emphasised that statistical information – if reliable and sufficiently significant – by itself can establish such presumption for discrimination. In the case in question, the Court held that there was an overrepresentation of elderly employees among the dismissed employees and that none of the dismissed employees were younger than 53 years of age. The Court, however, also held that there were a number of employees in the Government agency who were older than A and B, and who did not get dismissed during the workforce reduction. The Court concluded that the information about the ages of A and B as well as the information about the age distribution in the Government agency did not establish facts of possible discrimination. Thus, the Supreme Court acquitted the Government agency.

In cases before the Board of Equal Treatment, statistical evidence is often used in an effort to document age discrimination in situations of large or major lay-offs. One example is a teacher who was born in 1956 and who was among five dismissed schoolteachers.⁶⁸ The

⁶⁴ Printed in U.2005.1265H.

⁶⁵ Supreme Court judgment of 14 December 2015, Case No. 28/2015. Printed in U.2016.1168H.

⁶⁶ Board of Equal Treatment, Decision No. 401/2012 and Decision No. 402/2012.

⁶⁷ Eastern High Court judgment of 23 January 2015, Case No. B-2951-13.

⁶⁸ Board of Equal Treatment, Decision No. 9168 of 7 February 2018.

dismissed teachers all belonged to the oldest or second-oldest age group at the school. The employer could not prove that the teacher's age had been insignificant to the dismissal and the Board therefore concluded that discrimination had taken place. The teacher was awarded compensation amounting to nine months' salary. Another example is a civil engineer who was dismissed after 32 years in the same company.⁶⁹ The dismissal was part of a larger workforce reduction where 131 employees were dismissed. The Board assessed detailed statistical information about the age composition in different departments at the time of the dismissals as well as the age composition of the dismissed employees. On that basis, the Board argued that there was not a significant majority of older employees among the dismissed employees. The Board concluded that the complainant had not established facts that his age had been part of the redundancy decision.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Denmark, harassment is prohibited in national law. It is defined.

In Denmark, harassment explicitly constitutes a form of discrimination, cf. Section 1(4) of the Act on the Prohibition of Discrimination in the Labour Market etc., Section 3(4) of the Act on Ethnic Equal Treatment and Section 5(4) of the Act on the Prohibition of Discrimination due to Disability.

Harassment within the labour market is deemed to be discrimination when conduct related to race, skin colour, religion or belief, political opinion, sexual orientation, age and disability or national, social or ethnic origin, takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned, cf. Section 1(4) of the Act on the Prohibition of Discrimination in the Labour Market etc.

Harassment outside the labour market is deemed to be discrimination when conduct related to race, ethnic origin or disability takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned, cf. Section 3(4) of the Act on Ethnic Equal Treatment and Section 5(4) of the Act on the Prohibition of Discrimination due to Disability. Outside the labour market refers to the following: access to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession. For the discrimination ground of disability, the material scope is all public and private activity (except for the labour market and strictly private activities), cf. Section 2 of the Act on the Prohibition of Discrimination due to Disability.

Furthermore, according to the Act on Work Environment (*Arbejdsmiljøloven*) employers are obligated to secure a healthy physical and psychological work environment.⁷⁰ According to this Act, it is the employer's responsibility to work against harassment in general at the individual workplace.

There is limited case law on harassment within employment. A 2018 decision by the Board of Equal Treatment clarified the obligation of employers to secure a working environment without harassment because of issues related to ethnic origin, such as an ability to speak and understand Danish.⁷¹ The case dealt with a pedagogue of Turkish origin who had worked in the same nursery school for nearly five years. A new child with a hearing impairment was assigned to the room where the pedagogue worked. Shortly after the child

⁶⁹ Board of Equal Treatment, Decision No. 9930 of 15 August 2017.

⁷⁰ Denmark, Consolidated Act No. 1084 of 19 September 2017 with later amendments.

⁷¹ Board of Equal Treatment, Decision No. 9077 of 11 January 2018.

started, his parents complained to the manager about the pedagogue's lack of correct Danish. The pedagogue was not informed about the complaints and about the accommodations that the manager initiated to deal with the criticism from the parents. Among other things, the manager had told the parents about the pedagogue's working hours, with the result that the parents picked up their child right before the pedagogue was going to be the only pedagogue in the room. The pedagogue only heard about these things from other colleagues. Half a year after the child had started in the nursery school, the pedagogue went on sick leave. While she was off sick, the manager decided to move her to another room to limit her daily confrontations with the parents. The pedagogue did not agree with the move and ended up being dismissed because of sickness absence. She filed a complaint with the Board of Equal Treatment and argued that her manager had accommodated the wishes of the parents instead of protecting her as an employee. She argued that the constant criticism from the parents and lack of support from her manager had resulted in insecurity, stress and depression. She claimed that she had been harassed because of her ethnic origin. The Board explained that harassment within the labour market is deemed to be discrimination when conduct related to ethnic origin (like complaining that a person does not speak correct Danish) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned. The Board also underlined that the employer or manager is obliged to protect employees against harassment, including harassment committed by other employees or customers. The Board stated that the complainant's sickness, which led to her dismissal, was a result of the conflict with the parents as well as her experience of not being supported by her manager. On that basis, the Board concluded that the manager had not done enough to secure a working environment without harassment for the pedagogue. Thus, the manager could not prove that the principle of equal treatment had not been violated and the complainant received compensation corresponding to nine months' salary due to the discrimination because of ethnic origin.

Outside the area of employment, the Board of Equal Treatment awarded compensation for harassment because of ethnic origin in two decisions in 2018. In one case, the complainant had a foreign-sounding name and he had made a written offer for two used cars.⁷² When the seller responded to the offers, the seller called the complainant a 'Paki'. Furthermore, he stated that he only sold cars to the 'white side'. The Board found that the seller had harassed the complainant based on ethnic origin, which constituted discrimination. The complainant was awarded compensation of EUR 670 (DKK 5 000). In the other case, the complainant also had a foreign-sounding name.⁷³ The complainant and a tradesman had discussions about payment for some work on the complainant's floors in email correspondence. In emails, the tradesman called the complainant a 'banana picker'. He also wrote that 'in this part of the world', it is not a matter of 'bazaars' or 'rice markets'. The Board found that the tradesman had harassed the complainant based on ethnic origin, which constituted discrimination. The complainant was awarded compensation of EUR 670 (DKK 5 000).

b) Scope of liability for harassment

According to Section 3(4) of the Act on Ethnic Equal Treatment and Section 5(4) of the Act on the Prohibition of Discrimination due to Disability, the prohibition of harassment applies to anybody who performs tasks within the scope of the Act.

Where harassment is perpetrated by an employee, the employer is liable. In some cases, the employee is also liable. The following will deal with harassment in the labour market.

⁷² Board of Equal Treatment, Decision No. 9902 of 12 October 2018.

⁷³ Board of Equal Treatment, Decision No. 9901 of 12 October 2018.

The prohibition of harassment in Section 1(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. applies in situations where the employer is the one exercising the harassment.

The guidelines to Section 1(4)⁷⁴ state that the employer may also be liable for any harassment or other discriminatory behaviour exercised by employees, as the employer has to take the necessary measures to ensure a harassment-free working environment.

Thus, where harassment is perpetrated by an employee, the main rule is that only the employer is liable.

This also follows from the general Danish principle of employer liability according to Provision 3-19-2 of the Danish Act (*Danske Lov*), which dates from 1683. According to this principle, employers are responsible not only for their own negligence and faults, but also for faults committed by their employees acting on their behalf. However, as harassment is not part of performing a job, harassment will not be considered as included in, or part of, the employer's responsibility, unless the employer has neglected their duty to instruct or correct their staff as a good employer should do to avoid harassment among employees.

As described above, only employers are obligated by Provision 3-19-2 of the Danish Act and by the Act on the Prohibition of Discrimination in the Labour Market etc. If the employer is not responsible for harassment by an employee against another employee, the employee who experienced harassment can claim compensation from his or her colleague according to the general legislation on damage liability, and more precisely Section 26 of the Act on Damage Liability (*Erstatningsansvarsloven*).⁷⁵

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Denmark, instructions to discriminate are prohibited in national law. Instructions are not defined in detail.

The law just prohibits an instruction to discriminate, cf. Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc., Section 3(5) of the Act on Ethnic Equal Treatment and Section 5(5) of the Act on the Prohibition of Discrimination due to Disability.

In Denmark, instructions explicitly constitute a form of discrimination.

In the labour market, an instruction to discriminate against persons on grounds of race, skin colour, religion or belief, political opinion, sexual orientation, age and disability or national, social or ethnic origin shall be deemed to be discrimination, cf. Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc.

Outside the labour market, an instruction to discriminate against persons on grounds of race, ethnic origin or disability shall be deemed to be discrimination, cf. Section 3(5) of the Act on Ethnic Equal Treatment and Section 5(5) of the Act on the Prohibition of Discrimination due to Disability.

b) Scope of liability for instructions to discriminate

In Denmark, the instructor is liable for discrimination. The prohibition of instruction in Section 1(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. applies in situations where the employer gives an instruction to employees to discriminate, for

⁷⁴ *Vejledning om Lov om Forbud mod Forskelsbehandling på Arbejdsmarkedet m.v.* (1 February 2019), p. 9.

⁷⁵ Denmark, Consolidated Act No. 1070 of 24 August 2018 with later amendments.

example in a recruitment situation where the employer tells the personnel manager to avoid hiring employees with an ethnic minority background. An employee who instructs a colleague to discriminate against another colleague is not covered by the prohibition, because none of them has the power of an employer to instruct.

The employer may be liable for discriminatory behaviour, including an instruction to discriminate that is carried out by employees, as the employer has to take the necessary measures to ensure a working environment without discrimination.

This also follows from the general Danish principle of employer liability according to Provision 3-19-2 of the Danish Act. However, as an employee's instruction to discriminate is not part of performing a job, it will not be part of the employer's responsibility, unless the employer has neglected the duty to avoid discrimination among employees.

As described above, only employers are obligated by Provision 3-19-2 of the Danish Act and by the Act on the Prohibition of Discrimination in the Labour Market etc. If the employer is not responsible for an instruction to discriminate by an employee, the employee who experienced discrimination can claim compensation according to Section 26 of the Act on Damage Liability.⁷⁶ Compensation can be claimed from the person who instructed the discrimination as well as from the person who actually discriminated.

The prohibition of instruction (discrimination on account of race and ethnic origin) in Section 3(5) of the Act on Ethnic Equal Treatment only involves service providers. As in the case of employers, the provision only applies where the person giving the instruction has some authority or right of supervision over the person receiving the instruction. In other words, there must be a certain hierarchical relationship between the instructor and the person receiving the discriminatory instruction. A situation where a customer encourages a shopkeeper to discriminate against third parties will not be covered by the provision.

The prohibition of instruction (discrimination on account of disability) in Section 5(5) of the Act on the Prohibition of Discrimination due to Disability applies to all public and private activities in all areas of society, except for the labour market. In practice, it will most often involve service providers in situations where there is a certain hierarchical relationship between the instructor and the person receiving the discriminatory instruction. One example described in the preparatory work is an owner of a nightclub who instructs his employees to reject customers who use a wheelchair.⁷⁷ Another example is an owner of a holiday home who instructs the estate agent not to rent his holiday home to individuals with intellectual disabilities.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Denmark, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law according to Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc.

Reasonable accommodation is described in the law but not defined in detail. Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the employer shall take reasonable measures in view of the practical needs to provide a person with disabilities access to employment, to pursue employment or advance in employment, or to give a person with disabilities access to education. The obligation to provide

⁷⁶ Denmark, Consolidated Act No. 1070 of 24 August 2018 with later amendments.

⁷⁷ Bill No. L221 of 18 April 2018 on the Act on the Prohibition of Discrimination due to Disability.

accommodations does not apply if a disproportionate burden is thereby imposed upon the employer. It follows from Section 2(a) that the burden will not be considered to be disproportionate if it is sufficiently eased by public measures.

b) Practice and case law

The employer's knowledge about the employee's disability

Whether an employer has fulfilled his or her duty to provide reasonable accommodation will always depend on a concrete assessment. The growing body of case law in the area gives some indications on the criteria to be used when assessing the extent of this duty. It is a precondition of the duty to provide accommodations that the employer knows – or ought to know – about the employee's disability. This is illustrated by two landmark Supreme Court rulings from 2015.

The first case was part of the *Ring* and *Skouboe Werge* case complex. The Danish *Ring* and *Skouboe Werge* CJEU cases (C-335/11 and C-337/11) were the basis for two judgments delivered by the Maritime and Commercial Court on 31 January 2014.⁷⁸ The Danish Court found that the adaptation of the workplace with a height-adjustable desk as well as part-time employment constituted reasonable accommodation. The two women in question were each awarded compensation equal to 12 months' salary. The *Skouboe Werge* case was appealed by the employer and the Supreme Court observed that it is a precondition of the employer's obligation to establish reasonable accommodation that the employer actually knows or ought to know about the disability. The parties in the case had been emailing each other during the sickness absence of the employee, but the note from the specialist doctor with the long-term prognosis was not sent to the employer. On that basis, the Court did not find that the employer knew or ought to have known at the time of the dismissal about the fact that the illness had caused a disability and the employer was acquitted.⁷⁹

The second case dealt with an employee who had told her employer when she got a diagnosis of arthritis.⁸⁰ She had also informed the employer about the need to modify her tasks. On that basis, the Court found that the employer knew about the disability and was obliged to establish reasonable accommodation. The second case is from 2016.

The employee with a disability must be competent, capable and available

Recital 17 of the Employment Equality Directive is not directly reflected in the Danish legislation. It is, however, stated in the preparatory work for the Act on the Prohibition of Discrimination in the Labour Market etc. that an employer should only choose an applicant with a disability if the applicant is as qualified as an applicant without a disability. Thus, the duty of reasonable accommodation only applies when the applicant with a disability has the necessary qualifications to do the job if accommodations are made.

In a 2018 case before the Board of Equal Treatment, the complainant had been absent from her job as a prison officer for around two years because of illness.⁸¹ Her various health issues were all related to a previous traffic accident. She was dismissed from her job and she claimed that she had been discriminated against based on her disabilities. The Board found that the woman had a disability, which the employer knew about. The employer therefore had to prove that the duty to provide reasonable accommodations had been fulfilled. Based on statements from doctors and a special Board of Health, the Board found that it was not possible for the woman to perform her job as a prison officer. The Board

⁷⁸ Maritime and Commercial Court, Judgment No. F-13-06 and Judgment No. F-19-06 of 31 January 2014. See U.2014.1223S for the printed Judgment No. F-19-06.

⁷⁹ Supreme Court judgment of 23 June 2015, Case No. 25/2014. Printed in U2015.3301H.

⁸⁰ Supreme Court judgment of 11 August 2015, Case No. 104/2014. Printed in U2015.3827H.

⁸¹ Board of Equal Treatment, Decision No. 9824 of 26 September 2018.

concluded that it had been proven that the woman was no longer competent, capable and available to perform the most important functions of her position as a prison officer. Thus, discrimination had not taken place.

When comparing qualifications of job applicants and evaluating whether a person is competent, capable and available, it follows from case law that the person with a disability is to be assessed according to his or her capacity to carry out the essential functions of the position **after** reasonable accommodation is made.

The nature of accommodations

When an employer knows – or ought to know – about a disability and the need for accommodations following the disability in question, the employer is obligated to look into possible reasonable accommodations and, if necessary, test the various possibilities. Accommodations can be of a material and organisational nature, including adjustment of workplaces and workstations, modification of work patterns or divisions of labour, or reduction of working hours.

A 2017 ruling from the Supreme Court illustrates that if an employee needs reduced working hours because of her disability, the employer must show a willingness to look into possible accommodations like flex-jobs, part-time jobs, etc.⁸² The case dealt with a woman who had undergone serious brain surgery. After the surgery, she experienced abnormal tiredness and was on sick leave for about two months. Thereafter she was on partial sick leave for eight months. She wanted to go back to her full-time position in the bank where she had been employed for 18 years. However, the extreme fatigue meant that she could not work for more than 12 to 18 hours a week. The hospital had recommended a 'flex-job' with reduced working hours (for people with a reduced ability to work) but the employer rejected this. After this rejection, the claimant called in sick again. She was dismissed three weeks later and argued that the dismissal was discriminatory because of her disability. The Supreme Court stated that there were no prospects for the woman getting back to a full-time position in the bank as she was suffering from a 'diagnosed disabling fatigue'. The Supreme Court concluded that the impairment at the time of the dismissal constituted a disability and that the bank had been aware of the disability. The Supreme Court also stated that the bank had failed to fulfil its obligation to establish reasonable accommodation. This was based on the reasoning by the High Court that the employer had refused the claimant a 'flex-job' without examining the options more closely. In conclusion, the dismissal constituted discrimination based on disability.

In a 2016 ruling from the Supreme Court, the Court evaluated the extent of an employer's obligation to provide a part-time position as reasonable accommodation.⁸³ The Court argued that for the employer to provide for a 20-hour/week position, the employer would have to divide a current full-time position into two part-time positions. The Court stated that for objective reasons this organisational change in a small department consisting of three employees would constitute a disproportionate burden to the employer and the employer was acquitted. The case illustrates that an employer is not obliged to divide a full-time position into two part-time positions if there are objective reasons (like the small size of the company/department) for a current position to be full-time. It also illustrates that employers are given a wide discretion when it comes to the expedient organisation of their operations and services.

In 2018, the Board of Equal Treatment dealt with a complaint from a woman who had been dismissed from her job as a kitchen assistant in November 2016.⁸⁴ Because of surgery and treatment for breast cancer in 2011, she continued to experience severe pain in the left

⁸² Supreme Court judgment of 22 November 2017, Case No. 305/2016. Appeal of Eastern High Court judgment of 30 June 2016, Case No. B-477-15. Printed in U.2018.853H.

⁸³ Supreme Court judgment of 13 April 2016, Case No. HR-98/2015.

⁸⁴ Board of Equal Treatment, Decision No. 9736 of 30 October 2018.

side of her body. It was particularly difficult for the kitchen assistant to lift heavy weights. When she started working in 2012 after the cancer treatment, the local municipality granted her a personal assistant for 12 hours every week. At the time of dismissal, she had a personal assistant for four hours a week. Because of her pain, the complainant continued to sleep badly at night, and it was difficult for her to get to work in the early mornings. For several years, the complainant had performed her job by doing nightshifts. However, in 2016 the employer changed the employees' duty rosters due to a restructuring of the company. This meant that the kitchen assistant would have had to work at different hours during the day, including morning shifts. The complainant could not accept the changes and was dismissed from her position. Based on medical information and the fact that the complainant had been granted a personal assistant, the Board found that she had a disability covered by the anti-discrimination legislation. The Board also found that the employer had not looked into and evaluated the possibility of adjusting the duty roster according to the kitchen assistant's need for night shifts. The Board therefore concluded that the employer had not fulfilled its duty to provide reasonable accommodation. The kitchen assistant was awarded compensation amounting to nine months' salary.

Two 2018 cases for the Board of Equal Treatment dealt with young men who applied for plumbing apprenticeships.⁸⁵ In both cases, the applicants were deaf or hard of hearing and their applications were rejected. In the rejections, the employers referred to issues of communication and safety as well as the capacity of the respective company. In other words, the employers argued that it would be too difficult to have an employee who was deaf or hard of hearing. The Board stated that the employers had to prove that the duty to provide reasonable accommodations was fulfilled. The Board found in both cases that the employers had not looked into whether the young men would have been able to perform their duties as plumbing apprentices with reasonable accommodations, for example in the form of changed work patterns or division of tasks. Nor had the employers looked into the possibilities of obtaining help from public authorities. Thus, the employers had not proven that it would be a disproportionate burden to hire the young men. Both young men were awarded compensation of EUR 1 675 (DKK 12 500).

The accommodation must be reasonable

The obligation to provide accommodations does not apply if a disproportionate burden is thereby imposed upon the employer. The size of the employer's business is relevant when evaluating the reasonability of an accommodation. This is illustrated in a judgment from the Maritime and Commercial Court, which dealt with a colour-blind seaman.⁸⁶ According to Danish law, the seaman was not allowed to perform essential tasks on the ship he worked on because of his colour blindness and was therefore dismissed. The Court stated that the seaman had a disability and examined whether the employer should have established reasonable accommodation. The Court concluded that the only realistic option would be to hire an extra seaman during the two weeks when the seaman in question was at sea. As a small shipping company with few employees, such a measure would be unreasonable for the employer.

When evaluating whether the burden placed on the employer is disproportionate, consideration is also given to whether public authorities will cover some or all of the expense. There is no obligation on the employer to apply for public funding to cover such expense. But in a concrete discrimination case before the Board or the courts, it can be detrimental to the employer, if otherwise possible funding has not been applied for. This is illustrated in an older landmark ruling from the Maritime and Commercial Court.⁸⁷ The case dealt with an employee who had severe permanent backache. Due to his illness, the employer decided to terminate the training agreement. The employer had refused a

⁸⁵ Board of Equal Treatment, Decision No. 9894 of 10 October 2018 and Decision No. 9896 of 10 October 2018.

⁸⁶ Maritime and Commercial Court judgment of 22 December 2014, Case No. F-2-13. Printed in U2015.1053S.

⁸⁷ Printed in U.2009.1948SH.

proposal from the municipality concerning a personal assistant arrangement paid for by the municipality. The Court concluded that discrimination based on disability had taken place.

It is the employer who has to prove that accommodations impose a disproportionate burden. In concrete terms, the employer must look into and evaluate various possibilities of accommodation. In cases of dismissal, an employer must be able to document that steps have been taken to provide reasonable accommodation with regard to an employee's specific needs before the decision on dismissal was made. A 2017 ruling by the Eastern High Court dealt with a horse rider who was training to become a riding instructor.⁸⁸ Because of a back injury, she could not meet the requirements established by the Danish Riding Confederation. The question for the Court was whether a dispensation from the requirements constituted reasonable accommodation and thus whether the rejection of such dispensation by the Riding Confederation constituted indirect discrimination because of disability. The Court found that the Riding Confederation had proven that the tests and requirements to become an instructor were objectively justified by a legitimate aim, and that the means of achieving that aim were appropriate and necessary. The Court also found that the Confederation had proven that no accommodations could possibly help the rider to pass the relevant tests. In conclusion, discrimination based on disability had not taken place.

c) Definition of disability and non-discrimination protection

The definition of a disability for the purposes of claiming reasonable accommodation is the same as for claiming protection from discrimination in general.

d) Failure to meet the duty of reasonable accommodation for people with disabilities

In Denmark, failure to meet the duty of reasonable accommodation in employment for people with disabilities does count as discrimination.

If an employer denies or does not provide reasonable accommodation and if this is not justified, it will constitute indirect discrimination, cf. Section 2(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., which refers to Section 1(3) of the Act. The reasonable accommodation case is dealt with as a case of indirect discrimination meaning that the burden of proof will be shifted, cf. Section 7(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. The provision does not entail a total shift of burden of proof, but a divided burden of proof.

A victim of indirect discrimination can claim compensation from the employer according to Section 7 of the Act on the Prohibition of Discrimination in the Labour Market etc. There is no penalty.

e) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Denmark, there is no legal duty to provide reasonable accommodation for people with disabilities outside the area of employment. This is specifically stated in Section 3 of the Act on the Prohibition of Discrimination due to Disability. According to the preparatory work for this new law, one of the reasons for not including a duty to provide reasonable accommodation was what was referred to as 'unpredictable socio-economic costs'.⁸⁹

⁸⁸ Eastern High Court judgment of 23 August 2017, Case No. B-2441-16.

⁸⁹ *Notat af 21. august 2017 fra Børne- og Socialministeriet og Finansministeriet om rimelig tilpasning af offentlige ydelser*. See <https://www.ft.dk/samling/20171/lovforslag/L221/spm.htm>.

f) Duties to provide reasonable accommodation in respect of other grounds

In Denmark, there is no legal duty to provide reasonable accommodation in respect of other discrimination grounds in the public and private sector.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2), Directive 2000/43 and Recital 12 and Article 3(2), Directive 2000/78)

In Denmark, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. Undocumented migrants are therefore protected by the Danish anti-discrimination laws.

3.1.2 Natural and legal persons (Recital 16, Directive 2000/43)

a) Protection against discrimination

In Denmark, the personal scope of anti-discrimination law does not cover legal persons for the purpose of protection against discrimination. Only natural persons are protected against direct and indirect discrimination.

In the labour market, it follows from Sections 2 and 3 of the Act on the Prohibition of Discrimination in the Labour Market etc., which specifically mentions employees and job applicants. Outside the labour market, it follows from Section 3 of the Act on Equal Treatment and from Section 5 of the Act on the Prohibition of Discrimination due to Disability that individuals are protected against discrimination on account of their race, ethnic origin and disability.

b) Liability for discrimination

In Denmark, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

There is no distinction in Section 2 of the Act on the Prohibition of Discrimination in the Labour Market etc. between different kinds of employers when it comes to liability for discrimination in the labour market. According to the general Danish labour law concept of employers, both natural and legal persons may be liable for discrimination as employers. The liability covers an even broader group of legal persons than the traditional Danish labour market concept of employers. Thus, Section 3 of the Act on the Prohibition of Discrimination in the Labour Market etc. stipulates that the prohibition of discrimination applies to anybody who runs vocational training and assigns employment, who issues decisions on access to self-employment and who issues decisions on membership and benefits provided by trade unions or employers' associations.

Furthermore, employers can be penalised for discriminatory job advertisements according to Section 8(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. (provision of penal law). It specifically mentions that legal persons are subject to a fine for such discriminatory job advertisements.

According to Section 2 of the Act on Ethnic Equal Treatment and Section 2 of the Act on the Prohibition of Discrimination due to Disability, there is no distinction between natural and legal persons when it comes to liability for discrimination outside the area of employment.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

In Denmark, the personal scope of national anti-discrimination law does not cover the private and public sector, including public bodies, for the purpose of protection against discrimination. Only natural persons are protected against discrimination.

b) Liability for discrimination

In Denmark, the personal scope of anti-discrimination law covers the private and public sector including public bodies for the purpose of liability for discrimination. Sections 2, 3 and 8 of the Act on the Prohibition of Discrimination in the Labour Market etc. stipulates the liability of employers and anybody who runs vocational training and assigns employment etc. According to Section 2 of the Act on Ethnic Equal Treatment and Section 2 of the Act on the Prohibition of Discrimination due to Disability, there is no distinction between the private and public sector when it comes to liability for discrimination outside the area of employment.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Denmark, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service and the holding of statutory office, for the five grounds, cf. Sections 2 and 3 of the Act on the Prohibition of Discrimination in the Labour Market etc.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In Denmark, national legislation prohibits discrimination in the following areas: conditions for access to employment, self-employment or occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds, in both the private and public sector, as described in the directives.

Sections 2 and 3 of the Act on the Prohibition of Discrimination in the Labour Market etc. cover all aspects of discrimination in relation to access to employment, to self-employment and to occupation, including selection criteria, recruitment conditions and promotion.

A homeless newspaper vendor of Slovakian origin complained to the Board of Equal Treatment.⁹⁰ He claimed that he was a victim of discrimination on account of ethnic origin because the private, not-for-profit organisation that was behind the homeless paper did not want to renew his vendor ID since he did not speak Danish. The Board argued that the sellers of the homeless newspapers were not necessarily required to perform the work themselves personally. They could, to a limited extent, resell the newspapers to other authorised homeless sellers. In addition, the purpose of the newspaper was to ensure a voice for the homeless and to create a debate about and focus on the situation of homeless people. The Board also stated that the selling of homeless newspapers was an alternative to begging and was intended only to be a minor supplement to the income of the individual homeless person. On that basis, the selling of homeless papers could not be considered as employment covered by the Act on the Prohibition of Discrimination in the Labour Market etc. The Board dismissed the complaint.

In a concrete 2018 case, the Board of Equal Treatment considered volunteerism for employment covered by the Act on the Prohibition of Discrimination in the Labour Market

⁹⁰ Board of Equal Treatment, Decision No. 10005 of 22 April 2015.

etc.⁹¹ The case dealt with an unpaid volunteer who was a lieutenant in the Danish Home Guard. When he turned 65, he lost his rank as lieutenant and he became a soldier of the lowest rank. As a test case, the Board adjudicated the question of whether volunteerism was covered by the anti-discrimination law. The majority of the Board members referred to the circumstances of the case, including the fact that although unpaid, the lieutenant was obliged to perform a number of duties and that he had contributed 800 hours a year to the Danish Home Guard. On that basis, the Board concluded that the complaint was covered by the Act on the Prohibition of Discrimination in the Labour Market etc. In a previous and similar case, the Board had reached the opposite conclusion.⁹²

No case law has been found in which the Board considered whether volunteerism could fall under the scope of vocational training (Section 3.2.4.).

A case before the Board of Equal Treatment illustrates that the area of self-employment and occupation is covered by the Act on the Prohibition of Discrimination in the Labour Market etc.⁹³ The complainant, who was born in 1960, had applied to the Ministry of Justice to be recognised as a Government-funded defence lawyer. He received a rejection and the ministry argued that it had rejected the application based on an individual assessment of a number of factors, including experience and qualifications, gender, geography and age. The complainant stated that he had been discriminated against on account of his age. According to the Board, the ministry could not prove that the prohibition of discrimination had not been violated. On that basis, the complainant received compensation of EUR 3 350 (DKK 25 000).

In general, the anti-discrimination legislation does not differentiate between the public and the private sector. However, according to the Administration of Justice Act, Danish citizenship can be a selection criterion in the public sector for the police, judges, etc. In the private sector, on the other hand, such a requirement may be considered indirect discrimination due to national or ethnic origin.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In Denmark, national legislation prohibits discrimination in working conditions, including pay and dismissals, for all five grounds and for both private and public employment. Thus, Section 2(1) of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits public and private employers from exercising differential treatment in connection with recruitment, dismissal, transferral, promotion and work and pay conditions.⁹⁴

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

In Denmark, national legislation prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

Access to all types, and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, are covered in Section 3(1) and 3(2) of the Act on the Prohibition of Discrimination in the Labour Market

⁹¹ Board of Equal Treatment, Decision No. 9254 of 7 March 2018.

⁹² Board of Equal Treatment, Decision No. 11063 of 12 August 2015.

⁹³ Board of Equal Treatment, Decision No. 9564 of 27 June 2018.

⁹⁴ Art. 2(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. states: 'Discrimination shall be deemed to have occurred in relation to payment conditions if an equal salary is not offered for the same job or for jobs which are regarded as having the same value.'

etc. This provision covers any training aiming at paid employment. Paid employment must be understood in a very broad sense.

Section 2(2) of the Act on Ethnic Equal Treatment and Section 2(2) of the Act on the Prohibition against Discrimination due to Disability state that the Acts shall not apply to areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc. Education and training outside the labour market – not covered by the Act on the Prohibition of Discrimination in the Labour Market etc. – is covered by Section 2(1) of the Act on Ethnic Equal Treatment and by Section 2(1) of the Act on the Prohibition against Discrimination due to Disability.

In a case before the Board of Equal Treatment, a Swedish citizen complained that he was not accepted to medical school at the university in Denmark.⁹⁵ The Swedish citizen believed that the refusal was due to his age and his national origin. Before going into the merits of the complaint, the Board stated that any training aiming at paid employment is covered by the Act on the Prohibition of Discrimination in the Labour Market etc. In other words, the medical school at the university was governed by the obligations of the Act on the Prohibition of Discrimination in the Labour Market etc. In the case in question, the Board found that the applicant had not lifted the burden of proof and the complaint was therefore unsuccessful.

In a case of race discrimination at a technical school,⁹⁶ it was decided by a city court and confirmed by the Eastern High Court that this situation was not covered by the Act on the Prohibition of Discrimination in the Labour Market etc. but rather by the Act on Ethnic Equal Treatment prohibiting unequal treatment in goods and services, education etc. By considering a technical school as education covered by the Act on Ethnic Equal Treatment, race discrimination was covered. However, an implementation problem exists in relation to the other protected grounds: by making this decision, the High Court excluded students at technical schools from protection against discrimination due to age, sexual orientation, religion and belief (as no provisions against discrimination on these grounds exist in the field of goods and services, education, etc.). The case should have been adjudicated according to the Act on the Prohibition of Discrimination in the Labour Market etc. and thus appears not to comply with national law. No subsequent rulings on this topic have been found.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In Denmark, national legislation prohibits discrimination in the following area: membership of, and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment, cf. Section 3(4) of the Act on the Prohibition of Discrimination in the Labour Market etc.

In a concrete case, the Board of Equal Treatment dealt with the question of age discrimination in the regulations of a labour union.⁹⁷ The complainant in the case had been a sector president in the labour union. She was unable to run for re-election at the congress because of regulations stipulating that candidates for the post of sector president had to be under the age of 60. The Board referred to Section 3(4) of the Act on the Prohibition of Discrimination in the Labour Market etc., which deals with involvement in workers' organisations. The Board also argued that the post of sector president in reality constituted 'occupation' in the words of Article 3(1)(a) of the Directive. On that basis, the Board concluded that the regulations of the labour union violated the prohibition of age

⁹⁵ Board of Equal Treatment, Decision No. 11065 of 12 August 2015.

⁹⁶ Eastern High Court judgment of 27 June 2006, Case No. B-4028-05.

⁹⁷ Board of Equal Treatment, Decision No. 10073 of 22 June 2016.

discrimination in the Act on the Prohibition of Discrimination in the Labour Market etc. Thus, the complainant was awarded compensation of EUR 3 350 (DKK 25 000).

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in social protection, including social security and healthcare, as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. This protection only extends to race and ethnic origin.

Section 2(1) of the Act on the Prohibition of Discrimination due to Disability prohibits discrimination on account of disability in all public and private activities in all areas of society, including social protection.

According to Section 50 of the Danish Health Act, all residents with a right to free treatment in hospitals, by general practitioners or by specialists have a right to an interpreter when a doctor finds that an interpreter is necessary to explain the treatment. With the primary aim of further incentivising foreigners to learn Danish, new rules regarding interpreting fees came into force on 1 July 2018.⁹⁸ According to Section 50(2) of the Health Act, patients who have a need for an interpreter and who have lived in Denmark for more than three years are charged a fee for the interpreting service. This fee may result in the increased use of children and other relatives as interpreters, and patients who do not speak Danish well may not receive the right healthcare.⁹⁹ Thus, there is a risk that the new rules will cause indirect discrimination due to ethnic origin or race. These rules do not apply to people who use sign language interpretation.

a) Article 3.3 exception (Directive 2000/78)

The exception in Article 3(3) of Directive 2000/78 is not directly repeated or implemented in the Act on the Prohibition of Discrimination in the Labour Market etc. However, Section 43 of the Act on Unemployment states that a member of an unemployment insurance fund will automatically stop being a member when he or she becomes eligible for the state pension – for most people at the age of 65.¹⁰⁰

In a concrete case, the Supreme Court dealt with the question of whether the Danish Act on Unemployment Insurance violated the Employment Equality Directive (2000/78/EC).¹⁰¹ In the case, A was informed by his unemployment insurance fund that his membership would be terminated because of the fact that he turned 65 and would be eligible for the state pension. A was still working at that time and did not want to retire. One year later, he resigned from his job and declared himself unemployed as well as available. He did not take the state pension and requested unemployment benefit instead. The unemployment insurance fund declined his request, referring to Section 43 of the Act on Unemployment Insurance which states that a member of an unemployment insurance fund will automatically stop being a member at the age of 65. A sued the Ministry of Employment, claiming that Section 43 of the Act on Unemployment Insurance violated Article 2 of the Employment Equality Directive and the general EU principle on prohibition of age discrimination. The Supreme Court concluded that the Danish system of unemployment benefit should be regarded as a public scheme of social protection. The Court stressed the fact that the unemployment benefit scheme works independently of employers and that the benefit cannot be compared to a salary. According to the Court, the payment of

⁹⁸ Denmark, Consolidated Act No. 1286 of 2 November 2018 (*Sundhedsloven*). Regulation No. 855 of 23 June 2018 (*Bekendtgørelse om tolkebistand efter sundhedsloven*). The new rules are described in the latest official periodic report from Denmark to the CERD-Committee covering the period from July 2013 to December 2018. See UN document CERD/C/DNK/22-24 of 7 February 2019, paragraphs 185-190.

⁹⁹ DIHR, *Menneskerettigheder på dagsordenen – Beretning 2017-18* (10 April 2018), p. 32.

¹⁰⁰ Denmark, Consolidated Act No. 1213 of 11 October 2018 (*Lov om Arbejdsløshedsforsikring*).

¹⁰¹ Supreme Court judgment of 19 January 2015, Case No. 308/2012. Printed in U2015.1303H.

unemployment benefit was therefore covered by the exception clause in Article 3(3) of the Employment Equality Directive. In conclusion, the Court stated that Section 43 of the Danish Act on Unemployment Insurance did not violate the Employment Equality Directive.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in social advantages as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

Complementary to this protection is Section 1 of the criminal Act on the Prohibition of Discrimination due to Race etc. of 1971. According to this Act, penalties are warranted for differential treatment of persons on the grounds of race, skin colour, national or ethnic background, belief and sexual orientation in a number of areas of life, including social advantages. Any public or private leisure facilities, etc. open to the public, whether on a commercial or non-profit basis, must be offered on equal terms. According to the Act on the Prohibition of Discrimination due to Race etc. it is also an offence to refuse admittance on the same terms as others to social centres, or similar facilities open to the public, if the refusal is based on one of the protected grounds. As described, there is a certain overlap between the protection against discrimination offered by civil and criminal law – but not on all discrimination grounds. In theory, criminal law can make up for the fact that sexual orientation, for example, is not included in the protection offered by civil law. However, in practice, no indictments or case law have been found regarding such discrimination. This means that it can be questioned whether the protection against discrimination due to sexual orientation etc. is effective in social advantages.

Section 2(1) of the Act on the Prohibition of Discrimination due to Disability prohibits discrimination on account of disability in all public and private activities in all areas of society, including social advantages.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin. The protection against discrimination within education covers protection against bullying constituting harassment due to race and ethnic origin.

Section 1 of the criminal Act on the Prohibition of Discrimination due to Race etc. of 1971 prohibits discrimination on account of race, skin colour, national or ethnic origin, belief and sexual orientation. Both criminal and civil law apply to all aspects of education, including university education, and all types of schools. In theory, criminal law can make up for the fact that sexual orientation, for example, is not included in the protection offered by civil law. However, in practice, no indictments or case law have been found regarding such discrimination. This means that it can be questioned whether the protection against discrimination due to sexual orientation etc. is effective in education.

All individuals within Danish jurisdiction are protected from discrimination according to the legislation above, regardless of their status, whether they have a permanent or time-limited residence permit or have status as undocumented immigrants, and irrespective of citizenship and nationality.

There is no access to Danish school for individuals who are not legal residents in Denmark. This means that undocumented migrants do not have access to education on an equal footing with other migrants and Danish citizens. No data has been found on whether this has led to direct or indirect discrimination based on race or ethnic origin in real life.

School segregation based on ethnic origin has been reported as a problem in Denmark.¹⁰² Hence, the European Commission against Racism and Intolerance (ECRI) states in its fifth report on Denmark that an education gap persists between ethnic Danes and ethnic minorities. Only 62 % of pupils belonging to ethnic minorities finished school with adequate skills for further education. Among ethnic Danes, the percentage was 87 %.¹⁰³

In a concrete case, the DIHR submitted a complaint to the Board of Equal Treatment, claiming discrimination on account of ethnic origin at the Langkær upper secondary school. In September 2016, the school had divided its new students into three classes with a 50 % limit of non-ethnic Danes in each, while the other four classes were comprised solely of pupils from ethnic minorities. On 15 March 2017, the DIHR published a statement that it had agreed with the Langkær school on an out-of-court settlement concluding the case before the Board of Equal Treatment. In the statement, the DIHR expressed the following: 'You cannot divide classes according to ethnicity as the Langkær school has done. That is illegal discrimination, no matter what the underlying intent has been.' In the statement, the Langkær school expressed the following: 'Langkær school agrees that it cannot use names of pupils as a criterion for dividing its classes in the future. We have had no intention to discriminate against anybody and we don't think that anybody has been put in a bad position compared to others by this practice. However, because of the complaint from the Institute for Human Rights, we note that it constitutes discrimination and we will therefore not reiterate this procedure in the future.'¹⁰⁴ The statement from the DIHR and the Langkær school does not reveal the actual settlement and it does not describe efforts to combat future ethnic segregation in the Langkær school.

a) Pupils with disabilities

In Denmark, the general approach to education for pupils with disabilities does raise problems.

On 1 July 2018, it became illegal to discriminate on account of disability within education, cf. Section 2(1) of the Act on the Prohibition of Discrimination due to Disability. The provision prohibits discrimination on account of disability in all public and private activities in all areas of society, including education.

Since 2012, it has been a goal of the Danish Government and local municipalities to increase inclusion in Danish elementary schools. The Education Act has an overall aim of equality.¹⁰⁵ An amendment to the Education Act was adopted in 2012 with the aim of including more students with special needs in mainstream education.¹⁰⁶ It is an ongoing debate whether the changes in actual fact have caused problems for pupils with disabilities. One argument is that mainstream schools and teachers do not have the necessary resources to include more students with special needs in mainstream education. In 2016, the Disabled People's Organisation Denmark documented that children with disabilities do not benefit sufficiently from their elementary school education.¹⁰⁷ It was also reported that 33 % of parents of children with disabilities find that inclusion in mainstream education does not work optimally and that their children need more support to be able to participate on an equal basis with other pupils.¹⁰⁸

¹⁰² Council of Europe (2017), *ECRI Report on Denmark (fifth monitoring cycle)*, 16 May 2017.

¹⁰³ Council of Europe (2017), *ECRI Report on Denmark (fifth monitoring cycle)*, 16 May 2017, para. 80.

¹⁰⁴ Danish Institute for Human Rights (DIHR), *Forlig i sag om fordeling af elever på grund af etnicitet* (statement regarding an out-of-court settlement between the DIHR and Langkaer school), 15 March 2017, available at: <https://menneskeret.dk/nyheder/forlig-sag-fordeling-elever-paa-grund-etnicitet>.

¹⁰⁵ Denmark, Consolidated Act No. 1510 of 14 December 2017 with later amendments.

¹⁰⁶ Information can be found on the website of the Danish Ministry of Education: <https://uvm.dk/folkeskolen/laering-og-laeringsmiljoe/inklusion/regler-om-inklusion>.

¹⁰⁷ Disabled People's Organisation Denmark: <http://www.handicap.dk/nyheder/nyhedsarkiv/dhs-inklusionsundersogelse-der-er-stadig-store-udfordringer-med-inklusionen/>.

¹⁰⁸ Disabled People's Organisation Denmark: <http://www.handicap.dk/nyheder/nyhedsarkiv/dhs-inklusionsundersogelse-der-er-stadig-store-udfordringer-med-inklusionen/>.

The Ministry of Education has not evaluated the effects of the changes in the Education Act with regard to inclusion since its 2016 report.¹⁰⁹ At that time, the evaluation documented challenges in providing the necessary support to some pupils with disabilities. In 2017, the DIHR published a report focusing on a group of children with disabilities who do not attend school.¹¹⁰ The report concluded that these children have a right to education and that there is a lack of rules safeguarding the rights of the children and their parents, including the right to complain.

Children who require special support (children with disabilities, for example) that cannot be provided by differentiating teaching within the framework of ordinary education are offered special education and other types of special educational assistance. The purpose of special educational assistance is to enhance the development of children with special needs so that the children can, among other things, continue their education or take up employment. It includes, for instance, the provision of advice to teachers, parents and other relevant persons, special educational materials and facilities, education specially focusing on the learning ability of the child, personal assistance, special activities focusing on relieving a disability, etc.; cf. Section 2 of the Administrative Order on Special Education.¹¹¹ In December 2018, the Government and a majority of the Danish Parliament decided to give students with disabilities in higher education an additional allowance to the state education grant and to put forward a national disability action plan within higher education in 2019.¹¹²

b) Trends and patterns regarding Roma pupils

In Denmark, there are no specific trends or patterns (whether legal or societal) in education regarding Roma pupils, such as segregation. The Roma population in Denmark consists of around 2 000 individuals and no information has been found about Roma and education. There are restrictions on data collection based on ethnicity in Danish law. However, it is unclear whether this or other issues like policies or funding constitute the reason(s) for the lack of knowledge about Roma pupils in Denmark, including lack of knowledge about the experience of discrimination.

The municipality of Elsinore set up segregated classes for Roma children in 2002. The official explanation for these segregated classes was the need to make sure that the children would show up at school in the morning. This was not believed to be an objective justification by the Council of Europe Commissioner for Human Rights¹¹³ and the Complaints Committee for Ethnic Equal Treatment,¹¹⁴ which consequently stated that the segregation of Roma children was not in accordance with the law. In 2006, the municipality decided to cease the Roma classes and allow the children back into the ordinary classes in state schools in Elsinore. No recent cases regarding Roma have been reported in Denmark.

3.2.9 Access to and supply of goods and services that are available to the public (Article 3(1)(h) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in access to and supply of goods and services as formulated in the Racial Equality Directive.

Section 1 of the criminal Act on the Prohibition of Discrimination due to Race etc. warrants penalties for differential treatment of persons on the grounds of race, colour of skin, national or ethnic background, belief and sexual orientation in a number of areas of life,

¹⁰⁹ Ministry of Children, Education and Equality, *Afrapportering af Inklusionseftersynet* (2016).

¹¹⁰ DIHR, *Retten til Uddannelse – Når børn med handicap ikke går i skole* (December 2017).

¹¹¹ Denmark, Regulation No. 693 of 20 June 2014 (*Bekendtgørelse om folkeskolens specialundervisning og anden specialpædagogisk bistand*).

¹¹² Agreement of 20 December 2018. See <https://ufm.dk/lovstof/politiske-aftaler/aftale-om-handicaptillaeg-til-eligible-erhvervsuddannelser-og-forhojelse-af-fribelob>.

¹¹³ Final report by Mr. Alvaro Gil/Robles, 15 February 2005, Council of Europe.

¹¹⁴ Decisions of 5 December 2005, 730.7.

including the supply of goods and services. The discrimination grounds of age and disability are not covered. Any public or private supply of goods and services open to the public, whether it is commercial or non-profit, must be offered on the same terms as to others.

It is therefore a criminal offence to refuse a person admittance on the same terms as others to a place, restaurant, shop, or the like that is open to the public, if the refusal is based on one of the grounds protected by the Act on the Prohibition of Discrimination due to Race etc. In practice, the Act has been applied in few cases, although some doormen have been fined for denying access to restaurants, nightclubs, etc.

Civil legislation prohibits discrimination in access to and supply of goods and services, cf. Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

Section 2(1) of the Act on the Prohibition of Discrimination due to Disability prohibits discrimination on account of disability in all public and private activities in all areas of society, including access to and supply of goods and services.

An older decision from the Board of Equal Treatment was legally challenged for years and reached its final decision in a ruling by the Western High Court in June 2017.¹¹⁵ The case dealt with Mr. Ismar Huskic who was born in Bosnia and Herzegovina in 1975 and had lived in Denmark since 1993. He acquired Danish nationality in 2000. Mr. Huskic and his partner applied for a loan to purchase a used car. For the purpose of processing the loan application, the car dealer emailed the names, address, national identity numbers and copies of the applicants' driving licences to the credit institution, Jyske Finans. The driving license of Mr. Huskic indicated that he was born in Bosnia and Herzegovina, but it did not state his nationality. In accordance with internal procedural rules, Jyske Finans requested additional proof of Mr. Huskic's identity in the form of a copy of his passport or residence permit. Mr. Huskic found the practice to be discriminatory. The Board of Equal Treatment ruled that Jyske Finans' procedural rules constituted indirect discrimination based on ethnic origin.¹¹⁶ The case was taken to the civil courts, and the City Court of Viborg concluded that the rules amounted to direct discrimination. The ruling was appealed to the Western High Court, which requested a preliminary ruling from the CJEU regarding the meaning of direct and indirect discrimination because of ethnic origin. In the ruling, the CJEU stated that the practice of requesting additional proof of identity for individuals born outside EU or EFTA countries was neither directly nor indirectly connected with the ethnic origin of the person applying for a loan.¹¹⁷ Therefore, the practice could not be said to constitute direct or indirect discrimination based on ethnic origin within the meaning of the Race Directive. On that basis, the Board of Equal Treatment withdrew its claim against Jyske Finans. Accordingly, in June 2017, the Western High Court acquitted Jyske Finans.

Discrimination due to ethnic origin in access to nightclubs and discotheques has previously only been dealt with by the Board of Equal Treatment and city courts. The first High Court judgment on this issue was passed in 2018.¹¹⁸ The case dealt with two young men of ethnic minority background. They were refused access to both a nightclub and a café. They received no explanation for the refusal and they could observe that several individuals of Danish origin were admitted to the nightclub and the café. For the courts, the nightclub and the café argued that the young men had been drunk. An independent witness explained for the court that she did not experience the two men to be drunk. According to the city court and the High Court, the nightclub and the café had not documented that the men were drunk. The High Court upheld the ruling of the city court and thus concluded that the two men had experienced discrimination because of ethnic origin in violation of Section 3 of the Act on Ethnic Equal Treatment. The two men were awarded compensation

¹¹⁵ Western High Court judgment of 30 June 2017, Case No. B-1750-13. Printed in U.2017.3119V.

¹¹⁶ Board of Equal Treatment, Decision No. 10074 of 10 December 2010.

¹¹⁷ *Jyske Finans*, Judgment of 6 April 2017, C-668/15.

¹¹⁸ Eastern High Court judgment of 17 September 2018, Case No. B-1860-17.

of EUR 670 (DKK 5 000). The ruling seems to illustrate that nightclubs and discotheques need to provide documentation when they reject guests with an ethnic minority background.

The Board of Equal Treatment has dealt with a number of cases relating to discotheques and bars that deal with alleged ethnic discrimination in relation to access. In 2018, the Board adjudicated 10 cases relating to discotheques and bars. Two cases were dismissed based on the fact that the only evidence presented constituted contradictory claims and explanations from the parties and the case could therefore only be resolved by oral testimonies from parties and witnesses in a court setting.¹¹⁹ In two cases, the complainant received compensation for discrimination of EUR 670 (DKK 5 000).¹²⁰ In both cases, the Board based its decisions on the fact that the bar/restaurant were not able to concretely contradict the claims. In one case, the Board concluded that discrimination had not taken place.¹²¹ Five cases dealt with the same concrete situation where a group of young men had been rejected access to a bar on 11 September 2016.¹²² They all filed individual complaints with the Board on 30 October 2017. In all five cases, the Board concluded that discrimination had not taken place based on the fact that the complainants had acted passively by waiting more than a year before they filed their complaint with the Board. On that basis, they lost any claim against the bar.

In 2017, in comparison, the Board adjudicated 11 cases relating to discotheques and bars. Three cases were dismissed based on the fact that the only evidence presented constituted contradictory claims and explanations from the parties and the case could therefore only be resolved by oral testimonies from parties and witnesses in a court setting.¹²³ In six cases, the complainant received compensation for discrimination of EUR 670 (DKK 5 000).¹²⁴ In all six cases, the Board based its decisions on video recordings as well as the fact that the discotheques typically were not able to concretely contradict the claims. In all six cases, the video recordings illustrated that three other persons of 'Danish origin' were admitted after the complainants were rejected access. In two cases from 2017, the Board concluded that discrimination had not taken place.¹²⁵

a) Distinction between goods and services available publicly or privately

In Denmark, national law distinguishes between goods and services that are available to the public (in shops, restaurants or banks, for example) and those that are only available privately (for example, limited to members of a private association). It follows from Section 2(1) of the Act on Ethnic Equal Treatment, which states that goods and services available to the public are covered by the provision. The term 'publicly available' in the law must be interpreted broadly. Goods and services made available exclusively for family members or close acquaintances, for example, fall outside the law. In the area of disability, the distinction follows from Section 2(3) of the Act on the Prohibition of Discrimination due to Disability, which specifically exempts execution of activities of a purely private nature from the scope of the Act.

¹¹⁹ Board of Equal Treatment, Decision No. 9263 of 21 March 2018, Decision No. 9458 of 6 June 2018.

¹²⁰ Board of Equal Treatment, Decision No. 9571 of 27 June 2018, Decision No. 9829 of 26 September 2018.

¹²¹ Board of Equal Treatment, Decision No. 9174 of 7 February 2018.

¹²² Board of Equal Treatment, Decision No. 9456 of 6 June 2018, Decision No. 9626 of 6 June 2018, Decision No. 9627 of 6 June 2018, Decision No. 9629 of 6 June 2018, Decision No. 9630 of 6 June 2018.

¹²³ Board of Equal Treatment, Decision No. 10186 of 4 October 2017, Decision No. 10187 of 4 October 2017, Decision No. 10188 of 4 October 2017.

¹²⁴ Board of Equal Treatment, Decision No. 10180 of 4 October 2017, Decision No. 10181 of 4 October 2017, Decision No. 10182 of 4 October 2017, Decision No. 10183 of 4 October 2017, Decision No. 10184 of 4 October 2017, Decision No. 10185 of 4 October 2017.

¹²⁵ Board of Equal Treatment, Decision No. 9636 of 5 April 2017, Decision No. 10384 of 13 December 2017.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In Denmark, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive. It follows from Section 2(1) of the Act on Ethnic Equal Treatment. The protection in this Act only extends to race and ethnic origin.

Section 1 of the criminal Act on the Prohibition of Discrimination due to Race etc. warrants penalties for differential treatment of persons on the grounds of race, colour of skin, national or ethnic background, belief and sexual orientation in a number of areas of life, including housing. The discrimination grounds of age and disability are not covered. Any public or private housing open to the public, whether it is commercial or non-profit, must be offered on the same terms as to others.

Section 2(1) of the Act on Ethnic Equal Treatment applies to public and private housing companies that rent houses, and to real estate companies. The term 'available to the public' should be interpreted in a broad sense, but the Act does not apply to private persons letting out or sub-letting a room in their own home.

Section 2(1) of the Act on the Prohibition of Discrimination due to Disability prohibits discrimination on account of disability in all public and private activities in all areas of society, including housing.

In 2016, the Board of Equal Treatment dealt with a tenant who claimed that his landlord had harassed him.¹²⁶ The tenant had an African ethnicity. The landlord told him that he had been of the belief that the tenant was an 'extremist with a turban'. He had also referred to the tenant's temporary lodger as a 'black negro'. The Board found that the tenant had proven facts that gave rise to the suspicion that the landlord had exposed the tenant to harassment constituting discrimination because of ethnic origin. The landlord had failed to prove that harassment because of ethnic origin had not taken place. The tenant was therefore awarded compensation of EUR 670 (DKK 5 000).

In relation to public housing, discrimination is, moreover, prohibited by the general principle of equality in administrative law.

As of 1 January 2017, 24.7 % of people living in public housing were immigrants from non-Western countries and their descendants.¹²⁷ Various initiatives have been introduced to avoid segregation and promote integration. As a rule, public housing is assigned according to a seniority-based waiting list, but a number of exceptions apply. This means that public housing can use criteria other than length of time on a waiting list. The intention is to attract applicants from a broader segment of the population to so-called troubled areas with high numbers of residents outside the labour market.

In May 2018, the Danish Government entered into six political agreements with various parties in the Parliament. The agreements were based on the Government's strategy plan called 'A Denmark without Parallel Societies – No Ghettos by 2030'.¹²⁸ Initiatives in the political agreements included plans to prevent and dismantle so-called ghettos and parallel societies in Denmark. In early October 2018, the Government put forward a number of individual bills to implement the agreements. By the end of 2018, most of the bills were adopted.

The new legislation defines 'marginalised residential areas' according to a number of criteria. To be categorised as a 'marginalised residential area' at least two out of the following criteria must be met: level of income, number of individuals with criminal convictions, level of education and unemployment rate. A 'ghetto' is furthermore defined

¹²⁶ Board of Equal Treatment, Decision No. 10087 of 10 August 2016.

¹²⁷ Official periodic report from Denmark to the CERD Committee covering the period from July 2013 to December 2018. See UN document CERD/C/DNK/22-24 of 7 February 2019, para. 166.

¹²⁸ See <https://www.regeringen.dk/nyheder/ghettoudspil/>.

as a 'marginalised residential area' where the percentage of immigrants and descendants from third countries exceed 50 %. A practical consequence of being categorised as a ghetto is that some apartment buildings in the so-called ghettos will be torn down. Residents of the demolished buildings will be offered alternative accommodation.

To provide an overview of the 'ghetto initiatives', legislation outside the housing area will be included in the following brief description of the various new acts:

- Mandatory training for any child over the age of one who lives in a marginalised residential area and who is not enrolled in a day care centre. The 25 hours a week training must include training in the Danish language as well as Danish traditions, norms and values.¹²⁹
- Distribution of young children in day care centres. The aim is to make sure that not more than 30 % of children in a day care centre come from a marginalised residential area.¹³⁰
- Act that makes it illegal for housing associations in marginalised residential areas to assign housing to applicants who receive public integration benefits.¹³¹ The same prohibition is thought to apply if family members of the housing applicant receive public integration benefits.¹³²
- Act that gives the police the authority to designate a demarcated geographical area as a strict penalty zone. See below for the consequences of an area being designated as a strict penalty zone. For a police commissioner to designate a strict penalty zone, the area must be experiencing an extraordinary crime situation that creates insecurity for people living in the area. This will often be the case in areas that the police have designated as 'particularly vulnerable residential areas' (SUB areas). Examples include areas where maladjusted youth dominate an area and create insecurity with threats, violence, vandalism and drug dealing. Another example mentioned in the preparatory work includes the situation where postal services, the fire department and other public services experience difficulties entering the area because of threats and violence.¹³³
- Act that doubles the penalties for crimes committed in a designated strict penalty zone. Relevant crimes covered by the provision are violence, fights in public, vandalism, arson, theft and robbery, drug dealing. When evaluating the penalty for other crimes, the fact that the crime was committed in a designated strict penalty zone must be regarded as an aggravating circumstance.¹³⁴

¹²⁹ Denmark, Bill No. L 7 of 3 October 2018. See <https://www.retsinformation.dk/Forms/R0710.aspx?id=203091>. Adopted 13 December 2018: <https://www.ft.dk/samling/20181/lovforslag/l7/index.htm>.

¹³⁰ Denmark, Bill No. L 6 of 3 October 2018. See <https://www.retsinformation.dk/Forms/R0710.aspx?id=203139>. Adopted 13 December 2018: <https://www.ft.dk/samling/20181/lovforslag/l6/index.htm>.

¹³¹ Denmark, Bill No. L 38 of 3 October 2018. See <https://www.retsinformation.dk/Forms/R0710.aspx?id=203288>, Adopted 22 November 2018: <https://www.ft.dk/samling/20181/lovforslag/l38/index.htm>.

¹³² More than 90 % of individuals receiving public integration benefits have an ethnic minority background and are not Danish citizens. See Ministry of Foreigners and Integration: <http://uim.dk/nyheder/integration-i-tal/integration-i-tal-nr-4-4-januar-2017/hvem-er-integrationsydelsesmodtagerne>.

¹³³ Denmark, Bill No. L 22 B. Adopted on 4 December 2018. For the original bill, including preparatory work, see L22: <https://www.ft.dk/samling/20181/lovforslag/l22/index.htm>.

¹³⁴ Denmark, Bill No. L 22 B. Adopted on 4 December 2018. For the original bill, including preparatory work, see L22: <https://www.ft.dk/samling/20181/lovforslag/l22/index.htm>.

- Proposal to establish mandatory Danish language tests in schools with a high percentage of students coming from marginalised residential areas. Passing the language test will be a requirement for the student's promotion to the next class.¹³⁵

The new legislation affects primarily ethnic minorities. The various acts raise legitimate questions of possible illegal indirect discrimination because of ethnic origin within the areas of housing, education and social services. The DIHR has been raising such concerns of possible illegal indirect discrimination.¹³⁶

a) Trends and patterns regarding housing segregation for Roma

In Denmark, there are no trends or patterns of housing segregation and discrimination against Roma. The Roma population in Denmark consists of around 2 000 individuals, and no information has been found about Roma and housing. There are restrictions on data collection based on ethnicity in Danish law. However, it is unclear whether this or other issues like policies or funding constitute the reason(s) for the lack of knowledge about housing for Roma in Denmark, including lack of knowledge about the experience of discrimination.

¹³⁵ Denmark, Bill No. L 60 of 4 October 2018. See

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203372>.

Bill was expected to be adopted on 17 January 2019 but it is now unclear when this will happen:

<https://www.ft.dk/samling/20181/lovforslag/l60/index.htm>.

¹³⁶ See <https://menneskeret.dk/monitorering/hoeringssvar> for hearing statements from the DIHR:

- Høring over udkast til lov om ændring af lov om almene boliger m.v., lov om leje af almene boliger og lov om leje (initiativer der modvirker parallelsamfund) (3 April 2018).
- Høring over udkast til forslag til lov om ændring af dagtilbudsloven og lov om børne- og ungeydelse (obligatorisk læringstilbud til 1-årige børn i udsatte boligområder) (7 August 2018).
- Høring over forslag til lov om ændring af lov om almene boliger m.v., lov om leje af almene boliger og lov om leje (nye kriterier for udsatte boligområder og ghettoområder, initiativer til udvikling eller afvikling af ghettoområder, skærpelse af anvisnings- og udlejningsregler, ophævelser af lejekontrakt på grund af kriminalitet m.v.) (22 August 2018).
- Høring over udkast til lovforslag til lov om ændring af lov om folkeskoleloven, lov om friskoler og private grundskoler (29 August 2018).
- Høring over udkast til lov om ændring af straffeloven, pasloven og politiloven (initiativer mod parallelsamfund) (14 September 2018). See L22: <https://www.ft.dk/samling/20181/lovforslag/l22/index.htm>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Denmark, national legislation provides for an exception for genuine and determining occupational requirements, cf. Section 6(2) of the Act on the Prohibition of Discrimination in the Labour Market etc.

According to Section 6(2) of the Act on the Prohibition of Discrimination in the Labour Market etc., if it is of crucial significance that a person has a particular race, political opinion, sexual orientation or national, social or ethnic origin, has a particular skin colour, age or disability or is of a certain religion or belief and if the requirement for such a characteristic is reasonable in relation to the concrete work in question, the employer can apply for a dispensation from the relevant Government minister. After having obtained a statement from the Minister of Labour, the minister may issue a concrete exemption from the prohibition of differential treatment. Subsequently, the employer in question can legally make a requirement that the future employee for the job in question has a particular ethnic origin, etc. As an example, a police commissioner who wants to appoint a person with a particular ethnic origin for a particular job has to apply to the relevant and concerned Minister of Justice for a dispensation. As the minister responsible for the 'subject matter concerned', the Minister of Justice will subsequently provide a dispensation after having obtained a statement from the Ministry of Labour. A concrete example of an exemption to the prohibition of discrimination is a poultry slaughterhouse exporting to Arab countries that received a dispensation to hire a Muslim to perform halal slaughter. According to the Ministry of Labour, the ministry has only evaluated four dispensation cases regarding ethnic origin and religion.¹³⁷

A 2016 case before the Board of Equal Treatment dealt with a 53-year-old woman who applied for a position as a personal assistant for a 13-year-old girl with muscular dystrophy.¹³⁸ The woman received a written rejection, including an explanation that the girl's family preferred a team of personal assistants aged between 20 and 25. The woman issued a complaint to the Board, claiming that she had experienced discrimination based on her age. The Board referred to a decision of 13 October 2005 by the Ministry of Social Affairs allowing age to be taken into consideration when appointing personal assistants to persons with disabilities. In other words, the decision allowed persons with disabilities to look for employees in the same age group as themselves. The Board argued that the case in question was covered by the dispensation provided by the Ministry of Social Affairs and concluded that it was legitimate to reject the job applicant because of her age.

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

In Denmark, national law provides for an exception for employers with a special political opinion or an ethos based on religion or belief, cf. Section 6(1) of the Act on the Prohibition of Discrimination in the Labour Market etc. None of the other discrimination grounds are covered by the exception.

According to this exception in Section 6(1), in particular situations the prohibition of discrimination does not apply to employers whose establishments have the aim of promoting a certain political or religious point of view (for example, a church that wants to hire a priest can exclude all applicants of another faith, because religion is an occupational requirement in this case). The same applies to organisations with a specific ethos (for example, private schools established on the basis of a specific religion).

¹³⁷ Andersen, S. and Justesen, P. (2017), *Hvornår må man lave etnisk særbehandling – Personer med etnisk oprindelse på arbejdsmarkedet*, Institut for Menneskerettigheder, p. 27.

¹³⁸ Board of Equal Treatment, Decision No. 10111 of 7 September 2016.

The provision explicitly states that the political or religious requirement has to be of importance to the particular job in question to be covered by the exception. Whether the requirement is important to the particular job in question and thereby legal is a concrete assessment, which eventually will have to be made by the Board of Equal Treatment and the courts.

The Board of Equal Treatment ruled on the question on 27 June 2018.¹³⁹ In this particular case, a social worker complained that she had been rejected for a position in a shelter for drug abusers because she was not a member of the Danish National Church. The shelter was run by a Christian organisation. The Board found that the work in the shelter involved pastoral counselling and conversations and that the requirement for membership of the Danish National Church was therefore legitimate. It can be questioned whether this decision by the Board is in accordance with the principle of proportionality outlined in the CJEU *Egenberger* case (Case C-414/16).

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In Denmark, national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

According to Section 1(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., the Ministry of Defence can make exceptions for the armed forces in relation to age and disability. The Ministry of Defence has made use of this exception clause and exempted military personnel from the prohibition of discrimination on account of age and disability.¹⁴⁰

The Board of Equal Treatment dealt with the issue of age discrimination in the military in a 2017 case where an applicant to the lieutenant-education was rejected admission based on several factors, including his age.¹⁴¹ The Board referred to the exemption in Executive Order No. 350 of 30 March 2012 and concluded that the complainant was not covered by the protection against age discrimination provided in the Act on the Prohibition of Discrimination in the Labour Market etc.

Another case before the Board of Equal Treatment dealt with a senior sergeant who was diagnosed with type 1 diabetes.¹⁴² Shortly after the diagnosis, he was declared unfit for despatch. The sergeant was dismissed from his position as a senior sergeant and transferred to another job with a particular focus on education. In this job, he would not have to be sent to operations abroad. The complainant argued that the dismissal constituted discrimination based on disability. The Board stated that the situation was covered by the executive order exempting the military from the prohibition of discrimination based on disability. Thus, the Board did not decide in favour of the complainant.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Denmark, national law includes exceptions relating to difference of treatment based on nationality.

¹³⁹ Board of Equal Treatment, Decision No. 9566 of 27 June 2018.

¹⁴⁰ Executive Order No. 350 of 30 March 2012 (*Bekendtgørelse om undtagelse fra forbud mod forskelsbehandling på grund af alder og handicap*).

¹⁴¹ Board of Equal Treatment, Decision No. 10179 of 4 October 2017.

¹⁴² Board of Equal Treatment, Decision No. 9384 of 2 March 2016.

In the public sector, 'Danish citizenship' is a selection criterion for the police, judges, etc.¹⁴³ This criterion is established by law as these are functions related to the essence of Danish sovereignty. However, public employees in most sectors are not required to be Danish citizens.

Apart from these particular job categories, requirements of nationality in the private and public sector may be considered indirect discrimination due to national or ethnic origin.

In Denmark, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

The Act on the Prohibition of Discrimination in the Labour Market etc. does not cover discrimination based on nationality, as citizenship is not covered by the list of discrimination grounds. Demanding a certain citizenship may constitute indirect discrimination based on ethnic origin.¹⁴⁴ Since specific citizenship is not covered by the Act, it must be assumed that the same goes for stateless persons.

The Act on Ethnic Equal Treatment also does not cover discrimination based on nationality, as citizenship is not covered by the list of discrimination grounds.

b) Relationship between nationality and 'racial or ethnic origin'

Demanding a certain citizenship may constitute indirect discrimination based on race, ethnic or national origin.

An overlap between discrimination on grounds of nationality and ethnicity does not seem to be the case in Denmark. Case law regarding discrimination on grounds of nationality is either dealt with as nationality discrimination (not covered by discrimination law) or as indirect discrimination on account of race, ethnic or national origin (covered by discrimination law).

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

a) Benefits for married employees

In Denmark, it constitutes unlawful discrimination in national law if an employer provides benefits only to those employees who are married.

Section 1 of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits discrimination on account of sexual orientation in the area of employee benefits.¹⁴⁵ Therefore, such a limitation may be unlawful. No case law is known.

b) Benefits for employees with opposite-sex partners

In Denmark, it constitutes unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.

¹⁴³ Denmark, Regulation No. 210 of 11 December 2000 with later amendments (*Cirkulære om anvendelse af tjenestemandsansættelse i staten og folkekirken*).

¹⁴⁴ Preparatory work for Act No. 459 of 12 June 1996 on the Prohibition of Discrimination in the Labour Market etc.

¹⁴⁵ On 12 June 2012, an Act on Marriage between two people of different sexes and between two persons of the same sex was passed to replace the law on same sex unions. See Consolidated Act on Marriage No. 87 of 29 January 2019.

Section 1 of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits discrimination on account of sexual orientation in the area of employee benefits.¹⁴⁶ No case law is known.

4.6 Health and safety (Article 7(2) Directive 2000/78)

In Denmark, there are specific rules with regard to disability and health and safety in accordance with Article 7(2) of the Employment Equality Directive. Section 18 of the Executive Order on the Arrangement of Permanent Workplaces obligates employers to take into consideration the needs of employees with disabilities when arranging the workplace.¹⁴⁷ The aim of these obligations is to provide persons with disabilities the basic working conditions when establishing (new) permanent workplaces.

With regard to the other discrimination grounds, the only exception was found in Section 81(5) of the Road Traffic Act¹⁴⁸ and a Government circular (Cirkulære No. 17133 of 21 April 1997), which stated that male Sikhs were exempted from wearing a crash helmet when riding a motorbike, since they are obliged to wear the turban outside at all times. However, the exemption was abolished on 20 December 2018 and Sikhs are no longer exempted from wearing a crash helmet.¹⁴⁹

In an Eastern High Court judgment, a Sikh carried a kirpan knife as a religious symbol in a public space.¹⁵⁰ The Court found that there was no exception in the Act on Small Arms¹⁵¹ in relation to religious symbols. The Court therefore held the kirpan to be a knife and consequently there had been a violation of the Act. The kirpan was confiscated, but a fine was annulled because the Court considered the reason for wearing the kirpan as mitigating circumstances. The Court did not find the sanction to be a violation of Article 9 of the ECHR. The Danish courts made no reference to any European Court of Human Rights (ECtHR) decisions or judgments. The issue of reasonable accommodation was not argued as such in the case. The judgment illustrates that there are no religious exceptions in relation to the Act on Small Arms.

4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.7.1 Direct discrimination

In Denmark, national law provides for specific exception(s) for direct discrimination on the ground of age. Subsections 3, 4 and 5 of Section 5(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. allow for direct discrimination due to age.

a) Justification of direct discrimination on the ground of age

In Denmark, national law provides for justifications for direct discrimination on the ground of age.

According to Section 1(a) of the Act, the Minister of Defence can decide to exempt armed forces in active duty from the prohibition of differential treatment due to age and disability (see Section 3(4) of the Directive).

¹⁴⁶ On 12 June 2012, an Act on Marriage between two people of different sexes and between two persons of the same sex was passed to replace the law on same sex unions. See Consolidated Act on Marriage No. 87 of 29 January 2019.

¹⁴⁷ Executive Order No. 96 of 13 February 2001 with later amendments (*Bekendtgørelse om faste arbejdssteders indretning*).

¹⁴⁸ Denmark, Consolidated Act No. 1324 of 21 November 2018 with later amendments (*Færdselsloven*).

¹⁴⁹ CIS No. 10085 of 20 December 2018.

¹⁵⁰ *Weekly Law Journal*, U.2007.316Ø.

¹⁵¹ Denmark, Consolidated Act No. 1005 of 22 October 2012 with later amendments (*Våbenloven*).

Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act is not a hindrance to the maintenance of valid age limits regulated in or agreed upon in collective agreements, provided that these age limits are objectively and reasonably justified by a legitimate aim within the scope of Danish legislation and that the means of achieving that aim are appropriate and necessary (see Article 6 of the Directive). This rule only applies to collective agreements. Collective agreements in both the private and the public labour market are covered.

A landmark Supreme Court judgment of 27 August 2013 dealt with an employee who was working in a telecommunications company.¹⁵² His employment was covered by an existing collective agreement containing a provision for retirement without notice at the age of 67. The Supreme Court referred to Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. and concluded that a forced retirement age of 67 years constituted appropriate and necessary means to achieve the purposes of an appropriate age distribution and the reduction of the workforce by age-related departures rather than dismissals.

A judgment from the Danish Maritime and Commercial Court upheld an age limit in a collective agreement.¹⁵³ In June 2016, the Supreme Court upheld the judgment and referred to the reasoning of the Maritime and Commercial Court.¹⁵⁴ Referring to Section 5(a)(3), the Court concluded that the collective agreement did not constitute age discrimination. The provision in the collective agreement stipulated that service station employees under the age of 25, being students and not working more than 15 hours a week, would receive lower pay supplements than other employees. The Court stated that the purpose of the provision was to promote the occupational integration of young people enrolled in education and that the age limit was an appropriate and necessary means to achieve this purpose.

In a case before the Board of Equal Treatment, a janitor was asked to retire three months after he had turned 65.¹⁵⁵ The janitor filed a complaint about discrimination due to age. The compulsory retirement age followed from a collective agreement. The Board found that the retirement provisions in the collective agreement were objectively and reasonably justified by a legitimate aim and referred to Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. The Board referred to case law from the CJEU, including the *Palacios de la Villa* case (C-411/05) and the *Rosenbladt* case (C-45/09), and argued that Member States have a wide margin of appreciation when it comes to social-political and employment-related objectives. The Board did not describe the legitimate aim in the case in question but spoke in general terms of legitimate aims. Furthermore, the Board referred to a similar case adjudicated by the City Court of Svendborg.¹⁵⁶ On that basis, the Board concluded that discrimination had not taken place.

With regard to employment, payment and dismissal, Section 5(a)(4) (until 1 January 2016 it was Section 5a(5)) of the Act on the Prohibition of Discrimination in the Labour Market etc. allows for direct discrimination against young people under 18 years of age if their payment and salary is covered by a collective agreement.

A Supreme Court judgment of 14 November 2013 deals with a 16-year-old who was hired to work in a supermarket.¹⁵⁷ During his employment, he received a salary that was significantly lower than the salary that his 18-year-old colleagues received. When the young employee turned 18, he was dismissed due to the fact that, according to the collective agreement in the area, he would now have the right to a higher salary. The

¹⁵² *Weekly Law Journal*, U.2013.3130H.

¹⁵³ Danish Maritime and Commercial Court judgment of 18 June 2015, Case No. F-7-14.

¹⁵⁴ Supreme Court judgment of 16 June 2016, Case No. 154/2015. Printed in U.2016.3281H.

¹⁵⁵ Board of Equal Treatment, Decision No. 9903 of 12 October 2018.

¹⁵⁶ City Court of Svendborg judgment of 20 June 2018, Case No. BS R3-516/2017.

¹⁵⁷ Supreme Court judgment of 14 November 2013, Case No. 185/2010. Judgment printed in U2014.470H.

Supreme Court concluded that Section 5a(a) of the Act on the Prohibition of Discrimination in the Labour Market etc. was in accordance with EU law by not going further than allowed by Article 6(1) of Directive 2000/78/EC. The reasoning was that Section 5a(5) was justified by the need to ensure the integration of young people under 18 in the labour market.

With regard to employment, payment and dismissal, Section 5(a)(5) of the Act on the Prohibition of Discrimination in the Labour Market etc. allows for direct discrimination against young people under 15 years of age if their employment is not covered by a collective agreement.

Under certain circumstances, it also provides for differential treatment to be allowed in relation to children under 18 years of age if their employment is regulated by collective agreements.

Furthermore, Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. provides for positive action with regard to older workers to promote the employment of elderly people. No concrete examples of positive action have been found.

Section 9(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. also allows for age requirements imposed by other legislation, if such requirements are established in order to protect children and young people.

b) Permitted differences of treatment based on age

In Denmark, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

See above.

c) Fixing of ages for admission or entitlement to benefits of occupational pension schemes

In Denmark, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2). According to Section 6(a) of the Act on the Prohibition of Discrimination in the Labour Market etc., age requirements can be set for admission or right to occupational pension schemes as long as such requirements do not result in discrimination on account of gender.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

In Denmark, there are special conditions set by law for older workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc. provides for positive action with regard to older workers, with a view to promoting the employment of elderly people.

According to Section 16(4) of the Act on Equal Treatment of Men and Women regarding Occupation etc., the burden of proof is reversed when a person is dismissed during pregnancy or maternity leave.¹⁵⁸ In these situations the employer must prove that the dismissal was not motivated by these reasons.

There are no special conditions set by law for younger workers.

¹⁵⁸ Denmark, Consolidated Act No. 645 of 8 June 2011 with later amendments (*Ligebehandlingsloven*).

According to Section 41 of the Act on Social Services, the municipal council is under an obligation to contribute to the reimbursement of additional costs necessary for the homecare of children under the age of 18 with a permanently reduced functional capacity. It is a requirement that the extra costs are incurred by the reduced capacity.

According to Section 42 of the Act on Social Services, municipal councils must reimburse a portion of the earnings lost by persons who support an underage child with a permanently reduced functional capacity at home. It is a requirement that it is necessary to take care of the child at home because of the reduced functional capacity and that it is most suitable that the child is cared for by the mother or father.

According to Section 43 of the Act on Social Services, municipal councils must provide an additional payment for up to three months to unemployed persons who receive a reimbursement under Section 42.

4.7.3 Minimum and maximum age requirements

In Denmark, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

It is not prohibited to have provisions in collective agreements regarding special rules on payment etc. for young people under the age of 18, cf. Section 5(a)(4) of the Act on the Prohibition of Discrimination in the Labour Market etc. See above (Section 4.7.1) for the Supreme Court judgment of 14 November 2013 on this particular issue.

According to Section 5(a)(5), the prohibition of differential treatment due to age does not apply to employment, conditions of pay and dismissal for young people under the age of 15. This is also the case when their employment is not regulated by a collective agreement.

Section 43(a) of the Civil Servants Act stipulates the mandatory retirement of priests when they turn 70 years of age.¹⁵⁹ The provision was dealt with in a decision by the Board of Equal Treatment.¹⁶⁰ In the case, the complainant was a priest who argued that it constituted discrimination on account of age that he had to retire when he turned 70 years of age when all the other employees at his workplace (the organist, the verger, the parish clerk, etc.) could continue working after they turned 70 years of age. The Board held that the Danish Parliament amended the Civil Servants Act and the rules on forced retirement in 2008. By doing so, it maintained the forced retirement of priests, deans and bishops at the age of 70. According to the Board, the Danish Parliament must have taken the view at that time that Section 43(a) of the Civil Servants Act was not a violation of the prohibition of age discrimination. The Board furthermore opined that the Employment Equality Directive, the Act on the Prohibition of Discrimination in the Labour Market etc. as well as case law from Danish courts and the CJEU illustrate that, under certain conditions, exceptions from the prohibition of age discrimination would be allowed. The Board referred directly to Article 6 of the Employment Equality Directive. The Board concluded that it did not find reasons to set aside the assessment of the Danish Parliament. The exception from the prohibition of age discrimination in the Civil Servants Act was therefore justified.

There is no minimum age for judges and bailiffs but there is a maximum age. According to Section 34(2) of the Civil Servants Act, judges and bailiffs must also retire when they reach the age of 70.¹⁶¹ There is a minimum age for police officers. Applicants to the National Police Academy must be 20 years of age and must be 21 years of age before they can begin their training to become a police officer.¹⁶²

¹⁵⁹ Denmark, Consolidated Act No. 511 of 18 May 2017 (*Tjenestemandsløven*).

¹⁶⁰ Board of Equal Treatment, Decision No. 41/2014 of 5 March 2014.

¹⁶¹ Denmark, Consolidated Act No. 511 of 18 May 2017.

¹⁶² Website of the Police Academy: <http://politiskolen.dk/adgangskrav>.

4.7.4 Retirement

a) State pension age

In Denmark, there is a state pension age at which individuals must begin to collect their state pensions. Individuals are entitled to begin collecting their state pensions according to the Act on Pensions.¹⁶³ The retirement pension is an age-determined pension payable to women and men of 65 years and over if they were born before 1954. If they were born in or after 1954 the pension age increases to 68 years of age.

If an individual wishes to work longer, the pension can be deferred for a maximum of 10 years. In other words, if a person is entitled to a state pension, he or she can postpone the payment of the pension to a time after he or she has turned 65 if retirement is postponed.

An individual can collect a pension and still work. The pension will, however, be reduced on the basis of the recipient's income.

In 2018, the Maritime and Commercial Court adjudicated a case with an office worker who had a flex-job with reduced working hours and whose employer received financial compensation from the local municipality according to the flex-job legislation.¹⁶⁴ The office worker was dismissed from his position when he reached the state pension age. Among other things, he argued that he had been discriminated against based on his age. The Court stated that, according to the law, flex-job arrangements expire when an employee reaches the retirement age. The question for the Court was whether the automatic termination of a flex-job arrangement would entitle an employer to dismiss an employee? Or whether such dismissal constituted discrimination based on age? The Court referred directly to Article 6(1) of the Employment Equality Directive and concluded that it did not find reasons to set aside the assessment of the Danish Parliament, which had not found reason to amend the flex-job legislation when implementing the Employment Equality Directive. The dismissal therefore did not constitute age discrimination.

b) Occupational pension schemes

In Denmark, there is no fixed age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. Occupational pension schemes and other employer-funded pension arrangements are not legally regulated, and they are exempted from the general prohibition of age discrimination pursuant to Section 6(a)(1) of the Act on the Prohibition of Discrimination in the Labour Market etc. They are part of either collective agreements or individual arrangements. There are different age limits in the different collective agreements and different individual arrangements.

If an individual wishes to work longer, payments from such occupational pension schemes can be deferred.

An individual can collect a pension and still work.

The Supreme Court dealt with the issue of occupational pension schemes in a case of pension contributions increasing with older age.¹⁶⁵ The Court concluded that such schemes do not constitute illegal age discrimination if they are legitimate and comply with the principle of proportionality. In the ruling, a 29-year-old woman was recruited by a company providing analytical and information services to businesses and consumers. Pursuant to her employment contract, she was included in a compulsory pension scheme where

¹⁶³ Section 1a of Consolidated Act No. 1208 of 17 November 2017 with later amendments (*Pensionsloven*).

¹⁶⁴ Maritime and Commercial Court judgment of 28 June 2018, Case No. F-5-17.

¹⁶⁵ Supreme Court judgment of 12 November 2015, Case No. 1/2015. Printed in U2016.749H.

pension contributions from her employer would increase with her age. The woman resigned less than a year after and claimed that the pension scheme constituted unlawful discrimination on the ground of age. The employer claimed that pension schemes were not covered by the prohibition of age discrimination. A preliminary ruling from the CJEU was requested and a judgment was issued by the CJEU in case C-476/11 on 26 September 2013. On that basis, the Supreme Court stated that an occupational pension scheme is exempted from the prohibition of discrimination on grounds of age if it can be justified under EU law and especially under Article 6(1) of Directive 2000/78. The Supreme Court concluded that the aim of the pension scheme constituted a 'legitimate aim' as it took into account the interests of all employees in the company. Hereafter, the Court concluded that the detriments resulting from the differential treatment on account of age were offset by the benefits that the woman gained from the occupational pension scheme and that the principle of proportionality was not violated. Thus, the employer was acquitted.

c) State imposed mandatory retirement ages

In Denmark, there is no generally state-imposed mandatory retirement age. However, in some sectors, retirement ages are set by collective agreements for certain professions; see below under d). Furthermore, there is a state-imposed retirement age for some civil servants, as the Act on Civil Servants sets an age limit for certain civil servants working within the judiciary as well as for priests according to which they are dismissed at the end of the month that they turn 70.¹⁶⁶

d) Retirement ages imposed by employers

In Denmark, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by collective bargaining. Since 1 January 2016, neither individual employment contracts nor collective agreements providing for automatic termination of employment by the age of 70 or older can be agreed. It also follows from the Act on the Prohibition of Discrimination in the Labour Market etc. that previous individual contracts providing for automatic termination cannot be enforced after 1 January 2016. Collective agreements on automatic termination are, however, valid until the time when the collective agreement in question can be renegotiated.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.

f) Compliance of national law with CJEU case law

In Denmark, national legislation is in line with the CJEU case law on age regarding mandatory retirement.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Denmark, national law does not permit age or seniority to be taken into account in selecting workers for redundancy. It follows from Section 2(1) of the Act on the Prohibition of Discrimination in the Labour Market etc., that it constitutes illegal discrimination to take age into consideration in selecting workers for redundancy.

b) Age taken into account for redundancy compensation

¹⁶⁶ See Section 34(2) and Section 43(2) of Consolidated Act No. 511 of 18 May 2017.

In Denmark, national law provides compensation for redundancy. Such compensation is not affected by the age of the worker.

If a redundancy is judged illegal, workers can be awarded compensation according to national law. The Dismissal Board (*Afskedigelsesnævnet*) adjudicating cases on redundancies covered by collective agreements has developed a 25-year rule in its case law. It follows from this rule that an employer has an obligation, if possible, to refrain from dismissing a person who has been employed for 25 years or longer. If an employee with seniority of 25 years or more is dismissed, the burden of proof shifts to the employer, who has to prove that there were strong reasons for dismissing this particular person. There is no case law indicating that the age of the worker has an influence on the amount of compensation awarded. No information has been found about legal challenges to this 25-year rule.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In Denmark, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

4.9 Any other exceptions

In Denmark, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) Scope for positive action measures

In Denmark, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is permitted to a limited extent in national law. There is, however, no general provision for special or positive measures in Danish law embracing all the discrimination grounds.

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act does not prevent measures being taken with a view to improving employment opportunities for persons of a specific race, skin colour, religion, political opinion, sexual orientation or national, social or ethnic origin, age or disability by virtue of other legislation, rules other than legislation and other public measures. Such special measures require legal authority and are primarily to be taken by the minister through public projects. According to the preparatory work, Section 9(2) of the Act is directed primarily at the public sector and general projects improving the integration of ethnic minorities.

The right to take special measures in Section 9(2) does not apply to private employers who want to improve employment opportunities for marginalised groups. Thus, legislation makes it difficult for private employers to actively offer equal opportunities in practice. The fact is that even simple outreach initiatives can be claimed to discriminate against the groups that are not the target of the individual outreach initiatives.

Furthermore, private employers who are interested in actively offering equal opportunities (which do not conflict with the prohibition of discrimination) are met with another legal barrier. Section 4 of the Act on the Prohibition of Discrimination in the Labour Market etc. prohibits employers to ask for, obtain, receive or use information about the race, skin colour, religion or belief, political opinion, sexual orientation or national, social or ethnic origin of a job applicant or an employee. This rule makes it difficult in practice for private employers to measure the results of their equal opportunity initiatives.

The legislative barriers in the Act on the Prohibition of Discrimination in the Labour Market etc. are assumed to prevent private employers from being active in creating actual equal opportunities in the labour market.

According to Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., it is possible for private employers to take positive measures in relation to older persons and persons with disabilities.

Outside the labour market, Section 4 of the Act on Ethnic Equal Treatment allows for the maintenance or adoption of specific and temporary measures to prevent or compensate for disadvantages linked to racial or ethnic origin. Both public authorities and private organisations and entities can initiate such measures. Section 8 of the Act on the Prohibition of Discrimination due to Disability permits similar temporary measures in the area of disability.

Race and ethnic origin

In the guidelines to Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc., lawful public positive measures cover projects initiated by the different ministries as part of national integration schemes, including projects with the aim of improving the qualifications of persons with an ethnic minority background. The guidelines emphasise that only public programmes whose aim is to improve access to employment are possible. Preferential treatment of racial and ethnic minorities is not allowed.

The preparatory work for Section 4 of the Act on Ethnic Equal Treatment states that there has to be an *actual* disadvantage linked to racial or ethnic origin in order for specific measures to be initiated. It also states that it is possible for public authorities and private organisations and entities to initiate specific measures. The Act only covers equal treatment outside the labour market.

Age and disability

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to disability and age, allowing for a number of legislative or public measures that promote the employment opportunities of the elderly and persons with a disability.

According to Section 9(3) of the Act on the Prohibition of Discrimination in the Labour Market etc., it is possible for public and private employers to take concrete positive measures in relation to 'older' age and disability. The purpose of the positive action has to be the improvement of employment possibilities for persons with disabilities or for older employees. If job applicants have the same qualifications, it is thus possible for the employer to prefer the applicant with the disability or the applicant who is 'older'. An employer may choose the person with the disability instead of the person without the disability only if the two applicants are equally qualified.

The Act on Compensation for Persons with Disabilities in the Labour Market promotes the integration of persons with disabilities into the job market.¹⁶⁷ This Act focuses on how compensation for impairments in the labour market is best provided and sets out general rules on how to promote and enhance employment for persons with (special) difficulties in finding a job. The general aim of the Act is to enhance the integration of persons with disabilities into the labour force by means of affirmative action and various other compensatory measures. Section 3 of the Act provides for preferential treatment of equally qualified job applicants with a disability to positions in the public administration. It also states that job applicants who have a disability have the right to a job interview for positions in the public administration.

Outside the labour market, Section 8 of the Act on the Prohibition of Discrimination due to Disability allows for the maintenance or adoption of specific and temporary measures to prevent or compensate for disadvantages linked to disability. Both public authorities and private organisations and entities can initiate such measures.

Religion or belief

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to religion and belief, allowing for a number of legislative or public measures that promote the employment opportunities of persons from different religions.

Since religion is understood as formally approved or recognised religions, there is a theoretical link between recognition as a religious community and the possibility of benefitting from these positive actions in Section 9(2). In reality, however, because of the wider discrimination ground of belief, the establishment of such a link is not required in practice.

Besides of such possible public measures, there are no provisions in Danish law explicitly allowing for positive measures on grounds of religion.

¹⁶⁷ Denmark, Consolidated Act No. 727 of 7 July 2009 with later amendments (*Lov om kompensation til handicappede i erhverv m.v.*).

Sexual orientation

Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market etc. also applies in relation to sexual orientation, allowing for legislative or public measures that promote the employment opportunities of persons with different sexual orientations. No concrete examples of such measures have been found.

Other than this, there are no provisions in Danish law explicitly allowing for positive measures on grounds of sexual orientation.

b) Quotas in employment for people with disabilities

In Denmark, national law does not provide for a quota/quotas for people with disabilities in employment.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

- a) Available procedures for enforcing the principle of equal treatment

In Denmark, the following procedures exist for enforcing the principle of equal treatment:

Civil courts:

The lower city courts, the High Courts, the Maritime and Commercial Court and the Supreme Court hear cases which involve provisions of the Act on Ethnic Equal Treatment and the Act on the Prohibition of Discrimination in the Labour Market etc., implementing Directive 2000/43 and Directive 2000/78. The courts will also hear cases involving the Act on the Prohibition of Discrimination due to Disability. Judgments and decisions handed down by civil courts are legally binding.

Labour courts:

The Labour Court and labour arbitration bodies only interpret collective agreements and adjudicate cases concerning violations of collective agreements. They do not deal with cases concerning violations of the legislation on discrimination.¹⁶⁸ Judgments and decisions handed down by labour courts are legally binding.

However, Section 1(6) of the Act on the Prohibition of Discrimination in the Labour Market etc. states that the Act does not apply if equal protection is provided by a collective agreement. Trade unions engage in judicial procedures before the Labour Court on behalf of their members in cases concerning the violation of a prohibition of discrimination in a collective agreement. In the individual case, the trade union decides whether or not it wishes to bring a case. If an individual person covered by a collective agreement wishes to initiate a case concerning the violation of collective agreements, the case must be tried at the ordinary courts and the individual must provide proof that his or her trade union has no intention of pursuing the matter before the Labour Court.

Board of Equal Treatment:

In practice, most complaints of discrimination are dealt with by the administrative Board of Equal Treatment, which was established on 1 January 2009.¹⁶⁹ The Board deals with complaints related to discrimination based on gender, race, colour, religion or belief, political views, sexual orientation, age, disability or national, social or ethnic origin *within* the labour market. In sectors outside the labour market, the Board has a mandate to hear individual cases on discrimination because of gender, disability, race and ethnic origin. The Board of Equal Treatment issues binding decisions and can order compensation to be paid.

Individuals making complaints to the Board of Equal Treatment must have an individual and current interest in the case in question. The Board of Equal Treatment cannot force the parties to produce documents, give their opinion or reveal the factual circumstances of a case. The Board secretariat can, however, request that the parties contribute to the elucidation of a case. If a party does not comply with this request within the stated time period, a new deadline will be set. If the party still does not respond, the Board can choose to decide the case based on the existing evidence, cf. Section 5 of the Act on the Equal

¹⁶⁸ Denmark, Consolidated Act No. 1003 of 24 August 2017 with later amendments in the Labour Court and Labour Arbitration (*Lov om Arbejdsretten og faglige voldgiftsretter*).

¹⁶⁹ Denmark, Consolidated Act No. 1230 of 2 October 2016 with later amendments (*Bekendtgørelse af Lov om Ligebehandlingsnævnet*).

Treatment Board. The Board can also procure expert evidence for use in specific cases, cf. Section 7 of the Act.

The Board of Equal Treatment cannot deal with a complaint if the situation is covered by a prohibition of discrimination in a collective agreement.

Decisions handed down by the Board of Equal Treatment are legally binding. However, according to Section 12(2) of the Act on the Board of Equal Treatment, the Board is obliged to bring its decisions to the civil courts if they are not followed and the applicants wish to pursue the matter. Both parties to a case can also bring a Board decision to the civil courts.

In the period from January 2013 until the end of 2017, the Board of Equal Treatment received 1 783 complaints in total.¹⁷⁰ In the same period, the Board issued 1 216 decisions and its secretariat dismissed 245 complaints.

Institute of Human Rights – the National Human Rights Institution of Denmark:

The DIHR is a National Human Rights Institution (NHRI) in accordance with the UN Paris Principles.¹⁷¹ The Institute has been accredited as an A-status NHRI since 2001.

The DIHR functions as the national equality body in accordance with the Racial Equality Directive and the gender directives. Its mandate as a specialised body for the promotion of equal treatment irrespective of gender, racial or ethnic origin is laid down in the founding law of the Institute by replicating the EU law requirement to establish equality bodies. The DIHR's mandate is to promote equality with regard to gender, race and ethnicity by way of providing assistance to victims of discrimination, conducting independent surveys and publishing reports and recommendations about equality. The DIHR does not play any role in criminal proceedings.

b) Barriers and other deterrents faced by litigants seeking redress

To initiate a civil court case in practice requires the appointment of a lawyer, which is a financial barrier for many victims of discrimination.

In theory, it is not necessary to obtain assistance from a lawyer to file a complaint with the Board of Equal Treatment. In practice, many victims cannot manage to file the complaint by themselves.

There is no time limit in the Act on the Board of Equal Treatment within which a procedure must be initiated. However, the Board of Equal Treatment has concluded in concrete cases that claims were statute-barred according to the Act on Limitations and on that basis the Board could not decide in favour of the complainants.¹⁷² According to the Act on Limitations, there is an absolute three-year period of limitation (five-year period of limitation for employment-related cases), which means that a procedure must be initiated three years (or five years), at the latest, after the unlawful violation has occurred.¹⁷³ In another case, the Board of Equal Treatment argued that it could not decide in favour of the complainant because of limitation.¹⁷⁴ The case dealt with a dismissal in April 2004 and the claim of discrimination based on disability and age was not raised until August 2014.

Furthermore, the Board has rejected concrete complaints of discrimination on the basis that the complainants acted passively and thus had lost any claim against the employer.

¹⁷⁰ Board of Equal Treatment, Annual Report 2017 (January 2019).

¹⁷¹ Denmark, Consolidated Act No. 553 of 18 June 2012 on the Institute for Human Rights – The National Human Rights Institution of Denmark with later amendments.

¹⁷² Board of Equal Treatment, Decision No. 29/2015 of 4 March 2015, Decision No. 9386 of 2 March 2016.

¹⁷³ Denmark, Act on Limitations (*Forældelseslov*), Sections 3 and 4, Consolidated Act No. 1238 of 9 November 2015.

¹⁷⁴ Board of Equal Treatment, Decision No. 10423 of 25 February 2015.

According to a general principle of Danish law, a person can lose his or her claim before the statutory period of limitation by acting passively. Whether a person has acted passively is determined by an individual assessment carried out by the civil courts or other law enforcement agencies. In a case before the Board of Equal Treatment, an engineer claimed that he had been discriminated against based on his age because he did not receive retirement benefits according to an occupational pension scheme like most of his colleagues.¹⁷⁵ The engineer had been employed for four and a half years. While employed, he had not expressed dissatisfaction with his salary and the lack of payment of retirement benefits. It was not until two years after his departure from the job that the engineer told his previous employer that he found it unwarranted that he had not earned retirement benefits while employed. The Board found that the engineer had acted passively and decided in favour of the employer.

There are no statistics on the number of cases for which the Board decides that a complainant loses his or her claim by acting passively. Also, there is no fixed number of months or years, which will make the Board decide that a complainant has acted passively. The Board conducts concrete and individual case-by-case evaluations. However, passivity does not seem to be invoked often by the Board.

No absolute time limit is indicated in the Act on Labour Courts.¹⁷⁶ With regard to the civil courts, there is a three-year period of limitation (five-year period of limitation for employment-related cases), which means that a procedure must be initiated three years (or five years) at the latest after the unlawful violation.¹⁷⁷

A person can file a complaint even after his or her employment relationship has ended. There is therefore no deadline for filing a complaint, but practical difficulties can arise in relation to collecting evidence.

The assistance given by the DIHR to victims of discrimination deals primarily with the provision of information and with advice on how and where victims can complain about discrimination.¹⁷⁸ Typically, the DIHR does not file complaints with the Board of Equal Treatment on behalf of a victim, but rather provides information on how the complainant can do it on his or her own. On the DIHR's website, a telephone number and an email address is listed if a person needs assistance and advice on discrimination issues and ways to complain.

Chapter 31 of the Administration of Justice Act deals with legal aid and free legal proceedings.¹⁷⁹ The Minister of Justice can financially support legal aid offices where individuals can seek free legal advice and representation.¹⁸⁰ No public data is available on the practice of supporting and representing victims of discrimination.

Only a few NGOs specialise in assisting victims of discrimination in filing complaints and initiating court proceedings. Many Danish labour unions provide counselling and legal advice on discrimination, in particular discrimination because of disability in the labour market.

¹⁷⁵ Board of Equal Treatment, Decision No. 9083 of 11 January 2018.

¹⁷⁶ Denmark, Consolidated Act No. 1003 of 24 August 2017 with later amendments in the Labour Court and Labour Arbitration (*Lov om Arbejdsretten og faglige voldgiftsretter*).

¹⁷⁷ Denmark, Act on Limitations (*Forældelseslov*), Sections 3 and 4, Consolidated Act No. 1238 of 9 November 2015.

¹⁷⁸ See <https://menneskeret.dk/raadgivning>.

¹⁷⁹ Denmark, Consolidated Act No. 1284 of 14 November 2018 with later amendments.

¹⁸⁰ Denmark, Regulation No. 637 of 11 June 2014 (*Bekendtgørelse om tilskud til retshjælpskontorer og advokatvagter*).

c) Number of discrimination cases brought to justice

In Denmark, there are no available statistics on the number of cases related to discrimination brought to justice.

Statistics on cases brought to the city courts are not available as they are not registered or published in the *Weekly Law Journal (Ugeskrift for Retsvæsen)*. Only selected judgments from the Supreme Court, the High Courts and the Maritime and Commercial Court are published in the *Weekly Law Journal*. The *Weekly Law Journal* is a paid journal not freely available to the public.

d) Registration of discrimination cases by national courts

In Denmark, discrimination cases are not registered as such by national courts.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Engaging on behalf of victims of discrimination (representing them)

In Denmark, associations/organisations/trade unions are entitled to act on behalf of victims of discrimination under certain conditions.

There are very few specialised NGOs providing legal aid to victims of discrimination and using litigation as a method to generate public discourse on equality.

The Danish judicial system is regulated in the Administration of Justice Act.¹⁸¹ Under Danish procedural rules in Section 260 of the Administration of Justice Act, a person may either go to court himself or herself, or authorise a process agent to appear in court on his or her behalf. As a general rule, in Danish procedural law, only jurists authorised to practise law, i.e. certified lawyers, may serve as process agents for a party. As an exception, the Minister of Justice may allow for interest groups, labour unions and the like to represent their members in court through an in-house jurist in cases concerning pay and employment conditions. This is the case even when the in-house jurist is not a certified lawyer, cf. Section 260(6) of the Administration of Justice Act.

Trade unions and other membership organisations can therefore represent their members in civil court cases dealing with pay and employment conditions. The trade union employees representing the individual member must have a Danish bachelor's or master's degree in legal studies. According to established case law, a trade union may also be allowed to serve a function similar to that of a process agent for its members in the sense that the union files a suit in its own name on behalf of its member (in Danish: *mandatar*). However, it is still the member and not the union who is a party to the case.

No particular legislation exists regarding the possibility of NGOs and other associations representing victims of discrimination in civil court proceedings. In comparison with trade unions on questions of pay and employment conditions, NGOs do not have the same general legal standing before domestic courts of law in relation to cases of discrimination. According to Section 260(2), only certified lawyers who have obtained a mandate from the individual victim of discrimination can litigate a case for the civil courts. This means that the NGO can help to examine the case but when it comes to representing and promoting the case before the civil courts, the individual victim of discrimination must get legal representation from a certified lawyer.

¹⁸¹ Denmark, Consolidated Act No. 1284 of 14 November 2018 with later amendments.

Some public bodies have been given express statutory power to represent complainants in court. According to Section 12 of the Act on the Board of Equal Treatment, the Board of Equal Treatment is thus obliged to bring a case to the civil courts if the defendant refuses to follow the decision of the Board and the applicant wishes to pursue the matter. In practice, the Board of Equal Treatment is represented by the law firm Kammeradvokaten, which is the legal adviser to the Danish Government.¹⁸²

There are no formal requirements for giving a mandate to represent one's case. In practice, a mandate will always be in writing.

In Board of Equal Treatment cases, trade unions and NGOs are entitled to represent individuals who have a legitimate interest in the case. A victim of discrimination is represented before the Board in accordance with traditional administrative law, cf. Section 8 of the Public Administration Act.¹⁸³

The DIHR is competent to take principle cases to the Board of Equal Treatment, including individual cases of discrimination of general public interest.¹⁸⁴ In practice, this has only happened in a few cases.

b) Engaging in support of victims of discrimination (joining existing proceedings)

In Denmark, associations/organisations/trade unions are entitled to act in support of victims of discrimination. According to Section 252 of the Act on Administration of Justice, bi-intervention is allowed in existing court proceedings, where the association has a legal interest in the outcome of the case.

As an example, the DIHR may intervene in civil court cases in support of a victim of discrimination if the Institute determines that such support may help to clarify the general interpretation of the discrimination law in Denmark. Since 2016, the DIHR has acted as *amicus curiae* in six court cases but did not do so in 2018.¹⁸⁵

c) Actio popularis

In Denmark, national law does not directly allow associations/organisations/trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

The competence of the DIHR to take principle cases to the Board of Equal Treatment could be considered as a form of *actio popularis* as the Institute does not need a specific victim of discrimination to initiate such a principle case.

In Decision No. 88/2011 issued by the Board of Equal Treatment, an NGO working against discrimination because of race and ethnic origin filed a complaint with the Board. The complaint dealt with ethnic discrimination because of a newspaper article. In the article, an owner of a campground stated that he would refuse access to the campground for Roma people. The NGO argued that the newspaper article was a violation of the Act on Ethnic Equal Treatment. The Board refused to adjudicate the complaint because of the fact that the NGO did not file the complaint on behalf of or in support of a concrete individual claiming that his or her rights had been violated.

¹⁸² As described in Jacobsen, B.D. (2010), *Assistance to Victims of Discrimination by Equality Bodies of the EU Member States – a Scandinavian Perspective*, DJØF Publishing, Copenhagen.

¹⁸³ Denmark, Consolidated Act No. 433 of 22 April 2014 (*Forvaltningsloven*).

¹⁸⁴ Section 1(7) of Consolidated Act No. 1230 of 2 October 2016.

¹⁸⁵ Information provided in Skype interview with the DIHR Equal Treatment Department on 17 January 2018 and in an email from the DIHR Equal Treatment Department on 5 April 2019.

No *actio popularis* court cases exist in relation to discrimination. In individual cases in other fields, the Supreme Court has accepted cases filed on the constitutional legality of Denmark's membership of the EU, for example, (see U 1996.1300 H and U 1998.800 H). So one could argue that there is a willingness to accept *actio popularis* cases within the Danish judicial system.

d) Class action

In Denmark, national law allows associations/organisations/trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

Chapter 23a of the Danish Administration of Justice Act specifies rules on collective action.

A collective action is a special type of procedure prepared with a view to combining several – especially a large number of – uniform claims in the same proceedings. The term 'collective action' implies that the action relates to the claims of a group of persons, a representative of this group (not individual members of the group) being regarded as a party to the action. Collective actions seem to be the same as class actions.

The rules on collective actions are based on a main rule that the members of the group must opt for the action (the opt-in model). At the request of the group representative, the court may also decide that a collective action must comprise the group members who do not opt out of the collective action (the opt-out model). This is, however, subject to two additional conditions being satisfied.

First of all, the case must concern claims that are so small that it is evident that they cannot generally be expected to be brought through individual actions, not because the persons concerned do not think that they have a justified claim, but merely because the inconvenience and financial risk of individual litigation are deemed to be disproportionate to the outcome of the individual action.

A number of conditions for bringing a collective action have been laid down, including the condition that the court must approve the case as being suitable for a collective action. A number of 'control mechanisms' also apply. For example, the court must approve the group representative and may decide that the representative must provide security for the legal costs that he or she may have to pay to the other party if he or she loses the case.

As for associations, there are no specific requirements as to age, number of members, financial situation, etc., but in order to be appointed as group representative, the association must have sufficient financial means, including, for example, insurance to be able to cover legal costs.

No information has been found on collective actions in discrimination cases.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In Denmark, national law requires a shift of the burden of proof from the complainant to the respondent.

Section 7 of the Act on Ethnic Equal Treatment, Section 7a of the Act on the Prohibition of Discrimination in the Labour Market etc., and Section 10 of the Act on the Prohibition of Discrimination due to Disability all deal with the principle of a shared burden of proof.¹⁸⁶ This means that if a person who considers himself or herself to be discriminated against is able to establish facts of possible discrimination, then the employer, shop owner, landlord

¹⁸⁶ Section 7 of the Act on Ethnic Equal Treatment and Section 7a of the Act on the Prohibition of Discrimination in the Labour Market etc.

etc. has to prove that no discrimination has taken place. This shared burden of proof is in line with the directives.

The shared burden of proof is to be applied in cases of direct and indirect discrimination, harassment and instruction, but not in cases regarding victimisation.

In cases of discrimination based on disability, it is a precondition for the employer's obligation to establish reasonable accommodation that the employer actually knows or ought to know about the disability of the employee.

A number of judgments and decisions handed down by the Board of Equal Treatment illustrate the shared burden of proof in practice.

In a landmark judgment on disability of 22 November 2017, the Supreme Court underlined that the burden of proof rests with the employee with regard to proving that the employee has a disability, including that the impairment is of a long-term nature.¹⁸⁷ However, in the ruling, the Supreme Court also clarified that to have a disability covered by the discrimination law, it is not a requirement that the condition in question is caused by a medically diagnosed illness. Instead, the impairment must be evaluated based on all circumstances of the case. It makes no difference whether dizziness, for example, is an illness or a consequence as long as the condition involves a long-term impairment.

A decision from the Board of Equal Treatment illustrates the kind of facts that can establish possible discrimination resulting in a shift of the burden of proof.¹⁸⁸ The case dealt with a man who had an Arabic-sounding name and who applied for a position as a marketing manager. His application and resumé were written in English. The company sent a written rejection in English explaining that they wanted a Danish employee. The Board argued that the company assumed that the applicant was not Danish based on his Arabic-sounding name and the fact that his application was written in English. On that basis, the Board concluded that the complainant had established facts of possible discrimination because of ethnic origin, reversing the burden of proof. The company could not prove that it had not violated the prohibition of discrimination and the complainant was awarded compensation of EUR 3 350 (DKK 25 000).

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Denmark, there are legal measures of protection against victimisation.

National law prohibits subjecting a person to any adverse treatment or adverse consequence as a reaction to a complaint or to any type of proceedings aimed at enforcing compliance with the principle of equal treatment.

Section 7(2) of the Act on the Prohibition of Discrimination in the Labour Market etc., Section 8 of the Act on Ethnic Equal Treatment and Section 9 of the Act on the Prohibition of Discrimination due to Disability all prohibit adverse treatment as a reaction to a complaint concerning discrimination. According to these laws, a person who experiences negative treatment or unfavourable consequences because of the fact that he or she has asked for equal treatment can be granted compensation by the court.

The commentary to the Act on the Prohibition of Discrimination in the Labour Market etc. reads: 'Protection against victimisation applies in cases where a formal letter of complaint has been filed with a court of justice or another public authority, as well as in cases where

¹⁸⁷ Supreme Court judgment of 22 November 2017, Case No. 305/2016.

¹⁸⁸ Board of Equal Treatment, Decision No. 9641 of 26 April 2017.

a certain incident is criticised verbally at the place of work, or where the employee has contacted his or her trade union and related the circumstances to the union.¹⁸⁹

Both in the labour market as well as outside the labour market, protection applies to a person who files a complaint regarding differential treatment of himself or herself as well as to a person who files a complaint of differential treatment of another person.

It is a prior condition that a causal link can be established between the victimisation and the employee's or the complainant's request for equal treatment. Adverse treatment is not considered as a violation of the prohibition of discrimination in the directives. The burden of proof is therefore not shared in cases of victimisation

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

Discrimination in the private and public labour market may result in pecuniary compensation and discriminatory job advertisements may result in a fine, cf. Section 7(1) and Section 8 of the Act on the Prohibition of Discrimination in the Labour Market etc.

In public and private employment as well as in a field outside the area of employment, a person who has been subject to discrimination can be awarded compensation for non-economic damages, as stipulated in Section 7(1) of the Act on the Prohibition of Discrimination in the Labour market etc., in Section 9 of the Act on Ethnic Equal Treatment, and in Section 11 of the Act on the Prohibition of Discrimination due to Disability.

Furthermore, Danish civil courts can award damages for an established economic loss according to the general Danish rules concerning damages. The Danish law of torts is developed through Danish case law. Damages can be awarded if negligent behaviour has resulted in an economic loss and there is a causal link between the negligent behaviour and the loss. Furthermore, the loss has to be foreseeable to the person acting negligently.

Finally, a person who is responsible for an unlawful violation of another person's freedom, honour or integrity is liable to pay compensation, according to Section 26 of the Act on Damage Liability. There is a three-year period of limitation, meaning that compensation claims must be brought to the courts three years, at the latest, after the unlawful violation.¹⁹⁰

b) Ceiling and amount of compensation

There is no ceiling on the maximum amount of compensation that can be awarded.

Typically, the following amounts of compensation will be awarded to victims of discrimination:

- in cases of denial of access to public places like discotheques: from EUR 670 (DKK 5 000) to EUR 1 340 (DKK 10 000);
- in cases of discriminatory job advertisements: EUR 3 350 (DKK 25 000);
- in cases of discriminatory denial of employment/new job: EUR 3 350 (DKK 25 000);
- in cases of discriminatory dismissals: 6 to 12 months' salary.

¹⁸⁹ Preparatory work for Act No. 253 of 7 April 2004 amending the Act on the Prohibition of Discrimination in the Labour Market etc.

¹⁹⁰ Section 3 of Act on Limitations (*Forældelseslov*), Consolidated Act No. 1238 of 9 November 2015.

In the landmark Supreme Court judgment of 1 October 2014,¹⁹¹ the Court dealt with the level of compensation in cases of age discrimination. The Supreme Court referred to case law on gender discrimination in the labour market, stating that the pilots in question would be eligible to more than six months' salary in compensation. However, according to the Court, there were a number of mitigating circumstances, which meant that the compensation in these cases should be determined at a lower level. The result was that the Court granted four months' salary in compensation to each of the pilots. According to the Court, the mitigating circumstances were the following:

- the dismissals were necessary because of work and workforce reductions;
- the criterion for dismissing the pilots (eligibility for retirement benefits) was collectively negotiated with the pilot union;
- this criterion was the most humane and gentle in a situation where – no matter what – a number of pilots had to be dismissed.

This approach was corroborated in a Supreme Court judgment of 12 March 2015.¹⁹² In this case, the Court underlined that, when determining the amount of compensation, it must emphasise the 'coarseness', meaning the seriousness of the violation including the background for the violation and the infringement of the individual in question.

In another landmark Supreme Court judgment of 13 June 2013,¹⁹³ a young woman was appointed as a secretary at a law firm. She was dismissed instantaneously, only four days after she had started working. The woman had a diagnosis of ADHD¹⁹⁴ and the employer's reason for dismissing her was her 'special conditions'. The Supreme Court concluded that the dismissal was a violation of the prohibition of discrimination in the labour market and she was awarded compensation amounting to six months' salary. When setting the compensation, the Supreme Court referred to the case law on discrimination on account of gender and stated that in the case in question, there was no reason to depart from the compensation practice in the gender case law.

c) Assessment of the sanctions

In reality, compensation is almost the only sanction used in cases of unlawful discrimination. Fines and damages are used so rarely that it is difficult to evaluate whether these sanctions are effective.

The level of compensation in discrimination cases is higher than in traditional cases of unfair dismissal. The higher sanctions, combined with the increased knowledge that employers have about discrimination laws, are likely to have a dissuasive effect when it comes to discrimination in the labour market.

The Supreme Court has made a clear statement about the level of compensation in discrimination cases in the labour market. There was previously a tendency to award lower amounts of compensation in cases of discrimination on account of ethnic origin, age, disability, sexual orientation and religion/belief than in cases of discrimination because of gender. This is not the case anymore.

Outside the area of employment, on the other hand, within the realm of the Act on Ethnic Equal Treatment, sanctions are so mild that it must be questioned whether they are sufficiently effective, proportionate and dissuasive. This is the situation when it comes to nightlife and discotheques where discrimination is a big problem. The risk of having to pay very little compensation does not seem to sufficiently prevent discrimination in nightlife. Reports from the municipality of Copenhagen show that 24 % of all young people in

¹⁹¹ Supreme Court judgment of 1 October 2014, Case No. 322/2012. Printed in U.2015.1H.

¹⁹² Supreme Court judgment of 12 March 2015, Case No. 180/2014. Printed in U.2015.2027H.

¹⁹³ U.2013.2575 H.

¹⁹⁴ Attention deficit and hyperactivity disorder.

Copenhagen have experienced discrimination within the last year, and that 43 % of young people in Copenhagen with an ethnic minority background have experienced discrimination.¹⁹⁵

¹⁹⁵ Stemplet. See <https://www.kk.dk/stemplet>.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The DIHR is designated as a body for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Article 13 of the Racial Equality Directive.¹⁹⁶ Section 2(2) of the Act on the Institute for Human Rights – The National Human Rights Institution of Denmark stipulates that the DIHR must promote equal treatment of all persons without discrimination on grounds of gender, race or ethnic origin. The DIHR addresses discrimination in any domain, including employment, education, housing, social services, etc. In its work, the DIHR frequently applies a horizontal perspective. In practice, this means that all grounds for discrimination are addressed, taking into account gender, age, disability, sexual orientation, religion and faith, ethnicity and race.¹⁹⁷

The Act establishing the DIHR exempts Greenland and the Faroe Islands from the competence of the DIHR.¹⁹⁸ In 2014, it was decided by decree that the DIHR has a mandate to work in Greenland in the same way that it does in Denmark.¹⁹⁹ The DIHR evaluates, promotes and monitors human rights in Greenland and publishes ongoing status reports on its activities and on the human rights situation in Greenland. It presents these reports to the *Inatsisartut*, the Parliament of Greenland.²⁰⁰

In accordance with the requirements of Article 13 of the Directive, the Institute has been given the authority to assist victims of discrimination, to conduct surveys concerning discrimination and to publish reports and make recommendations on discrimination.

The Board of Equal Treatment is an independent complaints board established by the Act on the Board of Equal Treatment. It is a quasi-judicial institution that is limited to adjudicating individual complaints about discrimination.²⁰¹ The Board is not officially designated as an Article 13 body.

- b) Political, economic and social context for the designated body

In 2015, legislation was amended to give the DIHR the authority to bring complaints to the Board of Equal Treatment in cases that are a matter of principle or in cases that are a matter of general public interest.²⁰² The amendment represented a strengthening of the DIHR's position and can be seen as an indication that the Danish Government as well as the Danish Parliament have confidence in the DIHR. Furthermore, most of the DIHR's general budget comes from the Danish state (the national budget and various Government resources). During the last couple of years, the overall budget for the DIHR has largely been unchanged.

On the other hand, the right-wing Danish People's Party, which is a supporting party for the current Danish Government, often criticises international human rights obligations in general as well as the institution of the DIHR in particular. There have been many popular

¹⁹⁶ Denmark, Consolidated Act No. 553 of 18 June 2012 with later amendments on the Institute for Human Rights – The National Human Rights Institution of Denmark.

¹⁹⁷ See <https://www.humanrights.dk/about-us/mandate>.

¹⁹⁸ Section 15 of Consolidated Act No. 553 of 18 June 2012.

¹⁹⁹ Decree No. 393 of 23 April 2014 about the entry into force for Greenland of the Act on the Institute for Human Rights – The National Human Rights Institution of Denmark.

²⁰⁰ For information on the DIHR's work on Greenland, see <https://menneskeret.dk/emner/groenland>. For the latest status report on equal treatment in Greenland, see <https://humanrights.dk/publications/equal-treatment-greenland-status-2019>.

²⁰¹ Denmark, Consolidated Act No. 1230 of 2 October 2016 on the Act on the Board of Equal Treatment.

²⁰² Denmark, Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

debates during the last couple of years that have been hostile towards human rights in general. One issue has been how to limit the power of the ECtHR. Jonas Christoffersen, the Executive Director of the DIHR was active in the drafting of the 'Copenhagen Declaration', which was adopted in April 2018 by the Council of Europe. In very simple terms, the Copenhagen Declaration calls for the ECtHR to decide less and the national courts to decide more. Jonas Christoffersen's pragmatic approach is to somehow accommodate the criticism of human rights by politicians and citizens as a means of getting broader public support for human rights and safeguarding the most fundamental human rights.²⁰³ This pragmatism has been condemned by Morten Kjærum, former Executive Director of the DIHR, who is the current Executive Director of the Raoul Wallenberg Institute in Sweden. Morten Kjærum argues that current legal developments must be compared with and evaluated in the light of international human rights conventions, and not in the light of the present popular mood.²⁰⁴

Furthermore, during the last couple of years an intensive political and public debate about 'Danishness' has taken place. The question of when one can be characterised as being a Dane and what it means to be a Dane has been discussed. Often the question has been whether you have to be born in Denmark or whether you have to learn certain values and attitudes to become a Dane. The popular debates illustrate that there is often little acknowledgement of the existence of racism and racial discrimination in Denmark and that there is limited support for the promotion of genuine equality for ethnic minorities in Denmark.

c) Institutional architecture

In Denmark, the designated body forms part of a body with multiple mandates.

The Act on the Institute for Human Rights – The National Human Rights Institution of Denmark establishes the DIHR as a separate and independent human rights institution.²⁰⁵ The Act clarifies the role of the DIHR with regard to the promotion of equality and non-discrimination and specifies that the Institute also has a mandate under the EU directives as a specialised equality body on race and ethnic origin as well as on gender. Apart from being a specialised equality body, the DIHR is also an 'A' accredited NHRI according to the UN Paris Principles.

Furthermore, the DIHR is responsible for monitoring the Danish implementation of the UN Convention on Rights of Persons with Disabilities, which follows from Parliament Decision B15 of 17 December 2010.

The Equal Treatment Department is a separate department in the DIHR that works to fulfil the functions and tasks assigned to the DIHR by virtue of its role as a specialised equality body in respect of race, ethnic origin and gender. The department also monitors, promotes and oversees the implementation of the UN Convention on the Rights of Persons with Disabilities.²⁰⁶ The Equal Treatment Department works on issues of discrimination based on gender, race/ethnic origin and disability within all spheres of society and has divided its tasks between three teams centred around gender, race/ethnicity and disability. The Equal Treatment Department works on issues of equality in general and does not limit its work to the material scope of the EU directives.

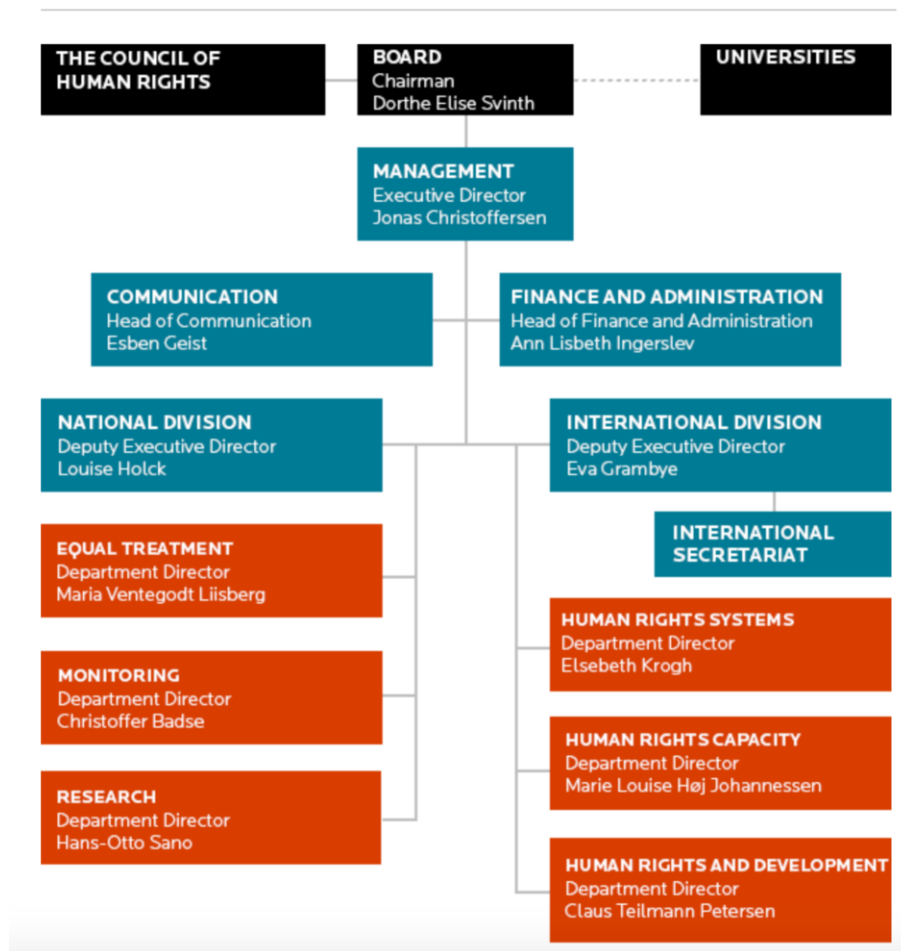
²⁰³ Altinget, 10 år som direktør for Institut for Menneskerettigheder: Vi er blevet mere pragmatiske og mindre idealistiske (21 January 2019).

²⁰⁴ Altinget, Kjærum: Går Jonas Christoffersen mere op i politiske skulderklap end konventioner? (25 January 2019).

²⁰⁵ Denmark, Consolidated Act No. 553 of 18 June 2012 with later amendments.

²⁰⁶ Table of DIHR departments. See <https://www.humanrights.dk/about-us/departments>.

Departments



The DIHR is established by law as an independent autonomous institution within the public administration. The DIHR works with human rights in general and is accountable to the Danish Parliament by the obligation to submit a yearly report to the Parliament and by the fact that the DIHR can only be abolished by legislation. With regard to its budget, the DIHR is technically accountable to the Ministry of Finance.

By the end of 2018, the DIHR had 143 employees in total. The Equal Treatment Department had 14 employees by the end of 2018. In addition, the Equal Treatment Department had 5 students paid by the hour.²⁰⁷

The DIHR publishes a number of reports every year within the area of human rights and equality, which gives the impression that there is a high level of attention to equality issues in general.

d) Status of the designated body/bodies – general independence

i) Status of the body

The DIHR is established by law as an independent autonomous institution within the public administration. The Equal Treatment Department works to fulfil the functions and tasks assigned to the DIHR by virtue of its role as a specialised equality body.

²⁰⁷ Information provided by the DIHR Equal Treatment Department in an email, 5 April 2019.

The Danish Council for Human Rights (*Rådet for Menneskerettigheder*) is established to assess the development and execution of the activities of the DIHR and may propose new activities to the DIHR Board. The Council meets four times a year to discuss the work of the DIHR and also appoints six members of the Board. Members of the Council are appointed to reflect the attitudes of civil society organisations working with human rights as well as public and governmental institutions and authorities. Only members from civil society organisations have the right to vote in the Council.

The Board members of the DIHR are appointed by various institutions: one member is appointed by the University of Copenhagen; one member is appointed by the University of Aarhus; one member is appointed by the University of Southern Denmark; one member is appointed by the University of Aalborg; two members are appointed by the Danish Conference of Rectors (*Rektorkollegiet*); one member is appointed by the employees of the DIHR; and six members are appointed by the Danish Council for Human Rights. The Board of Equal Treatment is not represented on the DIHR's Board. The Executive Director of the DIHR is appointed by the Board.

Most of the DIHR's budget comes from the Danish state (the national budget and various Government resources) and the budget has not changed for several years. With regard to its budget, the DIHR is technically accountable to the Ministry of Finance.

The DIHR is an independent autonomous institution within the public administration. The DIHR management has the power to recruit and manage staff.

The DIHR is accountable to the Danish Parliament by the obligation to submit an annual report to the Parliament about the status of human rights in Denmark, and by the fact that the DIHR can only be abolished by legislation.

ii) Independence of the body

The DIHR is established by law as an independent autonomous institution within the public administration. The DIHR can only be abolished by legislation.

e) Grounds covered by the designated body/bodies

The Act on the Institute for Human Rights – The National Human Rights Institution of Denmark establishes the Institute as a separate and independent institution.²⁰⁸ The Act also clarifies the role of the DIHR with regard to the promotion of equality and non-discrimination and specifies the mandate of the Institute under the EU directives as a specialised equality body on race and ethnic origin as well as on gender.

The DIHR is also responsible for monitoring the Danish implementation of the UN Convention on Rights of Persons with Disabilities, which follows from Parliament Decision B15 of 17 December 2010.

The Equal Treatment Department works to fulfil these DIHR functions and has divided its tasks between three teams centred around gender (including sexual orientation), race/ethnicity and disability. All three teams work to focus on their specific discrimination ground as well as on their intersections when relevant.²⁰⁹

Competences of the designated body/bodies – and their independent exercise

²⁰⁸ Denmark, Consolidated Act No. 553 of 18 June 2012 with later amendments.

²⁰⁹ Information provided in Skype interview with the DIHR Equal Treatment Department on 17 January 2018.

According to Section 2(3) of the Act on the Institute for Human Rights – The National Human Rights Institution of Denmark, the DIHR must issue a yearly report to the Parliament on the human rights situation in Denmark. It must also publish the report. This includes the situation of persons with disabilities. According to Parliament Decision B15 of 17 December 2010, the Institute is also responsible for monitoring the Danish implementation of the UN Convention on Rights of Persons with Disabilities.

The duties and powers of the Institute with regard to the equality mandates are specified in the Act on the Institute for Human Rights – The National Human Rights Institution of Denmark. According to Section 2(2) of the Act, the Institute must promote equal treatment of all persons without discrimination on grounds of gender, race or ethnic origin by, among other things:

- assisting victims of discrimination in pursuing their complaints about discrimination in the light of the rights of victims, associations, organisations and other legal entities;
- conducting independent surveys concerning discrimination; and
- publishing reports and making recommendations on discrimination issues.

i) Independent assistance to victims

In Denmark, the designated body does have the competence to provide independent assistance to victims.

- Independence

The DIHR has an advice unit in the Equal Treatment Department, which is responsible for giving advice relating to individual cases of alleged discrimination. The unit is part of the DIHR, which is established by law as an independent autonomous institution within the public administration and which has the status of an NHRI. The advice unit acts as independently as the rest of the DIHR.

People can call for advice and counselling every Tuesday and Thursday from 10.00 to 12.00 and from 13.00 to 15.00, or they can send an email to the Equal Treatment Department. Employees with the Institute provide independent legal assistance to victims of alleged discrimination. This includes assistance in applying to the authorities for free legal aid in court and filing a complaint with the Board of Equal Treatment.

The DIHR can take up cases about discrimination on account of race and ethnic origin on its own initiative. Since January 2016, the DIHR has been able to bring complaints to the Board of Equal Treatment in cases regarding a matter of principle or in cases of general public interest.²¹⁰ The Institute does not necessarily act on behalf of individual victims of discrimination in these complaints. Thus, it is not a condition that the Institute must identify a victim of discrimination by name to file such complaints.²¹¹

- Effectiveness

The advice unit of the DIHR receives very few discrimination inquiries on an annual basis. In 2018, the DIHR provided advice in 9 cases of discrimination because of gender; in 8 cases of discrimination because of

²¹⁰ Denmark, Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²¹¹ Denmark, Bill No. 2015/1 LSF 28 of 8 October 2015 regarding the amendment of the Act on the Board of Equal Treatment.

race/ethnic origin; in 13 cases of discrimination because of disability; and in 5 cases of multiple discrimination.²¹² The DIHR does not engage in outreach activities vis-a-vis the general population to inform people about rights or about the assistance it provides to victims of discrimination.

Information has not been found that can clearly establish whether the reason for so few people approaching the advice unit of the DIHR is lack of knowledge about the opportunity or whether it is lack of trust. Either way, based on the very low number of inquiries, it can be questioned whether the provision of assistance to victims of discrimination is effective.

- Resources

The basic budget for equal treatment in 2018 was approximately EUR 1.5 million (DKK 11.1 million), granted from the national budget.²¹³ In 2018, as in previous years, the total budget for activities related to gender, ethnicity and disability was approximately EUR 2.15 million (approximately DKK 16 million).²¹⁴ This budget covers the expenses of the advice unit. No information could be found on the specific budget for the advice unit. According to the DIHR, the low number of individual inquiries is not due to a lack of resources within the DIHR.²¹⁵

- ii) Independent surveys and reports

In Denmark, the designated body does have the competence to conduct independent surveys and publish independent reports.

- Independence

The DIHR provides general information to the public on human rights. It conducts courses, seminars and other promotional activities. It also undertakes surveys, reports and analyses on human rights in general as well as on all grounds of discrimination. The DIHR is obliged by law to submit an annual report to the Danish Parliament on human rights in Denmark in general.²¹⁶ The DIHR also publishes more detailed status reports on the situation of human rights in Denmark with recommendations,²¹⁷ including specific reports with recommendations on the current situation of women,²¹⁸ ethnic minorities²¹⁹ and persons with disabilities in Denmark.²²⁰

Besides being a specialised body according to Directive 2000/43, the DIHR is also an 'A' accredited national human rights institution according to the UN Paris Principles. Hence, it is independent, which means that published reports and recommendations must be independent. In 2018, for example, the DIHR and the Equal Treatment Department published reports with recommendations on issues such as unregistered

²¹² Information provided by the DIHR Equal Treatment Department by email, 5 April 2019.

²¹³ Information provided by the DIHR Equal Treatment Department by email, 5 April 2019.

²¹⁴ Awaiting confirmation from the DIHR.

²¹⁵ Information provided in Skype interview with the DIHR Equal Treatment Department on 17 January 2018.

²¹⁶ Institut for Menneskerettigheder, Menneskerettigheder på Dagsordenen – Beretning 2017-2018. See <https://menneskeret.dk/udgivelser/menneskerettigheder-paa-dagsordenen-beretning-2017-18>.

²¹⁷ Institut for Menneskerettigheder, Menneskerettigheder i Danmark – Status 2016-2017. See <https://menneskeret.dk/udgivelser/status-2016-17-menneskerettigheder-danmark>.

²¹⁸ See <https://menneskeret.dk/udgivelser/koen-status-2015-16>.

²¹⁹ See <https://menneskeret.dk/udgivelser/etnisk-oprindelse-statusrapport-2015-16>.

²²⁰ See <https://menneskeret.dk/udgivelser/handicap-status-2015-16>.

migrants,²²¹ families on integration support,²²² children with disabilities and private schooling.²²³

- Effectiveness

Within some areas, the DIHR is quite effective in setting the agenda for public debate in Denmark. In 2018, this was particularly the case in the introduction of a general prohibition of discrimination based on disability and the adoption of the Act on the Prohibition of Discrimination due to Disability.

- Resources

Via the national budget, the DIHR has permanent funding for its work on equal treatment, which provides security for the Equal Treatment Department. The Equal Treatment Department has 14 employees divided between three teams centred on gender, race/ethnicity and disability. Within the teams, employees are competent to work broadly on the individual discrimination ground, i.e. conducting surveys, preparing reports and drawing up recommendations. Most of the employees have academic backgrounds in law and the social sciences. Thus, the level and quality of resources seem satisfactory.

iii) Recommendations

In Denmark, the designated body does have the competence to issue independent recommendations on discrimination issues. See above regarding independence, effectiveness and resources.

iv) Other competences

The DIHR does some promotional work for equal treatment through cooperation with key stakeholders, such as municipalities and private companies. The DIHR does not conduct specific equality campaigns. The Equal Treatment Department is not involved in primary school education, but the general human rights education provided by the DIHR in primary schools does include elements of non-discrimination and equal treatment.

Furthermore, as an example, the DIHR has introduced the Disability Barometer, which provides an ongoing state of play regarding the fulfilment of the human rights of people with disabilities.²²⁴ The Barometer covers 10 essential areas of life, including employment.

g) Legal standing of the designated body/bodies

In Denmark, the designated body only has legal standing in the following areas:

The DIHR does not have explicit legal standing to bring discrimination complaints to court. However, the DIHR may intervene in existing court cases on discrimination if a legal interest in the matter at issue can be proven. Thus, the DIHR may intervene and act as *amicus curiae* in principle cases on discrimination based on race, ethnic origin, gender or disability.

²²¹ See <https://menneskeret.dk/udgivelser/uregisterede-migranter-status-2018>.

²²² See <https://menneskeret.dk/udgivelser/familier-paa-integrationsydelse>.

²²³ See <https://menneskeret.dk/udgivelser/boern-handicap-paa-frie-grundskoler>.

²²⁴ See <https://handicapbarometer.dk/>.

Since 2016, the DIHR has acted as *amicus curiae* in six court cases.²²⁵ The cases dealt with family reunification, the right to vote for persons under legal guardianship, children's rights and citizenship. None of the cases dealt with discrimination issues covered by the material scope of the EU directives.

The DIHR can assist and provide advice to individuals or lawyers in concrete court cases.

The DIHR can also assist a complainant in bringing his or her case to the ECtHR or other international human rights bodies.

The DIHR can bring a discrimination complaint on behalf of an individual to the Board of Equal Treatment.

In 2016, the Institute was also given a mandate to bring complaints to the Board of Equal Treatment in cases that are a matter of principle or in cases that are a matter of general public interest.²²⁶ According to the preparatory work for this law, it is not a condition that the Institute can identify a victim of discrimination by name to file such complaints.²²⁷ Thus, the Institute does not necessarily act on behalf of individual victims of discrimination in such complaints. Since 2016, the DIHR has filed three principle discrimination complaints but none in 2018.²²⁸

In 2016, the DIHR made a strategic decision to strengthen its legal efforts with regard to individual cases of human rights violations. The focus on individual cases aimed at improving protection of the individual person as well as clarifying more general legal questions of human rights. Even though the DIHR has been involved in more cases for the civil courts and for the Board of Equal Treatment, it has only initiated a limited number of individual cases. Typically, lawyers working at the DIHR are not lawyers authorised to litigate in the civil court system, which may constitute a barrier for the intervention of the DIHR in such individual cases for the courts and for the Board of Equal Treatment.

h) Quasi-judicial competences

In Denmark, the DIHR is not a quasi-judicial institution but rather a specialised body to assist and advise victims of discrimination.

In Denmark, the Board of Equal Treatment is a quasi-judicial institution:

The Board of Equal Treatment is an independent complaints board established by the Act on the Board of Equal Treatment. It is a quasi-judicial institution that is limited to adjudicating individual complaints about discrimination.²²⁹ Although not officially designated as an Article 13 body, the Board considers itself as a national equality body supplementing the work of the DIHR in accordance with the EU directives. The Board is also a member of the European Network of Equality Bodies (EQUINET).²³⁰ The Board deals with individual complaints related to discrimination in the labour market based on gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin while outside the labour market the Board only deals with complaints related to discrimination based on race, ethnic origin, disability and gender.

The Board is part of the public administration and is funded by public funds. The Board's expenses include remuneration of Board members and secretarial staff as well as fees to

²²⁵ Information provided in Skype interview with the DIHR Equal Treatment Department on 17 January 2018 and in email from the DIHR Equal Treatment Department on 5 April 2019.

²²⁶ Denmark, Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²²⁷ Denmark, Bill No. 2015/1 LSF 28 of 8 October 2015 regarding the amendment of the Act on the Board of Equal Treatment.

²²⁸ Information provided in email from the DIHR Equal Treatment Department on 5 April 2019.

²²⁹ Denmark, Consolidated Act No. 1230 of 2 October 2016 on the Act on the Board of Equal Treatment.

²³⁰ See <http://www.equineteurope.org/-Denmark>.

the legal advisor to the Danish Government (the law firm Kammeradvokaten), which represents the Board in civil court cases. In December 2017, the secretariat of the Board consisted of six full-time employees, including three caseworkers, one special consultant and one chief consultant as well as one student working 15 hours a week.²³¹

The Board consists of one president and two vice-presidents, who are judges, as well as nine members, who are lawyers with specific expertise in discrimination law. The president of the Board must be a High Court judge and the vice-presidents must be city court judges. Both genders must be represented in the presidency.²³² The Board members are independent of the ministries that have nominated and appointed them. The Board members do not represent any specific political or organisational views.

In 2015, the Act on the Board of Equal Treatment was amended to clarify that the Board can only adjudicate complaints if the complainant has an individual and current interest in the case in question.²³³ Since 1 January 2016, it has not been possible for an individual to file a complaint because of the fact that he or she belongs to a group of people (based on ethnic origin, for example) who have been discriminated against. The requirement for *locus standi* has resulted in a number of cases being dismissed. One example is a case of possible discrimination due to ethnic or national origin.²³⁴ The complainant was of Danish origin and he complained about a temp agency that had a positive description and coverage of foreign labour on its website. The complainant argued that he felt slighted as a Dane because of the content on the website and thus did not apply for a position at the temp agency. The Board argued that even though the complainant was looking for a job, he had not been directly affected by the content of the website and thus did not have an individual and current interest in the case in question. The Board therefore dismissed the case. When the Board dismisses a case, it informs the DIHR about the case. This allows the DIHR to consider whether it will bring a complaint to the Board based on the case being a matter of principle or a matter of general public interest.²³⁵

The Board does not have the power to take up cases on its own initiative or to allow for oral proceedings in individual cases.

When handling a complaint, the president or a vice-president of the Board participates together with two additional members. In 2015, the Act on the Board of Equal Treatment was amended to clarify that complaints, which can be adjudicated in accordance with well-established case law, can be decided by just one member of the Board's presidency.²³⁶ In complaints concerning matters of principle, the president can decide that four additional members participate instead of two.

The Board does not hold public hearings. The decisions of the Board of Equal Treatment are legally binding and generally well respected. The Board does not have the power to follow up on individual cases to track and secure implementation of its decisions. But if a decision by the Board is not respected, and if a complainant makes a request, the Board must bring the case before the courts pursuant to Section 12 of the Act on the Board of Equal Treatment.

A decision by the Board cannot be appealed to another administrative body but may be taken to the civil courts. The time limit in the statute of limitation is suspended by the Board's decision. See Section 6.1.b) for a description of the Danish rules on limitation.

²³¹ Information provided by the Board secretariat in an email, 9 February 2018.

²³² Denmark, Consolidated Act No. 1230 of 2 October 2016.

²³³ Denmark, Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

²³⁴ Board of Equal Treatment, Decision No. 9361 of 25 April 2018.

²³⁵ Board of Equal Treatment, *Ligebehandlingsnævnets Årsberetning 2017* (Annual Report 2017), p. 28.

²³⁶ Denmark, Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

According to Section 2 of the Act of the Board of Equal Treatment, the Board has the power to award financial compensation. Outside the area of employment, for example in cases of discrimination because of ethnic origin in access to bars and discotheques, sanctions are so mild that it can be questioned whether they are sufficiently effective, proportionate and dissuasive, as required by the directives.

i) Registration by the body/bodies of complaints and decisions

In Denmark, the DIHR registers the number of requests received for advice in individual cases of possible discrimination. The number of inquiries for information on general discrimination issues is not registered by the DIHR.

The DIHR assists victims of discrimination and has a unit responsible for giving advice relating to individual cases of alleged discrimination. The DIHR's data is not generally available to the public.

In 2018, the DIHR provided advice by phone or in writing in 9 cases of discrimination because of gender, in 8 cases of discrimination because of race/ethnic origin, in 13 cases of discrimination because of disability and in 5 cases of multiple discrimination.²³⁷

In Denmark, the Board of Equal Treatment registers the number of discrimination complaints that it receives as well as the number of decisions issued. Statistics on the number of complaints and the Board's decisions could previously be found on the website of the Board of Equal Treatment. This is no longer the case and the Board's 2017 annual report is the source of the statistics below:²³⁸

Number of complaints received:

- 2013: 418
- 2014: 358
- 2015: 317
- 2016: 396
- 2017: 294

Number of decisions made:

- 2013: 263
- 2014: 225
- 2015: 236
- 2016: 252
- 2017: 240

Decisions regarding race and ethnic origin:

- 2013: 36
- 2014: 37
- 2015: 22
- 2016: 25
- 2017: 44

Decisions regarding age and disability:

- 2013: 78
- 2014: 71
- 2015: 127

²³⁷ Information provided by the DIHR Equal Treatment Department in an email, 5 April 2019.

²³⁸ Board of Equal Treatment, *Ligebehandlingsnævnets Årsberetning 2017* (Annual Report 2017), pp. 36-40.

- 2016: 94
- 2017: 84

Decisions regarding multiple discrimination and other cases:

- 2013: 20
- 2014: 10
- 2015: 15
- 2016: 18
- 2017: 11

j) Stakeholder engagement

In Denmark, the designated body does engage with stakeholders as part of implementing its mandate. The architecture of the DIHR provides for some stakeholder engagement. The Danish Council for Human Rights consists of a large number of civil society organisations, public authorities, public bodies, members of Parliament, trade unions, etc. The Council meets four times a year to discuss the work of the DIHR. Members of the Council are largely appointed to reflect the attitudes of civil society organisations working with human rights in Denmark.

Furthermore, the Danish Council for Human Rights has established an Equality Committee (*Ligebehandlingsudvalg*). Members of the Equality Committee are primarily NGOs and are selected from among the members of the Danish Council for Human Rights as well as other organisations working on equality issues. The committee has an advisory function to the DIHR and aims to contribute to the promotion of equality and to the prevention of discrimination in Denmark. Furthermore, the committee works to strengthen cooperation between civil society organisations and the DIHR.

All DIHR departments have an ongoing dialogue with parliamentarians, the Government and other relevant local and national public authorities.²³⁹

Both the Council for Human Rights and the Equality Committee meet only four times a year. Both agencies have a large number of members. It is difficult to assess whether these structures provide effective stakeholder engagement. The daily and ongoing stakeholder engagement, which is part of the everyday work at the DIHR seems more effective.

k) Roma and Travellers

The DIHR does not treat Roma and Travellers as a priority issue.

²³⁹ Information provided in Skype interview with the DIHR Equal Treatment Department on 17 January 2018.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

In theory, the Ministry of Foreigners and Integration works to promote the integration and equal treatment of ethnic minorities in Denmark. However, no information on discrimination is found on the ministry's website. Instead, the website has a picture of a tracker counting the number of times rules on foreigners and immigrants have been tightened by the current Government (on 5 April 2019, the Government had tightened such rules 112 times).²⁴⁰ The Ministry for Children and Social Affairs has an office that coordinates efforts and initiatives within the disability area.²⁴¹

The DIHR serves as a specialised equality body, disseminating information about discrimination and equal treatment. In its annual reports, the DIHR deals with selected human rights issues and provides recommendations to promote the protection of general human rights in Denmark.²⁴² The latest status reports on the issues of race and disability are from June 2016. In these reports, the DIHR describes how Denmark faces a number of challenges in terms of implementing the principle of equal treatment and non-discrimination when it comes to race and ethnic origin, including the high number of ethnic minorities in Denmark who experience discrimination and the large salary gap between non-Western immigrants and ethnic Danes.²⁴³ Furthermore, in the status report on disability, the DIHR describes challenges around accessibility, legal capacity, reasonable accommodation in the labour market as well as the lack of a prohibition of discrimination outside the labour market.²⁴⁴

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

Apart from the general work of the DIHR, no recent actions have taken place when it comes to measures to encourage dialogue with NGOs.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

No recent actions have taken place when it comes to measures to promote dialogue between social partners.

- d) Addressing the situation of Roma and Travellers

There is no specific body to address current Roma issues in Denmark. The Roma and Travellers population in Denmark consists of around 2 000 individuals and no current general information has been found about the situation of Roma in Denmark. There are restrictions on data collection based on ethnicity in Danish law. However, it is unclear whether this or other issues like policies or funding constitute the reason(s) for the lack of knowledge, including lack of knowledge about the experience of discrimination. In December 2011, the Danish Government presented its National Roma Inclusion Strategy

²⁴⁰ See <http://uim.dk/>.

²⁴¹ See <http://socialministeriet.dk/arbejdsmraader/handicap/>.

²⁴² DIHR, Menneskerettigheder på Dagsordenen – Beretning 2017-2018. See <https://menneskeret.dk/udgivelser/menneskerettigheder-paa-dagsordenen-beretning-2017-18>.

²⁴³ See <https://menneskeret.dk/udgivelser/etnisk-oprindelse-statusrapport-2015-16>.

²⁴⁴ See <https://menneskeret.dk/udgivelser/handicap-status-2015-16>.

to the European Commission.²⁴⁵ In the spring of 2014, the European Commission adopted its assessment on the progress made in the implementation of the Danish National Roma Inclusion Strategy in four key areas of education, employment, healthcare and housing as well as in the fight against discrimination and the use of funding.²⁴⁶ In general, the European Commission recommends monitoring of the different policies. Awareness-raising campaigns to tackle anti-Roma prejudice and stereotyping of Roma should also be carried out, according to the European Commission. No updates have been found with regard to the situation of Roma and Travellers in Denmark in 2018.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

The rules of *lex specialis* and *lex posterior* apply as part of Danish law.

Moreover, it is a general principle of Danish anti-discrimination law as well as most employment law that a person cannot sign away or agree to be placed in a less favourable position than that prescribed by law. A person cannot waive his or her right not to be subjected to discrimination through a contract or agreement with his or her employer.

b) Rules contrary to the principle of equality

A general non-discrimination assessment of all relevant legislation has never been implemented in Denmark. However, to the knowledge of the author there are no laws in direct conflict with the principle of equality.

²⁴⁵ See http://ec.europa.eu/justice/discrimination/files/roma_denmark_strategy_en.pdf.

²⁴⁶ National Strategy for Roma Integration – Denmark: http://ec.europa.eu/justice/discrimination/roma-integration/denmark/national-strategy/national_en.htm.

9 COORDINATION AT NATIONAL LEVEL

The Ministry of Employment is responsible for issues of discrimination in the labour market.²⁴⁷

The Ministry of Foreigners and Integration is responsible for integration issues.²⁴⁸ It is not clear from the ministry's website what kind of efforts the ministry will make to protect genuine ethnic equality and non-discrimination.

The Ministry for Children and Social Affairs has an office that coordinates efforts and initiatives within the disability area.²⁴⁹ In August 2018, more than 60 Danish disability organisations wrote a letter to the Minister of Children and Social Affairs urging the minister to prepare a comprehensive action plan on disability.²⁵⁰

No recent national action plan on anti-discrimination has been published.

²⁴⁷ See <https://bm.dk/>.

²⁴⁸ See <http://uim.dk/>.

²⁴⁹ See <http://socialministeriet.dk/arbejdsmraader/handicap/>.

²⁵⁰ See <https://menneskeret.dk/nyheder/organisationer-faelles-opraab-regeringen-danmark-mangler-handicappolitisk-handlingsplan>.

10 CURRENT BEST PRACTICES

Status reports and annual reports prepared for the Danish Parliament by the DIHR document discrimination and provide recommendations to promote the protection of human rights and equality rights in Denmark.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

- Possible indirect discrimination based on ethnic origin and race

No ghettos in Denmark by 2030!

As described in Section 3.2.10 (Housing), a number of laws were adopted in 2018 to prevent and dismantle so-called ghettos and parallel societies in Denmark. The new legislation affects primarily ethnic minorities and raises legitimate questions of possible illegal indirect discrimination because of ethnic origin within the areas of housing, education and social services.

Overall, the acts include strict requirements that refugees, immigrants and descendants from non-Western countries assimilate into Danish society, including adapting to Danish traditions, norms and values. The bills send very strong negative signals that everything about the so-called ghettos and marginalised residential areas is bad and sad.

Discrimination against homeless unregistered migrants

In recent years, there has been an intense public debate regarding the presence of homeless foreign nationals in public spaces in Denmark. In response to these public order issues, the Danish Government and the Danish Parliament adopted a range of legislative initiatives in 2017 and 2018. As described by the DIHR, the initiatives are specifically aimed at homeless foreign nationals.²⁵¹

A ban has been introduced on establishing or residing in camps that disrupt public order.²⁵² Homeless people, who, according to the police, have established or resided in a camp that disrupts public order, may be sentenced to fines or imprisonment for up to 18 months. Homeless people who are sentenced for contravening this ban – including the first time they commit this offence – may be banned from residing in a given area for up to two years. The given area may comprise an entire municipality and the ban is known as a zonal ban.

Furthermore, tougher sanctions for begging on pedestrian streets, in front of railway stations, in front of or inside supermarkets or on public transport have been introduced. People convicted of begging at these locations may now receive 14 days' imprisonment for a first offence.

In the public debate leading to the legislative changes, both parliamentarians and cabinet ministers referred to the problematic camps of homeless people as 'Roma camps'. It is apparent from the debate in public and in the Parliament that the measures adopted are targeted at homeless foreign nationals. However, all of the measures are formulated in neutral terms and apply to any person who contravenes any of the various prohibitions.

There is no current proof that the police are enforcing the new regulations in a discriminatory manner. However, as described by the DIHR, statistics from the Ministry of

²⁵¹ Kjørboe, E. (2018), *Uregistrerede Migranter – Status 2018*, Institut for Menneskerettigheder. See <https://menneskeret.dk/udgivelser/uregistrerede-migranter-status-2018>.

²⁵² Bekendtgørelse nr. 305 af 31. marts 2017 om ændring af bekendtgørelse om politiets sikring af den offentlige orden og beskyttelse af enkeltpersoners og den offentlige sikkerhed mv., samt politiets adgang til at iværksætte midlertidige foranstaltninger.
Lov nr. 131 af 27. februar 2018 om ændring af lov om politiets virksomhed (Udvidet bemyndigelse til at fastsætte regler om zoneforbud).
Bekendtgørelse nr. 427 af 7. maj 2018 om ændring af bekendtgørelse om politiets sikring af den offentlige orden og beskyttelse af enkeltpersoners og den offentlige sikkerhed mv., samt politiets adgang til at iværksætte midlertidige foranstaltninger.

Justice imply that there may be serious issues of discrimination because of ethnic origin in the application of the new rules criminalising homelessness in Denmark.²⁵³

- Sanctions

Outside the area of employment, in the cases relating to bars and discotheques, for example, sanctions are so mild that it can be questioned whether they are sufficiently effective, proportionate and dissuasive, as required by the directives.

- Specialised equality body

The DIHR serves as a specialised equality body. In general, the DIHR is more focused on impacting decision makers and civil society than educating the general Danish population about human rights and non-discrimination. The DIHR does not engage in outreach activities and, with regard to the equality body mandate, there is no focused effort to inform the public about the possibility of getting legal advice on discrimination cases. The obligation set out in the EU directive and the Danish legislation to provide assistance to victims of discrimination does not seem to be a priority. The low number of discrimination inquiries (the DIHR provided advice in 8 cases of discrimination because of race/ethnic origin and in 13 cases of discrimination because of disability) illustrate that, for possible victims of discrimination, the DIHR either appears invisible or there is no confidence that approaching the DIHR will help. No information has been found as to whether the DIHR collaborates with the citizen advice service. With regard to the Board of Equal Treatment, the DIHR has the authority to bring complaints in cases that are a matter of principle or of general public interest.

11.2 Other issues of concern

Denmark faces challenges and barriers for minorities to take part in society on an equal footing. Research should be undertaken to examine institutional barriers that prevent minorities from gaining access to the labour market and obtaining jobs that match their education.

In Denmark, 43 % of immigrants and their descendants experienced discrimination because of their ethnic origin in 2016.²⁵⁴ There is a profound lack of recognition that such discrimination takes place in Danish society. Also, there is a serious lack of statistics and general research on discrimination. With the increasing xenophobia in Denmark, this information becomes even more relevant. Equality and non-discrimination efforts do not seem to be a high priority for the Danish Government. On the contrary, the Ministry of Foreigners and Integration boasts about the number of times that the Government has tightened various rules on foreigners and immigrants by having a picture on its website of a tracker counting the number of restrictions.²⁵⁵

Monitoring case law in Danish courts is severely hindered due to a lack of free public access to case law. All judgments handed down by the Supreme Court and a few selected cases from the High Courts and city courts are posted on the internet. Cases not posted can be obtained from the courts by paying a fee. Case law in the court systems, however, is sorted without reference to the legislation applied. A complete list of case law concerning specific legislation is not available through public registers. It is possible to subscribe to an expensive private database (the *Weekly Law Journal*), which contains all Supreme Court cases and select High Court cases. City court cases are only rarely published. This lack of

²⁵³ Kjørboe, E. (2018), *Uregistrerede Migranter – Status 2018*, Institut for Menneskerettigheder. See <https://menneskeret.dk/udgivelser/uregistrerede-migranter-status-2018>.

²⁵⁴ Institut for Menneskerettigheder, *Menneskerettigheder på Dagsordenen – Beretning 2017-2018*, p. 18. See <https://menneskeret.dk/udgivelser/menneskerettigheder-paa-dagsordenen-beretning-2017-18>.

²⁵⁵ See <http://uim.dk/>.

access to case law constitutes a problem, especially for monitoring discrimination cases, in particular city court cases, which are rarely appealed and therefore often remain unknown.

With regard to the Board of Equal Treatment, a number of issues should be raised:

- Although there has been a general rise in the number of complaints to the Board since the Board was established in 2009, the visibility of the Board among possible victims of discrimination is still relatively low. This is especially the case for ethnic minority groups and people with disabilities.
- It is not possible to present a complaint to the Board in person. Complaints have to be submitted in writing.
- The Board of Equal Treatment does not have a mandate to take up cases on its own initiative.
- The Board of Equal Treatment cannot force the parties to disclose material, produce documents, give their opinion or reveal the factual circumstances of a case in order to elucidate a case.
- The Board of Equal Treatment is not empowered to hear oral testimonies.
- Based on the CJEU ruling in *Jyske Finans*,²⁵⁶ the Board of Equal Treatment has re-opened previous decisions, which might constitute a new negative trend.²⁵⁷

Within the DIHR, there seems to be a worrying pragmatism when it comes to human rights in general. As described in Section 7(b), a statement by the DIHR Executive Director Jonas Christoffersen on the need to restrict some human rights to obtain broader public support for the European Convention on Human Rights is surprising.²⁵⁸

There are few NGOs and legal aid/citizen advice offices assisting victims of discrimination in filing complaints and initiating court proceedings. Only very few NGOs specialise in providing legal aid to victims of discrimination.

In more concrete terms, a number of disturbing anti-foreigner legislative initiatives came through in 2018. The anti-ghetto and anti-homeless initiatives and laws were described above. Other initiatives will be described in the following:

Adoption of burqa ban

The Danish Parliament amended the Penal Code on 31 May 2018 and made it a crime to wear face coverings in public.²⁵⁹ The prohibition entered into force on 1 August 2018. The preparatory work states that the following garments will be illegal in the public sphere if they cover the face: hats, hoods, scarves including burqas and niqabs, masks, helmets, artificial beards.²⁶⁰ Wearing a hijab in public is not prohibited.

According to the preparatory work, the aim of the prohibition is to demonstrate that it is incompatible with Danish values and social cohesion in Danish society to have the face covered in the public sphere. The fine for the first violation of the prohibition is EUR 134 (DKK 1 000). The fine will increase in the event of further violations.

In spite of its neutral language, the legal provision is adopted to target Muslim women wearing burqas and niqabs. In reality, it is a political act sending a signal to ethnic minorities in general and Muslims in particular that they have to assimilate into Danish society. Similar burqa bans have previously been suggested but failed to obtain approval.

²⁵⁶ Judgment of 6 April 2017, *Jyske Finans*, C-668/15.

²⁵⁷ See for example Board of Equal Treatment, Decision No. 9559 of 21 June 2018.

²⁵⁸ Altinget, 10 år som direktør for Institut for Menneskerettigheder: Vi er blevet mere pragmatiske og mindre idealistiske (21 January 2019).

²⁵⁹ Denmark, Bill No. L 219 on Act amending the Penal Code (prohibition of face covering) adopted on 31 May 2018.

²⁶⁰ Denmark, Bill No. L 219 on Act amending the Penal Code (prohibition of face covering) adopted on 31 May 2018.

The adoption of this amendment to the Penal Code can be seen as one consequence of increasing nationalistic and anti-foreigner sentiment in Denmark.

The prohibition constitutes indirect discrimination based on religion or ethnic origin.²⁶¹ The practical result will most likely be that Muslim women will be prevented from moving around in the public sphere. The EU anti-discrimination directives do not include the prohibition of face covering in the public sphere. However, the prohibition is important for the general situation of ethnic minorities, and Muslim women in particular, in Denmark.

Handshake as requirement for Danish citizenship

In June 2018, the Danish Government entered into a political agreement with the Danish People's Party and the Social Democratic Party regarding naturalisation. The parties agreed that, in addition to passing a naturalisation test and fulfilling a number of financial and residential requirements, obtaining Danish citizenship should be determined by participation in a municipal ceremony.

On that basis, the Danish Parliament adopted Bill No. L80 on 20 December 2018. The new rules require that individuals who have been awarded Danish citizenship by law must also take part in ceremonies in their local municipalities. At the ceremonies, the individuals are required to sign a document to demonstrate that they will respect Danish laws and values. They are also required to behave respectfully towards the mayor or other public authority representatives. The Act authorises the Minister of Immigration and Integration to establish more detailed rules for holding the ceremonies. According to the preparatory work for the Bill, respectful behaviour at the ceremony is considered to include shaking the hand of the mayor or other public authority representatives. In the preparatory work, the handshake is described as follows:

'[...] during the ceremony, representatives from the municipality meet face-to-face with the participants and exchange handshakes with the participants, without gloves, palm against palm, to celebrate and clearly mark the moment in the participants' lives where they become Danish citizens.' (own translation)²⁶²

If an individual does not live up to these ceremonial requirements, he or she will lose the right to become a Danish citizen.

A minority of Jews and Muslims in Denmark believe that it is against their religion to shake hands with a representative of the public authorities, in particular if the representative is of the opposite gender.

In all probability, the gender of the individual mayor or the representative of the public authorities will determine whether participants at the naturalisation ceremonies will obtain Danish citizenship or not. This is the case for participants who believe that it is against their religion to shake hands with a person of the opposite gender.

On that basis, the handshake requirement may constitute indirect discrimination because of religion, and possibly multiple discrimination based on religion and gender.

More specifically, the handshake requirement may constitute a violation of Article 9 of the European Convention on Human Rights, which deals with freedom of religion and/or a violation of the prohibition of discrimination as outlined in Article 14 of the European Convention on Human Rights, cf. Articles 8 and 9.²⁶³

²⁶¹ In Denmark, case law on religious headscarves has been adjudicated as possible indirect discrimination because of ethnic origin. Most Muslims in Denmark are ethnic minorities.

²⁶² Denmark, Bill No. L80 of 25 October 2018, Section 2.2.2, p. 5.

²⁶³ See <https://menneskeret.dk/monitorering/hoeringssvar> for hearing statement from the DIHR:

Overall, the Act is an illustration of moralising tokenism. For the individual who risks not obtaining Danish citizenship, the consequences can, however, be of tremendous importance.

- Høring over udkast til lovforslag til lov om ændring af lov om dansk indfødsret og lov om danskuddannelse til voksne udlændinge m.fl. (5 October 2018).

12 LATEST DEVELOPMENTS IN 2018

12.1 Legislative amendments

The Danish Parliament adopted a new act prohibiting direct and indirect discrimination because of disability in all spheres of Danish society. The Act on the Prohibition of Discrimination due to Disability entered into force on 1 July 2018.²⁶⁴

The Act expands the protection against discrimination on the ground of disability, which previously was only covered in the labour market. The Act applies to all public and private activities in all areas of society except for areas that are covered by the Act on the Prohibition of Discrimination in the Labour Market etc. and except for activities that are of a purely private nature. The aim of the Act is to provide the same protection against discrimination for people with disabilities as is currently the case for the protected grounds of race, ethnic origin and gender. Although the Danish ratification of the UNCPRD was mentioned in the preparatory work, the implementation of the convention did not seem to be the primary aim of the new law.

The prohibition of discrimination in the Act is defined in accordance with EU law. There is no definition of disability in the Act. The concept is to be understood in accordance with the disability concept in the Act on the Prohibition of Discrimination in the Labour Market etc., which has been developed by case law in accordance with EU law.

The Act does not include an obligation to provide reasonable accommodation and accessibility.

The Act defines discrimination by association as illegal discrimination in accordance with EU law. It also prohibits victimisation in accordance with EU law and establishes a shared burden of proof in accordance with EU law.

Individuals who experience discrimination because of disability may file a complaint with the Board of Equal Treatment. The Board can issue financial compensation to victims of discrimination because of disability.

12.2 Case law

Race, ethnic and national origin

Name of the court: Board of Equal Treatment

Date of decision: 11 January 2018

Reference number: Decision No. 9077

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=198666>

Brief summary: The case dealt with a pedagogue of Turkish origin who had worked in the same nursery school for nearly five years. A new child with a hearing impairment was assigned to the room where the pedagogue worked. Shortly after the child started, his parents complained to the manager about the pedagogue's lack of correct Danish. The pedagogue was not informed about the complaints and about the accommodations that the manager initiated to deal with the criticism from the parents. Among other things, the manager had told the parents about the pedagogue's working hours, with the result that the parents picked up their child right before the pedagogue was going to be the only pedagogue in the room. The pedagogue only heard about these things from other colleagues. Half a year after the child had started in the nursery school, the pedagogue went on sick leave. While she was off sick, the manager decided to move her to another room to limit her daily confrontations with the parents. The pedagogue did not agree with

²⁶⁴ Denmark, Act No. 688 of 8 June 2018 (*Lov om forbud mod forskelsbehandling på grund af handicap*).

the move and ended up being dismissed because of sickness absence. She filed a complaint with the Board of Equal Treatment and argued that her manager had accommodated the wishes of the parents instead of protecting her as an employee. She argued that the constant criticism from the parents and lack of support from her manager had resulted in insecurity, stress and depression. She claimed that she had been harassed because of her ethnic origin. She did not claim discrimination due to disability. The Board explained that harassment within the labour market is deemed to be discrimination when conduct related to ethnic origin (like complaining that a person does not speak correct Danish) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person concerned. The Board also underlined that the employer or manager is obliged to protect employees against harassment, including harassment committed by other employees or customers. The Board stated that the complainant's sickness, which led to her dismissal, was a result of the conflict with the parents as well as her experience of not being supported by her manager. On that basis, the Board concluded that the manager had not done enough to secure a working environment without harassment for the pedagogue. Thus, the manager could not prove that the principle of equal treatment had not been violated and the complainant received compensation corresponding to nine months' salary due to the discrimination because of ethnic origin.

Name of the court: Board of Equal Treatment

Date of decision: 7 February 2018

Reference number: Decision No. 9170

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=200240>

Brief summary: The case dealt with a woman of Philippine origin who was dismissed from her position as a nursery assistant. She had worked in the day care centre for one and a half years. The day care centre was a 'multicultural' institution and both Danish and English were used when employees were together with the children. The dismissal of the nursery assistant was due to a decision that the institution made to hire employees who were either educated as pedagogues or who spoke fluent Danish or English. The employer specifically stated that it was the lack of Danish language abilities that was the reason for the dismissal of the nursery assistant. On that basis, the Board stated that the nursery assistant had established facts that possible indirect discrimination because of national origin had taken place. The Board found that the language requirement was objectively justified by the linguistic development of the children. However, after the dismissal of the nursery assistant, the day care centre hired a new employee who was not a pedagogue and who did not speak Danish. Furthermore, the day care centre had not documented that the nursery assistant could not continue in her position speaking English with the children. Thus, the Board concluded that the dismissal was not appropriate and necessary. The nursery assistant was awarded compensation amounting to nine months' salary.

Name of the court: Board of Equal Treatment

Date of decision: 25 April 2018

Reference number: Decision No. 9361

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=201537>

Brief summary: In this case, the complainant was of Danish origin. He complained about a temp agency that had a positive description and coverage of foreign labour on its website. The complainant argued that he felt slighted as a Dane because of the content on the website and thus did not apply for a position at the temp agency. He argued that discrimination due to ethnic or national origin had taken place. The Board argued that even though the complainant was looking for a job, he had not been directly affected by the content of the website and thus did not have an individual and current interest in the case in question. The Board therefore dismissed the case.

Name of the court: Board of Equal Treatment

Date of decision: 21 June 2018
Reference number: Decision No. 9559
Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=202423>

Brief summary: In 2018, based on the CJEU ruling in *Jyske Finans*,²⁶⁵ the Board of Equal Treatment reopened a case from 2014.²⁶⁶ The case dealt with a car loan and whether it was legitimate to request additional documentation from a Danish citizen and loan applicant who was born outside the EU/EFTA. Based on the CJEU ruling, the Board repealed its previous decision and concluded that the request for additional identification did not constitute discrimination based on ethnic origin.

Name of the court: Board of Equal Treatment

Date of decision: 9 August 2018

Reference number: Decision No. 9730

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=202963>

Brief summary: The case dealt with a complainant who had Spanish as his first language. Among other issues, his complaint dealt with a job advertisement for an exam supervisor position. It was a requirement in the job advertisement that applicants would be fluent in spoken and written Danish. The Board found that the employer had not provided information about the necessity of this language requirement. The Board described the tasks of an exam supervisor as someone who primarily needs to keep silence and order during exams, and, according to the Board, a Danish language requirement was not necessary to perform this job. The language requirement therefore constituted indirect discrimination based on national origin.

Name of the court: Eastern High Court

Date of decision: 17 September 2018

Reference number: Case No. B-1860-17

Brief summary: The case dealt with two young men of ethnic minority background. They were refused access to both a nightclub and a café. They received no explanation for the refusal and they could observe that several individuals of Danish origin were admitted to the nightclub and the café. For the courts, the nightclub and the café argued that the young men had been drunk. An independent witness explained for the courts that she did not experience the two men to be drunk. According to the city court and the High Court, the nightclub and the café had not documented that the men were drunk. The High Court upheld the ruling of the city court and thus concluded that the two men had experienced discrimination because of ethnic origin in violation of Section 3 of the Act on Ethnic Equal Treatment. The two men were awarded compensation of EUR 670 (DKK 5 000).

Name of the court: Board of Equal Treatment

Date of decision: 12 October 2018

Reference number: Decision No. 9902

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203678>

Brief summary: In this case, the complainant had a foreign-sounding name and had made a written offer for two used cars. When the seller responded to the offers, the seller called the complainant a 'Paki'. Furthermore, he stated that he only sold cars to the 'white side'. The Board found that the seller had harassed the complainant based on ethnic origin, which constituted discrimination. The complainant was awarded compensation of EUR 670 (DKK 5 000).

Name of the court: Board of Equal Treatment

Date of decision: 12 October 2018

Reference number: Decision No. 9901

²⁶⁵ Judgment of 6 April 2017, *Jyske Finans*, C-668/15.

²⁶⁶ Board of Equal Treatment, Case No. 2013-6811-61300 of 29 April 2014.

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203677>

Brief summary: In this case, the complainant had a foreign-sounding name. The complainant and a tradesman had discussions about payment for some work on the complainant's floors in email correspondence. In emails, the tradesman called the complainant a 'banana picker'. He also wrote that 'in this part of the world', it is not a matter of 'bazaars' or 'rice markets'. The Board found that the tradesman had harassed the complainant based on ethnic origin, which constituted discrimination. The complainant was awarded compensation of EUR 670 (DKK 5 000).

Disability

Name of the court: Board of Equal Treatment

Date of decision: 7 February 2018

Reference number: Decision No. 9167

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=200237>

Brief summary: The complainant was a childminder who was dismissed from her job because of protracted illness. She had had anorexia for many years and had been able to work without accommodations until she went on sick leave owing to depression. The Board did not find that the anorexia caused a limitation on the childminder's ability to work and thus concluded that it did not constitute a disability. With regard to the depression, the Board argued that her depression had caused fatigue and weight loss as well as months of absence from work. However, based on information from doctors and psychologists, the health of the childminder was improving and at the time of the dismissal, she had informed her employer that she was ready to start working again. On that basis, the Board concluded that at the time of the dismissal, the childminder had not experienced such limitations because of her depression that she had a disability covered by the anti-discrimination legislation.

Name of the court: Board of Equal Treatment

Date of decision: 21 June 2018

Reference number: Decision No. 9560

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=202424>

Brief summary: The case dealt with a woman who was dismissed from her job as a teacher due to the employer's need for cost reductions. The complainant had a flex-job with reduced working hours in a school providing education for adults. The teacher was a wheelchair user and the employer made the decision to dismiss her while she was on maternity leave. She claimed that she had been discriminated against based on both her gender and her disability. The Board assessed the claims of gender discrimination and disability discrimination separately, almost as if two different cases existed. With regard to gender, the Board found that the decision to dismiss was made during the teacher's maternity leave and the employer had not submitted any proof that the teacher's absence had not influenced this decision. With regard to disability, the employer had told the teacher that she was considered to be the least flexible with regard to teaching in locations other than the school in that many of these places were inaccessible. The school had not provided information about the need for flexibility and thus had not proved that the dismissal was objective and proportional. The Board thus concluded that the teacher had been indirectly discriminated against because of both her gender and her disability. The teacher was awarded compensation corresponding to 12 months' salary.

Name of the court: Board of Equal Treatment

Date of decision: 19 September 2018

Reference number: Decision No. 9848

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203441>

Brief summary: The case dealt with a finance assistant who needed rest and reduced screen time after a head trauma. Because of her concentration difficulty, she also needed to be able to focus on one thing at a time. The assistant worked part-time due to illness. After 10 months she was dismissed. During the time that the assistant had been ill and was working part-time, she had increased her working hours to 15 hours a week and the prognosis for her working full-time again was estimated to be 18 months. On that basis, the Board did not find that the impairment was a long-term impairment. Thus, the Board concluded that the finance assistant did not have a disability at the time of dismissal.

Name of the court: Board of Equal Treatment

Date of decision: 26 September 2018

Reference number: Decision No. 9824

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203407>

Summary: In this case, the complainant had been absent from her job as a prison officer for around two years because of illness. Her various health issues were all related to a previous traffic accident. She was dismissed from her job and she claimed that she had been discriminated against based on her disabilities. The Board found that the woman had a disability, which the employer knew about. The employer therefore had to prove that the duty to provide reasonable accommodations had been fulfilled. Based on statements from doctors and a special Board of Health, the Board found that it was not possible for the woman to perform her job as a prison officer. The Board concluded that it had been proven that the woman was no longer competent, capable and available to perform the most important functions of her position as a prison officer. Thus, discrimination had not taken place.

Name of the court: Board of Equal Treatment

Date of decision: 10 October 2018

Reference number: Decision No. 9892

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203668>

Brief summary: The complainant had received a diagnosis of primary progressive sclerosis a couple of months before she was dismissed from her position as a family counsellor in a local municipality. Apart from progressive problems with her walk, she had not been experiencing symptoms of her sclerosis when she was dismissed. She was working full-time; she had not been in need of accommodations and had not been absent from work because of her illness. On that basis, the Board found that the woman had not experienced limitations because of her illness and concluded that she did not have a disability.

Name of the court: Board of Equal Treatment

Date of decision: 10 October 2018

Reference number: Decision No. 9894 and Decision No. 9896

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203670> and

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203672>

Brief summary: Two similar cases dealt with young men who applied for plumbing apprenticeships. In both cases, the applicants were deaf or hard of hearing and their applications were rejected. In the rejections, the employers referred to issues of communication and safety as well as the capacity of the respective company. In other words, the employers argued that it would be too difficult to have an employee who was deaf or hard of hearing. The Board stated that the employers had to prove that the duty to provide reasonable accommodations was fulfilled. The Board found in both cases that the employers had not looked into whether the young men would have been able to perform their duties as plumbing apprentices with reasonable accommodations, for example in the form of changed work patterns or division of tasks. The employers also had not looked into the possibilities of obtaining help from public authorities. Thus, the

employers had not proven that it would be a disproportionate burden to hire the young men. Both young men were awarded compensation of EUR 1 675 (DKK 12 500).

Name of the court: Eastern High Court

Date of decision: 12 October 2018

Reference number: Case No. B-2847-16

Brief summary: This case dealt with a service engineer working with fire prevention who experienced impairments due to his involvement in a traffic accident.²⁶⁷ After a period of sick leave, the service engineer worked reduced hours. He was no longer able to perform certain tasks, and the employer did not find it feasible to ask colleagues to perform these tasks. The service engineer was therefore dismissed. The High Court found that the impairment at the time of the dismissal had not been of a long-term duration. It was therefore necessary for the Court to evaluate the future prognosis to be able to decide whether the service engineer's impairments after the accident constituted a long-term impairment. Based on a comprehensive evaluation of the medical information in the case, the Court found that the prognosis did not support the claim that the service engineer had a long-term impairment. The Court thus concluded that the service engineer did not have a disability.

Name of the court: Board of Equal Treatment

Date of decision: 30 October 2018

Reference number: Decision No. 9736

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=202969>

Brief summary: This case dealt with a complaint from a woman who had been dismissed from her job as a kitchen assistant in November 2016. Because of surgery and treatment for breast cancer in 2011, she continued to experience severe pain in the left side of her body. It was particularly difficult for the kitchen assistant to lift heavy weights. When she started working in 2012 after the cancer treatment, the local municipality granted her a personal assistant for 12 hours every week. At the time of dismissal, she had a personal assistant for four hours a week. Because of her pain, the complainant continued to sleep badly at night, and it was difficult for her to get to work in the early mornings. For several years, the complainant had performed her job by doing nightshifts. However, in 2016 the employer changed the employees' duty rosters due to a restructuring of the company. This meant that the kitchen assistant would have had to work at different hours during the day, including morning shifts. The complainant could not accept the changes and was dismissed from her position. Based on medical information and the fact that the complainant had been granted a personal assistant, the Board found that she had a disability covered by the anti-discrimination legislation. The Board also found that the employer had not looked into and evaluated the possibility of adjusting the duty roster according to the kitchen assistant's need for night shifts. The Board therefore concluded that the employer had not fulfilled his duty to provide reasonable accommodation. The kitchen assistant was awarded compensation amounting to nine months' salary.

Age

Name of the court: Board of Equal Treatment

Date of decision: 11 January 2018

Reference number: Decision No. 9083

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=198672>

Brief summary: In this case, an engineer claimed that he had been discriminated against based on his age because he did not receive retirement benefits according to an occupational pension scheme like most of his colleagues. The engineer had been employed for four and a half years. While employed, he had not expressed dissatisfaction with his

²⁶⁷ Eastern High Court judgment of 12 October 2018, Case No. B-2847-16.

salary and the lack of payment of retirement benefits. It was not until two years after his departure from the job that the engineer told his previous employer that he found it unwarranted that he had not earned retirement benefits while employed. The Board found that the engineer had acted passively and decided in favour of the employer.

Name of the court: Board of Equal Treatment

Date of decision: 17 January 2018

Reference number: Decision No. 9086

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=198675>

Brief summary: The case dealt with a woman who applied for a job as a content marketing manager. The job applicant was born in 1963 and she received a rejection to her application in a video clip. In the video clip, the employer stated that the woman was among a group of older job applicants. The employer also said that, among other things, the rejection was based on her lack of adaptability. On that basis, the Board found that the complainant had established the necessary facts of possible age discrimination. The Board, however, did not decide in favour of the woman. Based on the employer's information about the position and the employer's evaluation of the complainant's qualifications compared to other applicants (including the applicant who was hired for the job), the Board found that the employer had proven that discrimination had not taken place.

Name of the court: Board of Equal Treatment

Date of decision: 7 February 2018

Reference number: Decision No. 9168

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=200238>

Brief summary: The case dealt with a teacher who was born in 1956 and who was among five dismissed schoolteachers. The dismissed teachers all belonged to the oldest or second-oldest age group at the school. The employer could not prove that the teacher's age had been insignificant to the dismissal and the Board therefore concluded that discrimination had taken place. The teacher was awarded compensation amounting to nine months' salary.

Name of the court: Board of Equal Treatment

Date of decision: 7 March 2018

Reference number: Decision No. 9254

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=200768>

Brief summary: The case dealt with an unpaid volunteer who was a lieutenant in the Danish Home Guard. When he turned 65, he lost his rank as lieutenant and he became a soldier of the lowest rank. As a test case, the Board adjudicated the question of whether volunteerism was covered by the anti-discrimination law. The majority of the Board members referred to the circumstances of the case, including the fact that, although unpaid, the lieutenant was obliged to perform a number of duties and that he had contributed 800 hours a year to the Danish Home Guard. On that basis, the Board concluded that the complaint was covered by the Act on the Prohibition of Discrimination in the Labour Market etc. However, the Board argued that the complainant was covered by Executive Order No. 350 of 30 March 2012 exempting military personnel from the prohibition of discrimination on account of age and disability and therefore did not decide in favour of the complainant.

Name of the court: Maritime and Commercial Court

Date of decision: 28 June 2018

Reference number: Case No. F-5-17

Brief summary: This case dealt with an office worker who had a flex-job with reduced working hours and whose employer received financial compensation from the local

municipality according to the flex-job legislation.²⁶⁸ The office worker was dismissed from his position when he reached the state pension age. Among other things, he argued that he had been discriminated against based on his age. The Court stated that, according to the law, flex-job arrangements expire when an employee reaches the retirement age. The question for the Court was whether the automatic termination of a flex-job arrangement would entitle an employer to dismiss an employee? Or whether such dismissal constituted discrimination based on age? The Court referred directly to Article 6(1) of the Employment Equality Directive and concluded that it did not find reasons to set aside the assessment of the Danish Parliament, which had not found reason to amend the flex-job legislation when implementing the Employment Equality Directive. The dismissal therefore did not constitute age discrimination.

Name of the court: Board of Equal Treatment

Date of decision: 27 June 2018

Reference number: Decision No. 9564

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=202429>

Brief summary: The complainant, who was born in 1960, had applied to the Ministry of Justice to be recognised as a Government-funded defence lawyer. He received a rejection and the ministry argued that it had rejected the application based on an individual assessment of a number of factors, including experience and qualifications, gender, geography and age. The complainant argued that the area of self-employment and occupation is covered by the Act on the Prohibition of Discrimination in the Labour Market etc. and he stated that he had been discriminated against on account of his age. According to the Board, the ministry could not prove that the prohibition of discrimination had not been violated. On that basis, the complainant received compensation of EUR 3 350 (DKK 25 000).

Name of the court: Board of Equal Treatment

Date of decision: 12 October 2018

Reference number: Decision No. 9903

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=203679>

Brief summary: In this case, a janitor was asked to retire three months after he had turned 65. The janitor filed a complaint about discrimination due to age. The compulsory retirement age followed from a collective agreement. The Board found that the retirement provisions in the collective agreement were objectively and reasonably justified by a legitimate aim and referred to Section 5(a)(3) of the Act on the Prohibition of Discrimination in the Labour Market etc.

Religion and belief

Name of the court: Board of Equal Treatment

Date of decision: 27 June 2018

Reference number: Decision No. 9566

Address of the webpage:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=202431>

Brief summary: In this case, a social worker complained that she had been rejected for a position in a shelter for drug abusers because she was not a member of the Danish National Church. The shelter was run by a Christian organisation. The Board found that the work in the shelter involved pastoral counselling and conversations and that the requirement for membership of the Danish National Church was therefore legitimate. It can be questioned whether this decision by the Board is in accordance with the principle of proportionality of the CJEU *Egenberger* case (Case C-414/16).

²⁶⁸ Maritime and Commercial Court judgment of 28 June 2018, Case No. F-5-17.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Denmark
Date: 31 December 2018

<p>Title of the law: Act on the Prohibition of Discrimination in the Labour Market etc. Date of adoption: 24 May 1996 Entry into force: 1 July 1996 Latest amendments: 1 January 2016 Web link: https://www.retsinformation.dk/Forms/R0710.aspx?id=179869 Grounds protected: Race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin Civil law Material scope: Employment Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate</p>
<p>Title of the law: Act on Ethnic Equal Treatment Date of adoption: 28 May 2003 Entry into force: 1 July 2003 Latest amendments: 1 January 2013 Web link: https://www.retsinformation.dk/forms/r0710.aspx?id=141404 Grounds protected: Race and ethnic origin Civil law Material scope: Access to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate</p>
<p>Title of the law: Act on the Prohibition of Discrimination due to Race etc. Date of adoption: 9 June 1971 Entry into force: 1 August 1971 Latest amendments: 31 May 2000 Web link: https://www.retsinformation.dk/forms/r0710.aspx?id=59249 Grounds protected: Race, skin colour, national or ethnic background, belief or sexual orientation Criminal law Material scope: Provision of goods or services and access to public places or events Principal content: Direct discrimination (denial of services)</p>
<p>Title of the law: Act on the Board of Equal Treatment Date of adoption: 27 May 2008 Entry into force: 1 January 2009 Latest amendments: 8 June 2018 Web link: https://www.retsinformation.dk/Forms/R0710.aspx?id=179851 Grounds covered: Gender, race, skin colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin Civil law Material scope: - Within labour market: all protected discrimination grounds</p>

<ul style="list-style-type: none"> - Outside labour market (access to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services, including housing, and membership of and access to services from organisations whose members carry out a particular profession): gender, disability, race and ethnic origin <p>Principal content: Creation of a specialised body</p>
<p>Title of the law: Act on the Institute for Human Rights – The National Human Rights Institution of Denmark</p> <p>Date of adoption: 18 June 2012</p> <p>Entry into force: 1 January 2013</p> <p>Latest amendments: 19 December 2013</p> <p>Web link: https://www.retsinformation.dk/forms/r0710.aspx?id=142116</p> <p>Grounds protected: Race, ethnic origin, disability, gender</p> <p>Civil law</p> <p>Material scope: Overall</p> <p>Principal content: Creation of a specialised body</p>
<p>Title of the law: Act on the Prohibition of Discrimination due to Disability</p> <p>Date of adoption: 8 June 2018</p> <p>Entry into force: 1 July 2018</p> <p>Web link: https://www.retsinformation.dk/Forms/R0710.aspx?id=201823</p> <p>Grounds covered: Disability</p> <p>Civil law</p> <p>Material scope: All public and private activities in all areas of society except for areas covered by the Act on the Prohibition of Discrimination in the Labour Market etc.</p> <p>Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate</p>

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Denmark
Date: 31 December 2018

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	13.04.1953	No	Yes	Yes
Protocol 12, ECHR	Not signed	Not ratified			
Revised European Social Charter	05.1996	Not ratified		Not signed the collective complaints protocol	
International Covenant on Civil and Political Rights	20.03.1968	06.01.1972	No	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	22.09.1997	Only recognised minority: Germans in southern Jutland	No	Yes
International Covenant on Economic, Social and Cultural Rights	20.03.1968	06.01.1972	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	21.06.1966	09.12.1971	No	Yes	Yes
Convention on the Elimination of Discrimination	17.07.1980	21.04.1983	No	Yes	Yes

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
n Against Women					
ILO Convention No. 111 on Discrimination	05.06.1958	22.06.1960	No	No	Yes
Convention on the Rights of the Child	26.01.1990	19.07.1991	No	No (on 10.11.2014 the Danish Government decided that it would accede to the complaints protocol)	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	24.07.2009	No	Yes (acceded to the complaints protocol on 23.09.2014)	Yes

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