Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 1 December 2016[1]

Case C-668/15

Jyske Finans A/S
v
Ligebehandlingsnævnet, acting on behalf of Ismar Huskic

(Request for a preliminary ruling from the Vestre Landsret (Court of Appeal of Western Denmark, Denmark))

(Directive 2000/43/EC — Article 2 — Equal treatment of persons irrespective of racial or ethnic origin — Business practice of a credit institution in the context of a loan for the purchase of a motor vehicle — Directive 2005/60/EC — Article 13 — Prevention of use of the financial system for the purpose of money laundering and terrorist financing — Requirement that the customer furnish additional identification when his driving licence attests a place of birth other than the Nordic countries, a Member State, Switzerland or Liechtenstein)

1. What does a person's place of birth say about that person's ethnic origin?

2. Surprisingly little.

3. In truth, to hold that there is an inalienable bond between a person's place of birth and his being of a particular ethnic origin serves, in the final analysis, only to maintain certain ill-begotten stereotypes.

4. In the main proceedings, the driving licence of a loan applicant states that his place of birth is not a Nordic country,[2] an EU Member State, Switzerland or Liechtenstein.[3] Does it amount to discrimination on the ground of ethnic origin for the lending credit institution to ask the customer to produce a passport issued by one of those countries or, failing that, to produce a passport issued by a third country and a valid residence permit ('the practice at issue')? If that is the case, can the practice at issue be justified by reference to the fight against money laundering and the financing of terrorism?

5. Those are the issues the Court is faced with in the matter under consideration. That case will, in particular, allow the Court to give guidance on the relationship between discrimination on grounds of ethnic origin, nationality and place of birth.

6. For the reasons provided below, a practice such as that at issue does not treat customers differently on the basis of their ethnic origin. Consequently I do not find it necessary for the Court to consider whether such a practice may be justified.

1 — Original language: English.

2 — That is to say, Denmark, Iceland, Norway, Sweden and Finland.

3 — Taken together, all those countries make up the EU Member States and the States party to the European Free Trade Association ('EFTA'). For the purpose of this Opinion, I shall refer to countries which are neither EU Member States nor EFTA States as 'third countries' and to their citizens as 'third-country nationals'.

I – Legal framework

A – *EU legislation*

1. Directive 2000/43/EC[4]

7. Article 1 of Directive 2000/43 ('Purpose') provides that its purpose is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

8. Article 2 of Directive 2000/43 ('Concept of discrimination') provides:

'1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

9. Pursuant to Article 3(2) of Directive 2000/43 ('Scope'), that directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

10. Under Article 8(1) of Directive 2000/43 ('Burden of proof'), Member States are to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Directive 2005/60/EC[5]

11. Chapter I of Directive 2005/60 ('Subject matter, scope and definitions') contains Articles 1 to 5. Article 1(1) of Directive 2005/60 provides that Member States shall ensure that money laundering and terrorist financing are prohibited. Under Article 2(1)(1) thereof, Directive 2005/60 applies to credit institutions, as defined in Article 3(1). Under Article 5 of Directive 2005/60, Member States may adopt or retain in force stricter provisions in the field covered by that directive to prevent money laundering and terrorist financing.

4 — Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

5 — Directive of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15), as amended.

12. Chapter II of Directive 2005/60 ('Customer due diligence'), contains Articles 6 to 19. While section 1 of that chapter ('General provisions') contains, in Articles 6 to 10, basic rules on customer due diligence measures, section 2 ('Simplified customer due diligence') lays down rules allowing simplified customer due diligence procedures to be used on certain specified occasions.

13. Article 13 of Directive 2005/60 (the sole provision of Chapter II, section 3 of that directive, entitled 'Enhanced customer due diligence') provides:

'1. Member States shall require the institutions and persons covered by this Directive to apply, on a risk-sensitive basis, enhanced customer due diligence measures, in addition to the measures referred to in Articles 7, 8 and 9(6), in situations which by their nature can present a higher risk of money laundering or terrorist financing, and at least in the situations set out in paragraphs 2, 3, 4 and in other situations representing a high risk of money laundering or terrorist financing which meet the technical criteria established in accordance with Article 40(1)(c).

2. Where the customer has not been physically present for identification purposes, Member States shall require those institutions and persons to take specific and adequate measures to compensate for the higher risk, for example by applying one or more of the following measures:

(a) ensuring that the customer's identity is established by additional documents, data or information;

(b) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by a credit or financial institution covered by this Directive;

(c) ensuring that the first payment of the operations is carried out through an account opened in the customer's name with a credit institution.

…

4. In respect of transactions or business relationships with politically exposed persons residing in another Member State or in a third country, Member States shall require those institutions and persons covered by this Directive to:

(a) have appropriate risk-based procedures to determine whether the customer is a politically exposed person;

(b) have senior management approval for establishing business relationships with such customers;

(c) take adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction;

(d) conduct enhanced ongoing monitoring of the business relationship.

…

6. Member States shall ensure that the institutions and persons covered by this Directive pay special attention to any money laundering or terrorist financing threat that may arise from products or transactions that might favour anonymity, and take measures, if needed, to prevent their use for money laundering or terrorist financing purposes.'

B – *Danish legislation*

14. The provisions of Directive 2000/43 have been given effect in Danish law by the Lov om etnisk ligebehandling (Law on ethnic equal treatment, 'the Equal Treatment Law').[6] The referring court states that, after consideration, the Danish legislator decided not to include, in the Equal Treatment Law, the criterion of discrimination on the ground of place of birth, as that criterion does not appear in that directive.

15. The Lov om forebyggende foranstaltninger mod hvidvask af udbytte og finansiering af terrorisme (the Law on preventive measures against laundering of profits and financing of terrorism, 'the Money Laundering Law')[7] contains provisions which implement Directive 2005/60. In particular, whereas section 12 of the Money Laundering Law provides general rules on customer due diligence, section 19, which broadly corresponds to Article 13 of that directive, provides, in its subsection 1, that, on the basis of a risk assessment, the persons and undertakings covered by that law are to set further requirements on customer identification than those referred to in section 12 of the law in situations which involve, in and of themselves, an increased risk of money laundering and financing of terrorism. As a minimum, they are to meet the requirements set out in subsections 2 to 4 of that provision.

II – Facts, procedure and the questions referred

16. Ismar Huskic ('the complainant') was born in Bosnia and Herzegovina in 1975. He and his family moved to Denmark in 1993, where he has lived since. He became a Danish citizen in December 2000. He lives with his partner, who is also a Danish citizen.

17. Jyske Finans A/S ('Jyske Finans'), a subsidiary of the financial institution Jyske Bank A/S, offers car loans and car leasing arrangements to individuals and businesses, in cooperation with motor vehicle dealerships.

18. In June 2009, the complainant and his partner concluded a contract with a motor vehicle dealership for the purchase of a used car. The car purchase was partly financed through a car loan, which the complainant and his partner contracted for jointly with Jyske Finans. In connection with the assessment of the loan application, Jyske Finans required the complainant to provide additional documentation, on the ground that his driving licence states that he was born in Bosnia and Herzegovina. No equivalent requirement of additional documentation was imposed in relation to his partner who, according to the information on her driving licence, was born in Odense, Denmark.

19. The complainant considered the request from Jyske Finans to be discriminatory and brought a complaint with the Ligebehandlingsnævnet (Equal Treatment Board) which, inter alia, handles complaints concerning discrimination on grounds of racial or ethnic origin. By decision of 10 December 2010, the Equal Treatment Board found that Jyske Finans had discriminated indirectly against the complainant and ordered Jyske Finans to pay DKK 10 000 (approximately EUR 1 340) as compensation.

20. Jyske Finans took the view that the Equal Treatment Board's decision was contrary to the Money Laundering Law and lacked the legal basis required by the Equal Treatment Law. Jyske Finans therefore chose not to comply with the Equal Treatment Board's decision. This led the Equal Treatment Board to bring proceedings before the Retten i Viborg (District Court, Viborg, Denmark) on behalf of the complainant.

6 — Lovbekendtgørelse nr. 438 af 16. maj 2012, *Lovtidende* 2012 A, med senere ændringer (Consolidated Act No 438 of 16 May 2012, as amended).

7 — Lovbekendtgørelse nr. 806 af 6. august 2009, *Lovtidende* 2009 A (Consolidated Act No 806 of 6 August 2009).

21. By judgment of 5 February 2013, the Retten i Viborg (District Court, Viborg) upheld the Equal Treatment Board's decision. However, it held that Jyske Finans' discrimination against the complainant on the basis of his place of birth constituted direct discrimination on the ground of ethnic origin.

22. Jyske Finans brought an appeal against the judgment of the Retten i Viborg (District Court, Viborg) before the referring court.

23. In the course of the proceedings, Jyske Finans has stated that, in dealing with the complainant's loan application, it applied an internal rule, namely the practice at issue. Jyske Finans has stated that the practice at issue was established in the light of Jyske Finans' obligation to comply with the Money Laundering Law. Accordingly, the referring court considers it established that the requirement of additional documentation which Jyske Finans imposed on the complainant is based solely on the fact that his Danish driving licence states that he was born in Bosnia and Herzegovina and therefore in a third country.

24. Entertaining doubts as to whether the practice at issue gives rise to direct or indirect discrimination on the ground of ethnic origin and whether it might be permissible in the light of obligations imposed on, inter alia, financial institutions with a view to preventing money laundering, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the prohibition on direct discrimination on grounds of ethnic origin in Article 2(2)(a) of [Directive 2000/43] be interpreted as precluding a practice such as the one in the present case, by which persons in an equivalent situation who are born outside the Nordic countries, a Member State, Switzerland and Liechtenstein are treated less favourably than persons born in the Nordic countries, a Member State, Switzerland and Liechtenstein?

(2) If the first question is answered in the negative: does such a practice then give rise to indirect discrimination on grounds of ethnic origin within the meaning of Article 2(2)(b) of [Directive 2000/43] — unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary?

(3) If the second question is answered in the affirmative, can such a practice in principle be justified as an appropriate and necessary means for safeguarding the enhanced customer due diligence measures provided in Article 13 of [Directive 2005/60]?'

25. Written observations were submitted by Jyske Finans, the Kingdom of Denmark and the Commission. On 12 October 2016, those parties presented oral argument.

III – Analysis

26. By its first question, the referring court asks whether the practice at issue amounts to direct discrimination under Directive 2000/43. If that is not the case, then, by its second question, that court seeks to ascertain whether it constitutes indirect discrimination, unless objectively justified and proportionate. In its third question, the referring court has indicated a possible ground for justification of the practice at issue in the event that it is to be considered on its face to be indirectly discriminatory.

27. I shall consider the aspect of discrimination and that of justification successively in parts A and B of this analysis.

A – *The first and second questions referred*

28. By its first two questions, which I shall answer jointly, the referring court essentially asks whether the practice at issue, which treats customers differently on account of their place of birth, amounts to direct or indirect discrimination under Directive 2000/43.

29. I shall first provide some remarks on why discrimination on the ground of ethnic origin as used in Directive 2000/43 cannot be established solely on account of a person's place of birth. Those considerations will then inform the question whether the practice at issue amounts to direct or indirect discrimination on that ground.

1. General remarks

30. According to Article 2(1) of Directive 2000/43, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on 'racial or ethnic origin'. Those are the two criteria on the basis of which that directive has made treating persons differently unlawful.

31. From the outset, in order to prevent and combat racism, it is necessary to define the concept of 'race' itself beforehand. However, that exercise has become increasingly unacceptable in modern societies. [8] Accordingly, over time the prohibition against discrimination on the basis of racial origin has perhaps ceded its pre-eminence in favour of the less overt and tangible concept of discrimination on the basis of ethnic origin which, as mentioned below in point 35, is a form of racial discrimination.

32. Directive 2000/43 does not define the concept of 'ethnic origin' and therefore does not answer the question of whether a link exists between the two criteria mentioned above in point 30 and a person's place of birth. [9]

33. That is hardly surprising. Formulating the criteria which make up the essential fabric of an ethnic origin and describing what makes it differ from other ethnic origins may be a challenge too great for any one person. As the Commission asked at the hearing, what, for example, makes a person be of 'Danish ethnic origin', and how does such a person differ ethnically from others, such as a person of 'Swedish' or 'Norwegian' ethnic origin — to the extent that those ethnic origins exist at all? It is not for me to attempt to answer that daunting question.

34. However, faced with that legislative silence, the Court has been required, and has not shied away from, giving an authoritative interpretation. In *CHEZ Razpredelenie Bulgaria*, the Court held that the concept of 'ethnic origin', or ethnicity, 'has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds'. [10]

8 — It follows from recital 6 of Directive 2000/43 that the Union rejects theories which attempt to determine the existence of separate human races, and the use of the term 'racial origin' in that directive does not imply an acceptance of such theories.

9 — The Explanatory Memorandum contained in the Commission proposal of 25 November 1999 for a Council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (COM(1999) 566 final), provides no assistance in that regard.

10 — Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 46.

35. In providing that definition, the Court followed the case-law of the European Court of Human Rights ('ECtHR'), which had stated that 'ethnicity and race are related concepts … Ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person's ethnic origin is a form of racial discrimination'. [11]

36. The markers of 'ethnic origin', as stated above in points 34 and 35, do not refer to a person's place of birth. However, the use of the terms 'in particular' indicates the non-exhaustive nature of those factors. Hence, it cannot be excluded that a person's place of birth might constitute such a factor, or at least might be a contributory factor.

37. Yet I take care to stress that, in the matter under consideration, the place of birth of the complainant is the *only* criterion which led the Equal Treatment Board and, subsequently, the Retten i Viborg (District Court, Viborg) to find that the practice at issue amounts to discrimination on account of ethnic origin, be it direct or indirect. To do so implies that a person's place of birth conditions that person's ethnic origin as used in Directive 2000/43.

38. However, that idea finds no support in Directive 2000/43.

39. Discrimination on the basis of place of birth is a self-standing criterion of discrimination distinct from other criteria of discrimination such as ethnic origin or nationality. Those criteria must not be conflated. Directive 2000/43 does not protect against situations of discrimination which are not based on the personal characteristics listed therein. [12]

40. For instance, under Article 3(2) of Directive 2000/43, the protection conferred by that directive, which applies to the private and public sectors alike in a wide range of areas listed in Article 3(1) thereof, does not extend to difference of treatment based on nationality. [13] That is consonant with the idea that possessing a given nationality says little about a person's ethnic origin. As indicated in the case-law mentioned above at points 34 and 35, 'common nationality'— that is to say, nationality in the 'ethnic' sense of the word [14] — is merely one factor which distinguishes a given ethnicity.

41. In my view, that same logic applies to the question whether discrimination on the basis of the place of a person's birth amounts to discrimination on the basis of ethnic origin. A place of birth is but one specific factor which enables the conclusion to be drawn that a person might belong to a given ethnic group, but it in no way determines this. For instance, what is the ethnic origin of persons adopted from third countries and brought into the Union or the EFTA? That cannot be predicted generally. Moreover, if a societal group can be considered a distinct ethnic community mainly on account of its religious faith, customs and way of life, [15] then what does the place of birth of a person who belongs to such a community say about that person's ethnicity?

11 — See ECtHR, 22 December 2009, *Sejdić and Finci v. Bosnia and Herzegovina*, CE:ECHR:2009:1222JUD002799606, § 43. In its judgment of 13 December 2005, *Timishev v. Russia*, CE:ECHR:2005:1213JUD005576200, § 55, the ECtHR also included 'tribal affiliation' as a marker of a societal group's ethnicity.

12 — See judgment of 7 July 2011, *Agafiței and Others*, C-310/10, EU:C:2011:467, paragraph 32, concerning discrimination on the basis of a person's 'socio-professional category'. Moreover, Directive 2000/43 does not cover situations which fall outside its scope ratione materiae. See judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, paragraph 47, concerning national rules governing the manner in which surnames and forenames are entered on certificates of civil status.

13 — Judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 49. Accordingly, recital 13 of Directive 2000/43 states that 'any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the [Union]. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.'

14 — In linguistic terms, the concept of 'citizenship', that is to say, the status attaching to a person recognised under custom or law as being the subject of a sovereign State or commonwealth, does not bear the same connotation as that of 'nationality'.

15 — In certain jurisdictions, this appears to be the case for, inter alia, the Jewish people or the Sikh community. See Bell, M., *Racism and Equality in the European Union*, Oxford Studies in European Law, Oxford, 2008, p. 16.

42. I should point out, furthermore, that the concept of 'place of birth' is itself ambiguous. In the case under consideration, that concept, as used in the complainant's driving licence, has been equated with his country of birth — unlike that of his partner. A country-wide use of the criterion of 'place of birth' more readily allows the inference to be drawn that the person in question belongs to a 'common nationality', which is one of the features indicative of ethnic origin according to the case-law mentioned above at points 34 and 35. However, there is no basis in law for the idea that for every sovereign State, one corresponding ethnic origin — and only one — exists.

43. Lastly, it is true that, as stated by the Kingdom of Denmark, Article 21 of the Charter of Fundamental Rights prohibits not only discrimination on grounds of race or ethnic origin, but also on grounds of birth. However, that separate enumeration merely reinforces the idea that the concepts of 'ethnic origin' and 'birth' differ.

44. This leads me to conclude that, as the Kingdom of Denmark recognises, the criteria of ethnic origin and place of birth are not automatically and necessarily linked. A person's place of birth may be a relevant factor when considering whether that person belongs to an ethnic group. However, discrimination on grounds of ethnic origin cannot be established solely by reference to a person's place of birth.

2. Does the practice at issue amount to direct discrimination under Article 2(2)(a) of Directive 2000/43?

45. A finding of direct discrimination under Article 2(2)(a) of Directive 2000/43 requires that the ethnic origin must have determined the decision to impose the treatment, or, in other words, that the treatment at issue proves to have been introduced and/or maintained for reasons relating to ethnic origin. [16]

46. In order to justify its conclusion of direct discrimination, the Retten i Viborg (District Court, Viborg) held, first, that most people applying for a loan or financing with Jyske Finans reside in Denmark and are ethnic Danes and, second, that the practice at issue therefore implies that persons born in third countries are treated less favourably than persons born in Denmark. It went on to hold that such a difference in treatment is not based on the nationality of those applicants, 'but on their geographic origin and *accordingly* their ethnic origin' (emphasis added).

47. That logic is flawed for several reasons.

48. First, as concluded above at point 44, a difference in treatment on the ground of ethnic origin is not an automatic consequence of a difference in treatment based on geographic origin, or place of birth.

49. Second, the statement that most persons born outside of Denmark are not 'ethnic Danes' — should such an ethnic origin exist — does not suffice to establish an instance of direct discrimination. If anything, that rather indicates the presence of indirect discrimination.

16 — Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraphs 76, 91 and 95. For a critique of the requirement of intent, see Cahn, C., 'Court of Justice of the EU Rules Collective and Inaccessible Electrical Metres Discriminate against Roma: *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashita ot diskiminatsia* (C-83/14)', *European Journal of Migration and Law*, vol. 18, issue No 1, Koninklijke Brill NV, Leiden, 2016, pp. 123 and 124.

50. Last, it is incorrect to restrict the comparison to be undertaken to the situation attaching to persons born in Denmark, on the one hand, against that of persons born in a third country, on the other. The practice at issue is simply not restricted thereto. Rather, the proper test for discrimination under Directive 2000/43 requires assessing whether the practice at issue involves a difference in treatment on grounds of ethnic origin between, on the one hand, a person born in an EU Member State or an EFTA State and, on the other hand, a person born in a third country.

51. Now, the order for reference does not state that there is evidence showing that the practice at issue was created for reasons relating to the particular ethnic origin of loan applicants.

52. However, at the hearing in particular, the Kingdom of Denmark argued that it might be possible to perceive the practice at issue as being directly discriminatory, as its practical effect is generally to cast suspicion on Danish citizens born in third countries who, in the view of that Member State, would not generally be of 'Danish ethnic origin'.

53. In that regard, first, it is irrelevant under Directive 2000/43 that the practice at issue treats Danish citizens born in third countries less favourably than Danish citizens born in the Union or the EFTA States. Neither their citizenship, nor their place of birth, is a personal characteristic protected under that directive.

54. Second, that line of argument is based on the illusion that place of birth, nationality and ethnicity go hand in hand. For the reason stated above in point 3, it must be rejected.

55. Last, the practical effect of the practice at issue does not suffice to establish an instance of direct discrimination. [17]

56. On that basis, I do not consider the practice at issue to amount to direct discrimination under Article 2(2)(a) of Directive 2000/43. I shall now move on to consider whether the practice at issue entails indirect discrimination under Article 2(2)(b) thereof.

3. Does the practice at issue amount to indirect discrimination under Article 2(2)(b) of Directive 2000/43?

57. In order for a measure to be capable of falling within Article 2(2)(b) of Directive 2000/43, it is sufficient that, although using neutral criteria not based on ethnicity, that measure has the effect of placing particularly persons of 'a [certain] ethnic origin' at a disadvantage. [18] Indirect discrimination does not necessarily require a discriminatory intent. [19] It may be established by any means, including on the basis of statistical evidence. [20]

58. When considering whether Jyske Finans' use of the neutral criterion of place of birth entails indirect discrimination, it could be claimed that targeting persons born outside of the Union or the EFTA States is more likely generally to affect persons of 'a [certain] ethnic origin' adversely. Indeed, that is the essential view of the Kingdom of Denmark, which considers that the additional requirement imposed by the practice at issue affects persons born in third countries and, consequently, mainly persons of 'non-Danish ethnic origin'.

59. However, such a view is unsustainable.

17 — See, similarly, the Opinion of Advocate General Kokott in *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:170, point 87.

18 — See, to that effect, judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 96.

19 — ECtHR, 13 November 2007, *D.H. and others v. the Czech Republic*, CE:ECHR:2007:1113JUD005732500, § 184, referring to Directive 2000/43.

20 — Judgment of 19 April 2012, *Meister*, C-415/10, EU:C:2012:217, paragraph 43.

60. Assuming for the sake of argument that the Kingdom of Denmark is correct to claim that persons not born in that Member State are not generally of 'Danish ethnic origin', that is not sufficient for a finding of indirect discrimination under Article 2(2)(b) of Directive 2000/43. Indeed, in order to be operative, the concept of indirect discrimination under that provision requires that the alleged discriminatory measure has the effect of placing *a particular* ethnic origin at a disadvantage. Put differently, that provision requires identifying the particular ethnic origin (or origins, in case a practice affects several distinct ethnic communities) to which the protection under that directive applies and which has suffered a less advantageous treatment. Unlike the view expressed by the Kingdom of Denmark above at point 58, that provision cannot be understood to confer (negative) protection against measures which arguably place a given ethnic origin at an advantage, without also identifying a specific ethnic origin which is put at a disadvantage. In that sense, although the English and German wordings of Article 2(2)(b) of Directive 2000/43 might be considered inconclusive in that regard, other official language versions use more precise terms which clarify the meaning of that provision [21] and find support in the purpose and general scheme of the directive. [22] That purpose is, according to recital 17 thereof, 'to prevent or compensate for disadvantages suffered by a group of persons of *a particular* racial or ethnic origin' (emphasis added). It would run counter to the general scheme of Directive 2000/43 simply to apply Article 2(2)(b) thereof in the abstract, as every single human being has an ethnic origin, even though that origin might yet have to be properly uncovered.

61. To be sure, the triggering of the prohibition on discrimination on the ground of ethnic origin requires neither the person concerned actually to belong to the ethnic community which is the target of less favourable treatment (in the case of 'discrimination by association'), [23] nor a victim to be positively identified. [24] Yet that does not alter the fact that Article 2(2)(b) of Directive 2000/43 requires the identification of a particular ethnic origin targeted by a discriminatory measure. The Court's case-law confirms that.

62. Indeed, in the first place, although the Court was perhaps not deliberately making a point on that issue, it has consistently referred to 'employees of *a certain* ethnic or racial origin'; 'persons of *a given* ethnic origin'; and 'persons possessing *such an* ethnic origin' (emphases added). [25]

63. In the second place, the major cases which the Court has dealt with concerning Directive 2000/43 all involved identified groups of persons to whom it was not contested that the protection against discrimination under Directive 2000/43 applies. [26]

21 — That is the case, inter alia, for the following language versions: Danish ('… personer af *en bestemt* race eller etnisk oprindelse …'); Spanish ('… personas de un origen racial o étnico *concreto* …'); French ('… des personnes d'une race ou d'une origine ethnique *donnée* …'); Italian ('… persone di *una determinata* razza od origine etnica …'); Dutch ('… personen van *een bepaald* ras of *een bepaalde* etnische afstamming …'); Portuguese ('… pessoas de *uma dada* origem racial ou étnica …'); Romanian ('… persoană, de o *anumită* rasă sau origine etnică …'); Finnish ('… *tiettyä* rotua tai etnistä alkuperää olevat henkilöt …') and Swedish ('… personer av *en viss* ras eller *ett visst* etniskt ursprung …') (emphases added). The German version is phrased '… Personen, die einer Rasse oder ethnischen Gruppe angehören …', while the English version is, as previously stated, 'persons of a racial or ethnic origin'.

22 — As regards linguistic differences in secondary EU law, see judgment of 22 September 2016, *Breitsamer und Ulrich*, C-113/15, EU:C:2016:718, paragraph 58 and the case-law cited.

23 — Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 56.

24 — Judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 23 and 25.

25 — See, respectively, judgments of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraph 31, and of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraphs 100 and 107.

26 — The case leading to the judgment of 12 May 2011, *Runevič-Vardyn and Wardyn*, C-391/09, EU:C:2011:291, concerned a person belonging to the Polish minority in the Republic of Lithuania (see paragraph 15). The case leading to the judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, concerned discrimination against persons belonging to the Roma community (see paragraphs 30 and 46). In the case leading to the judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, the statements at issue were directed at persons of Moroccan origin; see the Opinion of Advocate General Poiares Maduro in *Feryn*, C-54/07, EU:C:2008:155, points 1, 3 and 4. Although the case giving rise to the judgment of 19 April 2012, *Meister*, C-415/10, EU:C:2012:217, concerned a 'Russian national' (whom Advocate General Mengozzi described, in his Opinion in *Meister*, C-415/10, EU:C:2012:8, point 9, as being of Russian origin) the Court was asked to interpret the rules on evidence laid down in Directive 2000/43 and not whether that person had been discriminated against on the ground of her ethnic origin.

64. In the third place, as essentially stated by the Commission at the hearing, comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the favourable treatment in question. [27]

65. That view is not called into question by an argument, relied on by the Kingdom of Denmark at the hearing, that the ECtHR has recently held, by a majority, that national rules on family reunion which generally affect persons of 'foreign ethnic origin' unfavourably are in breach of Article 8 of the European Convention on Human Rights, read in conjunction with Article 14 thereof. [28] That case concerned a difference in treatment of a State's own citizens based on the duration of their citizenship, and therefore a matter in respect of which Directive 2000/43 affords no greater protection than as concerns a person's place of birth. Moreover, whereas the wording of those convention provisions — in particular Article 14 — does not suggest that it is necessary to identify a particular ethnic origin targeted by a discriminatory measure, that is not the case for Article 2(2)(b) of Directive 2000/43.

66. Turning to the matter under consideration, I note that the only clear piece of information that the Court has at its disposal is that the complainant was born in Bosnia and Herzegovina. Be that as it may, that lack of information is not decisive: whether the practice at issue amounts to indirect discrimination must be considered specifically on the basis of that practice itself.

67. In point of fact, the practice at issue seems to affect all ethnic origins in the same way, as the third countries potentially contain every ethnic origin on the face of the earth. It is therefore excluded that the practice at issue is liable to affect persons of a particular ethnic origin in 'considerably greater proportions' compared with other persons. [29]

68. On the basis of the foregoing, I do not consider the practice at issue to entail indirect discrimination under Article 2(2)(b) of Directive 2000/43.

4. Intermediate conclusion

69. It follows from the above that the practice at issue is caught neither by Article 2(2)(a) nor by (b) of Directive 2000/43. It is therefore unnecessary to consider the third question referred. However, in the event that the Court might consider the practice at issue to amount to indirect discrimination, I shall answer that question below at point 72 et seq.

70. Moreover, I also consider it unnecessary to take a position on the argument raised by the Commission at the hearing, that the practice at issue might unlawfully discriminate between EU citizens based on when they acquired their citizenship. [30] First, the referring court has not asked a question in that regard. Second, the Court does not have sufficient information at its disposal to rule on that argument, nor have the parties mentioned in Article 23 of the Statute of the Court of Justice had the opportunity to submit observations on that new argument, as is their right. Last, and in any event, I have difficulty seeing the relevance of that argument as, in the first place, the Commission's oral submission had specifically a possible discrimination between Danish citizens in mind. However,

27 — See, as regards equal treatment in the field of employment and occupation, judgment of 10 May 2011, *Römer*, C-147/08, EU:C:2011:286, paragraph 42.

28 — ECtHR, 24 May 2016, *Biao v. Denmark*, CE:ECHR:2016:0524JUD003859010, see §§ 112 and 114.

29 — Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 107.

30 — In support thereof, the Commission cited the judgments of 22 September 1983, *Auer*, 271/82, EU:C:1983:243; of 23 February 1994, *Scholz*, C-419/92, EU:C:1994:62; and of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104. In that connection, the Commission argued that the principle of equal treatment of EU citizens applies in purely internal situations.

once more, that misconstrues the ambit of the practice at issue, which is not limited to those citizens. In the second place, the case-law on which the Commission relies in support of its view concerns EU citizens who, having exercised their right to free movement, have settled in another Member State and become naturalised citizens thereof. I am not informed that that is the case in the main proceedings.

71. Although the complainant's first-hand experience of the difference in treatment caused by the practice at issue might have given rise to anger, it was not precluded under Directive 2000/43. Against that backdrop, the Court ought therefore not attempt to prohibit by judicial construct that difference in treatment, as that is a task which properly falls to the EU legislature to perform by enlarging the list of criteria protected under that directive.

B – *The third question referred*

72. By its third question, the referring court essentially asks whether a practice such as that at issue may be considered lawful owing to Article 13 of Directive 2005/60, which lays down rules on enhanced customer due diligence. That question is linked to the second question referred, as it forms part of the question whether the practice at issue is indirectly discriminatory. Unlike cases of direct discrimination,[31] under Article 2(2)(b) of Directive 2000/43, a *prima facie* case of indirect discrimination may escape that classification if it is 'objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

73. Jyske Finans, supported by the Kingdom of Denmark, argues that compliance with the rules on the prevention of money laundering and the financing of terrorism is a legitimate aim which may in principle justify the practice at issue. However, the parties diverge on whether the practice at issue is appropriate and necessary.

74. Jyske Finans is of the opinion that that is the case, in particular in view of the general risk assessment relating to the country concerned (Bosnia and Herzegovina) and the lack of physical contact between Jyske Finans and the complainant when the loan was agreed. It contends, furthermore, that the practice at issue is appropriate in order to ensure greater traceability and correct identification of customers. It is also appropriate in that it indicates loan applicants' desire to forge links with an EU Member State or an EFTA State rather than their country of birth, thereby ultimately ensuring that the line of credit granted is not monetised through an immediate sale of the vehicle and used for aims which Directive 2005/60 seeks to prevent. Jyske Finans also argues that the practice at issue does not stigmatise the customer, as the information that the customer was born in a third country is privileged, and the request to produce a passport is therefore not made public.

75. The Kingdom of Denmark and the Commission take the view that the practice at issue goes beyond what is necessary. In particular, the Kingdom of Denmark argues that Directive 2005/60 does not establish a link between a person's place of birth and a heightened risk of money laundering or financing of terrorism. To do so would contribute to the general suspicion towards and stigmatisation of citizens of the Union or the EFTA States born outside thereof.

76. From the outset, I consider that the objective of preventing money laundering and the financing of terrorism may, in principle, justify an indirectly discriminatory measure: in *CHEZ Razpredelenie Bulgaria*, the Court has already held that the prevention of fraud and abuse constitutes a legitimate aim for the purpose of Article 2(2)(b) of Directive 2000/43.[32] Money laundering is one type of fraud

31 — Direct discrimination may only be justified under Article 4 of Directive 2000/43; see also recital 18 thereof. In that regard, the ECtHR has held that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'; see the judgment of 22 December 2009, *Sejdić and Finci v. Bosnia and Herzegovina*, CE:ECHR:2009:1222JUD002799606, § 44 and the case-law cited.

32 — Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraphs 113 and 114.

and abuse. Moreover, the prevention and the combating of money laundering and terrorist financing are legitimate aims which may, in principle, justify a derogation from the rules on freedom of movement,[33] and which may consequently be relied on for the purposes of Directive 2000/43 as well.

77. What remains to be considered is whether the practice at issue is objectively justified by that aim, and whether its means of achieving that aim are appropriate and necessary.

78. At this juncture, I would call to mind that, in *Safe Interenvios*,[34] the Court has provided guidance on the powers of a credit institution to apply enhanced due diligence measures to its customers under Directive 2005/60 and, more importantly, the limits thereto.

79. First, it follows from the terms 'at least' appearing in Article 13(1) of Directive 2005/60 that the situations contemplated in paragraphs 2 to 4 thereof are not exhaustive, and that there could be situations other than those in which it might be necessary to apply, on a risk sensitive basis, enhanced customer due diligence measures.[35]

80. Second, Directive 2005/60 is a minimum harmonisation directive. Even where a Member State has properly implemented Article 13 of that directive in national law, Article 5 thereof allows them to adopt or retain in force stricter provisions where those provisions seek to strengthen the fight against money laundering and terrorist financing.[36]

81. Third, the Member State concerned must exercise the power to apply enhanced due diligence measures under Directive 2005/60 in compliance with EU law.[37] Where the legislation of a Member State has delegated those powers to the institutions and persons covered by Directive 2005/60, that requirement must apply to those parties as well.

82. Fourth, Member States may identify the specific measures to be applied in certain specific situations or give the institutions and persons covered by Directive 2005/60 discretion to apply, on the basis of an appropriate risk assessment, the measure considered proportionate to the risk at issue in a specific situation. The assessment of the existence and level of risk of money laundering or terrorist financing with respect to a customer, business relationship, account, product or transaction (as the case may be), is key. Where no risk of money laundering or terrorist financing exists, no preventive action can be taken on those grounds. Moreover, without such an assessment, it is not possible for the Member State concerned or, as the case may be, institution or person covered by the directive to decide in an individual case what measures to apply.[38]

83. Returning to the present case, I note that it follows from the wording of the third question referred that it is the lawfulness of the practice at issue that is at stake, rather than its specific application in the main proceedings. In that regard, as stated previously, it is not a precondition for that assessment that a victim be positively identified.[39] Therefore, the fact that it might have been lawful to require additional information from the complainant on account of an alleged heightened risk of money laundering and financing of terrorism linked to his country of birth, namely Bosnia and Herzegovina, is purely fortuitous. In any event, Jyske Finans does not claim to have performed a specific assessment of that risk in connection with the main proceedings.

33 — Judgment of 10 March 2016, *Safe Interenvios*, C-235/14, EU:C:2016:154, paragraph 102 and the case-law cited.

34 — Judgment of 10 March 2016, *Safe Interenvios*, C-235/14, EU:C:2016:154.

35 — See, to that effect, judgment of 10 March 2016, *Safe Interenvios*, C-235/14, EU:C:2016:154, paragraphs 72 and 73.

36 — Judgment of 10 March 2016, *Safe Interenvios*, C-235/14, EU:C:2016:154, paragraph 76 and the case-law cited.

37 — See, to that effect, judgment of 10 March 2016, *Safe Interenvios*, C-235/14, EU:C:2016:154, paragraphs 96 and 100.

38 — See, to that effect, judgment of 10 March 2016, *Safe Interenvios*, C-235/14, EU:C:2016:154, paragraphs 106 to 108.

39 — Judgment of 10 July 2008, *Feryn*, C-54/07, EU:C:2008:397, paragraphs 23 and 25.

84. Jyske Finans' principal argument is basically that it requested additional documentation from the complainant in order to comply with the rules on the prevention of money laundering and the financing of terrorism. However, Jyske Finans does not state which of the situations requiring the application of enhanced due diligence measures contemplated in Article 13 of Directive 2005/60 compelled it specifically to do so. Moreover, without having to give an authoritative interpretation as to whether section 19 of the Money Laundering Law goes beyond the minimum requirements set under Directive 2005/60, it is not far-fetched to consider that — subject to confirmation of the referring court — apart from the situations set out in subsections 2 to 4 thereof, that provision does not as such require, but rather allows the persons and undertakings covered by that law to apply such measures in situations which involve, in and of themselves, an increased risk of money laundering and financing of terrorism. Hence, it seems to me that the question is not whether Jyske Finans was obliged to impose the additional requirement under the practice at issue, but rather *whether it was open to it to do so*.

85. Against that backdrop, the practice at issue can in my view be considered to be objectively justified, appropriate and necessary under Article 2(2)(b) of Directive 2000/43 only if it is in line with the principles deriving from the judgment in *Safe Interenvios*,[40] as summarised above at points 79 to 82. It is for the national court to determine whether that is the case. However, the Court may provide it with guidance to assist it in resolving the dispute before it.[41]

86. I should stress that a credit institution is well within its rights, and may even be obliged, to apply enhanced due diligence measures where a heightened risk of money laundering or financing can be detected on the basis of, inter alia, the type of customer, country, product or transaction. I would not entirely rule out that it may even, on occasion, be possible to infer such a risk solely on account of the place of birth of the customer, in particular having regard to the applicable recommendations of the Financial Action Task Force ('FATF') in that regard.[42]

87. However, I would call to mind that where there is a *prima facie* case of indirect discrimination on the grounds of racial or ethnic origin, the concept of 'objective justification' is to be interpreted strictly.[43]

88. Jyske Finans' claim that the practice at issue is appropriate, as customers born in third countries are more likely to use the assets for which a line of credit is granted to finance the purposes which Directive 2005/60 seeks to prevent, is simply unsupported by evidence. At the very least, Jyske Finans must establish objectively the actual existence and extent of the conduct giving rise to the practice at issue and the precise reasons for which that conduct might continue in the absence thereof. In particular, Jyske Finans may not base its justification on general claims or undocumented affirmations.[44] In that regard, even though it can be said that Article 13(2) to (6) of that directive indirectly operates on the basis of stereotypes as regards certain persons or transactions ('profiling'), unlike the practice at issue, the application of those provisions *does* require an individual assessment.

40 — Judgment of 10 March 2016, *Safe Interenvios*, C-235/14, EU:C:2016:154.

41 — See, to that effect, judgment of 5 October 2016, *Maya Marinova*, C-576/15, EU:C:2016:740, paragraph 46.

42 — Under recital 5 of Directive 2005/60, 'the [EU] action should continue to take particular account of the Recommendations of the [FATF], which constitutes the foremost international body active in the fight against money laundering and terrorist financing'.

43 — See judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 112.

44 — See, to that effect, judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraphs 115 to 118.

89. Moreover, the practice at issue goes beyond what is necessary to achieve the aim of assisting in the fight against money laundering and the financing of terrorism, as it applies across the board to every person born in a third country. That amounts to applying enhanced due diligence measures in the situations not contemplated in Article 13(2) to (6) of Directive 2005/60 with no individualised risk assessment. The discretion conferred on the institutions and persons covered by Directive 2005/60 to apply enhanced due diligence measures in situations where they are not required to do so cannot be exercised in a manner which would obviate the protection conferred under Directive 2000/43.

90. As for the necessity of maintaining the practice at issue in view of the lack of physical contact between Jyske Finans and its customers, it emerges from the file lodged with the Court that Jyske Finans has itself considered, in an online document containing a general description of the way in which it complies with the Money Laundering Law, that the risk of money laundering and financing of terrorism is generally relatively limited when it comes to this type of transaction. The reasons given were, inter alia, that the financing in question is limited to chattels and that prior contact has been established between the customer and the motor vehicle dealership (the latter being often itself a customer of Jyske Finans). Against that backdrop, Jyske Finans' claim of a risk due to the lack of physical contact appears inconsistent.

91. Last, as for the argument that Jyske Finans does not make it publicly known when it requires a customer to produce a passport under the practice at issue and that, accordingly, such a requirement does not have a stigmatising effect, that argument rather goes to whether the practice at issue entails discrimination. In that regard, as argued by the Commission, Directive 2000/43 neither defines a *de minimis* threshold below which the protection it affords is not triggered,[45] nor requires unfavourable treatment to be made public in order to be classified as discriminatory.[46]

92. Accordingly, I consider the practice at issue to be neither objectively justified by the aim to prevent money laundering and the financing of terrorism, nor necessary to achieve that aim. However, in the final analysis, it is for the referring court to rule on that issue, taking into account all the relevant circumstances and having regard to the rule on the reversal of the burden of proof laid down in Article 8 of Directive 2000/43.

93. Nevertheless, that task would fall to the referring court only if the Court were to consider that the practice at issue entails indirect discrimination on the basis of ethnic origin, which I do not.

IV – Conclusion In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Vestre Landsret (Court of Appeal of Western Denmark, Denmark) to the effect that, on a proper construction of Article 2 of Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, the concept of discrimination on the basis of ethnic origin as used in that directive does not include the practice of a credit institution which, in the event that the driving licence of a customer indicates a place of birth that is not a part of an EU Member State or a State party to the European Free Trade Association, requires that customer to produce a passport issued by one of those countries or, failing that, to produce a passport and a valid residence permit.

45 — For instance, the terms 'particular disadvantage' used in Article 2(2)(b) of Directive 2000/43 simply mean a disadvantage; see judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraphs 96 and 99.

46 — See, to that effect, judgment of 19 April 2012, *Meister*, C-415/10, EU:C:2012:217, concerning the non-disclosure of the reasons not to recruit a jobseeker although, as mentioned, the Court was not asked to consider whether that case gave rise to discrimination on the ground of ethnic origin.