Executive Summary on race equality directive
State of play in DENMARK
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Introduction

As a society dominated by the agriculture sector Denmark did not need migrant workers, before the mid-sixties, when the growing industrial sector ran short of manpower. In this period migrants were highly welcomed, primarily as "guest-workers", who were employed in the areas that the native population did not find attractive because of low pay or bad working conditions.

As in other Western European countries, however, this situation changed in the beginning of the seventies, as a result of sudden rise in unemployment due to the oil crisis. For this reason the Danish Government introduced a general ban on immigration in November 1973, which have stayed in force since then.

Nevertheless, most migrants from the sixties choose not to give up their residence as a result of the rising unemployment, as they would now not be allowed to re-enter Denmark later, due to the general ban on immigration mentioned above. Furthermore, a number of these migrants reunified their family in Denmark, due to the rules of family reunification in the Danish Aliens Act. At the same time refugees from the war between Iran and Iraq as well as from other conflict situations started to arrived as asylum-seekers in Denmark Consequently, the numbers of third-country nationals in Denmark increased from about 50.000 to more than 100.000 during the 80ties. In the same period the numbers of EU-nationals slightly increased from about 24.000 to more than 27.000 residing in Denmark.

Today it is estimated, that the total numbers of foreign citizens (Nordic- , EU- and Third-country nationals) residing permanently in Denmark is now about 5 % out of a total Danish population of 5.000.000. This percentage is even higher if you include foreign born, who have obtained the Danish nationality.

The new Danish Liberal/Conservative Government from November 2001 is depending on the support of the Danish Peoples Party in order to hold majority in the Danish Parliament. DPP thus have a key position even though five members of that party were sentenced during 2003 for violation of section 266 b of the Danish Criminal Code (hate speech) and the same year the Danish Supreme Court stated in a decision, that it was not unjustified to label the Party leader as holding racist views).. When the Racial Equality Directive was decided in 2000, a number of Danish institutions and bodies were already working with tasks relating to Article 13 of the Directive. According to the EU Commission "Study on anti-discrimination bodies", May 2002, EU Commission 2002. The Board for Ethnic Equality was monitoring Danish legislation, and The Documentation and Advisory Center on Racial Discrimination (DACoRD) assisted individual victims of racial and religious discrimination. Also the Danish Center on Human Rights and the Danish Center for Migration and Ethnic Studies were working in this field. The Danish Peoples' Party, however, demanded the abolishing of such institutions, and cut backs on financial support to Non Governmental Organisations, in order to vote in favour of the Danish State financial budget for the year 2002.
The transposition process in Denmark of the Race and the Framework Directives has indeed been affect of these political events in Denmark during the transposition period. The

formation of expert Committees in 2001in order to prepare proposals for the most expedient implementation in Danish law of the Race and the Framework Directives was highly welcomed, however, the work of these Committees was overshadowed by the political process described above. In spring 2002 – before the two Committees had even ended their work – the Danish Government and the DPP had agreed on the abolishment of the Board for Ethnic Equality and the Danish Center on Human Rights. It was also agreed that a new Institute for Human Rights was placed in a new Center for International Studies established by the Ministry of Foreign Affairs (Act No. 411 as of June 6, 2002.

It can be argued that the work of the two Committees established by the Ministry of the Interior and the Ministry of Employment may be considered part of the consultation process in Denmark, as in both Committees the representatives of the Social Partners in Denmark participated in the work. But a great number of relevant NGO's, religious communities[1] etc, were not invited to take part in the process. At the same time, these two Committees prevented a broader discussion in society on the transposition of the Race and the Framework Directive, because all the key actors in the field participated in the Committees, and consequently, did not want to inter-act in public discussion until the end of the work of the Committees. By way of example, the Danish branch of the European Network against Racism (ENAR) held a public conference on June 5, 2002 on the transposition of the Race Directive, however, non of the key actors participated, because they were all taking part in the work of the Committee, that did not end before September 2002. Consequently, the first possibility of a broader public process was mid-September 2002, when the Equal Treatment Committees more than 300 pages Report no. 1422/2002 was published. At that time NGO's were asked to give their opinion, however, they were told to forward any comments they had, within two weeks, because the Minister wanted to forward the Bill to Parliament in the beginning of October 2002. Further more any comments from NGO's on the issue of Article 13 were no longer relevant because a majority in the Danish Parliament had already established the Center for International Studies and Human Rights. Any comments on this issue were in other words too late.

1. Main legislation

It is stated in the Danish Constitutional Act (as of 1849, present wording as of 1953), section 70, that nobody can be deprived of any civil or political rights on grounds of faith or origin. Furthermore, it is stated in section 71, that no Danish citizen can be deprived of personal liberty, on grounds of political opinion, faith or origin. Apart from these general provisions, there are no specific anti-discrimination provisions in the Danish Constitution.

A proposed Constitutional amendment made in 1953 for a more specific provision to secure the rights and freedom of the individuals, without discrimination on the basis of race, colour, sex, language, political or other beliefs, national or social origin, financial circumstances, birth or other social position, was rejected by a majority of the members in the Commission, that suggested amendments to the Danish Constitution in 1953.

The Danish Parliament approved the first prohibition against hate speech in 1939, however, the wording was changed in 1971 in connection to the ratification of the UN Convention on the Elimination of All forms of Racial Discrimination (ICERD). Also in 1971, the Act on Racial Discrimination was passed by Parliament, stating that a person commits a punishable

1 Denmark has recognised 63 religious communities and none of them were invited to participate.

offence if, while performing occupational or non-profit activities, he refuses to serve a person on the same conditions as others, due to that person's race, colour, national or ethnic origin, or creed. The maximum penalty was specified as being a fine or imprisonment for up to six months. In the same manner a person is guilty of an offence, if he/she for any of the above reasons refuses to admit a person on the same conditions as others to a place, performance, exhibition, gathering, or similar event, which is open to the public. The material scope of this provision is not only shops and discotheques both also the right to housing, education on an equal footing with other applicant. The only area that was not covered by anti-discrimination legislation in 1971 was the labour market field. Consequently, as late as 1995 no legislation in Denmark protected victims of racial or religious discrimination in the labour market. During the years, however, equal pay has been a general legal right principally for those working in the area of the labour market covered by collective agreements. Also the issue of unfair dismissal is covered by collective agreements amongst the Social Partners. Consequently, the main problem was discrimination in relation to hiring of manpower. In 1996, however, the Danish government proposed a Bill on the prohibition against discrimination in respect of employment and occupation (Act on the Prohibition of Differential Treatment on the Labour Market). The explanatory notes to the Bill, stated that the rationale behind it stemmed from the provisions of the ILO Convention 111 and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). The prohibition includes prohibition against direct and indirect discrimination on the grounds of race, colour, religion, political opinion, sexual orientation or national, social or ethnic origin.

As civil law the enforcement of the prohibition of discrimination in the labour market is easier than the enforcement of the Danish anti-discrimination legislation in the form of Criminal provisions. Especially the problem of proof has become less difficult to solve under civil law, however, as the “burden of proof” is still on the victim, problems in this relation still occurs.

In order to transpose the EU Race Directive some changes are necessary in the Danish legislation.

A first step was taken with the Act No. 411 as of 6 June 2002 establishing the Danish Centre for International Studies and Human Rights, which is going to be the new body to be designated according to Article 13. In other words the new Institute of Human Rights is to carry out all the tasks mentioned in Article 13 of the Race Directive. Furthermore a new Act on Equal Treatment irrespective of Ethnic origin - covering the non-employment aspects of the Race Directive – was decided by a majority in the Danish Parliament and entered into force on July 1, 2003. All The necessary changes in order to transpose the employment aspects of the Race Directive, however, did not take effect on time July 19, 2003.

A new Bill - similar to the one that did not pass Parliament in spring 2002 – was presented (again) to Parliament in October 2003 with the aim of transposing the employment aspects of the Race Directive and parts of the Framework Directive (i.e. Religion and belief).

2. Main principles and definitions

In Danish constitutional theory there has been discussion as to whether a general principle of equality is part of unwritten principles of constitutional law. However, such a constitutional principle of equality and non-discrimination cannot with any certainty be said to exist. Other Danish legislation - like the Constitution - does not know of any general principle of equality or a general prohibition against racial or religious discrimination.

On the other hand the so-called Maxim of equality in the public sector may include a prohibition against discrimination due to race or belief i.e. in connection to employment in the public sector. The Danish Parliament's Ombudsman has stated that public employers are obliged to make a fair assessment of all jobseekers and to choose the applicant which is the most qualified, thus leaving out the possibility giving preference to applicants of a certain ethnic or religious background. Given that Danish legislation does not know of any general principle of equality or a general prohibition against racial or religious discrimination, there is consequently no general definition of direct or indirect discrimination in law.

The Act on the Prohibition of Differential Treatment on the Labour Market includes prohibition against both direct and indirect discrimination. The definition of "indirect discrimination" has thus been assessed by the Danish Courts due to Court cases filled by victims of discrimination with the assistance of the Documentation and Advisory Centre on Racial discrimination.

The Danish High Court ruled on August 10, 2000 according to the Act on the Prohibition of Differential Treatment on the Labour Market in connection to the dismissal of a Muslim woman, who was rejected employment by the department store named "Magasin" for the sole reason that she was using a headscarf. The department store stated that this was not intentional discrimination, but simply the company enforcing the clothing guidelines on all applicants for jobs as well as on the staff members that they had to dress "business-like". High Court found that the dismissal of the plaintiff, solely on the grounds that – based on her religious convictions – she wore a headscarf, is an expression of indirect discrimination of the plaintiff. The emphasis is thus on the fact that enforcing the clothing guidelines, as happened here, will typically affect a specific group with the same religious background as the plaintiff. Consequently the High Court ruled that:
"*The High Court does not find that the defendant – whose clothing guidelines admit of a certain amplitude – has demonstrated conditions at the company such that the dismissal of the plaintiff can be regarded as objectively justified. Pursuant to section 7 of the Act, cf. sections 2 and 3, the plaintiff is entitled to damages…".*

The test, whether the requirement is "objectively justified" has also been invoked in other Court cases after the High Court decision in year 2000, by way of example a High Court decision from March 2001, however, in a recent High Court decision from December 2003, the Court held the opinion that it was justified when a company dismissed an employee because she started to use a headscarf for religious reasons. Her labour union assisting her have decided to appeal the decision to the Danish Supreme Court.

Even though "harassment" is not directly defined in the Act on the Prohibition of Differential Treatment on the Labour Market, it is assumed that harassment is covered by this Act as a form of discrimination. On the contrary discriminatory instructions and victimisation has never been part of the Danish anti-discrimination legislation. With the adoption of the new Act on Ethnic Equality in 2003 – covering the non-employment aspects of the Race Directive – discriminatory instructions have now become illegal as well as victimisation. In the labour market field this is, however, still not the case.

There is no general provision of special or positive measures in Danish law. The general presumption in Danish public law is against positive measures giving any preferential treatment to ethnic minority groups or others. The Act on the Prohibition of Differential Treatment in the Labour Market contains, however, a specific provision allowing for special

measures as exceptions to the prohibition of racial discrimination in the public sector. Section 9(2) states that the Act does not prevent that measures be 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 by virtue of other legislation, provisions by virtue of rules with a different legal basis or other public measures.

This right to take special measures, however, does not apply to employers who simply want to improve employment opportunities for persons from an ethnic or religious group, due to the fact that they are underrepresented in the workplace. The protection of the principle of prohibition of discrimination is considered by the authorities to be best ensured if it is only by means of legislation or other public measures that the possibility of improving employment opportunities for persons of a different ethnic origin is made possible. According to the Act, such special measures thus require legal authority and are primarily to be taken by the minister in the course of public language training projects etc. The Act, thus, makes it very difficult for private companies to take special measures to integrate ethnic minorities into the labour market.

If, however, a position requires specific occupational qualifications, that only a person belonging to ethnic or religious minorities fulfils, the employer may ask for exemption from the Act according to section 6. Exemptions may be relevant for church communities, who are gong to hire a new priest.

3. Material scope

The Equal Treatment Committee completed its work in September 2002 and shortly after published the final report. The general conclusion of the Equal Treatment Committee was not to suggest a new, comprehensive statute in Danish legislation prohibiting unequal treatment on grounds of racial or ethnic origin, religion and other grounds. Instead the Committee proposes that the Race Directive could be implemented in the form of a new Act on Equal Treatment irrespective of Ethnic origin, which is to apply to the areas covered by the Race Directive. This new Act – covering the non-employment aspects of the Race Directive – was decided by a majority in the Danish Parliament and entered into force on July 1, 2003. In connection to this new Act the Danish Institute for Human Rights were assigned the Article 13 mandate to assist victims of discrimination in all areas covered by the Race Directive, with the exception of the labour market field.

The Equal Treatment Committee also proposed the provisions of the Race Directive prohibiting unequal treatment in the labour market be implemented by amendments of the Act on the Prohibition of Differential Treatment on the Labour Market. A proposal for amending the Act on the Prohibition of Differential Treatment on the Labour market was thus presented by the Ministry of labour. This new Bill (L no. 152) was presented by the Government on January 29, 2003. The first reading of that Bill took place in the Danish Parliament on February 21, 2003. On April 30, 2003 the Parliament's standing Committee on Labour market policy published a report, showing a broad support for the new Bill, but a number of political parties wanted the newly established Institute for Human Rights to have the same Article 13 mandate to assist victims of discrimination in the labour market field as in other fields, e.g. victims of discrimination in housing, social services etc.. The Liberal/Conservative Government rejected this, with the result that the transposition of the employment aspects of the Race Directive did not take place as expected.

On 19 July 2003 Denmark appeared not to meet the requirements of the Race Directive in the area of employment in relation to the burden of proof, discriminatory instruction and victimisation. Furthermore the body designated to assist victims of discrimination does not have the possibility to assist individual complainants in the employment area. On the other hand Denmark has, since 1996 had its prohibition against racial discrimination legislation in the labour market in place. The Race Directive has been essential in preventing the lowering of protection of the standards in the 1996 Act, due to the non-regression principle.

4. Equality bodies

When the Race Directive was decided in 2000, a number of Danish institutions and bodies were already working with tasks relating to monitor racial and ethnic equality as stipulated in Article 13. The Board for Ethnic Equality was monitoring Danish legislation, and The Documentation and Advisory Center on Racial Discrimination (DACoRD) assisted individual victims in order to file complaints concerning racial and/or religious discrimination. As mentioned above the Board was abolished and all financial assistance for DACoRD was stopped.

By Act No. 411 of 6 June 2002 establishing the Danish Centre for International Studies and Human Rights, the body to be designated according to Article 13 has been established as the Institute of Human Rights. This includes mapping out discrimination and public independent surveys etc. In connection to assisting victims of discrimination, the Institute has from October 1, 2003 established a Complaints Committee with a three member department.

5. Enforcing the law

The enforcement of the Race Directives and prohibition against racial and ethnic discrimination will primarily be the task of the Danish Courts. This enforcement, however, is going to be supplemented with the new Complaints Committee, which is a free of charge administrative body with the mandate to make assessments of whether the legislation has been violated or not. The Committee can make non-binding statements however the Committee has no possibility of imposing sanctions. If, the Complaints Committee considers the legislation to be violated, the Committee may decide to ask for free legal aid, so the victim can bring the case to court. The Complaints Committee is to consider cases in writing and that must therefore refuse cases requiring evidence in the form of statements from the parties and witnesses. Further more, it must be noted, that only the non-employment aspects of the Race Directive are covered by the mandate of the Committee. The possibility to be assisted e.g. on the application for free legal aid in order to bring cases to Court, do not exist in the labour market field. The Government argues, that victims of discrimination in the employment area must ask for the assistance of the trade unions, however, the case law according to the 1996 Act clearly shows that the major problems occur for students, trainees, newly arrived refugees and others who are on their way into the labour market and consequently still not member of a trade union. Thus the victims have to ask for free legal advice by the DACoRD, because the Institute has no mandate to provide this. The DACoRD also provides free legal aid in connection to all other areas of the Race Directive, however, the opening hours have been significantly reduced due to the cutbacks in public funding.