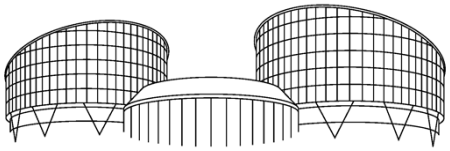

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF BIAO v. DENMARK

(Application no. 38590/10)

JUDGMENT

STRASBOURG

24 May 2016

This judgment is final.

In the case of Biao v. Denmark,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Işıl Karakaş, *President*,
Dean Spielmann,
Josep Casadevall,
Mark Villiger,
Boštjan M. Zupančič,
Ján Šikuta,
George Nicolaou,
Ledi Bianku,
Ganna Yudkivska,
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
André Potocki,
Helena Jäderblom,
Paul Mahoney,
Ksenija Turković,
Iulia Antoanella Motoc,
Jon Fridrik Kjølbro, *judges*,
and Lawrence Early, *Jurisconsult*,

Having deliberated in private on 1 April 2015 and 22 February 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 38590/10) against the Kingdom of Denmark lodged with the Court on 12 July 2010 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Ousmane Biao ("the first applicant"), a Danish national, and his wife Ms Asia Adamo Biao ("the second applicant"), a Ghanaian national.

2. The applicants were represented by Mr S. Petersen, a lawyer practising in Copenhagen. The Danish Government ("the Government") were represented by their Agent, Mr J. Bering Liisberg, of the Ministry of Foreign Affairs, and their co-Agent, Ms N. Holst-Christensen, of the Ministry of Justice.

3. The applicants alleged that the refusal by the Danish authorities to grant them family reunion in Denmark was in breach of Article 8 of the Convention, taken alone and in conjunction with Article 14.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 25 March 2014 a Chamber composed of Guido Raimondi, President, Peer Lorenzen, András Sajó, Nebojša Vučinić, Paul Lemmens, Egidijus Kūris, Robert Spano, judges, and Stanley Naismith, Section Registrar, delivered its judgment. It declared the application admissible and held, unanimously, that there had been no violation of Article 8 of the Convention and, by four votes to three, that there had been no violation of Article 14 read in conjunction with Article 8. A concurring opinion by Judges Raimondi and Spano and a dissenting opinion by Judges Sajó, Vučinić and Kūris were annexed to the judgment.

5. On 23 June 2014 the applicants requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention, and a panel of the Grand Chamber accepted the request on 8 September 2014.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Helena Jäderblom and Iulia Antoanella Motoc, substitute judges, replaced Elisabeth Steiner and Päivi Hirvelä, who were unable to take part in the further consideration of the case (Rule 24 § 3).

7. The applicants and the Government each filed further observations on the merits (Rule 59 § 1).

8. In addition, third-party comments were received from the Centre for Advice on Individual Rights in Europe, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 April 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J. BERING LIISBERG, Ministry of Foreign Affairs, *Agent*,
Ms N. HOLST-CHRISTENSEN, Ministry of Justice, *Co-Agent*,
Mr K. LUNDING, Ministry of Justice,
Mr A. HERPING NIELSEN, Ministry of Justice,
Mr M. BANG, Ministry of Foreign Affairs,
Ms M.A. SANDER HOLM, Ministry of Justice, *Advisers*;

(b) *for the applicants*

Mr S. PETERSEN, lawyer, *Counsel*,
Mr N.-E. HANSEN,
Mr H.K. NIELSEN, *Advisers*.

The Court heard addresses by Mr Bering Liisberg and Mr Petersen as well as their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicants were born, respectively, in 1971 in Togo and in 1979 in Ghana. They live in Malmö, Sweden.

11. The first applicant lived in Togo until the age of six and again briefly from the age of 21 to 22. From the age of six to 21 he lived in Ghana with his uncle. He attended school there for ten years and speaks the local language. On 18 July 1993, when he was 22 years old, he entered Denmark and requested asylum, which was refused by a final decision of 8 March 1995.

12. In the meantime, on 7 November 1994, he had married a Danish national. Having regard to his marriage, on 1 March 1996, by virtue of former section 9(1)(ii) of the Aliens Act (*Udlændingeloven*), he was granted a residence permit, which became permanent on 23 September 1997.

13. On 25 September 1998 the first applicant and his Danish wife divorced.

14. On 22 April 2002 the first applicant acquired Danish citizenship. At the relevant time he met the requirements set out in the relevant circular relating to the length of his period of residence (at least nine years), age, general conduct, arrears owed to public funds and language proficiency.

15. On 22 February 2003 the first applicant married the second applicant in Ghana. He had met her during one of four visits to Ghana made in the five years prior to their marriage.

16. On 28 February 2003, at the Danish Embassy in Accra, Ghana, the second applicant requested a residence permit for Denmark with reference to her marriage to the first applicant. At that time she was 24 years old. She stated that she had never visited Denmark, and that her parents lived in Ghana. On the application form, the first applicant submitted that he had not received any education in Denmark, but had participated in various language courses and short-term courses concerning service, customer care, industrial cleaning, hygiene and working methods. He had been working in a slaughterhouse since 15 February 1999. He had no close family in Denmark. He spoke and wrote Danish. The spouses had come to know each other in Ghana and they communicated between themselves in the Hausa and Twi languages.

17. At the relevant time, under section 9(7) of the Aliens Act family reunion could be granted only if both spouses were over 24 years of age and their aggregate ties to Denmark were stronger than the spouses' attachment to any other country (the so-called "attachment requirement").

18. On 1 July 2003 the Aliens Authority (*Udlændingestyrelsen*) refused the residence-permit request because it found that it could not be established

that the spouses' aggregate ties to Denmark were stronger than their aggregate ties to Ghana.

19. In July or August 2003 the second applicant entered Denmark on a tourist visa.

20. On 28 August 2003 she appealed against the Aliens Authority's decision of 1 July 2003 to the then Ministry for Refugees, Immigration and Integration (*Ministeriet for Flygtninge, Indvandrere og Integration*). The appeal did not have suspensive effect.

21. On 15 November 2003 the applicants moved to Malmö, Sweden, which since 1 July 2000 has been connected to Copenhagen in Denmark by a 16 km bridge (*Øresundsforbindelsen*).

22. By Law no. 1204 of 27 December 2003, section 9(7) of the Aliens Act was amended so that the attachment requirement was lifted for persons who had held Danish citizenship for at least twenty-eight years (the so-called "28-year rule" – *28-års reglen*). Persons born or having arrived in Denmark as small children could also be exempted from the attachment requirement, provided they had resided lawfully there for twenty-eight years.

23. On 6 May 2004 the applicants had a son. He was born in Sweden but is a Danish national by virtue of his father's nationality.

24. On 27 August 2004 the Ministry for Refugees, Immigration and Integration upheld the decision by the Aliens Authority of 1 July 2003 to refuse to grant the second applicant a residence permit. It pointed out that in practice, the residing person was required to have stayed in Denmark for approximately twelve years, provided that an effort had been made to integrate. In the case before it, it found that the applicants' aggregate ties to Denmark were not stronger than their ties to Ghana and that the family could settle in Ghana, as that would only require that the first applicant obtain employment there. In its assessment, it noted that the first applicant had entered Denmark in July 1993 and had been a Danish national since 22 April 2002. He had ties with Ghana, where he had been raised and had attended school. He had visited the country four times in the past six years. The second applicant had always lived in Ghana and had family there.

25. On 18 July 2006, before the High Court of Eastern Denmark (*Østre Landsret*), the applicants instituted proceedings against the Ministry for Refugees, Immigration and Integration and relied on Article 8 of the Convention, alone and in conjunction with Article 14, together with Article 5 § 2 of the European Convention on Nationality. They submitted, among other things, that it amounted to indirect discrimination against them when applying for family reunion that persons who were born Danish citizens were exempt from the attachment requirement altogether, whereas persons who had acquired Danish citizenship at a later point in life had to comply with the 28-year rule before being exempted from the attachment requirement. In the present case that would entail that the first applicant

could not be exempted from the attachment requirement until 2030, after twenty-eight years of Danish citizenship, and thus after reaching the age of 59.

26. In a judgment of 25 September 2007, the High Court of Eastern Denmark unanimously found that the refusal to grant the applicants family reunion with reference to the 28-year rule and the attachment requirement did not contravene the Articles of the Convention or of the European Convention on Nationality relied upon. It stated as follows.

> "[T]he facts given in the decisions of the immigration authorities in the case are found not to be in dispute.
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> Accordingly, [the second applicant] who is a Ghanaian national, was thus 24 years old when she applied for a residence permit on 28 February 2003, and she had no ties with Denmark other than her recent marriage to [the first applicant]. [The second applicant] had always lived in Ghana and had family there. [The first applicant] had some ties with Ghana, where he had lived with his uncle while attending school in Ghana for ten years. He entered Denmark in 1993 at the age of 22 and became a Danish national on 22 April 2002. [The applicants] married in Ghana on 22 February 2003 and have lived in Sweden since 15 November 2003 with their child, born on 6 May 2004. [The first applicant] has told the High Court that the family can settle lawfully in Ghana if he obtains paid employment in that country.
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> It appears from a Supreme Court judgment of 13 April 2005, reproduced on page 2086 of the Danish *Weekly Law Reports* [*Ugeskrift for Retsvæsen*] for 2005, that Article 8 of the Convention does not impose on the Contracting States any general obligation to respect immigrants' choices as to the country of their residence in connection with marriage, or otherwise to authorise family reunion.
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> In view of the information on [the applicants'] situation and their ties with Ghana, the High Court accordingly finds no basis for setting aside the Respondent's decision establishing that [the applicants'] aggregate ties with Ghana were stronger than their aggregate ties with Denmark and that [the applicants] therefore did not meet the attachment requirement set out in section 9(7) of the Aliens Act. In this connection, the High Court finds that the refusal did not bar [the applicants] from exercising their right to family life in Ghana or in a country other than Denmark. The fact that [the first applicant] is able to reside in Ghana only if he obtains paid employment there is found not to lead to any other assessment. Accordingly, the High Court holds that the decision of the Ministry did not constitute a breach of Article 8 of the Convention.
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> Although the High Court has held that Article 8 of the Convention has not been breached in this case, it has to consider [the applicants'] claim that, within the substantive area otherwise protected by Article 8, the decision of the Ministry constituted a breach of Article 14 of the Convention read in conjunction with Article 8.
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> The High Court initially observes that [the first applicant] had been residing in Denmark for eleven years when the Ministry issued its decision. Although he acquired Danish nationality in 2002, nine years after entering Denmark, he did not meet the twenty-eight-year nationality requirement applicable to all Danish nationals pursuant to section 9(7) of the Aliens Act, irrespective of whether they are of foreign or Danish extraction. Nor did he have a comparable attachment to Denmark to that which would be gained in twenty-eight years which will generally lead to an exemption from the

attachment requirement according to the preparatory work of the 2003 statutory amendment.

The 28-year rule is a generally worded relaxation of the attachment requirement based on an objective criterion. In practice, however, the rule may imply that a Danish national of foreign extraction will only meet the 28-year rule later in life than would be the case for a Danish national of Danish extraction. When applied, the rule may therefore imply an indirect discrimination.

According to the relevant Explanatory Report, Article 5 of the European Convention on Nationality must be taken to mean that Article 5 § 1 concerns the conditions for acquiring nationality while Article 5 § 2 concerns the principle of non-discrimination. According to the report, it is not a mandatory rule that the Contracting States are obliged to observe in all situations. Against that background, Article 5 is considered to offer protection against discrimination to an extent that goes no further than the protection against discrimination offered by Article 14 of the Convention.

The assessment of whether the refusal of the Ministry implied discrimination amounting to a breach of Article 14 of the Convention read in conjunction with Article 8 is accordingly considered to depend on whether the difference in treatment which occurred as a consequence of the attachment requirement in spite of nationality can be considered objectively justified and proportionate.

According to the preparatory work of the Act, the overall aim of the attachment requirement, which is a requirement of lasting and strong links to Denmark, is to regulate spousal reunion in Denmark in such a manner as to ensure the best possible integration of immigrants in Denmark, an aim which must in itself be considered objective. In the view of the High Court, any difference in treatment between Danish nationals of Danish extraction and Danish nationals of foreign extraction can therefore be justified by this aim as regards the right to spousal reunion if a Danish national of foreign extraction has no such lasting and strong attachment to Denmark.

The balancing of this overall consideration relating to the specific circumstances of this case requires a detailed assessment. The High Court finds that the assessment and decision of the Ministry were made in accordance with section 9(7) of the Aliens Act and the preparatory work describing the application of the provision. Accordingly, and in view of the specific information on [the first applicant's] situation, the High Court finds no sufficient basis for holding that the refusal by the Ministry to grant a residence permit to [the second applicant] with reference to the attachment requirement of the Aliens Act implies a disproportionate infringement of [the first applicant's] rights as a Danish national and his right to family life. The High Court therefore finds that the decision of the Ministry was not invalid, and that it was not contrary to Article 14 of the Convention read in conjunction with Article 8."

27. The applicants appealed against the judgment to the Supreme Court (*Højesteret*), which delivered its judgment on 13 January 2010 upholding the High Court judgment.

28. The Supreme Court, composed of seven judges, found, unanimously, that it was not in breach of Article 8 of the Convention to refuse the second applicant a residence permit in Denmark. It stated as follows.

"In its decision of 27 August 2004, the Ministry of Integration rejected the application from [the second applicant] for a residence permit on the ground that the aggregate ties of herself and her spouse [the first applicant] with Denmark were not stronger than their aggregate ties with Ghana (see section 9(7) of the Aliens Act).

[The applicants] first submitted that the refusal was unlawful because it was contrary to Article 8 of the European Convention on Human Rights. If the refusal was not contrary to Article 8, they submitted as their alternative claim that it was contrary to the prohibition against discrimination enshrined in Article 14 read in conjunction with Article 8, for which reason they were eligible for family reunion in Denmark without satisfying the attachment requirement set out in section 9(7) of the Act.

For the reasons given by the High Court, the Supreme Court upholds the Ministry's decision that it is not contrary to Article 8 to reject [the second applicant's] application for a residence permit."

29. Moreover, the majority in the Supreme Court (four judges) found that the 28-year rule was in compliance with Article 14 of the Convention read in conjunction with Article 8. They stated as follows.

"Pursuant to section 9(7), as worded by Law no. 1204 of 27 December 2003, the requirement that the spouses' or cohabitants' aggregate ties with Denmark must be stronger than their aggregate ties with another country (the attachment requirement) does not apply when the resident has been a Danish national for twenty-eight years (the 28-year rule).

Until 2002, Danish nationals had had a general exemption from the attachment requirement. Law no. 365 of 6 June 2002 tightened up the conditions of family reunion, one of the consequences being that the attachment requirement would subsequently also apply to family reunion where one of the partners was a Danish national. One of the reasons for extending the attachment requirement to include Danish nationals also given in the preparatory work (see page 3982 of Schedule A to the Official Gazette for 2001-02 (2nd session)) is that there are Danish nationals who are not particularly well integrated in Danish society and for this reason the integration of a newly arrived spouse in Denmark may entail major problems.

It quickly became apparent that this tightening up had some unintended consequences for persons such as Danish nationals who had opted to live abroad for a lengthy period and who had started a family while away from Denmark. For that reason, the rules were relaxed with effect from 1 January 2004 so that family reunion in cases where one of the partners had been a Danish national for at least twenty-eight years was no longer subject to satisfaction of the requirement of stronger aggregate ties with Denmark.

According to the preparatory work in respect of the relaxation, the Government found that the fundamental aim of tightening up the attachment requirement in 2002 was not forfeited by refraining from demanding that the attachment requirement be met in cases where the resident had been a Danish national for twenty-eight years (see page 49 of Schedule A to the Official Gazette for 2003-04). It is mentioned in this connection that Danish expatriates planning to return to Denmark one day with their families will often have maintained strong ties with Denmark, which have also been communicated to their spouse or cohabitant and any children. This is so when they speak Danish at home, take holidays in Denmark, read Danish newspapers regularly, and so on. Thus, there will normally be a basis for successful integration of Danish expatriates' family members into Danish society.

Persons who have not been Danish nationals for twenty-eight years, but were born and raised in Denmark, or came to Denmark as small children and were raised here, are normally also exempt from the attachment requirement when they have stayed lawfully in Denmark for twenty-eight years.

A consequence of this current state of the law is that different groups of Danish nationals are subject to differences in treatment in relation to their possibility of being reunited with family members in Denmark, as persons who have been Danish nationals for twenty-eight years are in a better position than persons who have been Danish nationals for fewer than twenty-eight years.

According to the case-law of the European Court of Human Rights, nationals of a country do not have an unconditional right to family reunion with a foreigner in their home country, as factors of attachment may also be taken into account in the case of nationals of that country. It is not in itself contrary to the Convention if different groups of nationals are subject to statutory differences in treatment as regards the possibility of obtaining family reunion with a foreigner in the country of their nationality.

In this respect, reference is made to paragraph 88 of the judgment delivered by the European Court of Human Rights in *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (28 May 1985, Series A no. 94). In that case the Court found that it was not contrary to the Convention that a person born in Egypt who had later moved to the United Kingdom and become a national of the United Kingdom and Colonies was treated less favourably as regards the right to family reunion with a foreigner than a national born in the United Kingdom or whose parent(s) were born in the United Kingdom. The Court stated in that respect:

> 'It is true that a person who, like Mrs Balkandali, has been settled in a country for several years may also have formed close ties with it, even if he or she was not born there. Nevertheless, there are in general persuasive social reasons for giving special treatment to those whose links with a country stem from birth within it. The difference of treatment must therefore be regarded as having had an objective and reasonable justification and, in particular, its results have not been shown to transgress the principle of proportionality.'

The Court then held that Mrs Balkandali was not a victim of discrimination on the ground of birth.

As regards Mrs Balkandali, who was a national of the United Kingdom and Colonies, it was not contrary to the Convention to make it an additional requirement for family reunion that she must have been born in the United Kingdom. A different additional requirement is made under Danish law: a requirement of Danish nationality for twenty-eight years. The question is whether [the first applicant] is subjected to discrimination contrary to the Convention owing to this criterion.

We find that the criterion of twenty-eight years of Danish nationality has the same aim as the requirement of birth in the United Kingdom, which was accepted by the Court in the 1985 judgment as not being contrary to the Convention: to distinguish a group of nationals who, seen from a general perspective, have lasting and strong ties with the country.

In general, a person of 28 years of age who has held Danish nationality since birth will have stronger real ties with Denmark and greater insight into Danish society than a 28-year-old person who – like [the first applicant] – only established links with Danish society as a young person or an adult. This also applies to Danish nationals who have stayed abroad for a shorter or longer period, for example in connection with education or work. We find that the 28-year rule is based on an objective criterion, as it must be considered objectively justified to select a group of nationals with such strong ties with Denmark when assessed from a general perspective that it will be unproblematic to grant family reunion with a foreign spouse or cohabitant in Denmark

as it will normally be possible for such spouse or cohabitant to be successfully integrated into Danish society.

Even though it is conceivable that a national who has had Danish nationality for twenty-eight years may in fact have weaker ties with Denmark than a national who has had Danish nationality for a shorter period, this does not imply that the 28-year rule should be set aside pursuant to the Convention. Reference is made to the case, relative to the then applicable additional British requirement of place of birth considered by the European Court of Human Rights, of a national who was not born in the United Kingdom, but who had in reality stronger ties with the United Kingdom than other nationals who satisfied the requirement of place of birth, but had moved abroad with their parents at a tender age or maybe had even been born abroad. It is noted in this respect that it was sufficient to satisfy that requirement for only one of the relevant person's parents to have been born in the United Kingdom.

We also find that the consequences of the 28-year rule cannot be considered disproportionate relative to [the first applicant]. [He] was born in Togo in 1971 and came to Denmark in 1993. After nine years' residence, he became a Danish national in 2002. In 2003 he married [the second applicant] and applied for reunion with his spouse in Denmark. The application was finally rejected in 2004. The factual circumstances of this case are thus in most material aspects identical to Mrs Balkandali's situation assessed by the Court in its judgment in 1985, when the Court found that the principle of proportionality had not been violated. She was born in Egypt in 1946 or 1948. She first went to the United Kingdom in 1973 and obtained nationality of the United Kingdom and Colonies in 1979. She married a Turkish national, Bekir Balkandali, in 1981, and their application for spousal reunion in the United Kingdom for the husband of a British national was rejected later in 1981. A comparison of the two cases reveals that both [the first applicant] and Mrs Balkandali only came to Denmark and the United Kingdom, respectively, as adults. In [the first applicant's] case, the application was rejected when he had resided in Denmark for eleven years, two of which as a Danish national. In Mrs Balkandali's case, the application was rejected after she had resided in the United Kingdom for eight years, two of which as a British national.

On these grounds we find no basis in the case-law to find that the 28-year rule implied discrimination contrary to the Convention against [the first applicant].

As regards the significance of the European Convention on Nationality of 6 November 1997, we find for the reasons stated by the High Court that it cannot be a consequence of Article 5 § 2 of this Convention that the scope of the prohibition against discrimination based on Article 14 of the European Convention of Human Rights read in conjunction with Article 8 should be extended further than justified by the 1985 judgment.

We hold on this basis that the refusal of residence for [the second applicant] given by the Ministry of Integration cannot be set aside as being invalid because it is contrary to Article 14 of the European Convention of Human Rights read in conjunction with Article 8.

For this reason we vote in favour of upholding the High Court judgment."

30. A minority of three judges were of the view that the 28-year rule implied indirect discrimination between persons who were born Danish citizens and persons who had acquired Danish citizenship later in life. Since persons who were born Danish citizens would usually be of Danish ethnic

origin, whereas persons who acquired Danish citizenship at a later point in their life would generally be of foreign ethnic origin, the 28-year rule also entailed indirect discrimination between ethnic Danish citizens and Danish citizens with a foreign ethnic background. More specifically, they stated as follows.

> "As stated by the majority, the requirement of section 9(7) of the Aliens Act that the spouses' or cohabitants' aggregate ties with Denmark must be stronger than their aggregate ties with another country (the attachment requirement) does not apply when the resident person has been a Danish national for twenty-eight years (the 28-year rule).
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> The 28-year rule applies both to persons born Danish nationals and to persons acquiring Danish nationality later in life, but in reality the significance of the rule differs greatly for the two groups of Danish nationals. For persons born Danish nationals, the rule only implies that the attachment requirement applies until they are 28 years old. For persons not raised in Denmark who acquire Danish nationality later in life, the rule implies that the attachment requirement applies until twenty-eight years have passed after the date when any such person became a Danish national. As an example, [the first applicant], who became a Danish national at the age of 31, will be subject to the attachment requirement until he is 59 years old. The 28-year rule therefore implies that the major restriction of the right to spousal reunion resulting from the attachment requirement will affect persons who only acquire Danish nationality later in life far more often and with a far greater impact than persons born with Danish nationality. Hence, the 28-year rule results in obvious indirect difference in treatment between the two groups of Danish nationals.
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> The vast majority of persons born Danish nationals will be of Danish ethnic origin, while persons acquiring Danish nationality later in life will generally be of other ethnic origin. At the same time, the 28-year rule therefore implies obvious indirect difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin regarding the right to spousal reunion.
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> Pursuant to section 9(7) of the Aliens Act, the attachment requirement may be disregarded if exceptional reasons make this appropriate. According to the preparatory work of the 2003 Act, this possibility of exemption is to be administered in such a manner that aliens who were born and raised in Denmark or who came to Denmark as small children and were raised here must be treated comparably to Danish nationals, which means that they will be exempt from the attachment requirement when they have lawfully resided in Denmark for twenty-eight years. However, relative to persons who were not raised in Denmark, but acquire Danish nationality later in life, this does not alter the situation described above concerning the indirect difference in treatment implied by the 28-year rule.
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> When the attachment requirement was introduced by Law no. 424 of 31 May 2000, all Danish nationals were exempt from the requirement. Law no. 365 of 6 June 2002 made the attachment requirement generally applicable also to Danish nationals. Concerning the reason for this, the preparatory work in respect of the Law states, *inter alia*:
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> 'With resident aliens and Danish nationals of foreign extraction it is a widespread marriage pattern to marry a person from their country of origin, among other reasons due to parental pressure ... The government finds that the attachment requirement, as it is worded today, does not take sufficient account of the existence of this marriage pattern among both resident foreigners and resident Danish nationals of foreign

extraction. There are thus also Danish nationals who are not well integrated into Danish society and for this reason the integration of a newly arrived spouse in Denmark may therefore entail major problems.'

By Law no. 1204 of 27 December 2003, the application of the attachment requirement to Danish nationals was restricted through the 28-year rule, and the preparatory work in respect of the Law stated that the purpose was, *inter alia*, 'to ensure that Danish expatriates with strong and lasting ties to Denmark in the form of at least twenty-eight years of Danish nationality will be able to obtain spousal reunion in Denmark'. In the light of these notes, it is considered a fact that the indirect difference in treatment between Danish nationals of Danish ethnic extraction and Danish nationals of other ethnic extraction following from the 28-year rule is an intended consequence.

Under Article 14 of the Convention, the enjoyment of the rights and freedoms recognised by the Convention, including the individual's right under Article 8 to respect for his or her family life, must be 'secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. As mentioned above, the 28-year rule implies both indirect difference in treatment between persons born Danish nationals and persons only acquiring Danish nationality later in life and, in the same connection, indirect difference in treatment between Danish nationals of Danish ethnic extraction and Danish nationals of other ethnic extraction. Both these types of indirect difference in treatment must be considered to fall within Article 14 of the Convention read in conjunction with Article 8. The two types of indirect difference in treatment implied by the 28-year rule are therefore contrary to Article 14 unless the difference in treatment can be considered objectively justified and proportionate.

The European Convention on Nationality of 6 November 1997, which has been ratified by Denmark, provides in Article 5 § 2: 'Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.' The memorandum of 14 January 2005 of the Ministry of Integration and the memorandum of November 2006 of the working group composed of representatives of the Ministry of Justice, the Ministry of Foreign Affairs and the Ministry of Integration state that the provision solely concerns issues on the revocation and loss of nationality. In our opinion it is dubious whether there is any basis for such a restrictive interpretation as the provision, according to its wording, comprises any difference in treatment exercised as a consequence of how and when nationality was acquired. As is apparent from the Explanatory Report, the provision is not a prohibition from which no derogation may be made, and the provision must be taken to mean that it may be derogated from if the difference in treatment is objectively justified and proportionate. However, when assessing the 28-year rule relative to Article 14 of the Convention read in conjunction with Article 8, we consider it necessary to include the fact that, at least according to its wording, Article 5 § 2 of the European Convention on Nationality comprises a general provision stating that any difference in treatment between different groups of a State Party's own nationals is basically prohibited.

In an assessment made under Article 14 of the Convention read in conjunction with Article 8, another factor to be taken into consideration is the crucial importance of being entitled to settle with one's spouse in the country of one's nationality.

As mentioned, Danish nationals were originally generally exempt from the attachment requirement. The Supreme Court established in a judgment reproduced on

page 2086 of the Danish *Weekly Law Reports* for 2005 that discrimination relative to the right to spousal reunion based on whether the resident spouse is a Danish or foreign national is not contrary to the prohibition of discrimination laid down in Article 14 of the Convention read in conjunction with Article 8. In this respect, the Supreme Court referred to paragraphs 84 to 86 of the judgment delivered by the European Court of Human Rights ... in *Abdulaziz, Cabales and Balkandali* [cited above]. Difference in treatment based on nationality must be seen, *inter alia*, in the light of the right of Danish nationals to settle in Denmark, and no significance can be attributed to the fact that such discrimination is not considered contrary to Article 14 read in conjunction with Article 8 when assessing whether it is permissible to implement a scheme implying a difference in treatment between different groups of Danish nationals. In our opinion, no crucial significance can be attributed to paragraphs 87 to 89 of the *Abdulaziz, Cabales and Balkandali* judgment either in this assessment, among other reasons because difference in treatment based on the length of a person's period of nationality is not comparable to a difference in treatment based on place of birth.

In the cases in which the attachment requirement applies, some of the factors emphasised are whether the resident spouse has strong links to Denmark by virtue of his or her childhood and schooling in Denmark. Such strong attachment to Denmark will exist in most cases where a person has held Danish nationality for twenty-eight years. However, when assessing whether the difference in treatment implied by the 28-year rule can be considered objectively justified, it is not sufficient to compare persons not raised in Denmark who acquire Danish nationality later in life with the large group of persons who were born Danish nationals and were also raised in Denmark. If exemption from the attachment requirement was justified only in regard of the latter group of Danish nationals, the exemption should have been delimited differently. The crucial element must therefore be a comparison with persons who were born Danish nationals and have been Danish nationals for twenty-eight years, but who were not raised in Denmark and may perhaps not at any time have had their residence in Denmark. In our opinion, it cannot be considered a fact that, from a general perspective, this group of Danish nationals has stronger ties with Denmark than persons who have acquired Danish nationality after entering and residing in Denmark for a number of years. It should be taken into consideration in that connection that one of the general conditions for acquiring Danish nationality by naturalisation is that the relevant person has resided in Denmark for at least nine years, has proved his or her proficiency in the Danish language and knowledge of Danish society and meets the requirement of self-support.

Against that background, it is our opinion that the indirect difference in treatment implied by the 28-year rule cannot be considered objectively justified, and that it is therefore contrary to Article 14 of the Convention read in conjunction with Article 8.

The consequence of this must be that, when applying section 9(7) of the Aliens Act to Danish nationals, the authorities must limit the 28-year rule to being solely an age requirement, meaning that the attachment requirement does not apply in cases where the resident spouse is a Danish national and is at least 28 years old.

Accordingly, we vote for ruling in favour of the [applicants'] claim to the effect that the Ministry of Integration must declare invalid the decision of 27 August 2004, thereby remitting the case for renewed consideration.

In view of the outcome of the voting on this claim we see no reason to consider the claim for compensation."

31. The applicants remained in Sweden and did not subsequently apply for family reunion in Denmark, which they could have done under section 9(7) of the Aliens Act, had the first applicant decided to reside in Denmark anew. He kept his job in Copenhagen and therefore commuted every day from Malmö in Sweden to Copenhagen in Denmark.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. The attachment requirement (section 9(7) of the Aliens Act)

32. The attachment requirement was introduced into Danish legislation on 3 June 2000 as one of the conditions for granting family reunion with persons residing in Denmark who were not Danish nationals.

33. With effect from 1 July 2002 the attachment requirement was extended to apply also to residents of Danish nationality, one of the reasons being, according to the preparatory work, that

> "... [e]xperience has shown that integration is particularly difficult in families where generation upon generation fetch their spouses to Denmark from their own or their parents' country of origin. With resident aliens and Danish nationals of foreign extraction it is a widespread marriage pattern to marry a person from their country of origin, among other reasons owing to parental pressure. This pattern contributes to the retention of these persons in a situation where they, more than others, experience problems of isolation and maladjustment in relation to Danish society. The pattern thus contributes to hampering the integration of aliens newly arrived in Denmark. The government finds that the attachment requirement, as it is worded today, does not take sufficient account of the existence of this marriage pattern among both resident foreigners and resident Danish nationals of foreign extraction. There are thus also Danish nationals who are not well integrated into Danish society and for this reason the integration of a newly arrived spouse in Denmark may therefore entail major problems."

34. In accordance with the amendment, the spouses' aggregate ties with Denmark must be stronger than their aggregate ties with another country. By this amendment (applicable in the applicants' case) the provision was moved to section 9(7) of the Aliens Act and reads as follows.

Section 9(7)

> "Unless otherwise appropriate for exceptional reasons, a residence permit under subsection (l)(i) can only be issued if the spouses' or cohabitants' aggregate ties with Denmark are stronger than the spouses' or cohabitants' aggregate ties with another country."

According to the explanatory notes, "exceptional reasons" could allow for obligations under Article 8 of the Convention.

2. The 28-year rule (inserted as an exemption in section 9(7))

35. It quickly became apparent that this tightening up of the rules had some unintended consequences for persons such as Danish nationals who

opted to live abroad for a lengthy period and who started a family while away from Denmark. For that reason, the rules were relaxed by Law no. 1204 of 27 December 2003, with effect from 1 January 2004, so that family reunion in cases where one of the partners had been a Danish national for at least twenty-eight years were no longer subject to satisfaction of the requirement of stronger aggregate ties to Denmark. Thereafter the relevant provisions were reworded as follows.

Section 9

"(1) Upon application, a residence permit may be issued to:

(i) an alien over the age of 24 who cohabits at a shared residence, either in marriage or in regular cohabitation of prolonged duration, with a person permanently resident in Denmark over the age of 24 who:

(a) is a Danish national;

...

(7) Unless otherwise appropriate for exceptional reasons, a residence permit under subsection (1)(i)(a), when the resident person has not been a Danish national for twenty-eight years, and under subsection (1)(i)(b) to (d), can only be issued if the spouses' or the cohabitants' aggregate ties with Denmark are stronger than the spouses' or the cohabitants' aggregate ties with another country. Resident Danish nationals who were adopted from abroad before their sixth birthday and who acquired Danish nationality not later than on their adoption are considered to have been Danish nationals from birth."

36. The preparatory work in respect of Law no. 1204 stated as follows.

"If a Danish national travels abroad and starts a family, staying with his or her foreign spouse or cohabitant and any children in the country of origin of the spouse or cohabitant for a lengthy period, it will often be difficult to prove that their aggregate ties with Denmark are stronger than their aggregate ties with another country. The Danes who opt to settle abroad for a lengthy period and start a family during their stay abroad may therefore find it difficult to meet the attachment requirement.

Against that background, the government proposes that the attachment requirement need not be met in future cases where the person who wants to bring his or her spouse or regular cohabitant to Denmark has been a Danish national for twenty-eight years.

The aim of the proposed provision is to ensure that Danish expatriates with strong and lasting ties with Denmark in the form of at least twenty-eight years of Danish nationality will be able to obtain spousal reunion in Denmark. Hence, the proposed provision is intended to help a group of persons who do not, under the current section 9(7) of the Aliens Act, have the same opportunities as resident Danish and foreign nationals for obtaining spousal reunion in Denmark. The proposed change to the attachment requirement will give Danish expatriates a real possibility of returning to Denmark with a foreign spouse or cohabitant, and likewise young Danes can go abroad and stay there for a period of time with the certainty of not being barred from returning to Denmark with a foreign spouse or cohabitant as a consequence of the attachment requirement.

The government finds that the fundamental aim of amending the attachment requirement by Law no. 365 of 6 June 2002 is not forfeited by refraining from

> demanding that the attachment requirement be met in cases where the resident person has been a Danish national for twenty-eight years. It is observed in this connection that Danish expatriates planning to return to Denmark one day with their families will often have maintained strong ties with Denmark, which are also communicated to their spouse or cohabitant and any children. This is so when they speak Danish at home, take holidays in Denmark, read Danish newspapers regularly, and so on, which normally gives a basis for a successful integration of Danish expatriates' family members into Danish society."

37. The preparatory work contained an assessment of the compatibility of Law no. 1204 with international treaties, including the European Convention on Human Rights. With reference to the prohibition against discrimination in Article 14 of the Convention, it was specifically stated that twenty-eight years of legal residence since early childhood would constitute "exceptional reasons" as set out in section 9(7) for non-Danish nationals. Accordingly, persons who were not Danish nationals, but who were born and raised in Denmark, or came to Denmark as small children and were raised in Denmark, were also exempted from the attachment requirement, as long as they had resided lawfully in Denmark for twenty-eight years.

38. An amendment of the Aliens Act came into force on 15 May 2012, reducing the 28-year rule to a 26-year rule.

3. The general provision on residence permits (section 9c(1))

39. Section 9c(1), as introduced in 2002, is a general provision on residence permits, which provides:

> "Upon application, a residence permit may be issued to an alien if exceptional reasons make it appropriate."

According to the explanatory notes to the provision, a residence permit will be issued under this provision in cases where an alien would be unable to obtain a residence permit under the other provisions of the Aliens Act, provided that Denmark has undertaken to grant such permit according to its treaty obligations. The notes read as follows.

> "Under the proposed section 9c(1), first sentence, a residence permit may be issued to an alien upon application, if exceptional reasons make it appropriate ... These cases are those, in particular, where family reunification is not possible under the current section 9(1) of the Aliens Act, but where it is necessary to grant family reunification as a consequence of Denmark's treaty obligations, including particularly Article 8 of the European Convention on Human Rights. Under current practice, family reunification may also be granted upon a very specific assessment in other exceptional cases where family reunification is not possible under the current section 9(1) of the Aliens Act."

4. Subsequent legal debate on the "attachment requirement" and the "28-year rule"

40. The introduction of the attachment requirement as well as the 28-year rule gave rise to a legal and political debate in Denmark. For

example, the Danish Human Rights Institute published a memorandum in 2004 criticising the legislation. As a consequence, the Ministry for Refugees, Immigration and Integration published a memorandum on 14 January 2005 discussing the legal issues. Furthermore, the government established a working group with representatives from the Ministry of Justice, the Ministry of Foreign Affairs and the Ministry for Refugees, Immigration and Integration Affairs. A memorandum prepared by the working group was published on 14 November 2006 discussing, *inter alia*, the compatibility of the 28-year rule with Denmark's international obligations.

5. Practice on family reunification

41. The Government have submitted information on the Danish authorities' practice on family reunification, namely a memorandum of 1 December 2005 on the application of the attachment requirement to spousal reunification under section 9(7) of the Aliens Act, and statistical material.

42. It appears from the memorandum of 1 December 2005 that usually spouses will have fulfilled the attachment requirement if they have been raised in different countries and have no joint ties with a country other than Denmark. This applies regardless of whether one of the spouses has been raised in Denmark or both spouses have been raised in countries other than Denmark. However, it is required that the foreign spouse must have visited Denmark previously at least once and that the spouse who is resident in Denmark has made efforts to become integrated into Danish society.

43. By contrast, if the spouses were raised in the same country (as was the case for the applicants, namely Ghana) or have joint ties with a country other than Denmark, the attachment requirement will entail that the spouse resident in Denmark is required to have essential ties with Denmark. Such essential ties with Denmark are normally considered to have been obtained when the resident spouse has been entitled to reside in Denmark for about twelve years, regardless of whether the resident spouse has become a Danish national, and at the same time has made efforts to become integrated into Danish society. If the resident spouse has been naturalised, the attachment requirement will normally be met after three years of nationality.

44. In respect of the statistical material, the Government submitted that the statistics were subject to uncertainty as the case management system of the Danish Immigration Service was set up as a recording and case management system and not as a proper statistics system. The Danish Immigration Service registered no information on ethnic origin as this was irrelevant to the consideration of an application under the 28-year rule and such registration would be illegal under Danish administrative law. No information could therefore be provided on the number of Danish nationals

of Danish ethnic origin who had benefited from the 28-year rule, nor other information on ethnic origin relating to the figures on family reunion.

45. In a period of over ten years (from 1 January 2004 to 10 December 2014), it appears that residence permits (not including asylum applications) were requested in 43,320 cases, refused in 12,539 cases and granted in 30,781 cases.

46. The 30,781 cases granted can be divided into 20,732 residence permits, where the attachment requirement had been fulfilled or had been granted under the 28-year rule, and 10,049 residence permits where exemptions from the attachment requirement were granted for "exceptional reasons" either under section 9(7) or under the general provision in section 9c(1) of the Aliens Act. Accordingly, almost a third of the residence permits was granted under the "exceptional reasons" proviso. This group included those aliens who were not Danish nationals, but who were born and raised in Denmark or who came to Denmark as small children and were raised there, and who had stayed lawfully in the country for twenty-eight years, who were therefore also exempted from the attachment requirement by virtue of section 9(7) of the Aliens Act (see paragraph 37 above).

III. RELEVANT EUROPEAN AND INTERNATIONAL MATERIALS

A. The Council of Europe

1. European Convention on Nationality

47. The Council of Europe's Convention on Nationality was adopted on 6 November 1997 and came into force on 1 March 2000. It has been ratified by twenty member States of the Council of Europe, including Denmark (on 24 July 2002 with entry into force on 1 November 2002). The relevant provisions read as follows.

> **Article 1 – Object of the Convention**
>
> "This Convention establishes principles and rules relating to the nationality of natural persons and rules regulating military obligations in cases of multiple nationality, to which the internal law of States Parties shall conform."
>
> **Article 4 – Principles**
>
> "The rules on nationality of each State Party shall be based on the following principles:
>
> a everyone has the right to a nationality;
>
> b statelessness shall be avoided;
>
> c no one shall be arbitrarily deprived of his or her nationality;
>
> d neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse."

Article 5 – Non-discrimination

"1 The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.

2 Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently."

48. The Explanatory Report to the European Convention on Nationality states the following, *inter alia*, about the above Articles.

Article 4 – Principles

"30. The heading and introductory sentence of Article 4 recognise that there are certain general principles concerning nationality on which the more detailed rules on the acquisition, retention, loss, recovery or certification of nationality should be based. The words 'shall be based' were chosen to indicate an obligation to regard the following international principles as the basis for national rules on nationality.

..."

Article 5 – Non-discrimination

"*Paragraph 1*

39. This provision takes account of Article 14 of the ECHR which uses the term 'discrimination' and Article 2 of the Universal Declaration of Human Rights which uses the term 'distinction'.

40. However, the very nature of the attribution of nationality requires States to fix certain criteria to determine their own nationals. These criteria could result, in given cases, in more preferential treatment in the field of nationality. Common examples of justified grounds for differentiation or preferential treatment are the requirement of knowledge of the national language in order to be naturalised and the facilitated acquisition of nationality due to descent or place of birth. The Convention itself, under Article 6, paragraph 4, provides for the facilitation of the acquisition of nationality in certain cases.

41. States Parties can give more favourable treatment to nationals of certain other States. For example, a member State of the European Union can require a shorter period of habitual residence for naturalisation of nationals of other European Union States than is required as a general rule. This would constitute preferential treatment on the basis of nationality and not discrimination on the ground of national origin.

42. It has therefore been necessary to consider differently distinctions in treatment which do not amount to discrimination and distinctions which would amount to a prohibited discrimination in the field of nationality.

43. The terms 'national or ethnic origin' are based on Article 1 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination and part of Article 14 of the ECHR. They are also intended to cover religious origin. The ground of 'social origin' was not included because the meaning was considered to be too imprecise. As some of the different grounds of discrimination listed in Article 14 of the European Convention on Human Rights were considered as not amounting to discrimination in the field of nationality, they were therefore excluded from the grounds of discrimination in paragraph 1 of Article 5. In addition, it was noted that, as the ECHR was not intended to apply to issues of nationality, the totality

of the grounds of discrimination contained in Article 14 were appropriate only for the rights and freedoms under that Convention.

44. The list in paragraph 1 therefore contains the core elements of prohibited discrimination in nationality matters and aims to ensure equality before the law. Furthermore, the Convention contains many provisions designed to prevent an arbitrary exercise of powers (for example Articles 4.c, 11 and 12) which may also result in discrimination.

Paragraph 2

45. The words 'shall be guided by' in this paragraph indicate a declaration of intent and not a mandatory rule to be followed in all cases.

46. This paragraph is aimed at eliminating the discriminatory application of rules in matters of nationality between nationals at birth and other nationals, including naturalised persons. Article 7, paragraph 1.b, of the Convention provides for an exception to this guiding principle in the case of naturalised persons having acquired nationality by means of improper conduct."

2. The Council of Europe Commissioner for Human Rights

49. The Council of Europe Commissioner for Human Rights has made recommendations to Denmark in respect of the Aliens Act, including the 28-year rule. In his report of 8 July 2004 (CommDH(2004)12), Mr Alvaro Gil-Robles, suggested that Denmark

> "[r]econsider some of the provisions of the 2002 Aliens Act relating to family reunion, in particular
>
> – the minimum age requirement of 24 years for both spouses for family reunion and the 28 year citizenship requirement for the exemption from the condition of both spouses aggregate ties to Denmark;"

In his view, these provisions did not guarantee the principle of equality before the law.

In a letter of 15 October 2004 to the Danish government, the Commissioner added the following clarification of his views.

> "My concern is that this requirement places undue restrictions on naturalised Danish citizens and places them at considerable disadvantage in comparison to Danish citizens born in Denmark. It is of course true that the 28-year rule applies equally to all citizens. It follows, however, that whilst the exemption from the aggregate ties condition will apply to a 28-year-old citizen born in Denmark, it will do so, for instance, only, allowing for the current 9 years residence requirement for naturalisation, at the age of 57 for a citizen who first settled in Denmark at the age of 20. The dispensation from the aggregate ties conditions for a naturalised citizen, for whom the condition will, inevitably, be harder to meet by virtue of his or her own foreign origin, at so late an age constitutes, in my view, an excessive restriction to the right to family life and clearly discriminates between Danish citizens on the basis of their origin in the enjoyment of this fundamental right."

In the follow-up assessment conducted by Mr Thomas Hammarberg, on 5 to 7 December 2006 (CommDH(2007)11), the Commissioner stated as follows.

> "The Commissioner cannot see how one can dispute that the requirement in question does introduce a different treatment of Danes who have held citizenship as of birth and those who have obtained it later on in their life and normally have to wait another 28 years before they can live in Denmark with their foreign partner. He notes that, in a meeting of his delegation with the Legal Affairs Committee of the Danish Parliament, it was conceded that there was indeed a discriminatory effect of such legislation and that this corresponded to a political decision. The Commissioner recommends that the Government reduce the very high threshold of 28 years."

On that basis the Commissioner recommended that the Danish authorities

> "reduce the requirement of 28 years of citizenship of the person living in Denmark for an exemption from the condition of both spouses having aggregate ties to Denmark that are stronger than with another country for granting a residence permit to his or her foreign partner;"

3. The Committee of Ministers

50. On 26 March 2002 the Committee of Ministers adopted Recommendation Rec(2002)4 to member states on the legal status of persons admitted for family reunification. It bore in mind

> "that family reunification is one of the major sources of immigration in most European states and that the residence status and other rights granted to the admitted family members are important elements in assisting the integration of the new migrants in the host society".

It also considered

> "that rules of member states on family reunion as an integral part of a coherent immigration and integration policy should be guided by common principles".

It recommended that governments ensure the adoption in their legislation and administrative practice of various principles to be applied after admission for family reunification, in particular as to the residence status of family members, the autonomy of the family member's residence status in relation to that of the principal right holder, effective protection against expulsion of family members, free movement, political participation of persons admitted for family reunification and acquisition of nationality.

4. The Parliamentary Assembly of the Council of Europe

51. On 23 November 2004 the Parliamentary Assembly of the Council of Europe adopted Recommendation 1686 (2004) on human mobility and the right to family reunion, which recommended, among other things, that the Committee of Ministers:

> "12.1. increase its monitoring of compliance by member states with international legal instruments regarding family reunion, particularly compliance with the European Convention on Human Rights and the relevant recommendations of the Committee of Ministers in this field;
>
> 12.2. draw up proposals for the harmonisation and implementation of family reunion policies in member states and lay down a common definition of the family

unit and rules regarding specific circumstances based on the recommendations set out in sub-paragraph 12.iii;

..."

5. European Commission against Racism and Intolerance (ECRI)

52. ECRI has produced reports on Denmark in, for example, 2001 (CRI(2001)4), 2006 (CRI(2006)18) and 2012 (CRI(2012)25).

53. In its second report on Denmark (CRI(2001)4), the following was stated in paragraph 23.

"The trend in Denmark, noted by ECRI in its first report, of tightening policies regarding entry into the country for immigrants, refugees and asylum seekers, has continued. Amendments to the Aliens Act have established further restrictions in the granting of permanent residence and in the area of family reunification. The length of time for which an ~~alien~~ immigrant must have had lawful residence in Denmark has now been increased to six years (instead of the previous five), and certain requirements, including the completion of an introduction programme must normally be met. In the area of family reunification the latest amendments require that persons wishing to bring a spouse to Denmark are over 25 years of age and dispose of a dwelling of reasonable size, unless particular reasons make it inappropriate. The age requirement, which the Danish authorities explain has been imposed in order to protect young people against forced marriage, may be waived if an individual assessment proves without any doubt that the marriage is based on the free will of the person living in Denmark. There has been considerable criticism of this age requirement from members of minority groups who feel that the change is based on negative stereotypes about the marriage practices of certain minority groups and violates their right to private life, including choosing a spouse. ECRI is concerned that such criteria in the area of family reunification may impact in a discriminatory fashion on certain minority groups, such as Muslims and encourages the Danish authorities to give due consideration to this issue."

54. In its third report on Denmark (CRI(2006)18), the following was set out.

"49. ... ECRI is deeply concerned by the fact that the 28 years' aggregate ties with Denmark rule amounts to indirect discrimination between those who were born Danish and people who acquired Danish citizenship at a later stage**.** The stated purpose of the 24 year old rule, which is to avoid forced marriages, in fact concerns only a very small number of people. According to research recently carried out among members of the Turkish, Lebanese, Pakistani, Somali and former Yugoslavian communities, 80% of the respondents indicated that they chose their spouse themselves, 16 % stated that they did it together with their parents and only 4% indicated that their parents chose their spouse for them. ...

...

Recommendations:

53. ECRI urges the Danish Government to reconsider the provisions contained in the Aliens' Act on spousal and family reunification, bearing in mind Article 8 of the European Convention on Human Rights. It also urges Denmark not to adopt laws which in effect indirectly discriminate against minority groups. ECRI strongly recommends that the Danish Government take into consideration the

recommendations made by various international and national bodies regarding the Aliens' Act."

55. In its fourth report on Denmark (CRI(2012)25), the following was set out (footnotes omitted).

"124. In its third report ECRI urged the Danish authorities to reconsider the provisions contained in the Aliens' Act on spousal and family reunification, bearing in mind Article 8 of the European Convention on Human Rights. It also urged the Danish authorities not to adopt laws which in effect indirectly discriminate against minority groups**.**

125. ECRI notes with concern that on 1 June 2011, the Danish Parliament adopted new rules (which entered into force on 1 July 2011) for spousal reunification which further tightened the strict rules already in force. ...

126. ... The spouses'/partners' combined attachment to Denmark must be considerably greater than their combined attachment to any other country. Persons who have held Danish citizenship for over 28 years, or who were born and raised in Denmark or came to the country as small children and have resided legally there for over 28 years are exempt from the attachment requirement. In order to fulfil the attachment requirement, the applicant spouse/partner is normally required to have visited Denmark at least twice on a visa or visa-free stay and to have completed a Danish language course (on A1 level as a minimum). The spouse/partner residing in Denmark must have made an effort to integrate into Danish society. ...

...

129. ... As concerns the rule by which family reunification can only be achieved at the age of 24, with the stated purpose of preventing forced marriages, ECRI notes research indicating that 84% of marriages are contracted with the free will of the parties concerned. Furthermore, ECRI considers that this measure is disproportionate to the aim sought. Even if the requirement that the spouses'/partners' combined attachment to Denmark should be considerably greater than their combined attachment to any other country is changed to the above-mentioned aggregate ties requirement, it remains a criterion which can be subject to subjective interpretation. The rule that persons who have held Danish citizenship whether it be for over 28 or 26 years, or who were born in Denmark or came to the country as a small child or have resided legally in the country, whether it be for over 28 or 26 years, are exempt from these requirements, also risks disproportionately affecting non-ethnic Danes. The Danish authorities have informed ECRI that the Aliens' Act contains an exemption mechanism. An example of an exceptional reason for allowing family reunification although not all the requirements for spousal reunification have been met is when refusing an application would interfere with Denmark's international obligations (e.g. the right to respect for private and family life guaranteed in Article 8 in the European Convention on Human Rights). The Danish authorities have indicated that exemptions can, for example, be granted if the spouse in Denmark holds a residence permit as a refugee and would otherwise have to enjoy his/her family life in a country where s/he risks persecution. ECRI also notes with concern reports indicating that if a child is not assessed as being able to integrate in Denmark, s/he will not be allowed to join his/her parent(s) in Denmark for family reunification purposes or s/he will be deported from the country.

...

131. ECRI urges the Danish authorities to carry out a wide-ranging reform of the spousal reunification rules in order to remove any elements which amount to direct or indirect discrimination and/or which are disproportionate to their stated aims. ...”

B. The European Union

56. The relevant Articles of the Charter of Fundamental Rights of the European Union read as follows.

Article 7 – Respect for private and family life

“Everyone has the right to respect for his or her private and family life, home and communications.”

Article 21 – Non-discrimination

“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”

57. Article 20 § 1 of the Treaty on the Functioning of the European Union establishes EU citizenship, and states:

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”

Article 21 § 1 states:

“Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”

58. The rules on family reunification under EU law were not applied in the present case. For the sake of completeness, however, it should be mentioned that EU law on family reunification differs depending on the status of the person receiving the alien for family reunification purposes (see, for example, *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 69, 3 October 2014).

59. Moreover, in a judgment of 25 July 2008 in *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* (C-127/08, EU:C:2008:449) the Court of Justice of the European Union (CJEU) clarified the conditions and limits applicable to the right of residence of spouses of EU citizens. The cases concerned four third-country nationals (“TCN”), who had initially unsuccessfully applied for political asylum in Ireland and then married EU citizens who were not Irish nationals but who resided in Ireland. Their applications for residence permits as spouses of EU

citizens were rejected by the Minister of Justice on the ground that they did not satisfy the condition of prior lawful residence in another member State laid down in Irish law. Those rejections formed the subject matter of actions for annulment before the High Court which, finding that none of the marriages in question was a marriage of convenience, sought a preliminary ruling from the CJEU on the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States in order to establish whether the Directive precluded legislation of a member State which made the right of residence of a national of a non-member country subject to the conditions of prior lawful residence in another member State and acquisition of the status of spouse of a citizen of the Union before his/her arrival in the host member State. The CJEU ruled that these cases were a matter of EU law since the applicants concerned had exercised their right to free movement. Furthermore, it made no difference whether TCNs who were family members of an EU citizen had entered the host member State before or after becoming family members of that EU citizen. According to the CJEU, the Directive did not make its application conditional on the beneficiaries – family members of a citizen of the EU – having previously resided in a member State. Nor did the Directive on family reunification require the EU citizen to have founded his/her family before exercising his/her right of free movement in another member State or the national of a non-member country to have entered the host member State before becoming a family member of the EU citizen. In other words, a TCN who was the spouse of an EU citizen and who accompanied that citizen in the host member State could enjoy rights conferred by that Directive irrespective of when and where their marriage took place or of how the TCN had entered the host member State.

C. The United Nations

60. In its concluding observations after the Sixty-ninth session in 2006 in respect of Denmark (UN Doc. CERD/C/DEN/CO/17), the Committee on the Elimination of Racial Discrimination, concluded, *inter alia*, as follows.

> "15. The Committee reiterates its concern regarding the restrictive conditions in Danish legislation regarding family reunification. In particular, the conditions that both spouses must have attained the age of 24 to be eligible for family reunification, and that their aggregate ties with Denmark must be stronger than their ties with any other country unless the spouse living in Denmark has been a Danish national or has been residing in Denmark for more than 28 years, may lead to a situation where persons belonging to ethnic or national minority groups are discriminated against in the enjoyment of their right to family life, marriage and choice of spouse. The Committee also regrets that the right to family reunification is restricted to children below the age of 15 (art. 5 (d) (iv)).

> The Committee recommends that the State party review its legislation to ensure that the right to family life, marriage and choice of spouse is guaranteed to every person without discrimination based on national or ethnic origin. It also recommends that the right to family reunification be allowed to children below the age of 18. The State party should ensure that the measures it adopts to prevent forced marriages do not impact disproportionately on the rights of persons belonging to ethnic or national minorities. It should also assess the extent to which the condition for spousal reunification that the spouse residing in Denmark must provide a bank guarantee and may not have received any public assistance for sustenance within the last year before the reunification amounts to indirect discrimination against minority groups who tend to suffer from socioeconomic marginalization."

IV. COMPARATIVE LAW

61. According to the information available to the Court, including a comparative-law survey covering twenty-nine Council of Europe member States (Austria, Belgium, Bosnia and Herzegovina, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Liechtenstein, Lithuania, Luxembourg, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, the United Kingdom), the basic requirements for family reunification of nationals with third-country nationals are broadly similar in the member States compared, although the practice may vary considerably from one country to another, and from one case to another, depending on the circumstances.

General conditions for granting family reunion in a large number of member States seem to be that the persons seeking family reunion should fall into one of the categories of beneficiaries and be in possession of valid personal documents and certificates proving family ties with the nationals. They should normally have sufficient means of subsistence, adequate housing, health insurance and the national spouse should have a registered place of residence in the country. Some countries require spouses to have reached either 18 or 21 years of age. The requirement that candidates should have a basic knowledge of the national language is also common.

A refusal to grant family reunion may be justified if it is shown that the marriage is a marriage of convenience or if a false identity and/or documents have been produced in support of the application for family reunion, or if there exist public-order or security and public-health concerns.

Some countries refuse to grant family reunion if the applicant has a criminal record or would be a burden on the welfare system, and other countries condemn in particular the giving of a false identity and untruthful statements in the proceedings. In a number of countries, the unlawful entry/stay of an alien is an impediment to the acquisition of a residence permit. However, some countries specify that it is not.

Some countries may provide for special conditions, for instance for the prevention of polygamy or human trafficking.

The requirements for family reunion usually vary depending on the type of permit sought. For long-stay permits and the acquisition of nationality, the duration of the marriage, the existence of genuine life community and residence in the country are relevant factors.

In terms of conditions for family reunification, none of the member States in respect of which the Court has information distinguishes between "nationals by birth" and "nationals by acquisition later in life".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

62. The applicants complained that the refusal by the Danish authorities to grant them family reunion in Denmark was in breach of Article 8, taken alone and in conjunction with Article 14. They submitted in the latter connection that the amendment to the Aliens Act in force as of 1 January 2004, lifting the attachment requirement for those who had held Danish citizenship for at least twenty-eight years (known as "the 28-year rule"), resulted in an unjustified difference in treatment between two groups of Danish nationals: namely those born Danish nationals and those, like Mr Biao, who acquired Danish nationality later in life, and also Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin.

63. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The Chamber judgment

64. In its judgment of 25 March 2014, the Chamber found unanimously that there had been no violation of Article 8 taken alone. In particular, it found that the Danish authorities had struck a fair balance between the public interest in ensuring effective immigration control, on the one hand, and the applicants' need to be granted family reunion in Denmark, on the other. Mr Biao had strong ties to Togo, Ghana and Denmark. His wife had very strong ties to Ghana but no ties to Denmark, apart from having married Mr Biao who lived in Denmark and had Danish citizenship. Furthermore, the couple had never been given any assurances by the Danish authorities that Ms Biao would be granted a right of residence in Denmark. As the attachment requirement had been applicable to Danish nationals from July 2002 onwards, the applicants could not have been unaware when they married, in February 2003, that Ms Biao's immigration status would make any family life in Denmark uncertain for them from the outset. Moreover, once they had been notified of the authorities' refusal of July 2003 to grant family reunion, Ms Biao could not have expected any right of abode by simply entering the country on a tourist visa. Lastly, Mr Biao himself had stated that, if he obtained paid employment in Ghana, he and his family could settle there. Thus, the refusal to grant Ms Biao a residence permit in Denmark did not prevent the couple from exercising their right to family life in Ghana or any other country.

65. Concerning the complaint under Article 14 read in conjunction with Article 8, the Chamber held, by a majority of four votes to three, that there had been no violation.

66. It firstly considered that the applicants had failed to substantiate their complaint that they had been discriminated against on the basis of race or ethnic origin as a consequence of the application of the 28-year rule. The Chamber recalled that a similar claim had been submitted in *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (28 May 1985, §§ 84-86, Series A no. 94) and dismissed. The Chamber found that the Court's reasoning in that judgment could apply in the present case and pointed out that non-Danish nationals who had been born and raised in Denmark, or had arrived in Denmark as small children and had been raised there, and who had stayed lawfully in the country for twenty-eight years, were also exempted from the attachment requirement.

67. The majority of the Chamber did find, however, that there had been a difference in treatment between Mr Biao, who had been a Danish national for less than twenty-eight years, and persons who had been Danish nationals for more than twenty-eight years. As regards that difference in treatment, the Chamber noted that at the relevant time the applicants' aggregate ties to Denmark had clearly not been stronger than their ties to another country. Furthermore, in 2004 Mr Biao had been a Danish national for less than two

years when he had been refused family reunion. Refusing to exempt Mr Biao from the attachment requirement after such a short time could not, in the Chamber's view, be considered disproportionate to the aim of the 28-year rule, namely to favour a group of nationals who, seen from a general perspective, had lasting ties with Denmark and who could be granted family reunion with a foreign spouse without difficulty, as the spouse could normally be successfully integrated into Danish society.

B. The parties' submissions

1. The applicants

68. The applicants submitted that they had been subjected to indirect discrimination. Firstly, there was an obvious difference in treatment when applying for family reunion between Danish-born nationals and those who acquired Danish nationality later in life, since persons who were born Danish citizens were exempt from the attachment requirement as soon as they had turned 28 years old, whereas persons who had acquired Danish citizenship at a later point in life had to wait twenty-eight years before being exempted from the attachment requirement. That differential treatment also amounted to indirect discrimination on the basis of race or ethnic origin, since the majority of Danish-born persons would be ethnically Danish, while persons acquiring Danish nationality later in life would overwhelmingly be of other ethnic origins.

69. The applicants repeated the submission they had made before the Chamber that for Danish citizens applying for family reunion with their non-Danish spouse living abroad, the 28-year rule did not pursue a legitimate aim because, allegedly, it had been introduced to target Danish citizens of non-Danish ethnic or national origin. The applicants thus called into question the argument that the aim had been to assist the integration of newcomers or to control immigration. They also disagreed with the argument that the aim related to the economic well-being of the country. In their view, spousal family reunion had no financial implication for the State, because the resident spouse was obliged to provide for the other spouse.

70. The applicants also referred to the opinion of the minority in the Chamber which supported their claim that there had been a violation of Article 14 read in conjunction with Article 8.

71. In the applicants' view, the Government had failed to provide objective justification for the disadvantageous treatment of a group of Danish citizens, namely naturalised citizens. Nor had the Government provided reasonable justification for such different treatment on the factual ground of ethnic and national origin, which would have required weighty reasons, especially given the rather narrow margin of appreciation that member States had in matters of family reunion.

72. The applicants maintained that, as a result of the refusal by the Danish authorities to grant them family reunion, they had been forced to move "in exile" to Sweden, which had adopted a more liberal attitude towards foreigners in its legislation. The applicants contended that the said exile had caused them humiliation and suffering.

73. They disagreed in general with the Government's arguments and pointed out that the 28-year rule had made it nearly impossible for Mr Biao to be reunited with his spouse in Denmark. The applicants alleged that they could not be reunited in Denmark until 2030. This also affected their son, even though he was a Danish national. They referred to Article 21 of the EU Charter of Fundamental Rights in this connection (see paragraph 56 above).

2. The Government

74. The Government contended that the non-application of the 28-year rule to the first applicant was in accordance with the law, that is section 9(7) of the Aliens Act. The 28-year rule pursued a legitimate aim, namely ensuring that Danish expatriates with strong and lasting ties with Denmark would be able to obtain family reunion in Denmark. The rationale was that it would be unproblematic to grant such persons family reunion with a foreign spouse because the latter would normally be successfully integrated into Danish society. Politically it was felt that this group had been unintentionally and unfairly disadvantaged by the tightening up of the attachment requirement introduced in 2002. More generally, the 28-year rule pursued the legitimate aim of immigration control and improving integration, which were important economic and social considerations. The Government also maintained that the refusal to grant the second applicant family reunion in Denmark struck a fair balance and was necessary in a democratic society.

75. They observed that the general rule was the attachment requirement, which was designed to secure integration into Danish society through language skills, education, training and employment, the logic being that if the resident spouse was well integrated, he or she would be better suited to assist the foreign spouse's integration.

76. The attachment requirement could be disregarded if "exceptional reasons" existed (see section 9(7) and section 9c(1) of the Aliens Act, paragraphs 37 and 39 above), as might be the case owing, *inter alia*, to Denmark's international obligations, including in particular under Article 8 of the Convention.

77. The attachment requirement might also be waived on the basis of the 28-year rule exemption, which had been introduced in 2004 to relax the attachment requirement for the benefit of persons who had strong and lasting ties with Denmark when seen from a general perspective. The Government thus pointed out that compliance with the 28-year rule was not

a requirement for spousal reunification but the exception from the attachment requirement.

78. Naturalised nationals, including those who moved to Denmark later in life, had good prospects of obtaining family reunion with a foreign spouse in Denmark by fulfilment of the attachment requirement, or by way of the exemption from any requirement of ties for "exceptional reasons". The Government reiterated that for spouses whose joint ties with another country were not stronger than the couple's aggregate ties with Denmark, the attachment requirement would normally be met without further conditions, already when the foreign spouse had visited Denmark once. For spouses who had both been raised in the same foreign country (like the applicants), and where the resident spouse had made efforts to become integrated in Denmark, the attachment requirement would normally be met at the latest when the resident spouse had resided in Denmark (with a residence permit) for twelve years, meaning normally after three years of nationality, and in many cases much earlier. The Government pointed out that the applicants had been made aware of this practice in the decision of 27 August 2004 by the Ministry for Refugees, Immigration and Integration (see paragraphs 24 and 43 above). Accordingly, if Mr Biao had remained in Denmark and the applicants had reapplied for family reunification, they would have had a prospect of success in fulfilling the attachment requirement already in 2005. It was therefore incorrect to assume that the applicants would only be allowed to be reunited in Denmark in 2030, when Mr Biao would have reached the age of 59.

79. The 28-year rule had the same aim as the requirement of birth in the country, a condition which had been found compatible with the Convention in *Abdulaziz, Cabales and Balkandali* (cited above, § 88), where the Court had stated that "there [were] in general persuasive social reasons for giving special treatment to those whose link with a country stem[med] from birth within it". The Government also referred to *Ponomaryov and Others v. Bulgaria* ((dec), no. 5335/05, 18 September 2007), where the Court stated that "there [were] in general persuasive social reasons for giving special treatment to those who [had] a special link with a country".

80. The Government pointed out that, as a matter of well-established international law and subject to its treaty obligations, a State had the right to control the entry of non-nationals into its territory as a manifestation of the interest of the economic well-being of the country. The Government noted that the Danish model of society was based on a universal Welfare State with generous welfare schemes, such as free healthcare and education at all levels for everyone and considerable financial support for families with children, childcare and old-age care. These welfare services were financed to a small extent by insurance schemes and user charges and to a very great extent by general taxes and duties, which were among the highest in the world. Welfare spending on individual citizens would therefore be higher

than the citizen's tax payment in many cases, depending on which of the welfare services offered were used by the individual citizen. By no means were all taxpayers net contributors to the national economy. This also applied to spouses who had been reunited as a family, where the resident spouse provided financial security for the maintenance of his or her newly arrived spouse. The willingness of the Danes to finance the universal Welfare State and the high degree of redistribution was based on values such as a strong spirit of solidarity and community in Danish society. Consequently, if a large number of people were not financially and/or socially well-integrated into society, this might affect support for the existing Danish model of society in the long term. These circumstances gave rise to particular issues with regard to immigration control and integration, and in this connection great importance was attached to the prospect of the successful integration of newcomers, both in each individual case and seen from a more general perspective. The rules on ties with Denmark as a condition for family reunion had to be understood in this light, among others.

81. Concerning the relevant time for assessing the applicants' case, the Government observed that the applicants had moved to Sweden in November 2003 and had not since submitted a new application for family reunion in Denmark, although they could have done. Under Danish law a reassessment of their situation would be made only upon submission of a new application. The domestic court proceedings concerned the situation at the time when the administrative authorities decided the case. Accordingly, in its judgment of 13 January 2010, the Supreme Court, at last instance, had decided that the refusal of 27 August 2004 by the Ministry for Refugees, Immigration and Integration (being the final administrative body) could not be set aside as being in breach of Article 14 of the Convention read in conjunction with Article 8. The Supreme Court's determination of the case had thus been based on the situation in 2004, and not in 2010. The Government emphasised in this connection that it followed both from the requirement of the Convention as to exhaustion of national remedies as a condition for submitting an application to the Court (Article 35 § 1 of the Convention), and from the established case-law of the Court, that the time of the decision in dispute, in this case the administrative decision, was decisive for the Court's assessment of a case under the Convention. Against this background, the Government submitted that 2004 was the relevant time for the Court's assessment of the case, not 2010 or 2015.

82. Moreover, in line with the findings of the Supreme Court, the Government observed that the consequences of the 28-year rule could not be considered disproportionate as regards the first applicant, who was born in Togo in 1971 and came to Denmark in 1993. After nine years of residence, he became a Danish national in 2002. In 2003 he married the second applicant and they immediately submitted an application for spousal

reunification in Denmark, which was finally rejected in August 2004. The first applicant had therefore been a Danish national for less than two years when he was refused family reunification.

83. The Government pointed out that the applicants could not have been unaware that the immigration status of the second applicant was such that the persistence of their family life within Denmark would from the outset be very uncertain, since the attachment requirement had been introduced for Danish nationals seeking spousal reunion one year before their marriage and application for such reunion, and since the 28-year rule exemption was not introduced until ten months after the second applicant's application for a residence permit.

84. Before the Grand Chamber, the Government were invited to include in their observations a reply to the following question:

> "The Government are requested to indicate how many persons have benefited from the 28-year rule pursuant to section 9, subsection 7, of the Aliens Act and how many of those were Danish nationals of Danish ethnic origin, and to submit other statistical material they may have relating to the application of the 28-year rule."

85. The Government replied that, regrettably, they had been unable to produce the specific information requested by the Court (see paragraph 44 above). However, they did provide a memorandum of 1 December 2005 on the application of the attachment requirement to spousal reunification under section 9(7) of the Aliens Act and general statistics on family reunion in Denmark (see paragraphs 41-46 above).

86. Finally, during the proceedings before the Grand Chamber, the Government submitted that since the first applicant had moved to Sweden on 15 November 2003, by virtue of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and in the light of the judgment of the Court of Justice of the European Union (CJEU) of 25 July 2008 in *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* (C-127/08, EU:C:2008:449 – see paragraph 59 above), "it would be correct to assume that the applicants and their child would have a prospect of success in applying from Sweden for a residence permit in Denmark".

3. The third-party intervener

87. The submissions of the Centre for Advice on Individual Rights in Europe focused on applicable EU law relating to citizenship of the Union and the right to freedom of movement.

They pointed out that by virtue of Article 53 of the Convention, the right to respect for family and private life could not be given a more restrictive interpretation by this Court than the respect for family life that was guaranteed under any applicable EU law provisions. To the extent that EU law applied, therefore, the Convention could not be interpreted so as to give

less generous protection to family (and private) life than that guaranteed by the relevant EU law provisions.

They pointed out that no distinction was made in EU law between those who acquired citizenship by birth and those who acquired it by registration or naturalisation, referring, *mutatis mutandis*, to the judgment of the CJEU of 7 July 1992 in *Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria* (C-369/90, EU:C:1992:295). It was therefore contrary to EU law to make a distinction in the enjoyment of human rights and fundamental freedoms based on the different ways in which citizenship was acquired or the duration of that citizenship.

Moreover, EU citizens who had moved to another member State had the right to return with their third-country national family members to their home country after exercising treaty rights in another State and could not be subjected to reverse discrimination because they were nationals of the State in question (the third-party intervener here referred to the CJEU's judgment in *Metock and Others*, cited above – see paragraph 59).

C. The Court's assessment

1. General principles

88. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide. It is necessary but it is also sufficient for the facts of the case to fall within the ambit of one or more of the Convention Articles (see, for example, *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 39-40, ECHR 2005-X; *E.B. v. France* [GC], no. 43546/02, §§ 47-48, 22 January 2008; and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 72, ECHR 2013).

89. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14. Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see, for example, *Carson and Others v. the United Kingdom* [GC], no. 42184/05,

§ 61, ECHR 2010; *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV; and *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). Article 14 lists specific grounds which constitute "status" including, *inter alia*, race, national or social origin and birth. However, the list is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French, "*notamment*") (see *Engel and Others v. the Netherlands*, 8 June 1976, § 72, Series A no. 22, and *Carson and Others*, cited above, § 70) and the inclusion in the list of the phrase "any other status". The words "other status" have generally been given a wide meaning (see *Carson and Others*, cited above, § 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, no. 7205/07, §§ 56-58, 13 July 2010).

90. A difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali*, cited above, § 82).

91. A general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent. This is only the case, however, if such policy or measure has no "objective and reasonable" justification (see, among other authorities, *S.A.S. v. France* [GC], no. 43835/11, § 161, ECHR 2014, and *D.H. and Others v. the Czech Republic*, cited above, §§ 175 and 184-85).

92. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified (see *D.H. and Others v. the Czech Republic*, cited above, § 177).

93. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see, for example, *Hämäläinen v. Finland* [GC], no. 37359/09, § 108, ECHR 2014; *X and Others v. Austria* [GC], no. 19010/07, § 98, ECHR 2013; and *Vallianatos and Others*, cited above, § 76). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background, but the final decision as to the observance of the Convention's requirements rests with the Court. A wide margin is usually allowed to the State when it comes to general measures of economic or social strategy (see *Burden*, cited above, § 60; *Carson and Others*, cited above, § 61; *Şerife Yiğit v. Turkey* [GC],

no. 3976/05, § 70, 2 November 2010; and *Stummer v. Austria* [GC], no. 37452/02, § 89, ECHR 2011). However, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention (see *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports of Judgments and Decisions* 1996-IV; *Koua Poirrez v. France*, no. 40892/98, § 46, ECHR 2003-X; *Andrejeva v. Latvia* [GC], no. 55707/00, § 87, ECHR 2009; and *Ponomaryovi v. Bulgaria*, no. 5335/05, § 52, ECHR 2011).

94. No difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society. Discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination (see *D.H. and Others v. the Czech Republic*, cited above, § 176; *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII; and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII).

2. Application of those principles to the present case

(a) Applicability of Article 14 of the Convention taken in conjunction with Article 8

95. It is undisputed by the parties that the facts of the case, namely the refusal to grant family reunification and the non-application of the 28-year rule to the applicants in the present case, fall within the ambit of Article 8. The Court agrees. Consequently, and recalling the principles set out in paragraph 88 above, Article 14 taken in conjunction with Article 8 applies to the facts of the case (see, for example, *Hode and Abdi v. the United Kingdom*, no. 22341/09, § 43, 6 November 2012).

(b) Compliance with Article 14 taken in conjunction with Article 8

(i) Do the facts of the case disclose discrimination?

96. It is not in dispute that the applicants were in a relevantly similar situation to that of other couples in which a Danish national and a foreign national seek family reunification in Denmark. Moreover, the Government acknowledged, as did the domestic courts, that the 28-year rule did treat Danish nationals differently, depending on how long they had been Danish nationals. If the person had been a Danish national for twenty-eight years, the exception to the "attachment requirement" applied. If the person had not been a Danish national for twenty-eight years, the exception did not apply. The crux of the case is therefore whether, as maintained by the applicants, the 28-year rule also created a difference in treatment between Danish-born nationals and those who acquired Danish nationality later in life, amounting to indirect discrimination on the basis of race or ethnic origin.

97. It will be recalled that on 1 July 2003 the Aliens Authority refused the second applicant's request for a residence permit as the applicants did not fulfil the attachment requirement. Their appeal was dismissed on 27 August 2004 by the Ministry for Refugees, Immigration and Integration on the same ground. The applicants did not benefit from the newly introduced exception to the attachment requirement, namely the 28-year rule, which had come into effect on 1 January 2004, as the first applicant had not been a Danish national for twenty-eight years.

98. The Court observes that the 28-year rule was introduced by Law no. 1204 of 27 December 2003, with effect from 1 January 2004, to relax the application of the attachment requirement for residents who had been Danish nationals for twenty-eight years or more. Thereafter, section 9(7) of the Aliens Act was worded as follows (see paragraph 35 above).

> "Unless otherwise appropriate for exceptional reasons, a residence permit under subsection (1)(i)(a), when the resident person has not been a Danish national for twenty-eight years, and under subsection (1)(i)(b) to (d), can only be issued if the spouses' or the cohabitants' aggregate ties with Denmark are stronger than the spouses' or the cohabitants' aggregate ties with another country. Resident Danish nationals who were adopted from abroad before their sixth birthday and who acquired Danish nationality not later than on their adoption are considered to have been Danish nationals from birth."

The wording of the provision thus distinguished only between residents who had been Danish nationals for at least twenty-eight years and those who had not been Danish nationals for twenty-eight years.

99. According to the preparatory work (see paragraph 36 above), it would appear that the aim of the proposed provision was to ensure that Danish expatriates having strong and lasting ties with Denmark in the form of at least twenty-eight years of Danish nationality would be able to obtain spousal reunion in Denmark. The proposed provision targeted a group of persons who did not, under the previous section 9(7) of the Aliens Act, have the same opportunities as Danish and foreign nationals living in Denmark for obtaining spousal reunion. The proposed change to the attachment requirement was to give

> "Danish expatriates a real possibility of returning to Denmark with a foreign spouse or cohabitant, and likewise [to allow] young Danes [to] go abroad and stay there for a period of time with the certainty of not being barred from returning to Denmark with a foreign spouse or cohabitant as a consequence of the attachment requirement".

100. Moreover, again according to the preparatory work (see paragraph 37 above), the exemption for "exceptional reasons" in the relevant provision allowed for situations covered by Denmark's treaty obligations. It was specifically stated that twenty-eight years of legal residence since early childhood would fall within the "exceptional reasons", as provided in section 9(7) for the benefit of non-Danish nationals. Accordingly, persons who were not Danish nationals, but who were born

and raised in Denmark, or came to Denmark as small children and were raised in Denmark, were also exempted from the attachment requirement, as long as they had resided lawfully in Denmark for twenty-eight years.

101. For the reasons that follow, the Court is not ready to accept the Government's claim that the difference in treatment was linked solely to the length of nationality with the result that the applicants were treated differently when compared to a couple seeking family reunification in which one of the spouses had been a Danish national for more than twenty-eight years, Mr Biao having been a Danish national for a shorter period.

102. The applicants alleged that the 28-year rule created in practice a difference in treatment between Danish-born nationals and those who acquired Danish nationality later in life. In addition, since the majority of Danish-born nationals would be ethnically Danish, while persons acquiring Danish nationality later in life would overwhelmingly be of different ethnic origins, that is other than Danish, the differential treatment also amounted to indirect discrimination on the basis of race or ethnic origin. The applicants referred, among other things, to the view expressed by the minority of the Supreme Court (see paragraph 30 above), in whose view the 28-year rule amounted to an indirect difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin regarding the right to spousal reunion.

103. The Court has accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (see, for example, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001). Such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent (see *D.H. and Others v. the Czech Republic*, cited above, § 184).

104. It is therefore pertinent in the present case to examine whether the manner in which the 28-year rule was applied in practice had a disproportionately prejudicial effect on persons who, like the first applicant, acquired Danish nationality later in life and who were of an ethnic origin other than Danish (ibid., § 185).

105. To this end the Court finds it necessary to view the relevant provision of the Aliens Act from a historical perspective. It notes that the attachment requirement was introduced into Danish legislation on 3 June 2000 as one of the conditions for granting family reunion with persons residing in Denmark who were not Danish nationals.

106. As of 1 July 2002, the attachment requirement was extended to apply also to Danish nationals, one of the reasons being, according to the preparatory work (see paragraph 33 above), as follows.

> "... Experience has shown that integration is particularly difficult in families where generation upon generation fetch their spouses to Denmark from their own or their

> parents' country of origin. With resident aliens and Danish nationals of foreign extraction it is a widespread marriage pattern to marry a person from their country of origin, among other reasons owing to parental pressure. This pattern contributes to the retention of these persons in a situation where they, more than others, experience problems of isolation and maladjustment in relation to Danish society. The pattern thus contributes to hampering the integration of aliens newly arrived in Denmark. The government finds that the attachment requirement, as it is worded today, does not take sufficient account of the existence of this marriage pattern among both resident foreigners and resident Danish nationals of foreign extraction. There are thus also Danish nationals who are not well integrated into Danish society and for this reason the integration of a newly arrived spouse in Denmark may therefore entail major problems."

107. However, as stated above (see paragraph 35), it soon became apparent that the decision to extend the attachment requirement to Danish nationals had consequences for Danish expatriates, who had difficulties returning to Denmark with their foreign spouses.

108. In the proceedings before the Grand Chamber, the Court invited the Government to indicate how many persons had benefited from the 28-year rule pursuant to section 9(7) of the Aliens Act and how many of those were Danish nationals of Danish ethnic origin (see paragraph 84 above).

109. As already indicated, the Government replied that regrettably they had been unable to produce the specific information requested by the Court (see paragraph 44 above). However, they did provide a memorandum of 1 December 2005 on the application of the attachment requirement to spousal reunification under section 9(7) of the Aliens Act and general statistics on family reunion in Denmark.

110. It is thus not possible for the Court to establish exactly how many persons have benefited from the 28-year rule pursuant to section 9(7) of the Aliens Act and how many of those were Danish nationals of Danish ethnic origin and how many were Danish nationals of other origin.

111. Nevertheless, the Court finds that it can in the present case, and without being exhaustive as to the categories of persons covered, conclude as follows:

(a) As intended, all Danish-born expatriates, who would otherwise have had difficulties in fulfilling the attachment requirement when returning to Denmark with their foreign spouses, would benefit from the 28-year rule from the age of 28.

(b) All other Danish-born nationals resident in Denmark would benefit from the 28-year rule from the age of 28.

(c) Moreover, it follows from the preparatory work (see paragraph 37 above) that aliens, who were not Danish nationals, who were born and raised in Denmark or who came to Denmark as small children, and who had lawfully resided in Denmark for twenty-eight years, would also benefit from the 28-year exemption rule, when they reached the age of 28 or shortly thereafter.

(d) Most, if not all, persons who, like Mr Biao, had acquired Danish nationality later in life, would not benefit from the 28-year rule, since the exception would apply only after twenty-eight years had passed from the date when such person became a Danish national.

The Government have explained that this does not mean, as claimed by the applicants, that persons in this category would *de facto* have to wait twenty-eight years before being granted family reunion, since, for example, couples in the applicants' situation, having been raised in the same country and one of them acquiring Danish nationality later in life, would generally fulfil the attachment requirement after three years of acquiring Danish nationality or after twelve years of lawful residence (see paragraph 78 above).

The Court observes that the preparatory notes to the 28-year rule did not mention that the 28-year rule would not have any disproportionately prejudicial effect on persons who acquired Danish nationality later in life since such persons would in any event fulfil the attachment criteria much sooner, and, as stated above, there are no statistics in this regard. Furthermore, the attachment requirement would not automatically be considered fulfilled after three years of nationality or after twelve years of lawful residence. Moreover, it is noteworthy that if a person acquires Danish nationality (category (d)) for example at the age of 28 (and thus after nine years of required lawful residence in Denmark, see paragraphs 14 and 30 above), in general he or she will still have to wait three years before the attachment requirement may be considered fulfilled. However, a 28-year old Danish-born national, resident in Denmark (category (b)) would be exonerated from the attachment requirement immediately at the age of 28, and a 28-year old Danish-born expatriate (category (a)) would also be exonerated from the attachment requirement immediately at the age of 28, even if the expatriate had resided in Denmark only for a short period of time. Accordingly, although persons who acquire Danish nationality later in life may not have to wait twenty-eight years to be allowed family reunification, but rather three years or more, this does not, in the Court's view, remove the fact that the application of the 28-year rule had a prejudicial effect on Danish nationals in the applicant's situation.

112. The Court also considers that it can reasonably be assumed that at least the vast majority of category (a) Danish expatriates and category (b) Danish nationals born and resident in Denmark, who could benefit from the 28-year rule, would usually be of Danish ethnic origin whereas category (d) persons acquiring Danish citizenship at a later point in their life, like Mr Biao, who would not benefit from the 28-year rule, would generally be of foreign ethnic origin.

113. It is not to be overlooked that aliens in category (c), and thus persons of foreign ethnic origin, could also benefit from the 28-year rule, but that does not alter the fact that the 28-year rule had the indirect effect of

favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage or having a disproportionately prejudicial effect on persons who, like the first applicant, acquired Danish nationality later in life and who were of an ethnic origin other than Danish (see paragraph 103 above).

114. The burden of proof must shift to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin (see paragraphs 115-37 below). Having regard to the fact that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society and a difference in treatment based exclusively on the ground of nationality is allowed only on the basis of compelling or very weighty reasons (see paragraphs 93-94 above), it falls to the Government to put forward compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination is to be compatible with Article 14 of the Convention taken in conjunction with Article 8.

(ii) The legitimacy of the aim pursued

115. The Government submitted that the aim of the 28-year rule was to make an exception to the attachment requirement for those who had strong and lasting ties with Denmark when seen from a general perspective. The rationale was that it would be unproblematic to grant such persons family reunion with a foreign spouse because the latter would normally be successfully integrated into Danish society. In particular the aim was to ensure that Danish expatriates would be able to obtain family reunion in Denmark since this group had been unintentionally and unfairly disadvantaged by the tightening up of the attachment requirement introduced in 2002. Finally, and more generally, the 28-year rule exception to the attachment requirement pursued the legitimate aim of immigration control and improving integration (see paragraph 80 above).

116. The applicants alleged that the disputed legislation had been introduced intentionally to target Danish citizens of non-Danish ethnic or national origin and thus did not pursue a legitimate aim. In this respect they referred to the finding by the minority of the Supreme Court (see paragraph 30 above).

117. The Court reiterates that where immigration is concerned, Article 8, taken alone, cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see, among others, *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 107, 3 October 2014). Moreover, the Court has, on

many occasions, accepted that immigration control, which serves the general interests of the economic well-being of the country, pursued a legitimate aim within the meaning of Article 8 of the Convention (see, for example, *Zakayev and Safanova v. Russia*, no. 11870/03, § 40, 11 February 2010; *Osman v. Denmark*, no. 38058/09, § 58, 14 June 2011; *J.M. v. Sweden* (dec.), no. 47509/13, § 40, 8 April 2014; and *F.N. v. the United Kingdom* (dec.), no. 3202/09, § 37, 17 September 2013).

118. That being said, the present case concerns compliance with Article 14 of the Convention read in conjunction with Article 8, with the result that immigration-control measures, which may be found to be compatible with Article 8 § 2, including with the legitimate-aim requirement, may nevertheless amount to unjustified discrimination in breach of Article 14 read in conjunction with Article 8. It appears that case-law on these matters is rather sparse. In *Hode and Abdi* (cited above, § 53), the Court accepted that offering incentives to certain groups of immigrants may amount to a legitimate aim for the purposes of Article 14 of the Convention. Furthermore, in *Abdulaziz, Cabales and Balkandali* (cited above, § 87), the Court found legitimate the aim cited by the Government for the differential treatment on the ground of birth, namely "to avoid the hardship which women having close ties to the United Kingdom would encounter if, on marriage, they were obliged to move abroad in order to remain with their husbands" or, in other words, to distinguish a group of nationals who, seen from a general perspective, had lasting and strong ties with the country.

119. The majority of the Supreme Court found that the 28-year rule had the same aim as the requirement of birth in the United Kingdom, which was accepted in *Abdulaziz, Cabales and Balkandali* (cited above), namely to distinguish a group of nationals who, seen from a general perspective, had lasting and strong ties with the country (see paragraph 29 above).

120. The minority of the Supreme Court, without specifically adverting to the legitimacy of the aim pursued, expressed a clear view that the indirect difference in treatment between Danish nationals of Danish ethnic extraction and Danish nationals of other ethnic extraction resulting from the application of the 28-year rule was an intended consequence (see paragraph 30 above).

121. The Court considers that it is not required to take a separate stand on the questions whether the indirect discrimination, which it has found in this case, was an intended consequence as alleged by the applicants, or whether the aim put forward by the Government for the introduction of the 28-year rule was legitimate for the purposes of the Convention. The Court finds it appropriate in the circumstances of the present case to limit its inquiry to the existence (or not) of compelling or very weighty reasons unrelated to ethnic origin for the difference in treatment, a matter which will be examined below.

(iii) The justification of the aims pursued

122. The Court observes that one of the aims of introducing the 28-year rule (see paragraphs 29, 35 and 74 above) was that the previous amendment of the Aliens Act in July 2002, extending the attachment requirement to apply also to Danish nationals, had been found to have unintended consequences for persons such as Danish nationals who had opted to live abroad for a lengthy period and who had started a family while away from Denmark and subsequently had difficulties fulfilling the attachment requirement upon return. It was found that there would normally be a basis for successful integration of Danish expatriates' family members into Danish society, since they would often have maintained strong ties with Denmark, which in addition would also have been passed on to their spouse or cohabitant and any children of the union.

123. It will be recalled that the preparatory work in respect of the 28-year rule stated that the "fundamental aim of tightening up the attachment requirement in 2002", namely securing better integration of foreigners, would not be forfeited by introducing the said exception. The "fundamental aim" of tightening up the attachment rule in 2002 was set out in the preparatory work to that amendment (see paragraph 33 above).

124. In the Court's view the materials concerning the legislative process show that the Government wished, on the one hand, to control immigration and improve integration with regard to "both resident foreigners and resident Danish nationals of foreign extraction" whose "widespread marriage pattern" was to "marry a person from their country of origin", and, on the other, to ensure that the attachment requirement did not have unintended consequences for "persons such as Danish nationals who opted to live abroad for a lengthy period and who started a family while away from Denmark" (see paragraphs 33 and 36 above).

125. The Court considers that the justification advanced by the Government for introducing the 28-year rule is, to a large extent, based on rather speculative arguments, in particular as to the time when, in general, it can be said that a Danish national has created such strong ties with Denmark that family reunion with a foreign spouse has a prospect of being successful from an integration point of view. The answer to this question cannot, in the Court's view, depend solely on the length of nationality, whether for twenty-eight years or less. Therefore, the Court cannot follow the Government's argument that because the first applicant had been a Danish national for only two years when he was refused family reunion, the consequences of the 28-year rule could not be considered disproportionate as regards his situation. It points out that this line of reasoning seems to overlook the fact that in order to obtain Danish nationality the first applicant had resided in Denmark for at least nine years, had proved his proficiency in the Danish language and knowledge of Danish society, and met the requirement of self-support.

More concretely, in August 2004, when Mr Biao was refused family reunion, not only had he been a Danish national for approximately two years, he had lived in Denmark for more than ten years, had been married there to a Danish national for approximately four years, had participated in various courses and worked there for more than six years, and had had a son on 6 May 2004, who was a Danish national by virtue of his father's nationality. None of these elements was or could be taken into account in the application of the 28-year rule to the applicant, although in the Court's opinion they were indeed relevant when assessing whether Mr Biao had created such strong ties with Denmark that family reunion with a foreign spouse had any prospect of being successful from an integration point of view.

126. The Court finds that some of the arguments advanced by the Government in the course of the preparatory work relating to the Law which extended from 1 July 2002 the attachment requirement to residents of Danish nationality reflect negatively on the lifestyle of Danish nationals of non-Danish ethnic extraction, for example in relation to their "marriage pattern", which, according to the Government, "contributes to the retention of these persons in a situation where they, more than others, experience problems of isolation and maladjustment in relation to Danish society. The pattern thus contributes to hampering the integration of aliens newly arrived in Denmark" (see paragraph 33 above). In this connection, the Court would refer to its conclusion in *Konstantin Markin v. Russia* ([GC], no. 30078/06, §§ 142-43, ECHR 2012) that general biased assumptions or prevailing social prejudice in a particular country do not provide sufficient justification for a difference in treatment on the ground of sex. The Court finds that similar reasoning should apply to discrimination against naturalised nationals.

127. Thus, so far, the arguments and material submitted by the Government before the Court have not shown that the difference in treatment resulting from the impugned legislation was based on objective factors unrelated to ethnic origin.

128. In the judicial review of the application of the 28-year rule to the applicants, the majority of the Danish Supreme Court found that the exception was based on an objective criterion and that it could be considered objectively justified to select a group of nationals with such strong ties to Denmark, when assessed from a general perspective, that it would be unproblematic to grant family reunion. The rationale being that it would normally be possible for the foreign spouse or cohabitant of such a person to be successfully integrated into Danish society. Moreover, they found that the consequences of the 28-year rule could not be considered disproportionate for the first applicant (see paragraph 29 above).

129. The majority relied heavily on the judgment in *Abdulaziz, Cabales and Balkandali* (cited above), as they considered that the factual

circumstances of the present case in most material aspects were identical to those of Mrs Balkandali's situation. Both the latter and Mr Biao arrived in the country as adults. Mr Biao's application for spousal reunion was rejected when he had resided in Denmark for eleven years, two of which as a Danish national. Mrs Balkandali's application was rejected after she had resided in the United Kingdom for eight years, two of which as a British national. Further, relying, *inter alia*, on the statement (ibid., § 88) that

> "there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it", the majority of the Supreme Court found, as stated above, that "the criterion of twenty-eight years of Danish nationality [had] the same aim as the requirement of birth in the United Kingdom, which was accepted by the Court in the 1985 judgment as not being contrary to the Convention: to distinguish a group of nationals who, seen from a general perspective, had lasting and strong ties with the country".

130. The Court would point out, however, that it has found that the 28-year rule had the indirect discriminatory effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage or having a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish (see paragraph 113 above). The Supreme Court, on the other hand, found that the discrimination at issue was based solely on the length of citizenship, a matter falling within the ambit of "other status" within the meaning of Article 14 of the Convention. Accordingly, the proportionality test applied by the Supreme Court was different from the test to be applied by this Court, which requires compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule (see paragraph 114 above).

131. In the field of indirect discrimination between a State's own nationals based on ethnic origin, it is very difficult to reconcile the grant of special treatment with current international standards and developments. Since the Convention is first and foremost a system for the protection of human rights, regard must also be had to the changing conditions within Contracting States and the Court must respond, for example, to any evolving convergence as to the standards to be achieved (see *Dhahbi v. Italy*, no. 17120/09, § 47, 8 April 2014; *Konstantin Markin*, cited above, § 126; and *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013).

132. The Court notes in this connection that the applicants relied on Article 5 § 2 of the European Convention on Nationality. It is noteworthy that it has been ratified by twenty member States of the Council of Europe, including Denmark (see paragraph 47 above). Moreover, in respect of Article 5 § 2 of the European Convention on Nationality, the Explanatory Report (see paragraph 48 above) states that although not a mandatory rule to be followed in all cases, the paragraph was a declaration of intent, aimed at eliminating the discriminatory application of rules in matters of nationality

between nationals from birth and other nationals, including naturalised persons. This suggests a certain trend towards a European standard which must be seen as a relevant consideration in the present case.

133. Furthermore, within the member States of the Council of Europe there is a degree of variation as regards the conditions for granting family reunion (see paragraph 61 above). However, it would appear from the twenty-nine countries studied that there are no States which, like Denmark, distinguish between different groups of their own nationals when it comes to the determination of the conditions for granting family reunification.

134. In relation to EU law it is relevant to point out that the Court's conclusions in, *inter alia*, *Ponomaryovi* (cited above, § 54) and *C. v. Belgium* (7 August 1996, § 38, *Reports* 1996-III) that "the preferential treatment of nationals of member States of the European Union ... may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship" concerned preferential treatment on the basis of nationality, not favourable treatment of "nationals by birth" as compared to "nationals by acquisition later in life" or indirect discrimination between the country's own nationals based on ethnic origin. The Court also notes that in EU law on family reunification no distinction is made between those who acquired citizenship by birth and those who acquired it by registration or naturalisation (see paragraph 87 above).

135. The rules for family reunification under EU law did not apply to the applicants' case in August 2004 (see paragraph 58 above). However, it is instructive to view the contested Danish legislation in the light of relevant EU law. Given that the first applicant has moved to Sweden, by virtue of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, and in the light of the CJEU's judgment in *Metock and Others* (cited above – see paragraph 59 above), the applicants and their child now have a prospect of success in applying from Sweden for a residence permit in Denmark.

136. In addition, it is noteworthy that various independent bodies have expressed concern that the 28-year rule entails indirect discrimination. Reference is made, for example, to the reports cited by ECRI in which it stated that "ECRI is deeply concerned by the fact that the 28 years' aggregate ties with Denmark rule amounts to indirect discrimination between those who were born Danish and people who acquired Danish citizenship at a later stage" (see paragraph 54, point 49, above) and that the "rule that persons who have held Danish citizenship whether it be for over 28 or 26 years, or who were born in Denmark or came to the country as a small child or have resided legally in the country, whether it be for over 28 or 26 years, are exempt from these requirements, also risks disproportionately affecting non-ethnic Danes" (see paragraph 55,

point 129, above). CERD expressed a similar concern (see paragraph 60, point 15, above).

137. The Council of Europe Commissioner for Human Rights also expressed his concern as regards the operation of the 28-year rule (see paragraph 49 above) and found that it placed naturalised Danish citizens at a considerable disadvantage in comparison to Danish citizens born in Denmark, and stated that

> "[t]he dispensation from the aggregate ties conditions for a naturalised citizen, for whom the condition will, inevitably, be harder to meet by virtue of his or her own foreign origin, at so late an age constitutes, in my view, an excessive restriction to the right to family life and clearly discriminates between Danish citizens on the basis of their origin in the enjoyment of this fundamental right".

(iv) The Court's conclusion

138. In conclusion, having regard to the very narrow margin of appreciation in the present case, the Court finds that the Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.

139. It follows that there has been a violation of Article 14 of the Convention read in conjunction with Article 8 in the present case.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

140. The applicants also relied on Article 8 of the Convention taken alone, complaining that the refusal to grant the second applicant a residence permit in Denmark violated their right to respect for their family life. However, in the light of the conclusion set out in the previous paragraph, the Court is of the opinion that there is no need to examine the application separately under Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

141. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

142. On 12 July 2010, when lodging the application, the applicants claimed compensation for non-pecuniary damage without further specification.

143. On 31 May 2011 the applicants claimed 5,000 Danish kroner (DKK) for non-pecuniary damage relating to the alleged violation of Article 8 of the Convention taken alone and together with Article 14.

144. On 14 December 2012 the applicants claimed compensation for non-pecuniary damage equivalent at least to the amount awarded in *Hode and Abdi v. the United Kingdom* (no. 22341/09, § 66, 6 November 2012), which was 6,000 euros (EUR). They maintained that they had endured suffering and humiliation as a result of their alleged exile in Sweden.

145. Before the Grand Chamber, on 15 January 2015, the applicants claimed compensation for non-pecuniary damage plus EUR 84,000 for the "length of the proceedings". Moreover, they referred to their claim before the Chamber.

146. The Government submitted that a finding of a violation would constitute in itself adequate just satisfaction for the alleged non-pecuniary damage, in particular because the applicants were never separated, apart from a few months just after their marriage in 2003, when Ms Biao was still in Ghana.

147. The Court points out that in *Hode and Abdi* (cited above, § 64), which also concerned a violation of Article 14 of the Convention in conjunction with Article 8, it awarded the applicants the sums which they had claimed. In the present case, the Court considers it equitable to award the applicants the same sum, namely EUR 6,000, in respect of non-pecuniary damage.

B. Costs and expenses

148. Before the Chamber the applicants did not claim compensation for costs and expenses. It should be noted, however, that in Denmark, by virtue of a Legal Aid Act (*Lov 1999-12-20 nr. 940 om retshjælp til indgivelse og førelse af klagesager for internationale klageorganer i henhold til menneskerettighedskonventioner*), applicants may be granted free legal aid for the purpose of lodging complaints and for the procedure before international institutions under human rights conventions (see, for example, *Valentin v. Denmark*, no. 26461/06, § 82, 26 March 2009, and *Vasileva v. Denmark*, no. 52792/99, § 50, 25 September 2003).

149. Before the Grand Chamber, in their observations of 15 January 2015, the applicants did not claim costs and expenses.

150. On 16 April 2015 they claimed costs and expenses incurred in the Convention proceedings in the amount of DKK 398,437.50, corresponding

to legal fees for a total of 187.5 hours of work, carried out between 2010 and 2015. Despite the late submission, the President of the Grand Chamber decided to admit the claims to the file (Rule 60 § 2 of the Rules of Court) without prejudice to the Grand Chamber's decision on the claim (Rule 60 § 3).

151. The applicants have already received DKK 388,330 under the said Legal Aid Act to cover legal fees incurred before the Chamber and the Grand Chamber proceedings, including DKK 5,634.70 to cover travelling expenses and DKK 3,258 to cover other expenses.

152. The Court notes that the applicants' claims in respect of the Grand Chamber proceedings were received after the time-limit laid down in Rule 60 § 2 (see, for example, *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 376, ECHR 2007-II). The decision by the President of the Grand Chamber to admit nevertheless the claims to the file did not prejudge any decision to be taken by the Grand Chamber subsequently on whether to reject the claim in whole or in part under Rule 60 § 3.

153. In the present case, the applicants have already received DKK 388,330 under the Legal Aid Act. In these circumstances, and having regard to the nature of the present case, the Court is satisfied that the applicants have been reimbursed sufficiently under domestic law, and it sees no reason to award them costs and expenses (see, among others, *Söderman v. Sweden* [GC], no. 5786/08, § 125, ECHR 2013; *X and Others v. Austria* [GC], no. 19010/07, § 163, ECHR 2013; *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 427, ECHR 2012; *Valentin v. Denmark*, no. 26461/06, § 82, 26 March 2009; and *Vasileva v. Denmark*, no. 52792/99, § 50, 25 September 2003).

C. Default interest

154. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by twelve votes to five, that there has been a violation of Article 14 of the Convention read in conjunction with Article 8;

2. *Holds*, by fourteen votes to three, that there is no need to examine the application separately under Article 8 of the Convention taken alone;

3. *Holds*, by twelve votes to five,

(a) that the respondent State is to pay the applicants, within three months, EUR 6,000 (six thousand euros) in respect of non-pecuniary damage, to be converted into Danish kroner at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 May 2016.

Lawrence Early	Işıl Karakaş
Jurisconsult	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) concurring opinion of Judge Pinto de Albuquerque;
(b) partly dissenting opinion of Judge Jäderblom;
(c) joint dissenting opinion of Judges Villiger, Mahoney and Kjølbro;
(d) dissenting opinion of Judge Yudkivska.

A.I.K.
T.L.E.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. While I have joined in the finding of a violation of Article 14 of the Convention in conjunction with Article 8 in the present case, I cannot fully share the reasoning in the judgment leading to such a finding. In particular, I entertain considerable doubts about the conclusion that the national authorities did not intend the discriminatory effect of the policy choice made. In my view, the reasoning given by the three out of seven minority in the Danish Supreme Court, which included the President, Torben Melchior, is very convincing in this regard. Furthermore, it seems to me that the time has come to revisit the findings and reasoning set out in *Abdulaziz, Cabales*

and Balkandali[1], notably as regards its principled statement made more than thirty years ago that "there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it". Had the Court taken that further step, this case could have provided the ideal occasion to put an end to its casuistic approach to the thorny issue of protection of family life in the context of migration policy, and namely of family reunification or reunion[2]. Unfortunately it did not. In the following opinion I will thus put forward the reasons why I find that *Abdulaziz, Cabales and Balkandali* is no longer good law in the light of the development of international law and the Court's own case-law.

The scope of the Court's review

2. In cases concerning family reunification under Article 8, alone or in conjunction with Article 14, the relevant point in time for the Court's assessment is the moment when the applicant was affected by the domestic administrative decision of refusal to grant family reunification. This may depend on the domestic remedies to be exhausted, including whether the domestic courts had to make their review on the basis of the facts established by the last-instance administrative authority. The Court is not precluded, however, from taking into account facts which post-date the final administrative decision[3].

3. In the present case, the final decision by the administrative authorities was the refusal by the Ministry for Refugees, Immigration and Integration on 27 August 2004. The task of the Ministry was to assess the decision of the Aliens Authority of 1 July 2003, considering all facts that had occurred since that decision. Thereafter, the applicants did not reapply for family reunification. Instead, on 18 July 2006, they initiated civil proceedings against the Ministry in the High Court of Eastern Denmark. Both the High Court in its judgment of 25 September 2007 and the Supreme Court in its judgment of 13 January 2010 reviewed the Ministry's refusal on the basis of

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1. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 88, Series A no. 94.

2. These two terms are used interchangeably by international organisations. For example, the Parliamentary Assembly of the Council of Europe (PACE) has used "family reunion" in Recommendation 1686 (2004) but more often "family reunification", as in Recommendation 1703 (2005) (see the instruments listed in paragraph 23 below). In *People on the Move: Handbook of selected terms and concepts* (p. 28), UNESCO defines "family reunion/reunification" as "the process of bringing together family members, particularly children, spouses and elderly dependents". I have struggled with the Court's position on this difficult topic already in my separate opinion in *De Souza Ribeiro v. France* ([GC], no. 22689/07, ECHR 2012), from the perspective of the right of undocumented migrants to family life.

3. See, among other authorities, *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 116, 3 October 2014.

the applicants' situation at the time when the Ministry had taken its decision, namely August 2004.

Before the Grand Chamber, the Government emphasised that the applicants had not submitted a new application for family reunification in Denmark, even though they could have done so. According to the Government, the attachment requirement would have been met for the applicants when Mr Biao had resided legally in Denmark for twelve years or had had Danish nationality for three years, and thus on 18 July 2005 if the period was calculated from 18 July 1993 (when Mr Biao entered Denmark as an asylum-seeker), or 1 March 2008 if calculated from 1 March 1996 (when the first applicant was granted a residence permit), or 22 April 2005 if calculated from 22 April 2002 (when he was granted Danish nationality)[4]. However, the applicants did not reapply for spousal reunification. Danish law does not impose an obligation on the authorities to assess of their own motion and on an ongoing basis whether persons who have previously been refused family reunification may meet the requirements at a later point in time. Such reassessment would be made only upon submission of a new application. Thus, the Government maintained that the relevant time for the Court's assessment of the case had to be 2004. The applicants did not comment on this issue.

4. In my view, in principle, the relevant point in time for the Court's assessment is 27 August 2004, the date of the decision of the Ministry for Refugees, Immigration and Integration. Thus, the temporal scope of the Court's assessment includes the entry into force of Law no. 1204 of 27 December 2003 introducing the 28-year rule, the transfer of the applicants' residence to Sweden in 15 November 2003 and the birth of the applicants' son in Sweden on 6 May 2004. Nevertheless, any events which might have occurred after August 2004 may also be considered for the purposes of the Court's assessment. In this regard, I note that the applicants still live with their son in Malmö, Sweden, which since 1 July 2000 has been connected to Copenhagen in Denmark by a 16 km bridge, and that the first applicant commutes daily to his work by train from Malmö to Copenhagen. Considerable weight must therefore be accorded to this long-lasting situation, which involves not only a certain degree of sacrifice for the first applicant, but also for his son, who, despite being Danish, has not been able to live with his family in his own country. I cannot turn a blind eye to this sacrifice of the Biao family.

4. I nevertheless note that during the Grand Chamber hearing the Government seemed to take a different position, suggesting that the twelve-year exception would not be applicable at that time. Moreover, the Government have always refused to undertake to allow Mr Biao's family reunification on national territory, even though the Aliens Authority is under their authority.

The basis of the differentiation of treatment

5. The main difference between the majority and the minority in the Supreme Court was the choice of the group with which the first applicant should be compared, and consequently whether the difference in treatment was based, for the purposes of Article 14 of the Convention, on "other status", namely the length of Danish nationality, or on "race" or ethnic origin. It will be recalled that the majority of the Danish Supreme Court found that there had been a difference in treatment between, on the one hand, persons like Mr Biao, who had been a Danish national for less than twenty-eight years and, on the other, persons who had been Danish nationals for more than twenty-eight years. Accordingly, they assessed the case strictly from the perspective of the length of the first applicant's Danish nationality. In other words, they considered that the first applicant enjoyed "other status" within the meaning of Article 14.

6. Contrary to this limited, superficial understanding of the case, the minority in the Danish Supreme Court went much further in their multifaceted analysis, looking beyond the apparently neutral wording of section 9(7) of the Aliens Act. They found that the 28-year rule entailed two forms of indirect discrimination. Although the rule applied both to persons born Danish nationals and to persons acquiring Danish nationality later in life, its significance in reality differed greatly for the two groups of Danish nationals. For persons born Danish nationals, the rule implied that the attachment requirement applied until they were 28 years old. Thereafter they were exempted from the requirement. For persons not raised in Denmark who acquired Danish nationality later in life, the rule implied that the attachment requirement applied until twenty-eight years had passed from the date when any such person became a Danish national. As an example, the first applicant, who became a Danish national at the age of 31, would be subject to the attachment requirement until he reached the age of 59. The 28-year rule therefore affected persons who acquired Danish nationality later in life far more often and with a far greater impact than persons born with Danish nationality. Hence, the 28-year rule resulted in an indirect difference in treatment between the two groups of Danish nationals.

More importantly, the minority in the Danish Supreme Court also found that the 28-year rule entailed an indirect difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origins, since the vast majority of persons born Danish nationals would be of Danish ethnic origin, while persons acquiring Danish nationality later in life would generally be of other ethnic origins. Thus the minority in the Supreme Court considered the case from the perspective that the indirect differences in treatment were based on both "other status" and on "race" or ethnic origin.

7. I would point out that the determination of the issues of how the applicants were treated differently and whether that difference was based on "other status" or "race" or ethnic origin could be relevant for the assessment of the case. In the light of the Court's present case-law, States enjoy, in principle, a wide margin of appreciation when it comes to differences in treatment involving general measures of economic or social strategy[5], whereas the margin is narrow when the difference is based on "national" origin, since the latter requires "very weighty reasons" for justification[6]. Finally, no difference in treatment based exclusively or to a decisive extent on a person's "race" or ethnic origin is capable of being justified in a contemporary democratic society, independent of the direct or indirect nature of the discriminatory measure[7]. This point of principle should be emphasised: the indirect nature of a discriminatory measure based on "race" or ethnic grounds does not allow for a less strict criterion of assessment than direct discrimination based on the same grounds. Racial or ethnic discrimination is so obnoxious and degrading that no law, regulation or public policy causing or promoting such discrimination may be justified, regardless of whether the discrimination is direct or indirect and independently of any proven or unproven discriminatory intent. One major caveat should be added to this principle: "positive discrimination" measures in favour of a disadvantaged group of people based on a racial or ethnic identifiable characteristic may be admitted when such law, regulation or policy is essential to put an end to or attenuate *de facto* discrimination in the enjoyment of a Convention right[8].

The purpose of the differentiation of treatment

8. The majority of the Danish Supreme Court found it established that the aim of the 28-year exemption rule was to distinguish a group of nationals who, seen from a general perspective, had lasting and strong ties with their country. In other words, the aim of the law was to provide for positive treatment in favour of persons who had been Danish nationals for twenty-eight years, or who were not Danish nationals, but who were born or raised in Denmark and had stayed there legally for twenty-eight years, the

5. See, for example, *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008, and *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 51-52, ECHR 2006-VI.

6. See, for example, *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports of Judgments and Decisions* 1996-IV; *Koua Poirrez v. France*, no. 40892/98, § 46, ECHR 2003-X; and *Andrejeva v. Latvia* [GC], no. 55707/00, § 87, ECHR 2009.

7. See *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 176, ECHR 2007-IV, and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 58, ECHR 2005-XII.

8. See my separate opinion in *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013; see also *Stec and Others*, cited above, §§ 61 and 66, and *Wintersberger v. Austria* (dec.), no. 57448/00, 27 May 2003.

reason being that this group was considered to have such strong ties with Denmark, when assessed from a general perspective, that it would be unproblematic, from an integration point of view, to grant them family reunification with a foreign spouse or cohabitant in Denmark. Yet in finding justification for such difference in treatment the majority of the Supreme Court admitted, in very clear language, that the Government's assumption that a national who had had Danish nationality for twenty-eight years would have stronger ties with Denmark than a national who had had Danish nationality for a shorter period may not stand the test of reality:

> "In general, a person of 28 years of age who has held Danish nationality since birth will have stronger real ties with Denmark and greater insight into Danish society than a 28-year-old person who – like [the first applicant] – only established links with Danish society as a young person or an adult. This also applies to Danish nationals who have stayed abroad for a shorter or longer period, for example in connection with education or work. ...
>
> Even though it is conceivable that a national who has had Danish nationality for twenty-eight years may in fact have weaker ties with Denmark than a national who has had Danish nationality for a shorter period, this does not imply that the 28-year rule should be set aside pursuant to the Convention. ..."

9. It is worth noting that the Government, on page 27 of their observations of 15 January 2015, adhered to the position of the majority of the Supreme Court:

> "The Government thus share the opinion of the Supreme Court that a 28-year old person, who acquired Danish nationality by birth will generally have stronger and more genuine ties with Denmark and greater insight into the Danish society than a 28-year old person who, like the first applicant, only came to Denmark as a young person or an adult. Danish nationals, who have stayed abroad for a short or long period for education or work purposes must be deemed to retain such attachment. As mentioned in the preparatory works, this may be done when they speak Danish at home, go on holiday to Denmark, read Danish newspapers regularly etc. Thus there will normally be basis for a successful integration of Danish expatriates' family members into Danish society."

10. This is a consistent position on the part of the Danish Government, since it has been sustained also in other international fora. In the reports submitted by States Parties under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination[9], the Government stated as follows.

> "According to the explanatory notes relating to the current condition of ties, integration is particularly difficult in families where generation upon generation fetch their spouses to Denmark from their own or their parents' country of origin. Among foreigners and Danish nationals of foreign origin who live in Denmark, there is a widespread tendency to marry a person from one's own country of origin, among other reasons due to parental pressure. ..."

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9. Seventeenth periodic reports of States parties due in 2005, UN Doc. CERD/C/496/Add.1, 2 September 2005.

In the Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women[10], the Danish Government stated, *inter alia*, as follows.

> "**Family reunification requirement of 24 years and efforts to combat marriage contracted against a person's own desire**
>
> Act No. 365 of 6 June 2002 amending the Aliens Act, the Marriage Act and other Acts includes, inter alia, the following amendments of the conditions for reunification of spouses:
>
> – Reunification of spouses will generally not be permitted if one of the spouses is under 24 years of age.
>
> – Reunification of spouses will generally not be permitted if it must be considered doubtful that the marriage was contracted or the cohabitation was established at both parties' desire.
>
> The Ministry of Refugee, Immigration and Integration Affairs does not find due cause to revoke the increase in 2002 in the age limit for spousal reunification from 18 to 24 years. The purpose of the requirement is stipulated below.
>
> As further stipulated below the Ministry of Refugee, Immigration and Integration Affairs has in 2003 made further legal efforts against marriages contracted forcibly or under pressure against a party's own desire.
>
> In addition to the legal efforts the Danish Government on August 15, 2003 launched an action plan for 2003-2005 on forced, quasi-forces and arranged marriages containing 21 initiatives to:
>
> • Prevent forced marriages
>
> • Discourage unhappy family reunifications based on arranged marriages
>
> • Contribute to better integration and increase gender equality
>
> • Help increase the focus on the marital problems of ethnic minority youth in Denmark
>
> • Disseminate information about focus areas to everyone who comes into contact with ethnic minorities, such as doctors, social workers, health visitors and teachers.
>
> With the action plan The Danish Government wishes to place focus on free choice, protection of the individual and gender equality and preventative measures to ensure that no person is forced or pressured into a marriage against their will. The Danish Government has allocated funds to offer financial support to initiatives aiming to implement the action plan.
>
> Act No. 365 of 6 June 2002 introduced the general rule that marriages not contracted at both parties desire cannot result in spousal reunification, as well as an age requirement of 24 years for both parties before spousal reunification can be granted.
>
> The purpose of these and other amendments of the conditions for reunification of spouses comprised by the Act was to restrict the number of aliens reunified with their

10. Sixth periodic report of States parties, UN Doc. CEDAW/C/DNK/6, 4 October 2004, pp. 62-63.

> families to counteract integration problems and to enhance the efforts to combat marriages contracted against the young people's desire.
>
> By introducing an age requirement of 24 years for both parties the Government wants to reduce the risk of forced marriages and arranged marriages intended to result in family reunification. The older a person is, the better he or she can resist pressure from the family or others to contract a marriage against his or her own will. The purpose of the age requirement is thus to protect young people against pressure in connection with contraction of marriages while freeing the young people from being pressured to explain to the immigration authorities that they want reunification of spouses although in reality this is not the case at all."

11. Furthermore, although the Government are aware of the fact that there is no direct statistical evidence of any correlation between the introduction of the age limit and the number of forced marriages, they keep an annual statistical report, "Tal og fakta – befolkningsstatistik om udlændinge", published by the Ministry for Refugees, Immigration and Integration with the purpose of assessing the marriage patterns among immigrants and their descendants. For example, the 2006 edition refers in table 12.2 to statistics on marriage age from 1999 to 2005 and in table 12.3 to marriages contracted in 2001, 2003 and 2005 between immigrants and their descendants from "non-Western countries" living in Denmark and the status of their spouse (whether the latter was living abroad, a Danish national, an immigrant or a descendant of an immigrant), it being explained previously that "non-Western countries" are countries other than European Union States, the United States of America, Canada, Australia, New Zealand, Andorra, Liechtenstein, Monaco, San Marino, Switzerland and the Vatican.

12. The minority in the Supreme Court demonstrated the fallacious nature of the majority's reasoning by comparing the applicants' situation with that of persons who were born Danish nationals and had been Danish nationals for twenty-eight years, but who had not been raised in Denmark. In support thereof they stated, *inter alia*, as follows.

> "... However, when assessing whether the difference in treatment implied by the 28-year rule can be considered objectively justified, it is not sufficient to compare persons not raised in Denmark who acquire Danish nationality later in life with the large group of persons who were born Danish nationals and were also raised in Denmark. If exemption from the attachment requirement was justified only in regard to the latter group of Danish nationals, the exemption should have been delimited differently. The crucial element must therefore be a comparison with persons who were born Danish nationals and have been Danish nationals for twenty-eight years, but who were not raised in Denmark and may perhaps not at any time have had their residence in Denmark. In our opinion, it cannot be considered a fact that, from a general perspective, this group of Danish nationals has stronger ties with Denmark than persons who have acquired Danish nationality after entering and residing in Denmark for a number of years. ..."

13. Furthermore, the impugned differentiation reflected and reinforced a negative stereotype of the lifestyle of resident foreigners and Danish

nationals of non-Danish ethnic origin, namely as regards their "marriage pattern". As the minority in the Supreme Court rightly pointed out:

> "When the attachment requirement was introduced by Law no. 424 of 31 May 2000, all Danish nationals were exempt from the requirement. Law no. 365 of 6 June 2002 made the attachment requirement generally applicable also to Danish nationals. Concerning the reason for this, the preparatory work in respect of the Law states, *inter alia*:
>
> > 'With resident aliens and Danish nationals of foreign origin it is a widespread marriage pattern to marry a person from their countries of origin, among other reasons due to parental pressure ... The government finds that the attachment requirement, as it is worded today, does not take sufficient account of the existence of this marriage pattern among both resident foreigners and resident Danish nationals of foreign extraction. There are thus also Danish nationals who are not well integrated into Danish society and for this reason the integration of a newly arrived spouse in Denmark may therefore entail major problems.'
>
> By Law no. 1204 of 27 December 2003, the application of the attachment requirement to Danish nationals was restricted through the 28-year rule, and the preparatory work in respect of the Law stated that the purpose was, *inter alia*, 'to ensure that Danish expatriates with strong and lasting ties to Denmark in the form of at least twenty-eight years of Danish nationality will be able to obtain spousal reunion in Denmark'. In the light of these notes, it is considered a fact that the indirect difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of other ethnic extraction following from the 28-year rule is an intended consequence."

14. I agree with the minority in the Supreme Court that the difference in treatment intended by the 28-year rule was based on an ethnic differentiation of a group of Danish citizens[11]. Rather than favouring a group of nationals who had been Danish nationals for twenty-eight years, which included Danish expatriates, the Government were in reality targeting a group of nationals who had been naturalised and were of ethnic origins other than Danish. The 28-year rule had the intended consequence of creating a difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin, because *de facto* the vast majority of persons born Danish citizens would be of Danish ethnic origin, whereas persons who acquired Danish citizenship later in life would generally be of foreign ethnic origin. I also agree with them when they concluded that the 28-year rule had a far greater impact on persons who had only acquired Danish nationality later in life than persons born with Danish nationality[12]. In fact, the chances for Danish citizens of reuniting with a

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11. This was also the applicants' central claim during the Grand Chamber hearing, namely that the Government had thereby created a "first class" of ethnic expatriates and a "second class" of non-Danish nationals from non-Western countries.

12. As the High Court also acknowledged, "[i]n practice, however, the rule may imply that a Danish national of foreign extraction will only meet the 28-year rule later in life than would be the case for a Danish national of Danish extraction. When applied, the rule may therefore imply an indirect discrimination" (see paragraph 26 of the present judgment).

foreign spouse in Denmark, and creating a family there, were significantly poorer and, it appears, almost illusory, where the residing partner had acquired Danish citizenship as an adult.

15. The fact that the Convention compatibility of the attachment requirement and the 28-year rule had been assessed by the Government before introducing the bills in Parliament and by Parliament itself evidently does not preclude the fact that their assessment might be erroneous. The mere procedural exercise of a governmental or parliamentary review of legislation prior to its approval and the subsequent judicial scrutiny of that same legislation do not limit the Court's supervisory responsibility. Regardless of the depth of the domestic legal and political discussion, the repetition of various parliamentary, administrative or even judicial reviews of the impugned legislation does not broaden *per se* the State's margin of appreciation, otherwise it would be very easy to hide behind an artificially complex and protracted domestic adoption procedure.

16. In the case at hand, the Government placed themselves in the awkward position of having to satisfy their burden of proof with statistical evidence whose collection would *per se* infringe the Convention, in view of their ethnically motivated policy purposes. In any case, no scientifically tested statistical evidence was produced by the Government as to their contentions about the way of life of resident foreigners and resident Danish nationals of foreign origin[13].

17. The opposite argument, that there is an insufficient basis for saying that the prospect of family reunification is illusory in practice, and therefore that the applicants would have had a good prospect of obtaining spousal reunification had they waited a few years before applying, is logically and ethically unacceptable. The logical flaw is flagrant. Logically, this line of argument does not stand up to scrutiny, simply because it is based on the so-called "fallacy of ignorance", an *argumentum ad ignorantiam*, whereby a proposition (the applicants had a good prospect of obtaining spousal reunification) is true because it has not yet been proven false. The ethical flaw is no less evident. By assuming an uncertain fact (that the applicants could have met the generally applicable attachment requirement in a "few years"), this line of argument avoids being confronted with a certain reality (that the Biao family would have had to wait until the first applicant turned 59 before they could live together in Denmark).

18. The Government have failed to substantiate in any objective way that Danes by birth have a greater "insight into Danish society" than persons who settled in Denmark in their youth or as adults. Moreover, the Government presuppose, without any objective grounds, that Danes born in

13. One should not forget the just criticism addressed by the Grand Chamber to the Government about the lack of pertinent statistical data in the present case (see paragraphs 84-85, 118 and 133 of the present judgment). The CEDAW also noted the absence of statistics on the incidence of forced marriage in its 2006 concluding comment.

Denmark who live outside the country "will often have maintained strong ties with Denmark, which are also communicated to their spouse or cohabitant and any children". Furthermore, the simplistic assumption that people who have been Danish nationals for twenty-eight years are in a better position to have their family reunited in Denmark than those who have been Danish nationals for less than twenty-eight years is also arbitrary. Ultimately, the stereotype that resident foreigners and Danish nationals of foreign origin are helpless young people, who are either forced to marry persons from their country of origin or tend to engage in an odd, "widespread" marriage pattern of a kind of cultural in-breeding, and later on build "unhappy" families, have "marital problems" and do not integrate well into society, is not confirmed by any objective evidence. In sum, the contested policy on family reunification is based on a confused amalgam of misguided, biased assumptions which portray a surreal image of resident foreigners and Danish nationals of foreign origin living in Denmark, and more specifically – and most disturbingly – of those coming from "non-Western countries", in contrast with an idealised image of ever-faithful Danes, born in Denmark, who live outside the country. To put it bluntly, the Government's case is not weak on the facts, it is simply not made out.

The illegitimacy of the differentiation of treatment under general international law

19. The majority of the Grand Chamber refrained, in paragraph 121, from making any explicit statement on the major issue of the "legitimacy of the aim pursued" by the domestic legislation, although they had all the necessary elements to do so. No reason was given. Yet such an odd methodological option warranted an explanation, since the issue of the legitimacy of the aim of the legislation should not be confused with that of the justification for the differentiation measure. Indeed, the establishment of an illegitimate aim would have made unnecessary any subsequent assessment of its justification. Nevertheless, the same majority stressed quite eloquently, in paragraph 126, that the impugned measure did have a biased, negative-stereotyped ideological background. The timid, self-restrained opinion in paragraph 121 was overridden by the bold, straightforward statement made in paragraph 126.

20. In my view, having already established that the 28-year rule was aimed at treating Danish citizens differently according to their racial and ethnic traits, this would have sufficed to find a violation of Article 14 in conjunction with Article 8. The Convention does not accord States any possibility of carrying out such racially or ethnically motivated policies, unless they are designed and implemented for the benefit of the disadvantaged racial or ethnic group, which was not the case here. Nevertheless, I will assume, purely for the sake of argument, that no

discriminatory intent had been established and the case should be decided on the basis of the "other status" ground invoked by the majority of the Supreme Court and the Government, namely the length of nationality.

21. The majority of the Supreme Court adhered to the findings of the High Court, which had noted that Article 5 § 1 of the European Convention on Nationality concerned the conditions for acquiring nationality, while Article 5 § 2 concerned the principle of non-discrimination and that, according to the Explanatory Report, it was not a mandatory rule that the Contracting States were obliged to observe in all situations[14]. Against that background, Article 5 § 2 was considered to offer protection against discrimination to an extent that went no further than the protection offered by Article 14 of the European Convention on Human Rights. That majority concluded therefore that it could not be a consequence of Article 5 § 2 of the Convention on Nationality that the scope of the prohibition against discrimination based on Article 14 of the Convention read in conjunction with Article 8 should be extended further than was justified by the judgment in *Abdulaziz, Cabales and Balkandali* (cited above).

22. I find this position to be at variance with the current status of general international law. In line with the finding by the minority in the Supreme Court, I consider that Article 5 § 2 of the Convention on Nationality comprises a general provision stating that any difference in treatment between different groups of a State Party's own nationals is basically prohibited, regardless of whether they are nationals by birth or have acquired their nationality subsequently[15]. This basic principle led to the very strongly worded criticisms of the Danish immigration policy on family reunification expressed by the European Committee against Racism and Intolerance (ECRI)[16], the Council of Europe Commissioner for Human Rights[17], the Committee for the Elimination of Racial Discrimination (CERD)[18], the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination Against Women (CEDAW)[19]. It is useful to recall the strong language used by these authorities. The outspoken ECRI did not fail to criticise both the

14. ETS 166. This Convention came into force in respect of Denmark on 1 November 2002. A reservation was made to Article 12.
15. See paragraph 132 of the present judgment.
16. See paragraphs 52-55 of the present judgment.
17. See paragraph 49 of the present judgment.
18. See paragraph 60 of the present judgment.
19. It cannot be argued that the Court should not amend non-binding policy-based recommendations into legally binding obligations. The Convention must be interpreted taking into account not only other human rights treaties, but also hard and soft law instruments related to it and especially the system of human rights protection of the Council of Europe within which it fits, as Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties provides (for a recent, laudable example, see *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, § 204, 8 July 2014).

discrimination against naturalised Danish citizens and Danish citizens of foreign ethnic origin in a 2012 report:

> "... The rule that persons who have held Danish citizenship whether it be for over 28 or 26 years, or who were born in Denmark or came to the country as a small child or have resided legally in the country, whether it be for over 28 or 26 years, are exempt from these requirements, also risks disproportionately affecting non-ethnic Danes. ..."

And earlier in a report of 2006:

> "... ECRI is deeply concerned by the fact that the 28 years' aggregate ties with Denmark rule amounts to indirect discrimination between those who were born Danish and people who acquired Danish citizenship at a later stage. ..."

In his letter of 15 October 2004 to the Danish Government, the Council of Europe's Commissioner for Human Rights focused his attention on the discrimination against naturalised Danish citizens:

> "My concern is that this requirement places undue restrictions on naturalised Danish citizens and places them at considerable disadvantage in comparison to Danish citizens born in Denmark. ..."

In its concluding observations after the Sixty-ninth session in 2006 in respect of Denmark, the CERD concluded as follows.

> " ... In particular, the conditions that both spouses must have attained the age of 24 to be eligible for family reunification, and that their aggregate ties with Denmark must be stronger than their ties with any other country unless the spouse living in Denmark has been a Danish national or has been residing in Denmark for more than 28 years, may lead to a situation where persons belonging to ethnic or national minority groups are discriminated against in the enjoyment of their right to family life, marriage and choice of spouse. ..."

These statements on the 28-year rule were made in the context of an extremely unfavourable international reaction to Danish immigration policy, and more specifically to a recently introduced "24-year rule", that should not be disregarded. In its report of 2004 the CESCR stated that the following was among the principal subjects of concern.

> "16. The Committee notes with concern that the amendment to the Aliens Act in 2002, which raised the age of the right to reunification of migrant spouses to 25 years, constitutes an impediment to the State party's obligation to guarantee the enjoyment of the right to family life in Denmark.
>
> ...
>
> 29. The Committee calls upon the State party to take appropriate measures to either repeal or amend the so-called 24-year rule of the 2002 Aliens Act, in line with its obligation to guarantee the enjoyment of the right to family life to all persons in Denmark, without distinction. In this connection, the Committee encourages the State party to consider alternative means of combating the phenomenon of forced marriage involving immigrant women."

In its report of 2005 the CESCR further expressed its concern as follows.

> "387. The Committee is concerned that the rise in the number of immigrants and refugees arriving in Denmark over the last years has been met with increased negative and hostile attitudes towards foreigners. The Committee also expresses concern about the occurrence of xenophobic incidents in the State party.
>
> ...
>
> 390. The Committee notes with concern that the 24-year rule introduced by the amendment to the Aliens Act in 2002 restricts the right to family reunification and may constitute an impediment to the enjoyment of the right to family life in the State party."

The concluding comments by the CEDAW on Denmark, 25 August 2006, set out, *inter alia*, as follows.

> "30. While noting the State party's action plan to counter forced marriages and arranged marriages launched in 2003 with initiatives that include dialogue and cooperation, counselling and research, the Committee is concerned by the consequences the legislation that increased the minimum age requirement from 18 to 24 years of age for spousal reunification may have for women. The Committee notes the absence of statistics on the incidence of forced marriage.
>
> 31. **The Committee recommends that the State party undertake an assessment of the consequences on women of the increase in the age limit for family reunification with spouses, and to continue to explore other ways of combating forced marriages.**" (Original emphasis.)

The concluding comments by the CEDAW on Denmark of 7 August 2009, as regards family reunification, were as follows.

> "40. While noting the positive effects of the awareness-raising campaign on forced and arranged marriages within the State party, the Committee reiterates the concerns expressed in the previous concluding observations that the 24-year-old age limit for the reunification of migrant spouses may constitute an impediment to the right to family life in the State party.
>
> 41. **While calling upon the State party to continue placing the issue of forced marriage high on its political agenda, it recommends the review of the 24-year old age limit in order to bring it into line with the rules applying to Danish couples. Furthermore, in view of the positive results of the awareness-raising campaign, the Committee encourages the State party to continue exploring alternative ways of combating forced marriages.**" (Original emphasis.)

23. From an international law perspective, it is certainly not correct to claim that immigration policy falls within the realm of State discretion. Family reunification is precisely one of the areas, amongst others, where immigration policy is confronted with strict international obligations. Equating immigration policy with State discretion can only result in the commodification of those persons involved, which would be totally at odds, at the universal level, with Articles 9 and 10 of the United Nations Convention on the Rights of the Child (1989)[20], Article 44 of the United

20. This Convention came into force on 2 September 1990 and has 196 States Parties. It was ratified by Denmark on 19 July 1991. No reservation was entered with regard to Articles 9 and 10.

Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)[21], Articles 1 and 3 of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children (1986)[22]; and at the European level, with several Council of Europe provisions, such as Article 19 § 6 of the European Social Charter (1961)[23], Article 19 § 6 of the revised European Social Charter (1996)[24] and Article 12 of the European Convention on the Legal Status of Migrant Workers (1977)[25], as well as Recommendation Rec(2002)4 of the Committee of Ministers on the legal status of persons admitted for family reunification[26], Recommendation No. R (99) 23 of the Committee of Ministers to member states on family reunion for refugees and other persons in need of international protection, PACE Recommendation 1686 (2004) on human mobility and the right to family reunion[27], its more recent "Position paper on family reunification"[28], and the European Union Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[29],

21. This Convention came into force on 1 July 2003 and has forty-eight States Parties. Denmark is not a Party.
22. UN Doc. A/RES/41/85, 3 December 1986.
23. ETS 35. The initial version of the Charter was signed and ratified by Denmark, but Article 19 was not included in its declaration, made in accordance with Article 20 § 1 (b) and (c), that was handed to the Secretary General at the time of deposit of the instrument of ratification.
24. ETS 163. The revised version of the Charter was signed on 3 May 1996, but not ratified by Denmark. No reservation was made to Article 19.
25. ETS 93. There are eleven ratifications of this Convention, not including Denmark.
26. The Committee of Ministers here expresses its support for family reunification on the basis, firstly, of the "universally recognised right" to the safeguarding of family unity and, secondly, because of its contribution to successful integration. The Recommendation states that family members admitted under family reunification should be granted the same residence status as that held by the principal migrant, and that after four years, adult family members should be granted independent permits. In the case of the divorce, separation or death of the principal migrant, the Recommendation calls on member States to consider granting autonomous residence permits for family members who have been legally resident for at least one year. It also advocates a right of appeal for those family members whose permits are not renewed and/or who are threatened with expulsion. The Recommendation also recommends equal treatment to that of the principal migrant in relation to access to the labour market, education and social rights, and to political participation (the right to vote and to stand in local-authority elections).
27. See paragraph 51 of the present judgment.
28. AS/Mig (2012) 01, 2 February 2012.
29. See Report from the Commission to the European Parliament and the Council of 8 October 2008 on the application of Directive 2003/86/EC on the right to family reunification (COM(2008) 610 final) and especially the Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification (COM(2014) 210 final). It is highly significant that the Court did not shy away from interpreting EU law in paragraph 135 of the present judgment, considering the domestic law to a certain degree incoherent with Directive 2004/38/EC, along the lines proposed by the Government, since

which all encourage States to promote the right to family reunification and to ensure treatment on an equal footing with nationals. Even in international humanitarian law, States are willing to strengthen their responsibility towards separated families by accepting the obligation to facilitate family reunification "in every possible way"[30].

24. To sum up, there is clear and uncontested evidence of a continuing trend in general international law, which has evolved to a degree that it places family reunification well above immigration policy interests, with the ineluctable consequence of the inadmissibility of any family-reunification policy which imposes conditions or requirements based on gender, sexual orientation, race, ethnicity, language, religion, political or other opinion, nationality or social origin, association with a national minority, property, birth or length of nationality[31]. States enjoy no discretion in assessing whether and to what extent these grounds in otherwise similar situations may justify a different treatment of applicants for family reunification, since they should pursue the elimination of all direct or indirect obstacles to family reunification and the extension of this basic right at least to all nationals and lawfully resident aliens. Thus, even interpreting the 28-year rule literally, at face value, the differentiation measure based on the length of nationality pursued an illegitimate aim under general international law. The Convention standard is not different from that of international law, as I shall demonstrate below.

The illegitimacy of the differentiation of treatment under the Convention

25. The majority of the Danish Supreme Court found that the consequences of the 28-year rule could not be considered excessively burdensome for Mr Biao, ignoring the effects it had on the lives of his wife and son. They noted in this respect that the factual circumstances of the present case in 2004 were identical in most material aspects to those of Mrs Balkandali's situation in the case of *Abdulaziz, Cabales and Balkandali* (cited above). They both came to the country as adults. Mr Biao's application for spousal reunification was rejected when he had resided in Denmark for eleven years, two of which as a Danish national.

"the applicants and their child now have a prospect of success in applying from Sweden for a residence permit in Denmark".

30. Article 74 of the Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I, 8 June 1977).

31. The "clear and uncontested evidence of a continuing international trend" was the relevant test in *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI.

Mrs Balkandali's application was rejected after she had resided in the United Kingdom for eight years, two of which as a British national.

26. The majority of the Chamber endorsed this view, to the effect that the *Abdulaziz, Cabales and Balkandali* principle applied equally to close ties with a country stemming from being a national for a certain period. The Chamber dismissed the complaint of indirect discrimination by referring to *Abdulaziz, Cabales and Balkandali* and arguing that the discrimination ground being "other status", namely length of citizenship, the Court did not have to apply the "very weighty reasons" test. It further observed that there had been no recent case-law departing from the principles and conclusions set out in that case, including the statement "that there are in general persuasive social reasons for giving special treatment to those who have strong ties with a country, whether stemming from birth within it or from being a national or a long term resident [*sic*]" [32]. It thus accepted that the aim put forward by the Government in introducing the 28-year exemption from the "attachment requirement" was legitimate for the purposes of the Convention.

27. In contrast, the minority in the Danish Supreme Court did not find that the *Abdulaziz, Cabales and Balkandali* judgment could be given decisive weight in the present case, because a difference in treatment based on the length of a person's period of nationality was not comparable to a difference in treatment based on the place of birth. Although the minority were, strictly speaking, right to distinguish the present case from *Abdulaziz, Cabales and Balkandali*, the argument could be made that the material similarity of the situation in both cases could justify analogous reasoning. Be that as it may, the fact is that no other judgment or decision of the Court has ever repeated the principle set out in paragraph 88 of *Abdulaziz, Cabales and Balkandali*, according to which "there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it" in terms of family reunification. Furthermore, in view of the above-mentioned evolution of international law, the *Abdulaziz, Cabales and Balkandali* principle, which was expressed in 1985, no longer holds true. The tolerance that the Court showed at that time

32. I note that the citation in the Chamber's judgment in *Biao* from *Abdulaziz, Cabales and Balkandali* was incorrect, since the Court never used the wording "or from being a national or a long term resident" in the cited passage. Moreover, I would draw attention to the fact that the other source cited by the majority of the Chamber, namely *Ponomaryov and Others v. Bulgaria* ((dec.), no. 5335/05, 18 September 2007), did not use that wording either, and even departed from it. While *Abdulaziz, Cabales and Balkandali* referred to "birth within" a country, that decision only mentioned a "special link with a country". Thus, the *Ponomaryov and Others* decision cannot be used as confirmation of *Abdulaziz, Cabales and Balkandali.*

with regard to a legal regime whose intention was to "lower the number of coloured immigrants"[33] cannot be accepted today.

28. To put it directly, I am firmly convinced that it is high time to depart from the regrettable standard set by *Abdulaziz, Cabales and Balkandali*. This departure concerns the legitimacy of the aims pursued by national legislation in the field of family reunification, and not the proportionality of the legislative measure as applied in a concrete case. I submit that differentiation of treatment of nationals and lawfully resident aliens on the basis of their place of birth, nationality or length of nationality is, as a matter of principle, arbitrary, if one reads Article 14 of the Convention in the light of the evolving general principles of international law[34]. The Government's arguments are too weak to negate such a reading. The somewhat mythical notion that a national by birth has a greater "insight into Danish society" than a person who came to Denmark as a youngster or an adult is certainly not a convincing argument by way of contradiction. Likewise, the "normal successful integration" of Danish expatriates' family members into Danish society is nothing but wishful thinking.

29. The Grand Chamber has not yet gone so far as to affirm that the Convention does grant a right to family reunification and that this right prevails over immigration, or even criminal, policy considerations[35]. But as in *Jeunesse*, the Court should have asked itself "whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing" entry into or residence in a European country[36]. Instead of addressing the issue of family protection within the framework of immigration policy from a principled, standard-setting perspective, the Court has preferred until now to hide behind the pure casuistic treatment of the "exceptional circumstances" of each case, occasionally resolving the human problem of the applicant, and thus giving

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33. See the explicit reference by the minority of the Commission in *Abdulaziz*, *Cabales and Balkandali*, cited above, § 84.

34. As formulated in *Golder v. the United Kingdom* (21 February 1975, § 35, Series A no. 18), the Convention should be interpreted in the light of general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 § 1 (c) of the Statute of the International Court of Justice). Family reunification is one such principle, as was shown previously.

35. A family-friendly policy would have pointed in that direction, such as that adopted long ago by the Portuguese Constitutional Court in its decisions 187/1997, 470/1999 and 232/2004, which prohibit expulsion of convicted foreigners, even for serious crimes like drug trafficking, when they have one or more children of minor age and of Portuguese nationality residing in Portugal. Expulsion in this case would imply one of two constitutionally inadmissible consequences: either the separation of the family, with the indirect consequence of the "punishment" of the members of the family of minor age; or the "indirect" expulsion of the Portuguese minor from Portuguese territory, in order to live with his or her expelled, non-national parent. Children should not suffer the consequences of their parents' misconduct.

36. *Jeunesse*, cited above, § 121.

the appearance of leaving the general picture of State discretion in this field of law untouched.

30. In actual fact, the Court has gradually eroded the apparently untouchable principle that Article 8 cannot be considered to impose on a State a general obligation to respect a family's choice of country for their residence or to authorise family reunification on its territory[37]. The consequence of this erosion is plain to see: the personal interests of an applicant in maintaining his or her family life in a given State's territory are no longer subordinated to that State's public-order interests in controlling immigration[38]. The day will come, hopefully sooner rather than later, when the Court will take the simple but courageous step of concluding, in an unequivocal manner, that the right to family life does warrant family reunification. Family members are expected to live together, when there are no practical obstacles. Such obstacles should not be created by the State. Paragraph 132 of the present judgment almost takes this step, when referring to the "certain trend towards a European standard which must be seen as a relevant consideration in the present case", but its final formulation lacks precision[39]. The maximum point to which the Grand Chamber is willing to go for the time being is stated in paragraph 138, where it accepts the applicants' argument (from paragraph 71) as to the "rather narrow margin of appreciation that member States had in matters of family reunion" – a view which had already been expressed in the dissenting opinion appended to the Chamber judgment.

31. Taking family life seriously means taking, in effect, affirmative action to protect and facilitate it. On equality issues, a government is responsible not only for talking the talk but also for walking the walk.

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37. Once again, the mechanical repetition of this formulation can be found in paragraph 117 of the present judgment. And once again also, the Court did embark on an assessment of Mr Biao's "concrete" family circumstances in order to depart from the stated general position.

38. The most recent and significant "erosive" decision of the Court was evidently *Jeunesse* (cited above), which used the artifice that "the circumstances of the applicant's case must be regarded as exceptional" (§ 122). In this regard, the minority judges, who were attentive to the erosive potential of this artifice, denounced something obvious. The same erroneous methodological approach was used in *De Souza Ribeiro* (cited above, § 95), as I mentioned in my separate opinion.

39. I am not convinced by the majority's analysis of the international and comparative law materials in paragraphs 61 and 132-33. They lack precision. A more rigorous study would have demonstrated that there is at least "clear and uncontested evidence of a continuing international trend", which was the relevant test in *Christine Goodwin* (cited above, § 85). For example, no attention was given to the fact that forty-seven States are now Parties to the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 44 § 2 of which states that "States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children".

Nicely worded general statements not followed by consistent legal practice reveal not only hypocrisy and incoherence on the part of immigration authorities in Europe, but also a widening gap between law and reality. The sometimes delirious analysis of the possibility of family life "elsewhere" contributes to a fictional conclusion, with no footing in reality, imposing on family members the merciless, radical transformation of their lives[40]. Often the applicable standard is considered to depend on the existence of "insurmountable obstacles"[41] for applicants to settle elsewhere, although it is very likely that a particular applicant and his or her family would experience a degree of hardship if they were forced to do so.

32. Worse still, concerns about cultural tensions, social exclusion and professional maladjustment in Europe serve, most of the time, the hidden purpose of closing down European societies to the most vulnerable and the least well-off. It is well known from experience that the most vulnerable family members, such as those who are ill, disabled, elderly, poorly educated, living in developing or conflict or post-conflict countries, have the greatest difficulty in meeting integration and knowledge-based requirements[42]. This scenario is worsened if and when the complex technicalities of the legal framework are aimed at placing some categories of persons in a much worse position than others for the exercise of their Convention rights, such as the right to family life. Governments and immigration authorities tend to forget that "reconstitution of the families of lawfully resident migrants ... by means of family reunion strengthens the policy of integration into the host society and is in the interests of social cohesion", as PACE Recommendation 1686 (2004) puts it. The same applies *a pari* to families of nationals and naturalised persons.

33. Finally, it will be recalled that the applicants' son was born in Sweden on 6 May 2004. He obtained Danish nationality on the basis of his father's nationality. Mr and Ms Biao did not complain on his behalf in the domestic proceedings or before this Court, but the fact was not ignored by the national authorities[43] and cannot be ignored by this Court. Like the minority in the Chamber, I consider it an aggravating circumstance that the Government, in the application of the 28-year rule, ignore the side-effects of the law on Danish children, who cannot live in their country with their foreign mother or father, even though their other parent is a naturalised Dane[44]. In the present case, the parents had to move to another country,

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40. A telling example of this practice is the Ministry's decision of 27 August 2004, which found that the Biao family could settle in Ghana, as that would only require that the first applicant obtain employment there (paragraph 24 of the present judgment). As if Mr Biao could easily exchange an eleven-year-long professional career in Denmark for a comparable professional situation in Ghana (as the applicants pointed out in the Grand Chamber hearing, not contested by the Government)!

41. See, for example, *Jeunesse*, cited above, § 107.

42. See paragraph 14 of the PACE "Position paper on family reunification", cited above.

43. See, for example, paragraph 26 of the present judgment.

Sweden, in order to be able to remain together with their son. In other words, two Danish citizens had to move to Sweden in order to live together with their non-Danish wife/mother.

Conclusion

34. Seen through the lens of international law and the Convention, the impugned legislation (section 9(7) of the Aliens Act, as worded by Law no. 1204 of 27 December 2003) treats naturalised Danish citizens and Danish citizens of foreign ethnic origin differently from other Danish citizens without any plausible reason. The legislative measure is the mature fruit of a policy choice of the respondent State to combat an alleged "marriage pattern" among foreigners and Danish citizens of foreign origin and to benefit Danish nationals who have opted to live abroad for a lengthy period and who started a family outside Denmark. The fact that this policy choice is pursued by means of an exemption to the attachment rule, and therefore the discriminatory measure has an indirect nature, does not detract from the political and social purposes that it pursued. Accordingly, the pursued differentiation of treatment on ethnic grounds constitutes inadmissible ethnic discrimination, and this suffices for the finding of a violation of Article 14 of the Convention in conjunction with Article 8. Even assuming, for the sake of an exhaustive discussion of the case, that only a differentiation of treatment based on the length of citizenship could be established, this would nevertheless constitute inadmissible indirect discrimination on the basis of "other status", since the Convention does not allow any differentiation of treatment of nationals and lawfully resident aliens on the basis of their birth, nationality or length of nationality for the purpose of family reunification.

35. Like a boat sailing against the wild current of populist rhetoric, the Court must today take a coherent stand for the right to family life, as it did recently in *Jeunesse*. The *ratio* of the present judgment, which is to protect naturalised Danish citizens and Danish citizens of foreign ethnic origin, who are put in an extremely unfavourable position before the law, would evidently be frustrated if new legislation were to worsen the conditions for obtaining family reunification in Denmark, for instance by simply abolishing the exemption from the generally applicable "attachment requirement"[45]. A good-faith implementation of the present judgment

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44. As in *Jeunesse*, cited above, § 120, the Court could have concluded that "insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit".

45. A law, regulation or policy which brings about equality through "levelling down" the enjoyment of a Convention right by an advantaged group of people with an identifiable characteristic in comparison with another disadvantaged group of people could be censured

warrants an overall reassessment of the legal framework concerning family reunification, including its "attachment requirement". I would thus also have indicated to the Danish Government under Article 46 of the Convention that the now 26-year rule should be amended, with the caveat that this should not in any way imply any retrogression in the legal protection of the right to family life of the potentially affected persons.

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by the Court's review (see *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, §§ 40-43, 10 May 2007).

PARTLY DISSENTING OPINION OF JUDGE JÄDERBLOM

I respectfully disagree with the majority that there has been a violation of Article 14 of the Convention read in conjunction with Article 8, and in this respect I concur with the views expressed by Judges Villiger, Mahoney and Kjølbro in their joint dissenting opinion (see paragraphs 2-45 of that opinion). However, I voted with the majority that there was no need to examine the application separately under Article 8 of the Convention.

JOINT DISSENTING OPINION OF JUDGES VILLIGER, MAHONEY AND KJØLBRO

1. We respectfully disagree with the majority that there has been a violation of Article 14 of the Convention read in conjunction with Article 8. Consequently, we find it necessary to examine the application separately under Article 8 of the Convention. Below, we will explain briefly why we find that there has been no violation either of Article 14 read in conjunction with Article 8 or of Article 8 taken alone.

Applicability of Article 14

2. We fully agree with the majority that the facts of the case (the refusal to grant a residence permit to the female applicant for the purpose of family reunification with the male applicant in Denmark) fall within the ambit of Article 8 of the Convention and that as a consequence Article 14 is applicable (see paragraph 95 of the present judgment).

Difference in treatment (direct or indirect discrimination)

3. It is undisputed that there has been a difference in treatment between persons in comparable situations for the purposes of Article 14 of the Convention. However, there is a dispute as to the criteria or "status" giving rise to the difference in treatment.

4. Under section 9(7) of the Aliens Act, the so-called attachment requirement was imposed in relation to persons residing in Denmark who had not been Danish nationals for at least twenty-eight years. Conversely, an exemption from satisfying this requirement applied to persons who had been Danish nationals for that period.

5. As recognised by the Supreme Court and the Government, the legislative scheme in question treated persons differently depending on the length of the period during which the person had been a Danish national. Where the person had not been a Danish national for twenty-eight years, the exemption did not come into play, and as a consequence the generally applicable attachment requirement had to be met. This amounts, unquestionably, to a difference in treatment on account of "other status", within the meaning of Article 14.

6. The question is, however, whether there has also been an indirect difference in treatment on the basis of ethnic origin, as alleged by the applicants.

7. The majority are of the view that there has indeed been an indirect difference in treatment based on ethnic origin. We respectfully disagree. More importantly, even assuming that this is the case, we also part company

with the majority as regards the legal consequences of such a situation for the Court's examination of the application.

8. It follows from its wording, as well as from the preparatory work, that the 28-year rule was applicable irrespective of the point in time when the person acquired Danish nationality. Having said that, it is evident that such a rule has more severe consequences for a person who has acquired nationality later in his or her life compared with a person who acquired nationality by birth. Therefore, it might be argued that the provision, having regard to its effects in practice, entails a difference in treatment between persons who are Danish nationals by birth and persons who have acquired Danish nationality later in life. As persons acquiring Danish nationality by birth are, in general, of Danish ethnic origin, while persons acquiring Danish nationality later in life are, in general, of foreign ethnic origin, it might be argued that the rule also treats people differently on the basis of ethnic origin.

9. It is on that basis – the effects in practice of the legislation – that the majority have reached the conclusion that there has also been a difference in treatment on the basis of ethnic origin (see paragraphs 101-14 of the present judgment).

10. It must be stressed that the generally applicable attachment requirement does not make any distinction whatsoever between people who acquired nationality by birth and those who have become nationals later in life. It is only the exemption from this requirement that may operate in that manner in practice; an exemption that is, however, meant to lessen the burden of demonstrating an objective fact, namely the required attachment for those persons who have presumptively strong ties with Denmark.

11. Furthermore, the Court should be careful of saying that the 28-year rule treats persons differently on the basis of criteria other than those mentioned in the Law and the preparatory work. There is no basis in the Law or the preparatory work for saying that a difference in treatment on the basis of national or ethnic origin is intended. On the contrary, it emerges clearly from the preparatory work that non-nationals (or persons who have been nationals for less than twenty-eight years) will be treated as equal to persons who have had Danish nationality for twenty-eight years, provided that they were born in Denmark or arrived there as young children and have been lawfully resident there for twenty-eight years. This exception was introduced specifically to ensure compliance with the prohibition against discrimination and grants equal treatment to non-nationals (and persons who have been nationals for less than twenty-eight years). Thus, persons of other national or ethnic origin are in some situations granted the same preferential treatment. The extension of the preferential treatment to non-nationals (and persons who have been nationals for less than twenty-eight years) militates against any assumption that the difference in treatment is based on national or ethnic origin.

12. In our view, the judges in the minority of the Supreme Court did not have a sufficient basis for asserting that the indirect difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals from other ethnic backgrounds was an intended consequence – a question on which the majority do not find it necessary to take a separate stand (see paragraphs 120-21). The words quoted by the Supreme Court minority (concerning problems with integration, marriage patterns and Danish nationals of foreign extraction) from the preparatory work (Bill no. 152 of 28 February 2002) did not concern the introduction of the 28-year rule (Law no. 1204 of 27 December 2003), but the reason for extending the attachment requirement to nationals (Law no. 365 of 6 June 2002). In other words, the remarks quoted related to the factual situation obtaining for people who in practice would apply for spousal reunification, as well as to problems with integration, isolation, maladjustment and unemployment.

13. In this context it must be underlined that the minority's reading of domestic legislation and the intentions of the legislature was not endorsed by the majority of the Supreme Court, according to whom the only difference in treatment entailed by the Danish legislative scheme in issue was between persons who had been nationals for twenty-eight years and persons who had been nationals for less than twenty-eight years. In general, the Court should not call into question the domestic courts' interpretation of domestic legislation unless it is arbitrary or manifestly unreasonable; and in the instant case there is, in our view, no basis for this international Court to set aside the authoritative interpretation of domestic legislation carried out by the Danish Supreme Court.

14. Furthermore, a difference in treatment on the basis of nationality will in principle always indirectly involve some difference in treatment based on national or ethnic origin, since persons of a different nationality will more often than not be of a different national or ethnic origin. However, this is not in itself sufficient to conclude that a difference in treatment on the basis of nationality automatically amounts to an indirect difference in treatment on the basis of national or ethnic origin for the purposes of Article 14 of the Convention. Likewise, a difference in treatment on the basis of possession of nationality for a certain period will in practice always have a different impact on persons who are born as nationals, compared with persons who acquire nationality later in life. However, the Court should be reticent to conclude that a difference in treatment on the basis of possession of nationality for a certain period automatically amounts to an indirect difference in treatment on the basis of national or ethnic origin, where such a conclusion has no basis in the wording of the provision or the purpose of the rule.

15. Therefore, for our part, we are not willing to accept that the application of the 28-year rule raises an issue of indirect discrimination on the basis of ethnic origin. However, even if it were accepted that the

28-year rule involves a difference in treatment between persons on the basis of ethnic origin, this should not – under the Court's existing case-law on indirect discrimination – have the legal consequences attached to it by the majority in their reasoning.

16. The Court has accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group of persons (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001). The leading case on indirect discrimination is *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, ECHR 2007-IV), and the principles established in that judgment have been applied and confirmed in *S.A.S. v. France* ([GC], no. 43835/11, ECHR 2014).

17. In *D.H. and Others v. the Czech Republic* the Court stated:

> "195. In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The burden of proof must therefore shift to the Government, which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin."

18. In *S.A.S. v. France* the Court explained as follows.

> "160. The Court notes that the applicant complained of indirect discrimination. It observes in this connection that, as a Muslim woman who for religious reasons wishes to wear the full-face veil in public, she belongs to a category of individuals who are particularly exposed to the ban in question and to the sanctions for which it provides.
>
> 161. The Court reiterates that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent ... This is only the case, however, if such policy or measure has no 'objective and reasonable' justification, that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality' between the means employed and the aim sought to be realised ... In the present case, while it may be considered that the ban imposed by the Law of 11 October 2010 has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public, this measure has an objective and reasonable justification for the reasons indicated previously ..."

19. It follows from those two judgments that, in cases where an applicant alleges an indirect difference in treatment, if the Court – on the basis of an assessment of evidence concerning the effects of the general measure complained of – concludes that there is a "presumption", or even a "strong presumption", of indirect discrimination, it will then proceed to examine whether "the difference in the impact of the legislation was the result of objective factors unrelated to" the "status" in question, be it ethnic origin as in *D.H. and Others v. the Czech Republic* or religion and gender as in *S.A.S. v. France*. In other words, even if an application is considered to raise a question of indirect discrimination, the Court will determine whether

there is objective and reasonable justification for such difference in treatment.

20. In the present case, the majority do not confine themselves to affirming that the legislation in question had "a disproportionately prejudicial effect on persons ... who were of an ethnic origin other than Danish" (see paragraph 113), and that the burden of proof was on the Government to show "that the difference in the impact of the legislation ... was the result of objective factors unrelated to ethnic origin" (see paragraph 114). In addition, the majority argue that it was for the Government to put forward "compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination [were] to be compatible with Article 14 of the Convention taken in conjunction with Article 8" (see paragraph 114, and also paragraphs 121 and 138). By adopting such an approach, the majority have, in our view, prejudged the outcome of the assessment whether the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

21. In cases of a direct difference in treatment on the basis of ethnic origin, or if it has been proven that there have been indirect differences in treatment on that basis, it would indeed require very weighty reasons for such a difference in treatment to be justified – if indeed it could ever be justified. However, we find it problematic to require "compelling or very weighty reasons" before it has been decided at all whether there was in fact a difference in treatment on the basis of ethnic origin.

22. In our view, what is decisive in the present case is whether there was an objective and reasonable justification for the difference in treatment in question, that is to say, whether that difference pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Legitimate aim

23. We have difficulty in understanding why the majority find cause to question the legitimacy of the aims invoked by the Government, by stating that the Court "considers that it is not required to take a separate stand on the question ... whether the aim put forward by the Government for the introduction of the 28-year rule was legitimate for the purposes of the Convention" (see paragraph 121).

24. The introduction of the 28-year rule in 2003 should be seen in the context of extending the attachment requirement to Danish nationals in 2002. The aims invoked by the Government, which transpire clearly from the preparatory work in respect of the legislative amendments, are immigration control, successful integration of foreigners and the alleviating of difficulties for persons with strong and lasting ties with the country. In

our view, these aims are clearly legitimate aims within the meaning of the Court's case-law.

Objective and reasonable justification (the question of proportionality)

25. In the assessment of proportionality it is necessary to have regard to the margin of appreciation to be afforded to the national authorities and to the principle of subsidiarity.

26. In our view, the subject matter of the instant case falls within a domain in which the State, for a number of reasons, should be recognised as having a wide margin of appreciation.

27. Firstly, the Convention does not as such grant a right to family reunification (see *Gül v. Switzerland*, 19 February 1996, § 38, *Reports of Judgments and Decisions* 1996-I). In other words, the difference in treatment does not concern a Convention right.

28. Secondly, there is no evidence of a clear European consensus as regards conditions for family reunification and preferential treatment granted to persons with strong and lasting ties with the country.

29. Thirdly, it is material that the compatibility of the relevant legislation with the Convention was carefully and thoroughly examined at domestic level several times. Thus, the Convention compatibility of the attachment requirement and the 28-year rule was examined by the Government before introducing the relevant bills into Parliament. It was then assessed by Parliament before passing the Acts. On the basis of the 2004 memorandum from the Danish Human Rights Institute criticising the legislation, a detailed assessment was set out in the 2005 memorandum from the Ministry for Refugees, Immigration and Integration. A similar detailed assessment is found in the 2006 memorandum from the working group with representatives from the Ministry of Justice, the Ministry of Foreign Affairs and the Ministry for Refugees, Immigration and Integration, which discusses, *inter alia*, the compliance of the 28-year rule with Denmark's international obligations. Finally, the Convention compatibility of the attachment requirement and the 28-year rule was judicially scrutinised by the High Court of Eastern Denmark and the Supreme Court.

30. Fourthly, it is relevant for situating the margin of appreciation that the contested difference in treatment obtains, as we are convinced, on the basis of "other status". In general, a wide margin of appreciation is afforded to member States in relation to differences in treatment on the basis of "other status", as opposed to "national" or "ethnic" origin.

31. Fifthly, it is also of no mean significance for the margin of appreciation that the legislation concerns immigration control and the conditions for spousal reunification. These are matters in relation to which Convention States are called upon to adopt general measures in implementation of their economic or social policy. Immigration and family

reunification represent a regulatory area where States are faced with the challenge of striking the right balance between the rights of the individual and the interests of society. Favouring the interests of the individual will inevitably have repercussions for society in general. These challenges to society cannot be ignored and have to be addressed by the States in adopting and implementing policies and legislation. For example, immigration has an incidence on matters such as public expenditure, access to social security and the country's welfare system. It involves issues as to employment and unemployment. It also raises issues concerning integration into society, including the risk of isolation, maladjustment, ghettos and tensions between different cultures. In sum, this is an area where the States are confronted with difficult choices when complying with their international obligations.

32. Article 5 § 2 of the European Convention on Nationality does not constitute a factor that should be decisive for the Court's assessment. On the basis of the wording of the provision ("shall be guided by") as well as the Explanatory Report ("indicate a declaration of intent and not a mandatory rule to be followed in all cases"), it is more than arguable that Article 5 § 2 does not embody a legally binding norm, but a principle, and that it does not afford any stronger protection than that provided for in Article 14 of the Convention. This is the understanding reflected in the Supreme Court's judgment, and, to our minds, it is a reasonable reading of the provision. Furthermore, it is not the Court's role to interpret the European Convention on Nationality. In any event, Article 5 § 2 of that Convention cannot in itself entail an interpretation of Article 14 of the Convention that prohibits a difference in treatment between nationals depending on the length of the period for which they have been nationals.

33. It is true that the Danish legislation on immigration and family reunification, including the attachment requirement and the 28-year rule, has been criticised by international bodies, such as ECRI, CERD, CESCR and CEDAW, which in various ways over the years have argued that the application of the relevant criterion is capable of leading to discrimination. However, it is well known that such international bodies may, and frequently do, express views that do not necessarily reflect legally binding norms. Furthermore, the Court should be careful not to convert non-binding, policy-based recommendations into legally binding obligations (see also *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, no. 31045/10, §§ 92-99, ECHR 2014).

34. In assessing the proportionality of the contested measure, it is material that the criterion applied in the legislation is an objective one. It applies to all Danish nationals, irrespective of whether they are of Danish ethnic origin or of foreign extraction.

35. It is also a relevant consideration that the statutory criterion reflects a general assessment of a person's knowledge of and ties with Danish society with a view to successful integration. In other words, the criterion has the

purpose of defining a group that in general can be regarded as having lasting and strong ties/links with Danish society, thereby providing a prospect of successful integration.

36. It goes without saying that in the specific circumstances of a particular case a person not fulfilling the 28-year rule may nevertheless in practice have stronger ties/links with Danish society than a person fulfilling that rule. However, the theoretical existence of such a possibility is not, on its own, a sufficient basis for regarding as incompatible with Article 14 of the Convention the generally applicable rules in issue in the present case.

37. Neither can it be overlooked that the Court has explicitly accepted that Contracting States are entitled to give preferential treatment to persons having strong ties with the country. Thus, the Court has recognised that "there are in general persuasive social reasons for giving special treatment to those who have a special link with a country" (see *Ponomaryov and Others v. Bulgaria* (dec.), no. 5335/05, 18 September 2007, concerning preferential treatment of "aliens of Bulgarian origin and Bulgarians living abroad") and, in particular, "to those whose link with a country stems from birth within it" (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 88, Series A no. 94, concerning reunification of spouses). In our view, this principle applies equally to the existence of close ties with a country stemming from being a national for a certain period. The majority do not find it necessary to explain whether they are departing from the case-law authorities cited above or are finding the present application distinguishable from them, particularly from *Abdulaziz, Cabales and Balkandali*, which was explicitly analysed and relied upon by the Supreme Court in its consideration of the present case.

38. Most importantly, in determining whether the difference in treatment satisfies the proportionality requirement, it is not sufficient to examine the legislation in general. It is also necessary to have regard to the specific circumstances of the case. Indeed, the specific circumstances of the case and the consequences for the applicant should be decisive for the Court's assessment of the application. The role of the Court is not to review the contested domestic legislation *in abstracto*, but to assess its specific application to the applicants' situation.

39. In that regard it is pertinent that the first applicant had been a Danish national for only one year when the second applicant applied for spousal reunification, and that he had been a Danish national for two years when the final administrative decision was taken. The first applicant had been living in Denmark for ten years when the second applicant submitted her application, and for eleven years when the final administrative decision was taken. It is therefore difficult to argue that the first applicant was in a comparable situation to that of persons who had been Danish nationals for twenty-eight years or had been residing in Denmark for twenty-eight years.

40. In assessing the specific circumstances of the case and the proportionality of the contested measure, it is also relevant to have regard to the consequences for the applicants of the inapplicability of the exemption from the attachment requirement.

41. The inapplicability of the 28-year rule does not mean that the applicants will have to wait until the first applicant turns 59 before they can apply for family reunification. Nor does it imply that such reunification will be illusory. The inapplicability of the 28-year rule only meant that the applicants would have to meet the generally applicable attachment requirement for family reunification.

42. Therefore, it is not correct for the applicants to assert that the first applicant "still has to wait until the year 2030 for permission to reunite in Denmark with the second applicant". Likewise the Commissioner for Human Rights is incorrect in arguing, firstly, that persons who have acquired nationality later in life would "normally have to wait another 28 years before they can live in Denmark with their foreign partner", and, secondly, that "[t]he dispensation from the aggregate ties conditions ... at so late an age constitutes ... an excessive restriction on the right to family life" (see paragraph 137 of the present judgment).

43. The Government have provided the Court with detailed information on administrative practice concerning the attachment requirement, including consideration of the length of residence in Denmark and of the foreigner's efforts to become integrated into Danish society.

44. It may be difficult to say whether or when the applicants will be able to fulfil the attachment requirement and be granted family reunification in Denmark. However, there is no sufficient basis for saying that the prospect of family reunification is illusory in practice. In fact, it seems likely that the applicants would have had very good prospects of obtaining spousal reunification had they waited a few years before applying.

45. In sum, in our view, objective and reasonable justification for the difference in treatment at issue has been shown to exist. In other words, there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Our conclusion is therefore that no violation of Article 14 of the Convention read in conjunction with Article 8 can be found to have occurred on the facts of the present case.

The applicant's complaint under Article 8

46. As we find no violation of Article 14 read in conjunction with Article 8, we consider it necessary to examine the application under Article 8 taken alone. However, in our view, it is clear that there has been no violation of Article 8 of the Convention.

47. The marriage was contracted in Ghana, where the female applicant was living. When the family life was established, the applicants had no

reason to believe that they would be able to live together in Denmark. Both applicants had strong ties with Ghana, and the female applicant had no ties with Denmark apart from her marriage to the male applicant.

48. As we fully subscribe to the reasons given by the unanimous Chamber (see paragraphs 52-60 of the Chamber's judgment), we do not find it necessary to elaborate further on that issue.

Concluding remarks

49. It will be for Denmark to decide, under the supervision of the Committee of Ministers, which general measures are necessary to comply with the Court's binding judgment and to avoid similar violations in the future. This will, most likely, necessitate legislative changes. However, any such changes may not necessarily make it easier for persons such as the present applicants to be granted a residence permit for the purpose of family reunification.

50. If Denmark decides to comply with the judgment by abolishing the exemption from the generally applicable attachment requirement, the Court's finding of a violation will not make it easier for persons who have been Danish nationals for less than twenty-eight years (now twenty-six years) to obtain spousal reunification. Furthermore, such a legislative change would operate to the disadvantage of Danish nationals who have been living and have started a family abroad and who would like to return to Denmark. It would also operate to the disadvantage of non-nationals who have been lawfully resident in Denmark for twenty-eight years since birth or early childhood, which could turn out to be a particular problem for them should they wish to marry a person from another country to which they have close ties.

51. In other words, what may be perceived as a victory for individual applicants may, depending on the national measures adopted as a consequence of the Court's judgment, turn out to be to the detriment of a large number of persons wishing to obtain spousal reunification in Denmark. Thus, the majority's endeavour to secure what they perceive to be the human rights of the individual applicants in the instant case may be at the expense, and to the detriment, of the immigration rights and interests of other persons.

52. That being said, our main concern about the Court's judgment is the novel and, in our view, extensive application of the notion of indirect discrimination on the basis of ethnic origin, in particular the requirement of "compelling or very weighty" justificatory reasons when statistical data on the application of a general measure are relied on as the main means for determining whether there is indirect discrimination on the basis of ethnic origin.

DISSENTING OPINION OF JUDGE YUDKIVSKA

I voted against finding a violation of Article 14 in the present case, although I can share the majority's view that "the 28-year rule had the indirect effect of favouring Danish nationals of Danish ethnic origin". Nevertheless, strictly legally speaking, I see this case from a different perspective.

In the present case the "attachment requirement" pertaining to Danish nationals for purposes of family reunification was introduced in 2002. The applicants got married in 2003 (when the first applicant had been a Danish national for one year only), being perfectly aware of the fact that they were unlikely to satisfy the said requirement. Following the refusal to grant them family reunion, they appealed. Meanwhile, the government had introduced the impugned 28-year exemption clause, which gave the applicants the possibility in their further appeals not only to complain of the refusal of family reunification, but also to invoke discrimination. Nonetheless, their inability to overcome the "attachment requirement" in order to reside together in Denmark remained the essence of the applicants' grievance.

In the special circumstances of the applicants' case, the Court was prevented from analysing the "attachment requirement" itself or its compatibility with the Convention. According to the relevant documents submitted by the Government, when extending the "attachment requirement" to Danish nationals back in 2002 the authorities were concerned that "integration [was] particularly difficult in families where generation upon generation fetch[ed] their spouses to Denmark from their own or their parents' country of origin" (see paragraphs 33 and 106 of the present judgment). In other words, according to them, this tradition resulted in a *cumulative* detachment from Danish society and marginalised part of that society. But this certainly did not concern those Danish citizens who moved for work to foreign countries and raised children there; they remained very much involved in Danish society, as did their children. There was much less risk of marginalisation if such a child, raised abroad, was to bring his/her spouse to Denmark. Therefore the Government introduced the 28-year exemption in issue in the present case, which, as the majority established, had "a disproportionately prejudicial effect on persons ... who were of an ethnic origin other than Danish" (see paragraph 104 of the present judgment).

The minority in the Supreme Court of Denmark stated that "[i]n an assessment made under Article 14 of the Convention read in conjunction with Article 8, another factor to be taken into consideration [was] the crucial importance of being entitled to settle with one's spouse in the country of one's nationality" (see paragraph 30 of the present judgment). However, the prima facie scope of Article 8 alone does not protect the choice of a family to reside in a State if one of the spouses is a non-national of the State

concerned, and a State would fall short of its obligations under this provision when it comes to a ban on family reunification for non-nationals only in very serious circumstances.

However, in the instant case Article 14 changed the Grand Chamber's analysis, focusing it on the fact that the 28-year rule impaired the ability of Danish nationals with a particular ethnic background to enjoy life together with a non-Danish spouse in Denmark on a basis of equality with other Danish nationals. Thus the majority extended the protective scope of Article 8, using Article 14 of the Convention. It is true that Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention, but such a broad concept of its ambit without sufficient connection to the substantive Convention guarantee makes it vague and indistinguishable from Protocol No. 12.

But what is more, under Article 14 taken together with Article 8, we must assess whether the action or measure complained of affected the applicants' *enjoyment* of the right set out in Article 8 in a discriminatory manner. The Court, from the *Case "relating to certain aspects of the law on the use of languages in education in Belgium"* ((merits), 23 July 1968, Series A no. 6) onwards, has constantly emphasised that a State distinction that affects the *equal enjoyment of Convention rights* is unlawful discrimination, unless justified.

Here we find ourselves in a rather paradoxical situation, as has been stressed by my dissenting colleagues. What is surely problematic in respect of the applicants' right to family reunification in Denmark is the "attachment requirement" of 2002. But, as noted above, we are limited in our examination of the case to analysis of the 28-year exemption rule, which gives preference to a certain group and allows them to "avoid" the general attachment requirement. It is this exemption which was found by the majority to amount to indirect discrimination. As underlined by Judges Villiger, Mahoney and Kjølbro, the most evident way of complying with this judgment would be to abolish the exemption from the attachment requirement, so that no one would be equally entitled to avoid the latter. Thus, the equality will be achieved in terms of equal "non-enjoyment" of a right. The applicants would nevertheless still be unable to enjoy family reunification in Denmark. In other words, what the applicants can gain as a consequence of their victory is not their equal entitlement to family reunification (which was their primarily goal), but equal non-entitlement to family reunification together with others who were formerly so entitled.

Here lies my principal disagreement with the majority. I cannot interpret Article 14 of the Convention as aiming to achieve equality by any means, including by equating incommensurable interests. In the event of revocation of the impugned exemption clause, a feeling of satisfaction for the applicants that they would no longer be differentiated as migrants is perfectly understandable, but it is of the utmost importance that their core

Article 8 right will remain intact, whilst the Article 8 rights of the other group of Danish citizens will be significantly impaired.

I cannot agree more with the US Supreme Court Justice Stephen Breyer, according to whom "the judge must examine the consequences [of his/her judgment] through the lens of the relevant constitutional value or purpose". The purpose of Article 14 is to guarantee "the enjoyment of the [Convention] rights and freedoms ... without discrimination", but it will lose its paramount value, in my view, if interpreted as guaranteeing "equal non-enjoyment" of rights. Therefore I concur with my dissenting colleagues that "the majority's endeavour to secure what they perceive to be the human rights of the individual applicants in the instant case may be at the expense, and to the detriment, of the immigration rights and interests of other persons" who have strong ties with Denmark.

As the eighteenth-century English writer Samuel Johnson once said, "it is better that some should be unhappy rather than that none should be happy, which would be the case in a general state of equality".

Bearing in mind that discrimination in the present case, as found by the Grand Chamber, can be resolved by removing the 28-year exemption clause not to the satisfaction of the applicants but to the detriment of others, I voted against the finding proposed by the majority.