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

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Danish legislation on family reunion is discriminatory

In today's **Grand Chamber** judgment[1] in the case of Biao v. Denmark (application no. 38590/10) the European Court of Human Rights held:

by 12 votes to five, that there had been **a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life)** of the European Convention on Human Rights; and,

by 14 votes to three, that there was **no need to examine the application separately under Article 8** of the European Convention taken alone.

The case concerned the complaint by a naturalised Danish citizen of Togolese origin, Ousmane Biao, and his Ghanaian wife that they could not settle in Denmark. Notably, the Danish authorities refused to grant them family reunion as the couple did not comply with the requirement under the relevant domestic law (the Aliens Act) that they must not have stronger ties with another country, Ghana in their case, than with Denmark (known as the "attachment requirement"). They also complained that an amendment to the Aliens Act in December 2003 – lifting the attachment requirement for those who held Danish citizenship for at least 28 years – resulted in a difference in treatment between those born Danish nationals and those, like Mr Biao, who had acquired Danish citizenship later in life.

The Court considered that the Government's justification for introducing the 28-year rule (namely, to ensure that there were not unintended consequences for Danish expatriates who had started a family while away and subsequently had difficulties fulfilling the attachment requirement upon their return to Denmark) was, to a large extent, based on rather speculative arguments. In particular, the question of whether a Danish national had created such strong ties with Denmark that family reunion with a foreign spouse had a prospect of being successful from an integration point of view could not depend solely on the length of nationality, whether for 28 years or less. That reasoning meant that certain elements had been overlooked in Mr Biao's case, such as the fact that, in order to obtain Danish nationality, he had resided in Denmark for at least nine years, had proved his proficiency in the Danish language and knowledge of Danish society, and had met the requirement of self-support.

The Court therefore concluded that the Government had 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 favoured Danish nationals of Danish ethnic origin, and placed at a disadvantage, or had a disproportionately prejudicial effect on persons, such as Mr Biao, who acquired Danish nationality later in life and who were of ethnic origins other than Danish.

Principal facts

The applicants, Ousmane Biao, a Danish national of Togolese origin, and his wife, Asia Adamo Biao, a Ghanaian national, were born in 1971 and 1979 respectively and live in Malmö, Sweden. They have a son, born in Sweden in May 2004, who is Danish due to his father's nationality.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

The case concerns the couple's complaint about the Danish authorities' refusal to grant them family reunion in Denmark. Mr Biao was born in Togo and lived there until the age of six when he went to live in Ghana with his uncle until the age of 21. He entered Denmark in July 1993 and, having married a Danish national in November 1994, was issued with a residence permit in 1997. He learnt Danish and had steady employment for the next five years and was granted Danish nationality in 2002. In the meantime, Mr Biao divorced in 1998. In the period from 1998 to 2003 he visited Ghana four times and during his last visit there, in February 2003, he married his current wife, Asia Adamo Biao, born and raised in Ghana.

A week after their marriage, Ms Biao requested a residence permit for Denmark, which was refused by the Aliens Authority in July 2003 and on appeal in August 2004. The authorities found in particular that the applicants did not comply with the requirement that a couple applying for family reunion must not have stronger ties with another country, Ghana in the applicants' case, than with Denmark (known as the "attachment requirement").

The High Court and the Supreme Court upheld the refusal to grant family reunion in September 2007 and January 2010, respectively. The majority of the Supreme Court found that it could be objectively justified to select a group of nationals with such strong ties to Denmark (such as expatriates) 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. Furthermore, the consequences of the 28-year rule could not be considered disproportionate for Mr Biao, who had been a Danish national for only two years when he was refused family reunion.

Meanwhile in the summer of 2003, Ms Biao had entered Denmark on a tourist visa and the couple moved to Sweden in November 2003. Mr Biao maintains a job in Copenhagen and commutes every day from Malmö in Sweden.

Complaints, procedure and composition of the Court

The case was lodged with the European Court of Human Rights on 12 July 2010.

Mr and Ms Biao complained that the decision of August 2004 refusing to grant Ms Biao a residence permit in Denmark for family reunion had breached their rights under Article 8 (right to respect for private and family life) of the Convention. The applicants also relied on Article 14 (prohibition of discrimination) in conjunction with Article 8, alleging that an amendment to the Aliens Act in December 2003 – notably the attachment requirement was lifted for those who had held Danish citizenship for at least 28 years – had resulted in a difference in treatment between those born Danish nationals and those, like Mr Biao, who had acquired Danish citizenship later in life as well as between Danish nationals of Danish origin and Danish nationals of other origin.

In its Chamber judgment of 25 March 2014 the Court held, unanimously, that there had been no violation of Article 8 and, by four votes to three, that there had been no violation of Article 14 in conjunction with Article 8.

On 24 June 2014 the applicants requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 8 September 2014 the panel of the Grand Chamber accepted that request.

"The AIRE Centre" was granted leave to intervene as a third party in the written proceedings (Article 36 § 2 of the Convention).

A Grand Chamber hearing on the case was held in public in Strasbourg on 1 April 2015.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Işıl **Karakaş** (Turkey), *President*,
Dean **Spielmann** (Luxembourg),
Josep **Casadevall** (Andorra),
Mark **Villiger** (Liechtenstein),
Boštjan M. **Zupančič** (Slovenia),
Ján **Šikuta** (Slovakia),
George **Nicolaou** (Cyprus),
Ledi **Bianku** (Albania),
Ganna **Yudkivska** (Ukraine),
Vincent A. **de Gaetano** (Malta),
Paulo **Pinto de Albuquerque** (Portugal),
André **Potocki** (France),
Helena **Jäderblom** (Sweden),
Paul **Mahoney** (the United Kingdom),
Ksenija **Turković** (Croatia),
Iulia **Motoc** (Romania),
Jon Fridrik **Kjølbro** (Denmark),

and also Lawrence **Early**, *Jurisconsult.*

Decision of the Court

Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (private and family life)

In the judicial review of the application of the 28-year rule to Mr Biao and his wife, the Danish Supreme Court had found that the discrimination at issue had been based solely on the length of citizenship and that the consequences could not be considered disproportionate for Mr Biao, who had only been a Danish citizen for two years when he was refused family reunion. The Court, on the other hand, applied a different test when examining the rule, which required very weighty reasons unrelated to ethnic origin to justify a difference in treatment based exclusively on the ground of nationality.

The Court first established that the facts of the case had disclosed indirect discrimination. Notably, unlike certain categories of persons (namely, Danish-born expatriates, all other Danish-born nationals resident in Denmark and foreigners who were not Danish nationals but were born and raised in Denmark or who came to Denmark as small children and who had lawfully resided in Denmark for 28 years) who could be exonerated from the attachment requirement under the 28-year rule, Mr Biao had acquired Danish nationality later in life and could not benefit from the rule since the exception would only apply after 28 years had passed from the date on which he had become a Danish citizen. Although persons who acquired Danish nationality later in life might not in practice have to wait 28 years to be allowed family reunification, but rather three years (when a couple in the applicants' situation would generally fulfill the attachment requirement, namely after three years of acquiring Danish nationality or after 12 years of lawful residence), that did not, in the Court's view, remove the fact that the application of the 28-year rule had had a prejudicial effect on Danish nationals in Mr Biao's situation. Therefore, the 28-year rule had 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 Mr Biao, had acquired Danish nationality later in life and who were of an ethnic origin other than Danish.

As to the aim of the 28-year rule, the Court observed that the legislative process surrounding the Aliens Act showed that the Government had wished, on the one hand, to control immigration and improve integration of both resident foreigners and resident Danish nationals of foreign extraction, and, on the other, to ensure that there were not unintended consequences for Danish expatriates who had started a family while away and subsequently had difficulties fulfilling the attachment requirement upon return.

However, the Court considered that the justification for introducing the 28-year rule was, to a large extent, based on rather speculative arguments, in particular as to the time when, in general, it could be said that a Danish national had created such strong ties with Denmark that family reunion with a foreign spouse had a prospect of being successful from an integration point of view. The answer to that question could not, in the Court's view, depend solely on the length of nationality, whether for 28 years or less. Therefore, the Court could not follow the Government's argument that the consequences of the 28-year rule could not be considered disproportionate for Mr Biao because he had been a Danish national for only two years when he was refused family reunion. That line of reasoning seemed to overlook the fact that, in order to obtain Danish nationality, Mr Biao had resided in Denmark for at least nine years, had proved his proficiency in the Danish language and knowledge of Danish society, and had met the requirement of self-support. The application of the 28-year rule to Mr Biao also meant that such relevant factors as his four-year marriage to a Danish national, his participation in various courses, the fact that he worked in Denmark for more than six years and that he had had a son who was a Danish national by virtue of his father's nationality, could not be taken into account.

Indeed, some of the Government's arguments reflected negatively on the lifestyle of Danish nationals of non-Danish ethnic extraction, who, according to the Government, had a "marriage pattern" which "was to marry a person from their country of origin" and which "contributed 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." In this connection, the Court recalled that general biased assumptions or prevailing social prejudice in a particular country did not provide sufficient justification for a difference in treatment, be it on the ground of sex (as it had found in a previous Grand Chamber case[2]) or, as in the applicants' case, on the ground of being a naturalised national.

The Court also bore in mind the European Convention on Nationality and a certain trend towards a European standard aimed at eliminating the discriminatory application of rules in matters of nationality between nationals from birth and other nationals, including naturalised persons. Indeed, it would appear that, of the 29 member countries[3] studied in a comparative law survey, there were no States which, like Denmark, distinguished between different groups of their own nationals when it came to the determination of the conditions for granting family reunification. Furthermore, in European Union law on family reunification no distinction was made between those who had acquired citizenship by birth and those who had acquired it by registration or naturalisation. Moreover, various independent bodies (the European Commission against Racism and Intolerance, the Committee on the Elimination of Racial Discrimination and the Council of Europe Commissioner for Human Rights) had all expressed concern that the 28-year rule entailed indirect discrimination.

In conclusion, the Court found that the Government had 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 favoured Danish nationals of Danish ethnic origin, and placed at a disadvantage, or had a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.

[2] *Konstantin Markin v. Russia* (application no. 30078/06) of 22.03.2012.

[3] See paragraph 61 of the present judgment.

It followed that there had been a violation of Article 14 read in conjunction with Article 8 of the Convention in Mr Biao and his wife's case.

Given that conclusion, the Court was of the opinion that there was no need to examine separately the application under Article 8 alone.

Article 41 (just satisfaction)

The Court held, by 12 votes to five, that Denmark was to pay Mr and Mrs Biao 6,000 euros (EUR) in respect of non-pecuniary damage.

Separate opinions

Judges Villiger, Mahoney and Kjolbro expressed a joint dissenting opinion. Judge Jäderblom expressed a partly dissenting opinion, Judge Pinto de Albuquerque a concurring opinion and Judge Yudkivska a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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