Information Note on the Court's case-law No. 172

March 2014

Biao v. Denmark - 38590/10

Judgment 25.3.2014 [Section II]

Article 8

Positive obligations

Article 8-1

Respect for family life

Refusal to grant family reunion to a Danish citizen and his foreign wife on the ground that the spouses' ties with another country were stronger than their ties with Denmark: *no violation*

Article 14

Discrimination

More favourable conditions for family reunion applying to persons who had held Danish citizenship for at least 28 years: *no violation*

[This case was referred to the Grand Chamber on 8 September 2014]

Facts – The applicants are husband and wife. The first applicant is a naturalised Danish citizen of Togolese origin who lived in Ghana from the age of 6 to 21, entered Denmark in 1993 aged 22 and acquired Danish citizenship in 2002. He married the second applicant in 2003 in Ghana. She is a Ghanaian national who was born and raised in Ghana who at the time of the marriage had never visited Denmark and did not speak Danish. After the marriage, the second applicant requested a residence permit for Denmark, which was refused by the Aliens Authority on the grounds that the applicants did not comply with the requirement under the Aliens Act (known as the "attachment requirement") that a couple applying for family reunion must not have stronger ties with another country – Ghana in the applicants' case – than with Denmark. The "attachment requirement" was lifted for persons who had held Danish citizenship for at least 28 years, as well as for non-Danish nationals who were born and/or raised in Denmark and had lawfully stayed there for at least 28 years (the so-called 28-year rule under the Aliens Act). The applicants unsuccessfully challenged the refusal to grant them family reunion before the Danish courts. They submitted, *inter alia*, that the 28-year rule resulted in a difference in treatment between two groups of Danish nationals, namely those who were born Danish nationals and those who acquired Danish nationality later in life. The first applicant could not therefore be exempted from the attachment requirement until 2030 when he would reach the age of 59.

In the meantime, the second applicant entered Denmark on a tourist visa. Some months later, the couple moved to Sweden where they had a son, born in 2004. Their son has Danish nationality due to his father's nationality.

Law – Article 8: In so far as the instant case concerned the refusal to grant family reunion in Denmark, it was to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation. While the first applicant 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 the first applicant who lived in Denmark and had Danish citizenship. The applicants had never been given any assurances by the Danish authorities that the second applicant would be granted a right of residence in Denmark. The attachment requirement having entered into force in 2002, the couple could not have been unaware when they married – in 2003 – that the second applicant's immigration status would make any family life in Denmark precarious for them from the outset. Moreover, the second applicant could not have expected any right of residence by simply entering the country on a tourist visa. On the other hand, the first applicant himself had stated that, if he obtained paid employment in Ghana, he and his family could settle there. Therefore, the domestic courts had found that the refusal to grant the second applicant a residence permit in Denmark had not prevented the couple from exercising their right to family life in Ghana or any other country. In the light of the above, the European Court did not find that the domestic authorities had acted arbitrarily or otherwise transgressed their margin of appreciation when seeking to strike a fair balance between the public interest in ensuring effective immigration control, on the one hand, and the applicants' need for family reunion in Denmark, on the other.

Conclusion: no violation (unanimously).

Article 14 in conjunction with Article 8: The applicants had failed to substantiate having been discriminated against on the basis of race or ethnic origin in the application of the 28-year rule, given that non-Danish nationals who had been born and/or raised in Denmark and who had stayed lawfully in the country for 28 years, were exempted from the attachment requirement. The Court did find, however, that there had been a difference in treatment between the first applicant who had been a Danish national for fewer than 28 years and persons who had been Danish nationals for more than 28 years. The aim of the 28-year rule was to distinguish a group of nationals who, seen from a general perspective, had lasting and long ties with Denmark so that it would be unproblematic to grant family reunion with a foreign spouse because it would normally be possible for such spouse to be successfully integrated into Danish society. While that aim was legitimate, it appeared excessively strict to conclude that that in order to be presumed to have strong ties with a country, one had to have had direct ties with that country for at least 28 years. The Court was not convinced that the strength of one's ties continuously and significantly increased after, for example, 10, 15 or 20 years of stay in a country. Moreover, all persons born Danish nationals were exempted from the attachment requirement as soon as they turned 28 years old, whether or not they had lived in Denmark, and whether or not they had retained strong ties with Denmark. The 28-year rule thus affected persons who only acquired Danish nationality later in life with a far greater impact than persons born with Danish nationality. In fact, the chances of reuniting with a foreign spouse in Denmark, and creating a family there, were significantly poorer and almost illusory where the residing partner acquired Danish citizenship as an adult, since the family either had to wait 28 years, or create such strong aggregate bonds in other ways to Denmark, despite being separated, as to fulfil the attachment requirement. As regards the proportionality of the measure, the applicants' aggregate ties to Denmark were clearly not stronger than their ties to another country (Ghana). Moreover, the first applicant had been a Danish national for less than two years when he was refused family reunion. The refusal to exempt the applicant from the attachment requirement after such a short time

could not, in the Court's view, be considered disproportionate to the above mentioned legitimate aim of the 28-year rule.

Conclusion: no violation (four votes to three).

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