

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

SECOND SECTION

CASE OF BIAO v. DENMARK

(Application no. 38590/10)

JUDGMENT

STRASBOURG

25 March 2014

THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
24/05/2016

This judgment may be subject to editorial revision.



In the case of Biao v. Denmark,

The European Court of Human Rights (Second Section), sitting as 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,*

Having deliberated in private on 4 February and 18 February 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

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

2. The applicants are represented by Mr Steen Petersen, a lawyer practising in Copenhagen. The Danish Government ("the Government") were represented by their Agent, Mr Thomas Winkler, of the Ministry of Foreign Affairs, and their Co-agent, Mrs Nina 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, alone and in conjunction with Article 14.

4. On 11 May 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1971 and 1979. They live in Malmö, Sweden.

6. The first applicant was born in Togo, where he lived until the age of 6 and again briefly from the age of 21 to 22. From the age of 6 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.

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

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

9. On 22 April 2002 the first applicant acquired Danish citizenship. Thus, at the relevant time he met the requirement relating to the length of his period of residence, age, general conduct, arrears owed to public funding and language proficiency.

10. On 22 February 2003 in Ghana, the first applicant married the second applicant, whom he had met during one of four visits to Ghana made in the five years prior to their marriage. The second applicant was born in Ghana.

11. On 28 February 2003, at the Danish Embassy in Accra in 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 not visited Denmark. Her parents lived in Ghana. In 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 in the Hausa and Twi languages.

12. At the relevant time, under section 9, subsection 7, of the Aliens Act family reunion could only be granted if both spouses were over 24 years old and their aggregate ties to Denmark were stronger than the spouses' attachment to any other country.

13. On 1 July 2003, the Aliens Authority (*Udlændingestyrelsen*) refused the request because it found that it could not be established that the spouses' aggregate ties with Denmark were stronger than their aggregate ties to Ghana.

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

15. On 28 August 2003 she appealed against the Aliens Authority' decision of 1 July 2003, to the then Ministry of Refugee, Immigration and

Integration Affairs *(Ministeriet for Flygtninge, Indvandrere og Integration).*The appeal did not have suspensive effect.

16. On 15 November 2003 the applicants moved to Sweden.

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

18. On 6 May 2004 the applicants had a son. He was born in Sweden but is a Danish national due to his father's nationality.

19. On 27 August 2004 the Ministry of Refugee, Immigration and Integration Affairs upheld the decision by the Aliens Authority of 1 July 2003 to refuse to grant the second applicant a residence permit. It noted in particular that the second applicant had always lived in Ghana and had family there, and that the first applicant had ties with Ghana and had, among other things, attended school there for ten years. Finally, it found that the family could settle in Ghana, as that would only require that the first applicant obtain employment there.

20. On 18 July 2006, before the High Court of Eastern Denmark (*Østre Landsret*), the applicants instituted proceedings against the Ministry of Refugee, Immigration and Integration Affairs and relied on Article 8 of the Convention, alone and in conjunction with Article 14 of the Convention, as well as 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, thus after 28 years of Danish citizenship, and after having reached the age of 59.

21. By 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 the European Convention on Nationality relied on. It stated as follows:

> "...the facts given in the decisions of the immigration authorities in the case are found not to be disputed.
>
> Hence, [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 other ties with Denmark 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 Ghana.

It appears from a Supreme Court judgment of 13 April 2005, reproduced on page 2086 in 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' choice of the country of their residence in connection with marriage, or otherwise to authorise family reunion.

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 Defendant'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, subsection 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 only able to reside in Ghana 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.

Although the High Court has held that Article 8 of the Convention has not been breached in this case, the High Court 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 read in conjunction with Article 8 of the Convention.

The High Court initially observes that [the first applicant] had been residing in Denmark for 11 years when the Ministry made its decision. Although he acquired Danish nationality in 2002, nine years after his entry to Denmark, he did not meet the 28-year nationality requirement applicable to all Danish nationals pursuant to section 9, subsection 7 of the Aliens Act, irrespective of whether they are of foreign or Danish extraction. Nor did he have the comparable attachment to Denmark throughout 28 years which will generally lead to an exemption from the attachment requirement according to the preparatory works to 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 read in conjunction with Article 8 of the Convention is accordingly considered to depend on whether the difference in treatment which occurred as a consequence of the attachment requirement despite the nationality can be considered objectively justified and proportionate.
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> According to the preparatory works to 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 manner as best to ensure the integration of immigrants in Denmark, which aim must in itself be considered objective. In the view of the High Court, difference in treatment between Danish nationals of Danish extraction and Danish nationals of foreign extraction can therefore be justified by this aim relative to 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 relative to the specific circumstances in the 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 works 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 read in conjunction with Article 8 of the Convention."

22. The applicants appealed against the judgment to the Supreme Court (*Højesteret*), which passed its judgment on 13 January 2010 confirming the High Court judgment.

23. The Supreme Court 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:

> "By its decision of 27 August 2004, the Ministry of Integration refused the application from [the second applicant] for a residence permit on the grounds 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, subsection 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 decision made by the Ministry of Integration that it is not contrary to Article 8 to refuse [the second applicant's] application for a residence permit."

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

"Pursuant to section 9, subsection 7, as worded by Act 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 person has been a Danish national for 28 years (the 28-year rule).

Until 2002, Danish nationals had had a general exemption from the attachment requirement. Act No. 365 of 6 June 2002 tightened 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 works (on page 3982 of Schedule A to the Official Gazette for 2001 to 2002 (2nd session)) is that there are Danish nationals who are not particularly well integrated in Danish society, for which reason the integration of a spouse newly arrived in Denmark may involve major problems.

It quickly turned out that this tightening had some unintended consequences for persons such as Danish nationals who opt to live abroad for a longer period and who start 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 28 years were no longer subject to satisfaction of the requirement of stronger aggregate ties with Denmark.

According to the preparatory works of the relaxation, the Government found that the fundamental aim of tightening the attachment requirement in 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 28 years, see page 49 of Schedule A to the Official Gazette for 2003 to 2004. 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 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. Thus, there will normally be a basis for a successful integration of Danish expatriates' family members into Danish society.

Persons who have not been Danish nationals for 28 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 28 years.

A consequence of this current state of the law is that different groups of Danish nationals are subject to difference in treatment in relation to their possibility of being reunited with family members in Denmark as persons who have been Danish nationals for 28 years are in a better position than persons who have been Danish nationals for fewer than 28 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 difference 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 on 28 May 1985 in the case *Abdulaziz, Cabales*

and Balkandali v. the United Kingdom. In this 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 said 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 was born in the United Kingdom. A different additional requirement is made under Danish law: a requirement of Danish nationality for 28 years. The question is whether [the first applicant] is subjected to discrimination contrary to the Convention due to this criterion.

We find that the criterion of 28 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, had lasting and strong ties with the country.

In general, a person of 28 years 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 28 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 the British requirement at that time of place of birth, that one of the relevant person's parents was 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 refused 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 the Turkish national Bekir Balkandali in 1981, and their application for spousal reunion in the United Kingdom for the husband of a British national was refused 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 refused when he had resided in Denmark for 11 years, two of which as a Danish national. In Mrs Balkandali's case, the application was refused 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 case-law that the 28-year rule implied discrimination against [the first applicant] contrary to the Convention.

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 read in conjunction with Article 8 of the European Convention of Human Rights is 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 read in conjunction with Article 8 of the European Convention of Human Rights.

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

25. A minority of three judges was of the view that the 28-year rule implied an indirect discrimination between persons who were born Danish citizens and persons who had acquired Danish citizenship later in their 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 an indirect discrimination between ethnic Danish citizens and Danish citizens with a foreign ethnic background. More specifically, they stated:

"As stated by the majority, the requirement of section 9, subsection 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 28 years (the 28-year rule).

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 28 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.

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.

Pursuant to section 9, subsection 7, of the Aliens Act, the attachment requirement may be disregarded if exceptional reasons make it appropriate. According to the preparatory works to 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 28 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.

When the attachment requirement was introduced by Act No. 424 of 31 May 2000, all Danish nationals were exempt from the requirement. Act No. 365 of 6 June 2002 made the attachment requirement generally applicable also to Danish nationals. Concerning the reason for this, the preparatory works to the Act state, *inter alia*: “With resident aliens and Danish nationals of foreign extraction 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 in Danish society and where integration of a spouse newly arrived in Denmark may therefore entail major problems.” By Act 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 works to the Act 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 28 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 read in conjunction with Article 8 of the Convention. 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 made by the Ministry of Integration and the memorandum of November 2006 made by 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 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 appears 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 read in conjunction with Article 8 of the Convention, 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 read in conjunction with Article 8 of the Convention, 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 p. 2086 in 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 read in conjunction with Article 8 of the Convention. In this respect, the Supreme Court referred to paragraphs 84 to 86 of the judgment delivered by the European Court of Human Rights on 28 May 1985 in *Abdulaziz, Cabales and Balkandali v. the United Kingdom.* 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 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 others because difference in treatment based on the length of a person's period of nationality is not comparable to 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 in which a person has held Danish nationality for 28 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 by regard for 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 28 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 read in conjunction with Article 8 of the Convention.

The consequence of this must be that, when applying section 9, subsection 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 in which 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."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Aliens Act and the attachment requirement

26. The basic provisions concerning the right of aliens to enter and to remain in Denmark, including the criteria for obtaining family reunion, are laid down in the Aliens Act *(Udlændingeloven)*.

27. Act no. 424 of 31 May 2000, which entered into force on 3 June 2000 introduced the so-called "attachment requirement" into section 9, subsection 10, of the Aliens Act as one of the conditions for granting family reunion with persons residing in Denmark who were not Danish nationals. As a result of the attachment requirement, a couple applying for family reunion must not have stronger ties with another country than with Denmark. The aim of the attachment requirement is to improve the integration of aliens applying for spousal reunion in Denmark, which appears from the general explanatory notes of the preparatory works:

"The current rules for reunion of spouses have turned out in some cases to result in reunion of foreign spouses with resident persons who are not well integrated in Danish society. The result is that such spouses, more than others, experience problems of isolation and maladjustment in relation to Danish society.

The Danish Government finds this situation a matter of concern. Moreover, there is no objective reason why the spouses or cohabitants should be reunited in Denmark if the spouses' or the cohabitants' aggregate ties with another country are stronger.

Against that background it is proposed that as a point of departure it is made a condition for reunion of spouses with a resident person who is not a Danish national that the spouses' or the cohabitants' aggregate ties with Denmark correspond at least to the spouses' or the cohabitants' aggregate ties with another country.

The aim of the proposed provision is to grant permission for reunion of spouses only when the spouses' or the cohabitants' aggregate ties with Denmark are so strong that the spouses should be reunited in Denmark, thereby achieving better integration of the relevant persons."

28. Act no. 365 of 6 June 2002, which entered into force on 1 July 2002, extended the attachment requirement to apply also to resident persons of Danish nationality. Following the statutory amendment, the spouses' aggregate ties with Denmark must be stronger than the spouses' aggregate ties with another country. By the amendment (applicable in the applicants' case) the provision was moved to section 9, subsection 7, of the Aliens Act and read as follows:

Section 9, subsection 7

"Unless exceptional reasons make it inappropriate, a residence permit under subsection (l)(i) 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."

29. The general explanatory notes of the preparatory works to Act no. 365 read as follows:

"...The current attachment requirement prescribed in section 9, subsection 10, of the Aliens Act was introduced by Act no. 424 of 31 May 2000, one reason being that the current rules for reunion of spouses had turned out in some cases to result in reunion of foreign spouses with resident persons who were not well integrated in Danish society.

In 2000 the Danish Immigration Service refused reunion of spouses under the current section 9, subsection 10, of the Aliens Act in 27 cases. Provisional figures from the Danish Immigration Service show that in 2001 the Danish Immigration Service refused reunion of spouses under this provision in 256 cases.

As stated in paragraph 7.1, it appears from a report from the Governments' Think Tank on challenges for the integration efforts in Denmark that 47 per cent of the immigrants and descendants from third countries who married in 1999 married persons who resided abroad.

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 due to parental pressure. This pattern contributes to 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 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 in Danish society and where integration of a spouse newly arrived in Denmark may therefore entail major problems.

The Government therefore finds it inexpedient that the existing attachment requirement does not apply to Danish nationals. Moreover, there is no objective reason why reunion of spouses with Danish nationals should be allowed in Denmark if the spouses' or the cohabitants' aggregate ties with another country are just as strong or stronger.

Against this background the Government proposes that, in all future cases, reunion of spouses can only be granted when the spouses' aggregate ties with Denmark are stronger than the spouses' aggregate ties with another country.

The aim of the proposed provision is to ensure the best possible starting point for a successful integration of the family member wanting to be reunited with his or her family in Denmark ....

The extended attachment requirement will apply to all Danish nationals whether or not the Dane is of foreign extraction."

30. Act no. 365 of 6 June 2002 also included section 9c, subsection 1, first sentence, of the Aliens Act, which reads as follows:

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

According to the specific explanatory notes in the preparatory works 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:

"Under the proposed section 9 c, subsection 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 reunion is not possible under the current section 9, subsection,1 of the Aliens Act, but where it is necessary to grant family reunion as a consequence of Denmark's treaty obligations - including particularly Article 8 of the European Convention on Human Rights. Under current practice, family reunion may also be granted upon a very specific assessment in other exceptional cases where family reunion is not possible under the current section 9, subsection 1, of the Aliens Act."

B. The Aliens Act and the 28-year rule

31. Act no. 1204 of 27 December 2003, which entered into force on 1 January 2004, amended section 9, subsection 7, of the Aliens Act so that the attachment requirement does not apply in cases in which the resident person who wants to bring his or her spouse to Denmark has been a Danish national for 28 years. Thereafter the relevant provisions were worded 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 exceptional reasons make it inappropriate, a residence permit under subsection 1(i)(a), when the resident person has not been a Danish national for 28 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 at their adoption are considered to have been Danish nationals from birth."

In order to comply with Denmark's treaty obligations, 28 years of legal residence since early childhood would constitute "exceptional reasons" as set out in section 9, subsection 7, for non-Danish nationals (see the preparatory works under paragraph 33). 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 28 years.

32. As regards the reason for the introduction of the 28-year rule, the general explanatory notes in the preparatory works stated:

"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 longer 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 longer 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 28 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 28 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, subsection 7, of the Aliens Act, have the same opportunities as resident Danish and foreign nationals for obtaining spousal reunion in Denmark. The proposed adjustment of 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 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 Act 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 28 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."

33. The specific explanatory notes in the preparatory works to section 9, subsection 7, of the act stated as follows regarding the introduction of the 28-year rule:

"Under the current provision set out in section 9, subsection 7, of the Aliens Act, a residence permit under section 9, subsection 1(i) of the Aliens Act (spousal reunion) can only, unless exceptional reasons make it inappropriate, 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.

Under the proposed wording of section 9, subsection 7, a residence permit under section 9, subsection 1(i)(a), when the resident person has not been a Danish national for 28 years, and under section 9, subsection 1(i)(b) to (d) can only, unless exceptional reasons make it inappropriate, 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.

The proposed provision implies that the attachment requirement of section 9, subsection 7, will not apply to spousal reunion with resident persons who have been Danish nationals for 28 years. This applies whether the person acquired his or her Danish nationality by birth or by subsequent naturalisation, and whether the person has another nationality in addition to his or her Danish nationality. If the person has been a Danish national for several periods interrupted by the nationality of another country, the aggregate periods of the person's Danish nationality will be used as a basis for calculating whether the person has been a Danish national for 28 years.

In all other cases than where the resident person has been a Danish national for 28 years, the attachment requirement still applies unless exceptional reasons make it inappropriate. In such other cases, it is presupposed that the attachment requirement is applied in accordance with current administrative practice, but see below.

It follows from Denmark's treaty obligations that in certain respects, including in respect of the right to family reunion, it is necessary to place a resident alien who was born and raised in Denmark, or came to Denmark as a small child and was raised in Denmark, in the same position as a Danish national.

Therefore, when persons who have not been Danish nationals for 28 years, but were born and raised in Denmark or came to Denmark as small children and were raised there, have resided lawfully in Denmark for 28 years, these persons must also be placed in the same position as persons who have been Danish nationals for 28 years for the purpose of application of section 9, subsection 7, of the Aliens Act.

In practice, this means that the circumstance that a resident spouse or cohabitant who has not been a Danish national for 28 years, but was born and raised in Denmark, or came to Denmark as a small child and was raised in this country, and has further resided lawfully in Denmark for, in all essentials, a continuous period of at least 28 years, constitutes an exceptional reason making it inappropriate to demand that the attachment requirement be met in order for spousal reunion to be granted. Persons who were born and raised in Denmark, or came to Denmark as small children and were raised in this country, and have further resided lawfully in Denmark for 28 years are therefore exempt from the attachment requirement."

34. An amendment of the Aliens Act, which entered into force on 15 May 2012, changed the 28-year rule in section 9, subsection 7 to a 26-year rule.

III. INTERNATIONAL LAW AND PRACTICE

A. The European Convention on Nationality of 6 November 1997

35. The Council of Europe's Convention on Nationality was adopted on 6 November 1997 and entered into force on 1 March 2000. It has been ratified by 20 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."

...

36. The Explanatory Report to the European Convention on Nationality states, *inter alia,* about the above articles:

"Chapter I - General matters

Article 1 - Object of the Convention

...

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."

B. The Commissioner for Human Rights

37. In his report of 8 July 2004, Mr Alvaro Gil-Robles, Commissioner for Human Rights, suggested as one of his recommendations to Denmark:

"1. Reconsider 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; ..."

He also stated (paragraph 10):

"The requirement that the spouses' aggregate ties with Denmark are stronger than those with another country, hits immigrants and second-generation immigrants particularly hard, including those who have lived in Denmark for most of their lives and have become well integrated in society. [...] I am also concerned that in this respect, the legislation treats in a different manner Danish citizens depending on the period during which the person has held citizenship. If a person obtained the citizenship at birth, the aggregate ties requirement will not be considered if the person is at least 28 years old. However, it continues to be applied in relation to a person who was later naturalised, until the 28 years of citizenship is achieved, unless he or she was born in Denmark or arrived as a child, in which case the length of citizenship requirement is substituted by an equally long residence requirement. These provisions do not in my view guarantee the principle of equality before the law."

38. In its memorandum of 22 September 2004 on the report, the Danish Government observed in section 5.2 that the Commissioner seemed not to be aware that the 28-year rule is not a requirement in connection with family reunion, but an exception to the attachment requirement. Hence the provision does not stipulate that the resident spouse must have been a Danish national for 28 years to acquire family reunion, but only that the attachment requirement will be derogated from in such cases, if relevant. 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-years 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 naturalization, 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 in 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."

39. Following the follow-up assessment conducted by the Commissioner for Human Rights, Mr Thomas Hammarberg, on 5 to 7 December 2006, the Commissioner stated that:

> "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 this basis the Commissioner recommended that the Danish authorities:

> "2. 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."

IV. COMPARATIVE LAW

40. The general conditions for granting family reunion within a large number of Member States seems 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 of certificates proving family ties with the nationals. They should normally have sufficient means of subsistence, adequate housing, health insurance and the national spouse should often have a registered place of residence in the country. Some countries require that spouses should have reached either 18 or 21 years of age. The requirement that candidates should have basic knowledge of the national language is also common. Furthermore, there should be no other grounds for the refusal of a permit, such as marriages of convenience, giving false identity and/or documents, concerns of public order or security and public health, a criminal record and being a burden on the welfare system. Some countries specify that candidates should not have links with extremist or terrorist structures or with organised crime. A number of countries condemn in particular giving false identity and statements in the proceedings. In a number of countries, the unlawful entry/stay of an alien is an impediment to the acquisition of the residence permit. However, some

countries specify that it is not. Some countries may provide for special conditions, for instance in view of 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.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicants complain that the decision of 27 August 2004 by the former Ministry of Refugee, Immigration and Integration Affairs to refuse to grant the second applicant a residence permit in Denmark based on family reunion breached their rights under Article 8 of the Convention which 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."

42. The Government contested that argument.

A. Admissibility

43. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

44. It appears that the applicants maintained that the "attachment requirement" for Danish citizens applying for family reunion with their non-Danish spouse living abroad did not pursue a legitimate aim because allegedly it was introduced to target Danish citizens of non-Danish ethnic or national origin. The applicants thus contested that the aim had been to assist the integration of newcomers or to control immigration due to

unemployment in Denmark. They also dismissed the notion that the aim related to the economic well-being of the country since, in their view, spousal family reunion has no financial implication for the State, because the residing spouse was obliged to provide for the joining spouse.

45. As a consequence of the refusal by the Danish authorities to grant them family reunion, the applicants were forced to move in exile to Sweden, which has adopted a more liberal attitude towards foreigners in its legislation. The applicants contended that exile caused them humiliation and suffering.

46. The Government contended that the interference was in accordance with the law, namely section 9, subsection 7, of the Aliens Act, pursued the legitimate aim of immigration control and improving integration, being an important economic and social matter, and that the refusal to grant the second applicant family reunion in Denmark struck a fair balance and was necessary in a democratic society.

47. The attachment requirement 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. The Government noted in that connection that the attachment requirement draws on many of the same criteria that the Court has emphasised in its case-law relating to family reunion as regards the spouses' familial and linguistic attachment to their respective countries of residence as well as their history of employment and education and the length of their stay in those countries.

48. Moreover, the Aliens Act provides for derogation from the attachment requirement if there are "exceptional reasons" which is an implicit reference to Denmark's treaty obligations, including in particular Article 8 of the Convention.

49. In this case the first applicant had ties with Togo, of which he was previously a national and where he resided until the age of 6 and again briefly from the age of 21 to 22. He had ties with Ghana, whose language he speaks and where he resided from the age of 6 to 21, and attended school for ten years. He also had ties with Denmark, which he entered at the age of 22 and where he married a Danish national. Three years later he was issued with a permanent residence permit, shortly after which he divorced his Danish wife. Following about seven years of lawful residence in Denmark, during which he learnt Danish and had steady employment from five years into his period of residence, the first applicant applied for and was granted Danish nationality. A year later he married the second applicant, whom he met during one of four visits to Ghana made in the five years prior to their marriage. Her ties were mainly with Ghana. The couple communicated in Hausa and Twi. Thus, although the first applicant had resided in Denmark for ten years and been a Danish national for one and a half years, the

applicants' aggregate ties with Denmark were not of a comparable strength to the ties with Ghana when the refusal of the application was upheld by the Ministry of Integration on 27 August 2004, by which time the applicants had moved to Sweden. Moreover, there was no information indicating that they were unable to continue their family life in Ghana, where the first applicant had obtained confirmation that he would be eligible for a residence permit if he found employment there.

50. 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 precarious since the attachment requirement was introduced for Danish nationals seeking spousal reunion one year before their marriage and application for spousal reunion, and since the exemption for persons who have been Danish nationals for more than 28 years was not introduced until ten months after the second applicant's application for a residence permit.

51. In conclusion the Government agreed with the High Court, which in its judgment of 25 September 2007 rejected the claim of a breach of Article 8 of the Convention based on reasons that were later unanimously upheld by the Supreme Court by its judgment of 13 January 2010. The Danish courts made a thorough substantive examination of the issue, including whether the applicants were barred from exercising their right to family life in Ghana or in a country other than Denmark.

2. The Court's assessment

52. The Court notes that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be a positive obligation inherent in effective "respect" for private and family life (see, for example, *Söderman v. Sweden* [GC], no. 5786/08, § 78, 12 November 2013). In the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation (see, *inter alia*, *Osman v. Denmark*, no. 38058/09, § 53, 14 June 2011). The present case concerns the refusal to grant the second applicant family reunion in Denmark. Therefore, this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation (*Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 38, ECHR 2006-I).

53. The Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, § 67, Series A no. 94, *Boujlifa v. France*, judgment of 21 October 1997, *§* 42, Reports *of Judgments and*

Decisions 1997-VI). Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in 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, for example, *Butt v. Norway*, no. 47017/09, § 70, 4 December 2012; *Antwi and Others v. Norway*, no. 26940/10, §§ 88-89, 14 February 2012; *Nunez v. Norway*, no. 55597/09, §§ 66-70, 28 June 2011; *Darren Omoregie and Others v. Norway*, no. 265/07, § 64, 31 July 2008; *Rodrigues da Silva and Hoogkamer v. the Netherlands*, cited above, § 39 and § 43, ECHR 2006-I; *Priya v. Denmark* (dec.), 13549/03, 6 July 2006 and *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Rodrigues da Silva and Hoogkamer*, cited above; *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999; *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (see *Jerry Olajide Sarumi v. the United Kingdom* (dec.), no. 43279/98, 26 January 1999 and *Andrey Sheabashov v. Latvia* (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see *Abdulaziz, Cabales and Balkandali*, cited above, § 68; *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others*, cited above; and *Rodrigues da Silva and Hoogkamer*, cited above).

54. The Court will proceed to the main issue to be determined in the present case, namely whether the Danish authorities struck a fair balance between the competing interests of the individual and of the community as a whole.

55. The first applicant had ties with Togo, of which he was previously a national and where he resided until the age of six and again from the age of 21 to 22. He also had ties with Ghana, whose language he speaks and where he resided for fifteen years from the age of 6 to 21, and where he attended school for ten years. Finally, he had ties with Denmark, which he entered in July 1993 at the age of 22. Having married a Danish national, he was issued with a permanent residence permit. He divorced in 1998. The first applicant

learnt Danish and had steady employment from five years into his period of residence. He was granted Danish nationality in 2002. In the period from 1998 to 2003 the first applicant visited Ghana four times and the last time he married a Ghanaian national there, namely the second applicant. Accordingly, the first applicant had strong ties to Togo, Ghana and Denmark.

56. The second applicant was born and raised in Ghana. On 28 February 2003, when she was 24 years old and had been married to the applicant for a week, she requested family reunion. Her request was refused by the Aliens Authority on 1 July 2003. One or two months later, she entered Denmark on a tourist visa. She and the first applicant moved to Sweden on 15 November 2003, where on 6 May 2004 they had a son, who was born Danish. The second applicant stayed in Denmark for approximately four months and she does not speak Danish. Accordingly, at the relevant time the second applicant's ties to Ghana were very strong and she had no ties to Denmark but for being newly wed to the first applicant, who lived in Denmark and had acquired Danish citizenship.

57. The applicants were never given any assurances that the second applicant would be granted a right of residence by the competent Danish authorities. Moreover, by virtue of section 9, subsection 7, of the Aliens Act, which had been amended by Act no. 365 of 6 June 2002, entering into force on 1 July 2002, the attachment requirement had been extended to apply also to resident persons of Danish nationality. Following that statutory amendment, the spouses' aggregate ties with Denmark had to be stronger than the spouses' aggregate ties with another country. Thus, in February 2003 when the applicants married in Ghana and the second applicant requested family reunion, they could not have been unaware that the immigration status of the second applicant was such that their family life within Denmark would from the outset be precarious. Moreover, having received in Ghana the Aliens Authorities' refusal of 1 July 2003 to grant her family reunion, she could not expect that any right of residence would be conferred on her as a *fait accompli* due to her entry into the country on a tourist visa shortly after or because the applicants continued their family life in Denmark until 15 November 2003, when they moved to Sweden.

58. Moreover, on the basis, *inter alia,* on the first applicant's own statement that the family could settle in Ghana if he obtained paid employment there, the High Court found that the refusal to grant the second applicant a residence permit in Denmark did not bar the applicants from exercising their right to family life in Ghana or in a country other than Denmark. The Supreme Court adhered in general to the High Court's reasoning as to the claim under Article 8 alone.

59. In the light of the above, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed the margin of appreciation which should be accorded to it in

this area when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicants' need for the second applicant to be granted family reunion in Denmark, on the other hand.

60. Accordingly, there has been no violation of Article 8 of the Convention.

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

61. The applicants also complained that refusal to grant the second applicant a residence permit in Denmark based on family reunion breached their rights under Article 14 of the Convention in conjunction with Article 8. The former article reads as follows:

> "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."

62. The Government contested that argument.

A. Admissibility

63. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

64. The applicants referred to the finding by the minority in the Supreme Court's judgment of 13 January 2010 in support of their claim that there had been a violation of Article 14 in conjunction with Article 8.

65. They also referred to, *inter alia, Kurić and Others v. Slovenia* ([GC], no. 26828/06, ECHR 2012 (extracts)) and *Hode and Abdi v. the United Kingdom* (no. 22341/09, 6 November 2012) which in their view were more relevant to the present case than *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (28 May 1985, Series A no. 94) notably because the latter authority was old, and because the aim of the legislation had been different. In the present case the alleged aim of the attachment requirement was to ensure the best possible starting point for successful integration of any family member wanting to reunite his or her family in Denmark, whereas in

the said judgment it was to curtail primary immigration in order to protect the labour market.

66. The applicants disagreed in general with the Government's argumentation and pointed out that a spouse could not benefit from faster integration by being denied access to the country for years. Firstly, the spouse was denied access until the age of 24 and then the attachment requirement was used to prevent him or her from entering. If the Danish Government really wanted to assist the newcomer in learning Danish and being able to enter the labour market, the spouse should be allowed to enter as soon as possible and invited to take Danish language classes, because with age it becomes more difficult to learn a new language.

67. Moreover, the possibility that Danish expatriates with foreign family members staying abroad for many years may or may not have better possibilities to integrate the foreign spouse on arrival in Denmark seems in no way to justify preferential treatment over those couples, like the applicants, where the Danish citizen has been living in Denmark for more years than the Danish expatriates who have lived abroad for many years, perhaps from their teen years, and return to Denmark for the first time in their "third age".

68. The Government did not dispute that the first applicant was in an analogous position to other Danish nationals and was treated differently. However, the difference in treatment was objectively and reasonably justified as there were persuasive social reasons for giving special treatment to persons who have been Danish nationals for 28 years or have resided lawfully in Denmark for 28 years since their birth or childhood. Moreover, the Danish attachment requirement and the exception to this requirement in the form of the 28-year rule pursued a legitimate aim. Thus, in their view the 28-year rule was not contrary to Article 14 read in conjunction with Article 8 of the Convention.

69. They pointed out that all Danish nationals are subject to the attachment requirement and that the 28-year rule, which came into force on 1 January 2004, was an exception to that requirement. It was based on the objective criterion of either 28 years of nationality or 28 years of lawful stay in Denmark since birth or childhood. Consequently, persons who have not been Danish nationals for 28 years, but who were born and raised in Denmark, or came to the country as small children and were raised in Denmark, are also exempt from the attachment requirement and will be considered equal to any person who has been a Danish national for 28 years. For persons who have had ties with Denmark since early childhood, it is therefore irrelevant whether they were granted Danish nationality at birth, at a later date or not at all. The attachment requirement will not apply in any case after 28 years of lawful residence.

70. As can also be seen from the preparatory works, the only condition stipulated in connection with the 28-year rule is that the relevant person

must have been a Danish national for 28 years; accordingly the sole question is when the relevant person acquired Danish nationality or obtained attachment to the country.

71. A child acquires Danish nationality at birth if one or both of its parents hold Danish nationality, regardless of whether one or both parents are of Danish or other ethnic origin. Similarly, Danish residents of any ethnic origin will be in a situation that is equal to that of persons who have been Danish nationals for 28 years when they have resided lawfully in Denmark for 28 years. This means that persons in comparable situations are treated in the same manner.

72. The 28-year rule implies, as was also stated by the Supreme Court, that different groups of Danish nationals are subject to difference in treatment when it comes to the right to family reunion in Denmark, as persons who have been Danish nationals for 28 years are in a better position than persons who have been Danish nationals for fewer than 28 years. Persons who became Danish nationals by birth or were born and raised in the country will therefore meet the requirement earlier than persons who came to Denmark and acquired Danish nationality later in their lives.

73. The Government emphasised in that respect that the 28-year rule is an exception to the attachment requirement, the aim being to distinguish a group of persons who have lasting and strong ties with Denmark when seen from a general perspective. The Government found, as was also mentioned by the Supreme Court, that the 28-year rule has the same aim as the requirement of birth dealt with in *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (cited above), namely to distinguish a group of nationals who have lasting and strong ties with the country seen from a general point of view. The Court found that such a requirement was not contrary to the Convention since (ibid. § 88) "*there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it"*. Even though that judgment was delivered in 1985, it continues to be a leading case and its principles were followed subsequently (see, for example, *Ponomaryovi v. Bulgaria* (dec.), no. 5335/05, 18 September 2007).

74. The Supreme Court said in its judgment that the consequences of the 28-year rule could not be considered disproportionate with regard 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 they then submitted an application for spousal reunion in Denmark. The application was finally refused in 2004. The factual circumstances of the case are thus in all material aspects identical to Mrs Balkandali's situation in the judgment *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (cited above) in which 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 in 1981, and their application for spousal reunion in the United Kingdom, on the grounds that he was the husband of a British national, was refused later in 1981. A comparison of the two cases reveals that both the first applicant in this case and Mrs Balkandali only came to Denmark and the United Kingdom, respectively, as adults. In the first applicant's case, the application was refused when he had resided in Denmark for 11 years, two of which as a Danish national. In Mrs Balkandali's case, the application was refused after she had resided in the United Kingdom for eight years, two of which as a British national.

75. In the Government's view, it was objectively and reasonably justified that the first applicant did not receive the special treatment in the form of an exemption from the attachment requirement granted to persons falling within the 28-year rule. The normal situation is that a 28-year-old who has been a Danish national from birth or has legally resided in Denmark from early childhood with the resulting childhood spent in a Danish culture will have stronger real ties with Denmark and insight into Danish society than the first applicant, who only started having ties with Danish society at the age of 22. Hence, the Government found that the approximately ten years that the first applicant spent in Denmark prior to the refusal did not confer on him a special link to Denmark comparable to the special link held by a person falling within the 28-year rule.

76. Finally, the Government also submitted that the European Convention on Nationality offers protection against discrimination to an extent that goes no further than the extent offered by Article 14 of the Convention. They referred to paragraph 45 of the Explanatory Report to the European Convention on Nationality which set out that the words 'shall be guided by' in Article 5 § 2 indicate a declaration of intent and not a mandatory rule to be followed in all cases. Hence, it follows that Article 5 § 2 is not a binding treaty obligation.

2. The Court's assessment

a) Whether the facts of the case fall within the ambit of Article 8

77. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. 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 *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 39, ECHR 2005-X).

78. Although the Court has found no violation of Article 8 taken alone (see paragraphs 65-66 above), the facts at issue nevertheless fall within the ambit of the said provision (see, for example, *Hode and Abdi v. the United Kingdom*, no. 22341/09, §43, 6 November 2012).

b) Whether there was a difference in the treatment of persons in analogous, or relevantly similar, situations, based on "status" covered by Article 14

79. Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another (see, for example, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 61 and 70, ECHR 2010, and *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). It lists specific grounds which constitute "status" including, *inter alia*, race, national or social origin and birth. However, the list set out in Article 14 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*, 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*, 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).

80. 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 (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007 and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

81. Referring to the findings by the minority of the Supreme Court in its judgment of 13 January 2010, the applicants alleged that although the 28-year rule applied both to persons born Danish nationals and to persons acquiring Danish nationality later in life, in reality the significance of the rule differed greatly for the two groups of Danish nationals. For persons born Danish nationals, the rule only implied that the attachment requirement applied until they were 28 years old. For persons not raised in Denmark who acquired Danish nationality later in life, the rule implied that the attachment requirement applied until 28 years have passed after the date when any such person became a Danish national. For 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 will therefore affect persons who 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 resulted in indirect difference in treatment between the two groups of Danish nationals.

82. The applicants also alleged that the 28-year rule implied indirect difference in treatment between Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin 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 origin.

83. The Government did not dispute that the first applicant was in an analogous position to other Danish nationals and was treated differently. They pointed out, however, that the only condition stipulated in connection with the 28-year rule was that the relevant person had been a Danish national for 28 years. Accordingly, the sole question was when the relevant person acquired Danish nationality or obtained attachment to the country.

84. The Court reiterates that the wording of section 9, subsection 7, of the Aliens Act as from 1 January 2004 reads as follows: "Unless exceptional reasons make it inappropriate, a residence permit under subsection 1(i)(a), when the resident person has not been a Danish national for 28 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' ties with another country". According to the wording, the provision does not distinguish between persons who acquired Danish nationality by birth and persons who acquired Danish nationality later in life, nor does it distinguish between Danish nationals of Danish ethnic extraction and Danish nationals of other ethnic extraction.

85. Moreover, although the amendments in Act no. 1204 of 27 December 2003 specifically concerned Danish nationals, by virtue of the "exceptional reasons" in section 9, subsection 7 and Denmark's treaty obligations, persons who were not Danish nationals, but who were born and raised in Denmark, or came to Denmark as small children and were raised there, and who had stayed lawfully in the country for 28 years, were also exempted from the attachment requirement. As such, this exception does not distinguish between Danish residents according to their ethnic or other origin.

86. As to the effects on the application of Section 9, subsection 7, to the whole group of Danish nationals, the majority of the Supreme Court stated that:

> "Persons who have not been Danish nationals for 28 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 28 years.

> A consequence of this current state of the law is that different groups of Danish nationals are subject to difference in treatment in relation to their possibility of being reunited with family members in Denmark as persons who have been Danish nationals for 28 years are in a better position than persons who have been Danish nationals for fewer than 28 years."

87. The majority of the Supreme Court noted that the preparatory works to Act no. 365 of 6 June 2002 which tightened the conditions of family reunion so that the attachment requirement also applied where one of the partners was a Danish national, stated that one of the reasons for extending the attachment requirement to include Danish nationals as well was that there were Danish nationals who were not particularly well integrated in Danish society, for which reason the integration of a spouse newly arrived in Denmark might involve major problems. The majority of the Supreme Court also referred to the preparatory works to Act no. 1204 of 27 December 2003 introducing the 28-year rule which relaxed section 9, subsection 7, of the Aliens Act, so that in cases where one of the partners had been a Danish national for at least 28 years, family reunion was no longer subject to the attachment requirement. The preparatory works stated that the fundamental aim of tightening the attachment requirement in 2002, to include Danish nationals, would not be forfeited by refraining from demanding that the attachment requirement be met in cases where the resident person has been a Danish national for 28 years. It was mentioned in that connection that Danish expatriates planning to return to Denmark one day with their families would often have maintained strong ties with Denmark, which were also communicated to their spouse or cohabitant and any children. This was achieved when they spoke Danish at home, took holidays in Denmark, read Danish newspapers regularly, and so on. Thus, there would normally be a basis for a successful integration of Danish expatriates' family members into Danish society. In conclusion 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, dealt with in the judgment *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (cited above), namely to distinguish a group of nationals who, seen from a general perspective, had lasting and long ties with the country.

88. Referring to the same preparatory works the minority of the Supreme Court considered that the alleged indirect difference in treatment between Danish nationals of Danish ethnic extraction and Danish nationals of other ethnic extraction following from the 28-year rule was an intended consequence.

89. Having regard thereto, and to the material before it, including the preparatory works mentioned above, the Court considers that it is not able to reach a different conclusion from the majority of the Supreme Court according to which the only intention behind the introduction of the 28-year rule was to provide for a positive treatment in favour of persons who had

been Danish nationals for 28 years, or who were not Danish nationals but who were born or raised in Denmark and had stayed there legally for 28 years, the 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 to grant them family reunion with a foreign spouse or cohabitant in Denmark. This group should therefore be exempted from the attachment requirement.

90. However, the Court can agree with the minority of the Supreme Court that the 28-year rule had the consequence of creating an indirect 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 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 Court recalls that a similar argument was submitted in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* case (cited above, see §§ 84-86), in which the Court agreed with the opinion by the majority of the Commission that there had been no discrimination on the ground of race, *inter alia*, because:

> "Most immigration policies - restricting, as they do, free entry - differentiated on the basis of people's nationality, and indirectly their race, ethnic origin and possibly their colour. Whilst a Contracting State could not implement 'policies of a purely racist nature', to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute "racial discrimination". The effect in practice of the United Kingdom rules did not mean that they were abhorrent on the grounds of racial discrimination, there being no evidence of an actual difference of treatment on grounds of race".

Likewise, on the material before it, and recalling anew that non-Danish nationals who were born and raised in Denmark, or came to Denmark as small children and were raised there, and who had stayed lawfully in the country for 28 years, were also exempted from the attachment requirement, in the Court's view the applicants have failed to substantiate being discriminated against on the basis of race or ethnic origin in the application of the 28-year rule.

91. Consequently, it concludes that the applicants in the present case were treated differently because the first applicant had been a Danish national for fewer than 28 years as opposed to persons who had been Danish nationals for more than 28 years. The Court accepts that in this respect the applicants enjoyed "other status" for the purpose of Article 14 of the Convention (see, for example, *mutatis mutandis*, *Hode and Abdi v. the United Kingdom*, cited above, §46-48; *Bah v. the United Kingdom*, no. 56328/07, §§ 43-46, ECHR 2011; and *Kiyutin v. Russia*, no. 2700/10, § 57, ECHR 2011).

c) Whether the difference in treatment had an objective and reasonable justification

92. A difference in the treatment of persons in analogous, or relevantly similar, situations is discriminatory if it has no objective and reasonable justification; in other words, 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden*, cited above, § 60). However, the scope of this margin will vary according to the circumstances, the subject-matter and the background. Lastly, as to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 177, ECHR 2007).

93. The Court recalls that the majority of the Supreme Court thoroughly analysed the current case in the light of the Court's case-law when finding that the 28-year rule was based on an objective criterion.

94. The Court observes that there has been no recent case-law departing from the principles and conclusions drawn in *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment (cited above), 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" (§ 88), (see also *Ponomaryovi v. Bulgaria* (dec.), cited above). It thus accepts that the aim put forward by the Government for introducing the 28-year rule exception to the "attachment requirement" was legitimate for the purposes of the Convention.

95. The Court can also agree with the Supreme Court and the Government that Article 5 § 2 of the European Convention on Nationality (see paragraphs 34-35, above) has no importance for the interpretation of Article 14 of the Convention in the present case.

96. It remains to be determined whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

97. In relation to the proportionality test, the majority of the Supreme Court compared the material aspects in the present case to that of Mrs Balkandali's situation in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* case (cited above) and found them almost identical since they, as nationals who were married to a foreign spouse, both came to Denmark and the United Kingdom, respectively, as adults. In the first applicant's case, the application for family reunion was refused when he had resided in Denmark for eleven years, two of which as a Danish national. In

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

98. The Court finds it pertinent in addition to examine more thoroughly the aim of the 28-year rule. As stated above, the aim 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.

99. The question remains when in general it can be said that a person who has acquired citizenship in a country has created so strong ties with that country that family reunion with a foreign partner has prospects of being successful from an integration point of view. The Danish Government found that 28 years of citizenship was needed in this respect. It is not for the Court to lay down a specific limit for the time that may be required. However, to conclude that in order to be presumed to have strong ties with a country, one has to have direct ties with that country for at least 28 years appears excessively strict. The Court is not convinced either that in general it can be concluded that the strength of one's ties continuously and significantly increases after, for example, 10, 15 or 20 years in a country.

100. Moreover, the Court recalls that 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. Non-Danish nationals having resided in Denmark since early childhood were exempted from the attachment requirement after 28 years of legal stay in Denmark, thus also around the time when they turned 28 years old. However, for a person who was not raised in Denmark and who acquired Danish nationality later in life, the 28-year rule implied that the attachment requirement applied until 28 years have passed after the date when such person became a Danish national.

101. The Court therefore endorses the view of the minority of the Supreme Court that the 28-year rule affected persons who only acquired Danish nationality later in life with a far greater impact than persons born with Danish nationality. In fact, this group of Danes' chances of reuniting with a foreign spouse in Denmark, and creating a family there, were significantly poorer and, it appears, almost illusory where the residing partner acquired Danish citizenship as an adult, since they either had to wait 28 years after that date, or they had to create such strong aggregate bonds in other ways to Denmark, despite being separated, that they could fulfil the attachment requirement.

102. In these circumstances, the Court must conclude that persons who acquire Danish nationality later in life have very little benefit from the 28-year exemption. It is even difficult to imagine how a person acquiring Danish nationality at the average age for creating a family can expect to do

so with a foreign spouse in Denmark. This finding is in line with that of the Commissioner for Human Rights, who in a letter of 15 October 2004 to the Danish Government stated: "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-years 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 naturalization, 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 in 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" (see paragraph 38).

103. The Court must point out, however, that where national legislation is in issue, it is not the Court's task to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before it (see, for example, *Taxquet v. Belgium* [GC], no. 926/05, § 83 *in fine*, ECHR 2010 and *Donohoe v. Ireland*, no. 19165/08, § 73, 12 December 2013).

104. It needs to be determined whether at the relevant time in 2004 there was a lack of a reasonable relationship of proportionality between the means employed and the aim sought to be realized by the 28-year rule in the applicants' case.

105. The first applicant came to Denmark in 1993 when he was 22 years old. After nine years, in 2002, he became a Danish national. He married the second applicant in Ghana in 2003, and they applied for family reunion immediately thereafter. The spouses communicated in Hausa and Twi. As concluded above (see paragraphs 55-56), although the first applicant had strong ties with Denmark, Togo and Ghana, the second applicant had no ties to Denmark at all but for being newly wed to the first applicant. Accordingly, at the relevant time their aggregate ties to Denmark were clearly not stronger than their ties to another country.

106. It should also be recalled that the first applicant had been a Danish national for less than two years, when he was refused family reunion. To refuse to exempt the applicant from the attachment requirement after such a short time cannot in the Court's view be considered disproportionate to the aim of the 28-year rule, namely to exempt from the attachment requirement 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.

107. Accordingly, in the specific circumstances of the present case, there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention;

3. *Holds*, by four votes to three, that there has been no violation of Article 14 of the Convention in conjunction with Article 8.

Done in English, and notified in writing on 25 March 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Guido Raimondi 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 Judges Raimondi and Spano;

(b) joint dissenting opinion of Judges Sajó, Vučinič, and Kūris.

G.R.A.
S.H.N.

CONCURRING OPINION OF JUDGES RAIMONDI AND SPANO

1. We voted with the majority in finding that there had been no violation of Article 14 of the Convention, taken in conjunction with Article 8, in this case. However, we write separately to express our opinion that we disagree with the inclusion of paragraphs 99-102 in the Court's judgment.

2. These three paragraphs criticise the relevant Danish law, namely Law no. 1204 of 27 December 2003, which amended section 9(7) of the Aliens Act, providing that the so-called "attachment" requirement does not apply in cases where the resident who wishes to bring his or her spouse to Denmark has been a Danish national for 28 years – the so called "28-year rule". Conversely, in paragraph 103 onwards, the Court reaches the conclusion that we obviously share, namely that the application of this rule to the facts of the case was not disproportionate.

3. The Court has consistently held that its task is not to review domestic law and practice *in abstracto* or to express a view as to the compatibility of the provisions of legislation with the Convention, but to determine whether the manner in which they were applied or in which they affected the applicant gave rise to a violation of the Convention (see, among other authorities, in the Article 14 context, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98, § 90, 31 July 2008).

4. Consequently, in accordance with its settled case-law and its institutional status, it is not for this Court to criticise in the abstract, as manifested in paragraphs 99-102, the underlying merits of domestic legislation, especially in the fields of immigration and social policy. As the application of the relevant provisions of the Danish Aliens Act to the applicant's situation did not constitute a disproportionate measure within the meaning of Article 14, taken in conjunction with Article 8, the Court should have stopped there.

JOINT DISSENTING OPINION OF JUDGES SAJÓ, VUČINIČ AND KŪRIS

1. We respectfully disagree with the majority that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 8. The reasoning provided in paragraphs 79–102 of the judgment leads to the opposite finding. Having stated that "it is not the Court's task to review the [national] legislation in the abstract" and that the Court "must confine itself, as far as possible, to examining the issues raised by the case before it" (see paragraph 103), the majority have "confined" themselves far too much. As a consequence, the judgment has endorsed indirect discrimination of citizens.

2. The restrictive application of the *Taxquet* considerations (*Taxquet v. Belgium*, [GC], no. 926/05, ECHR 2010), as relied upon in the judgment in the context of indirect discrimination, puts at risk the level of rights protection currently guaranteed by the Court's jurisprudence.

3. We disagree with the majority's standard that they have found applicable, because it has been introduced by means of two fictions. The first fiction lies in the over-emphasis of the watershed between the factual situation, on the one hand, and the law owing to which this situation had been created, on the other. In explaining our view as to how the divide between facts and law should have been approached in the present case, we assert that in this case of indirect discrimination the *D. H. and Others* standard (*D. H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV), rather than that of the artificially restrictive *Taxquet* interpretation, had to be applied because it is the former which offers adequate protection against discrimination based on ethnic or national origin (part I). The second fiction lies in the invention of a convenient "relevant time" for the alleged violation. Again, this runs counter to the Court's jurisprudence, which, had it been followed, would have led to the opposite finding in relation to that of the majority (part II).

I. ON THE FIRST FICTION: FACTS, LAW, AND INDIRECT DISCRIMINATION

4. Throughout the judgment, the relevant provisions of the Aliens Act (hereinafter "the Act"), as introduced by the 2003 Amendment to this Act (hereinafter "the Amendment"), are interpreted as a combination of a general rule and an exception thereto: (i) the general rule for allowing a Danish citizen and his or her foreign spouse to be reunited in Denmark is the so-called attachment requirement, that is to say their aggregate ties to Denmark have to be stronger than to any other country; (ii) the exception which makes the said requirement inapplicable is the 28-year rule under which such reunification is allowed only if the Danish spouse has been a

Danish citizen for at least twenty-eight years. (For exceptions which do not apply in the present case see, *inter alia*, paragraphs 31, 33, 69, 72, 86, 89, 90 and 100.) However, the wording of the Act allows equally for an interpretation where the said general rule becomes the exception and *vice versa*: (i) family reunification in Denmark is allowed if the Danish spouse has been a citizen of this country for no less than twenty-eight years, unless (ii) the spouses' aggregate ties to any other country are stronger than to Denmark. Thus, the requirement that a Danish citizen has to meet in order to be allowed to reunite in Denmark with his or her foreign spouse includes two alternatives: he or she must meet either (i) the 28-year citizenship criterion or (ii) the criterion of both spouses' stronger aggregate ties to Denmark. Hardly anyone would contest that both conditions are difficult (indeed almost impossible) to satisfy for a person who obtained Danish citizenship in his or her ripe adulthood.

5. In Denmark (as in other countries), family reunification implies not the acquisition of Danish citizenship for a Danish citizen's foreign spouse but a residence permit for the latter. Also, under Danish law, a child born from a Danish citizen's marriage to a foreigner acquires Danish citizenship irrespective of the country of birth or residence. It can be observed in the present case that the applicants' child, who, by virtue of his father's citizenship, is a Danish citizen, is faced with a dilemma: either to live abroad with both parents (if they have chosen to be a united family) and to develop only a distant connection to Danish society, or to develop a closer connection with Denmark by being raised in this country, but by the father alone because his non-Danish mother is banned from residing there. As the issue of the rights of the applicants' child is not raised before the Court, this matter is little elaborated further.

6. States are free to determine the criteria for the naturalisation, as for the permanent residence, of foreigners based on assumptions of social integration. Such criteria do not necessarily have to be uniform; as a matter of principle, it is not forbidden to lay down different criteria for different groups of people. Generally, a State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, 29 April 2008). The scope of this margin will vary according to the circumstances, the subject-matter and the background (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, 16 March 2010).

7. In family reunion matters, however, a State's margin of appreciation is not very wide because family reunion is a core aspect of the right to family life in the country of one's citizenship, i.e., the fact of living there with one's spouse and children. Different treatment of citizens based on ethnic or national origin (the latter meaning, *inter alia*, origin related to citizenship) may amount to discrimination on grounds of ethnicity or

nationality. Very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of ethnic or national origin as compatible with the Convention (see *Gaygusuz v. Austria*, no. 17371/90, 16 September 1996, § 42) and justify such discrimination (see *Koua Poirrez v. France*, no. 40892/98, 30 September 2003, § 46; *Timishev v. Russia*, nos. 55762/00 and 55974/00, 13 December 2005, § 56; and *Andrejeva v. Latvia* [GC], no. 55707/00, 18 February 2009, § 87, where the Court did not pay enough heed even to such an otherwise decisive factor as that the justification for the difference in treatment had stemmed, ultimately, from the history of the respondent State's occupation by a foreign power). According to the Court's jurisprudence this requirement applies to treatment not only of individuals but also of groups of citizens.

8. In this context, the paramount concern of a human rights court should be whether such criteria have the disparate adverse impact of a stereotype on a minority group, no less important than the actual individual impact, which in every case is absolutely necessary for victim status to obtain. The difference in the treatment of a group raises fundamental human rights concerns, especially if it reflects or reinforces existing patterns of social stereotyping related to one or other "natural feature". It is impossible to think of Article 14 of the Convention as permitting second-class citizenship, especially within the ambit of Convention rights (such as those consolidated in Article 8). For this reason, the Court's indirect discrimination doctrine is concerned with the group effects of a general measure and not only with individual impacts: discrimination may occur where "*a general policy or measure* ... has disproportionately prejudicial effects on a particular group" (see *D. H. and Others*, cited above, § 175, emphasis added; see also paragraph 15 below).

Where a purportedly neutral requirement (such as length of citizenship which, in the present case, is the criterion for the difference in treatment of Danish citizens) results in the categorisation of people into groups on the basis of origin, and one group is suffering a certain disadvantage, there are grounds to speak of indirect discrimination. This will amount to a violation of Article 14 of the Convention, unless justified. Indirect discrimination is unrelated to legislative intent, therefore in such cases there is no need to prove discriminatory intent. It exists, and it remains impermissible, even if it burdens disparately only a group that is differentiated on a specific ground. There is no way to justify discrimination, even if indirect, where it is to a "decisive extent" based on a person's ethnic or national origin (see paragraph 9 below).

9. According to the Court's indirect discrimination jurisprudence (see *D. H. and Others*, cited above, § 176):

> "Discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination

> and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. ... The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (see *Timishev*, cited above, § 58)."

This language is unequivocal: in cases of indirect discrimination based on ethnic origin (no less, if on national origin in the wider sense of the word) there can be no justification under the Convention.

10. In the present case, the purportedly neutral 28-year rule actually singles out a group of citizens, naturalised foreigners, and gives privileged treatment to Danish citizens by birth. The first applicant belongs to the first group. When applying for family reunion in Denmark, he was treated differently because he was not born or raised in Denmark, and nor were his parents Danish.

11. The question a human rights court has to ask is this. What is the ground for the difference in treatment of Danish citizens? On the surface, it is the length of citizenship. In the judgment, the majority have rightly accepted that what matters is the consequence of the length of citizenship difference as established by the 28-year rule (see, *inter alia*, paragraphs 37, 90 and 91). This consequence (on which the majority's reasoning is silent) is the fact that naturalised immigrants who are, predominantly, of different ethnic or national origin or belong to ethnic groups different from ethnic Danes, are treated differently from the latter.

12. Unlike the majority (see paragraph 91), we do not consider that the first applicant enjoyed "other status" for the purposes of Article 14 of the Convention. Were it "other status", the State would have had a wide margin of appreciation and a limited burden of proof to show the reasonableness of the difference applied (see paragraph 7 above and paragraph 15 below). But this is not a *Carson* type situation where a difference in pension benefits due to the freely chosen difference in residence did not amount to a violation of Article 14 (see *Carson*, cited above).

13. As mentioned in paragraph 8 above, in indirect discrimination cases, there is no way to justify discrimination, even if indirect, where it is to a "decisive extent" based on a person's ethnic or national origin. Such "decisive extent" is not claimed by the applicants, therefore it is not examined here as being racist. We will refer to the differentiation as one based on national origin, to which the "ethnic criterion" in the non-racist sense applies. However, one has to keep in mind that, as a matter of fact, different treatment of groups on the basis of national origin has some potential to shift to ethnic racism.

14. In the present case, the difference in treatment is based exclusively on the citizen's national origin. The *Gaygusuz* standard (see paragraph 7 above), which is also applicable to the national origin criterion, in view moreover of the European Convention on Nationality, an instrument created

under the aegis of the Council of Europe, which, although not ratified by many member States, has been ratified by Denmark, does not allow for different treatment of nationals as to citizenship. That convention cannot be disregarded in the interpretation of Article 14 in this case, even if the majority of the Danish Supreme Court considers it non-binding (see paragraph 24).

15. In *Oršuš and Others v. Croatia* (no. 15766/03, § 150, 16 March 2010; see also, *mutatis mutandis*, *D. H. and Others*, cited above, § 177), the Court stated as follows:

> "The Court has also accepted that a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable only on the basis of an ethnic criterion, may be considered discriminatory notwithstanding that it is not specifically aimed at that group (see, *mutatis mutandis*, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001, and *Hoogendijk v. the Netherlands* (dec.), no. 58461/00, 6 January 2005; and *Sampanis*, cited above, § 68), unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate. Furthermore, discrimination potentially contrary to the Convention may result from a de facto situation (see *Zarb Adami v. Malta*, no. 17209/02, § 76, ECHR 2006‑VIII). Where an applicant produces prima facie evidence that the effect of a measure or practice is discriminatory, the burden of proof will shift on to the respondent State, to whom it falls to show that the difference in treatment is not discriminatory (see *D.H. and Others*, cited above, §§ 180 and 189)."

The said requirements of objective justification are applicable. As explained in paragraph 13 above, national origin is an "ethnic criterion" in the non-racist sense. Therefore what has to be objectively justified is not the proportionality of the measure but the discrimination itself as a means to achieve the allegedly legitimate aim. However, indirect discrimination will not violate the Convention where there is a reasonable and objective justification for the introduction of the specific requirement (see *Hoogendijk v. the Netherlands* (dec.), no. 58641/00, 6 January 2005).

16. What, then, could be the alleged legitimate aim of the difference created by the Amendment? The concern was that, among the relevant population, there was "a widespread marriage pattern to marry a person from their countries of origin" (see paragraph 29 concerning the preparatory work in respect of the Amendment, and also the Supreme Court minority opinion in paragraph 25), this being understood for all practical purposes as reflecting a lack of integration. The impugned differentiation reflects and reinforces, albeit indirectly, a negative stereotype. In this context it should be mentioned that the Court previously held that general assumptions or prevailing social attitudes in a particular country provided insufficient justification for a difference in treatment on the ground of sex (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012). We find that similar concerns should apply to immigrant minorities. Favouring Danish citizens by birth on grounds of blood relationship is not a very

weighty reason for justifying a discriminatory approach. To assume that birth to Danish nationals *per se* results in attachment is a fiction, or even two, as this approach is based on (i) the fictional assumption about the attachment of any foreign-born non-resident Danish citizen to Danish society, and (ii) on the generalised suspicion that any long-term-resident naturalised Danish citizen with proven attachment to Denmark does not provide guarantees of attachment when it comes to family reunion.

17. In paragraph 94, the Court has quoted *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (28 May 1985, § 88, Series A no. 94), where special treatment, unlike the situation in the present case, was not based on the *length of citizenship* but stemmed from birth within the country, from citizenship versus non-citizenship or from long-time residence versus residence that is clearly not long-term, namely to the effect 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".

Unfortunately, neither *Abdulaziz* nor the present judgment have specified what those "persuasive social reasons" are. For the purposes of the present case, and in the light of the *Abdulaziz* criteria, a Danish citizen by birth born abroad does not automatically enjoy the mysterious special tie that is due to his or her "birth within the country", neither are such *Abdulaziz* criteria as citizenship versus non-citizenship or long-time residence versus short-time residence applicable to his or her attachment to Denmark (as a precondition for family reunion). Be that as it may, *Abdulaziz* did not say that there were persuasive social reasons to grant special treatment to some forms of strong ties (such as citizenship by birth) but not to others (such as long residence or naturalisation).

18. On the whole, the applicability of *Abdulaziz* raises some concerns in contemporary Europe not only with respect to indirect discrimination but also with respect to gender stereotypes, as the Court agreed in that case with the respondent Government that "that the difference in question was justified by the concern 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" (ibid., § 87), but this matter would be collateral to our reasoning. So, it is probably not accidental that the majority have not limited their analysis by a reference to *Abdulaziz*; in fact, it seems that the majority have even departed from it, although – and this is troubling in itself – not by applying the Court's post-*Abdulaziz* jurisprudence but by introducing, to decide this case of indirect discrimination, the *Taxquet* criteria.

19. The majority have recognised that there is at least an indirect difference in the treatment of Danish nationals for the purposes of family reunification (see paragraph 24 below). However, they have not directed the

analysis at the "disproportionately prejudicial effects [of a measure] on a particular group" (see *D. H.*, cited above, § 175) which would have been most appropriate. Instead, they have relied upon *Taxquet*. However, *Taxquet* was an Article 6 case that concerned jury trials in Belgium, and, second, it did not have an Article 14 aspect. Moreover, the reference provided in paragraph 103 of the judgment reproduces an important gap to be found in *Taxquet* (cited above, § 83). In following the wording used in *Taxquet*, which was intended to justify the fact that the Court in that case did not examine the institution of the jury as such, the majority have omitted a consideration which has been present ever since the Court formulated its individualised approach in *Guzzardi v. Italy* (6 November 1980, Series A no. 39). The full quotation, as indeed restored after *Taxquet* in *Nejdet Şahin and Perihan Şahin v. Turkey* ([GC], no. 13279/05, § 69, 20 October 2011), reads as follows:

> "Furthermore, in cases arising from individual petitions the Court's task is not to review the relevant legislation or an impugned practice in the abstract. Instead, it must confine itself, as far as possible, *without losing sight of the general context*, to examining the issues raised by the case before it (see, among other authorities, *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002–X, and *Taxquet*, cited above, § 83)." (emphasis added)

It should be noted that in *Nejdet Şahin and Perihan Şahin* there is an express reference to *Taxquet* and *N. C.*, neither of which contain the "general context" clause. In the present judgment the "general context" wording has again been omitted.

This Court's jurisprudence has always insisted on the importance of the "general context". The reference to the "general context" emerged in *Guzzardi.* This was not accidental. It was a consideration that reflected – and, we would like to believe, still reflects – the Court's understanding of its functions. Since 1980 the Court has repeatedly stated that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" (see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and also *Guzzardi*, cited above, § 86). This was most recently confirmed in a discrimination case in *Konstantin Markin* (cited above, § 89):

> "Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see *Karner*, cited above, § 26; *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII (extracts); and *Rantsev v. Cyprus and Russia*, no. 25965/04, § 197, 7 January 2010)."

While the Court accepts in the present judgment that the first applicant

has been indirectly treated "differently" because of the concentration of the individual impact on him, the "general context" perspective is lost. It is precisely this "general context" that matters so decisively in the human rights framework. In the present case, the "general context" is the impact on a class of citizens who are treated with suspicion on the ground of their alleged lack of strong ties due to their national origin, regardless of whether they are longstanding residents, even longstanding citizens, have no other citizenship or any other formal affiliation with another country, and so on. It is in this "general context" that these nationals will be considered second-class citizens who lack "properly" strong ties to their country of citizenship and, thus, will rightfully feel discriminated against.

20. Citing *Taxquet* the majority claim that "it is not the Court's task to review the [national] legislation in the abstract" (paragraph 103 of the judgment). The majority's analysis is thus restricted to the specific burden which the 28-year rule had placed on both applicants *jointly*. It is argued that the spouses' "aggregate ties to Denmark were clearly not stronger than their ties to another country" (paragraph 105). But the issue is not, first and foremost, how integrated the wife is. True it is – and it goes without saying – that a spousal reunion is a union of two, but it is a union in which each spouse exercises his or her individual choice, individual determination and individual right to be united with the partner in marriage. Therefore, the husband's restricted possibility of family reunion in his country of citizenship, Denmark, concerns not only their joint right to reunion but also his individual right, which has to be considered not only jointly with that of the spouse but, as in the case of non-resident nationals who were born or raised in Denmark, also separately. In the event that the husband's individual right to family reunion in Denmark is breached by the application of the Act, this (with a spousal reunion seen as a union of two) also entails that the corresponding right of the wife must be considered breached even without any "joint" examination. In the present case, the fact that the first applicant's right to family reunion had been breached by the application of the Act is clearly proved by the discriminatory manner in which this Act treats immigrants who were naturalised in their adulthood (no matter how long ago, provided that this term is shorter than twenty-eight years) *vis-à-vis* those citizens who are not Danish citizens by birth but were born or raised in this country: a person belonging to the latter category may have an equally "unattached" foreign spouse, but no "joint" consideration is required in such a case!

21. Contrary to the restrictive *Taxquet*-based logic of the majority (and most important for the future of indirect discrimination jurisprudence), a proportionality test in an Article 14 case must not be reduced to an "individualised" analysis of correspondence of restrictive means *vis-à-vis* the legitimacy of the aim of the interference with a right. It is, as the above-quoted Grand Chamber cases command, the difference in treatment of those

similarly situated persons and groups who are most disadvantageously affected by the application of restrictive legislation *vis-à-vis* the majority of the members of the relevant population that the respondent State has the burden to justify as being proportionate to the aim.

22. Having applied a standard "individualised" proportionality analysis the majority could not but disregard the blanket nature of the 28-year rule. However, the presumption of this rule regarding different groups of citizens represents blanket treatment. Such treatment was found by the Grand Chamber, in *X. and Others v Austria* ([GC], no. 19010/07, § 126, ECHR 2013), to be inherently suspect in the context of discrimination created by a law which contained:

> "... an absolute prohibition ..., making any examination of the specific circumstances of [the applicants'] case unnecessary and irrelevant and leading to the refusal of their ... request as a matter of principle. It follows that the Court is not reviewing the law *in abstracto*: the blanket prohibition at issue, by its very nature, removes the factual circumstances of the case from the scope of both the domestic courts' and this Court's examination (see, mutatis mutandis, *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 72, ECHR 2005-IX)."

23. Contemporary European standards and the jurisprudence of the Court (for the most recent example see *Hode and Abdi v. the United Kingdom*, no. 22341/09, 6 November 2012) are extremely concerned about indirect discrimination based on grounds of ethnic or national origin. Even if we do not claim that the Amendment resulted in the kind of racist or ethnic discrimination that was found unacceptable in *Abdulaziz*, we find that the Government have not provided an objective justification for the disparate, disadvantageous treatment of a group of Danish citizens, namely naturalised citizens, nor have they provided reasonable justification for such different treatment on the factual ground of ethnic or national origin which would have required weighty reasons, especially given the rather narrow margin of appreciation that States have in family reunification matters (see paragraph 15 above).

24. This Court does not exercise abstract review over the conformity of national legislation with such legal principles as non-discrimination and equality of persons (which, incidentally, are not explicitly enshrined in Denmark's Constitution). Such a test would be a task for constitutional review. In any event, in cases such as the present, a divide between the law and the factual situation resulting therefrom is not clear cut. Despite unwillingness to "review the [national] legislation in the abstract", the judgment contains negative pronouncements about the Act. The 28-year rule is called "*excessively strict*" (paragraph 99 of the judgment); the chances for those who acquired Danish nationality "later in life" are called "*significantly poorer*" and "*almost illusory*" (paragraph 101); in paragraph 102, it has been found "*difficult to imagine* how a person acquiring Danish nationality at the average age for creating a family can expect to do so with a foreign

spouse in Denmark"; in the same paragraph, the majority have agreed with the Commissioner for Human Rights in saying that the 28-year rule "places *undue restrictions* on naturalised Danish citizens and places them at considerable disadvantage in comparison to Danish citizens born in Denmark" (emphasis added). We share this attitude of the majority because we believe that, as a matter of principle, to turn a blind eye to the obvious discriminatory character of an instrument of national legislation thus applied would not contribute to implementing justice under the Convention. However, as is shown below, our accord ends here.

II. ON THE SECOND FICTION: 2004 AS "THE END OF TIME"

25. If the Act "places *undue restrictions* on [one category of] citizens", "places them at considerable disadvantage in comparison to [other citizens]" and makes it "*difficult to imagine* how a person" belonging to such category of underprivileged citizens "can expect to [create a family] with a foreign spouse in Denmark" (see paragraph 24 above), it is hardly conceivable that the application of this Act with respect to someone belonging to the underprivileged category can be lily-white in the eyes of the Convention. The bottom-line question (as posed by the majority) is this: can the different (and unfavourable) treatment of a 35-year-old Danish national with two years of citizenship in a matter of family reunion be justified in a court? No, unless it is by means of a fiction.

26. In paragraph 104 the majority have chosen 2004 as the "relevant time" of the alleged violation examined in this case. Even if we accept, only for the sake of argument, that the considerations set forth in paragraphs 105 and 106 of the judgment provide for a narrow justification, one specific moment does not allow for an overall finding of no violation: the choice of 2004 as the "relevant time" is selective and artificial. A fiction has been composed.

27. Why 2004? In that year, the Ministry of Refugee, Immigration and Integration Affairs upheld the 2003 Aliens Authority's refusal to grant the second applicant a residence permit. Later, there were court proceedings which culminated, in 2010, in the judgment of the Supreme Court. Only having exhausted this national remedy (as required by Article 35 § 1 of the Convention), did the applicants lodge their application with the Court. What is of paramount importance is that they did not petition against the Ministry's decision – they petitioned *against the final decision of the High Contracting Party*, Denmark, adopted in 2010 by its Supreme Court. In the judgment, any reasoning as to why 2004 was preferred over 2003, or why the year when the *final* decision was adopted was not chosen as the "relevant time" has, most regrettably, been omitted.

28. But that is not the only issue. Today we are in 2014. At the time of the examination of this case, four years have passed since the adoption of

the Supreme Court's judgment. The applicants' situation has not changed. The applicants, one of whom is a Danish citizen, are still banned from reuniting in Denmark. They continue to live in Sweden with their son, who is a Danish citizen by birth, that is to say a step away from the country of which two members of their family are citizens. This ongoing character of the situation must not be ignored. However, it has been ignored.

29. When assessing the justification for a measure or the existence of a violation, the Court has at times, particularly in cases involving expulsion or child custody, taken into account developments that have occurred since the last domestic proceedings (see, for example, *Sylvester v. Austria*, nos. 36812/97 and 40104/98, 24 April 2003, and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, §§ 145–147). In *Maslov v. Austria* ([GC], no. 1638/03, § 91, 23 June 2008) the Court stated:

> "In cases in which the applicant has not yet been deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (see *Saadi v. Italy* [GC], no. 37201/06, § 133, ECHR 2008). Thus, in these cases the Court does not limit itself to assessing the situation at the time when the final domestic decision ordering the expulsion was given."

Were the majority to draw on principles (*inter alia*, methods of reasoning) set forth in the Court's case-law regarding the expulsion of aliens (see also *Emre v. Switzerland*, no. 42034/04, § 68, 22 May 2008), they would have had to come to a different finding.

30. How could one ignore the period from 2004 (the "relevant time") to 2014, when the Court has decided the applicants' case? The year 2004 was not the "end of time". For the applicants, nothing ended but it was only beginning in 2004 (more precisely, in 2003). And this continuing, discriminatory situation is not over yet. The applicants' Sweden-based three-person family of which two members are Danish citizens would be allowed to reunite in Denmark only in 2030, when the first applicant would have reached the age of fifty-nine (paragraph 20) and his son would be twenty-six. This second-generation (and, from the point of view discussed here, also second-class) Danish citizen, owing to the severity of the Act, but also owing to the judgment of this Court, will obviously not be raised in Denmark. Were he to marry a foreigner (which is more likely when a citizen lives all his life abroad) comparatively early, he would be able to reunite with his spouse in Denmark only in 2032, after having reached the age of twenty-eight. The applicants' family are forced to live abroad if they wish to live as a family and the Act obliges them to educate their Danish child abroad. Imagine the level of attachment of that Danish national to Denmark, should he decide to return to Denmark as an adult. This tells us a lot about the "appropriateness" of the means chosen by the legislature to generate attachment.

31. In the judgment, decisive weight is given to the fact that "the first applicant had been a Danish national for less than two years, when he was

refused family reunion" (paragraph 106). This has added to the "relevant time" fiction, as no significance has been attributed to the fact that the first applicant had resided in Denmark for nine years before naturalisation. The period of twenty-six years, which, at the "relevant time", as chosen by the Court, was (and sixteen of those years still are) ahead for the first applicant before he is allowed to reunite with his foreign spouse in Denmark, is a much longer period than the ten-year period which, in *Emre v. Switzerland (no. 2)* (no. 5056/10, § 76, 11 October 2011), was called "a considerable period in a person's life" for exclusion purposes; enough for finding a violation. We find no reason whatsoever to apply, in the present case, a more severe standard to the applicants, when the file does not appear to contain any information that they have not been law-abiding people, than to the applicant in *Emre (no. 2)*, someone with a weighty criminal record.

32. In this context, it should be observed that the Court's line of discrimination cases does not impose a length requirement in assessing the margin of appreciation afforded to governments implementing legislation which has a discriminatory effect. Rather, attention is focused on the justifiability of a discriminatory effect, whether or not it is long-lasting (see, for example, *Koua Poirrez*, cited above; *Fawsie v. Greece*, no. 40080/07, 28 October 2010; *Saidoun v. Greece*, no. 40083/07, 28 October 2010; and *Anakomba Yula v. Belgium*, no. 45413/07, 10 March 2009).

* * *

33. To sum up, we conclude that Article 14 of the Convention, taken in conjunction with Article 8, has been violated with respect to the first applicant and, by extension (see paragraph 20 above), with respect to the second applicant also. Moreover, this violation concerns all Danish citizens of foreign extraction and their foreign spouses who may find themselves in an unfortunate situation similar to that of the applicants.

34. Fictions can prove things otherwise unprovable in a lawyer's writings. As a matter of common sense, however, for a citizen, even if naturalised, to have to wait twenty-eight years for permission to reunite in his country of citizenship is disproportionately, drastically and unjustly far too long and amounts for that human being, and for his spouse, to deprivation of their right to pursuit of happiness. We do not believe that the Convention was meant to endorse such deprivation.