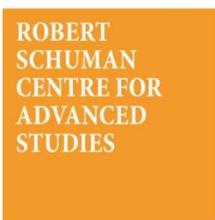




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**Biao v. Denmark – Discrimination among citizens?**

Eva Ersbøll



European University Institute  
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ISSN 1028-3625

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Printed in Italy, July 2014  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu/RSCAS/Publications/](http://www.eui.eu/RSCAS/Publications/)  
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## **Abstract**

On 25 March 2014 the European Court of Human Rights delivered a controversial judgment in a case on family reunion in Denmark, the Biao case. The applicants were a Danish national, Mr Ousmane Ghanian Biao, and his wife, a Ghanaian national, Mrs Asia Adamo Biao. They alleged that a refusal by the Danish authorities to grant them family reunion was in breach of the European Convention on Human Rights (ECHR) article 8, alone and in conjunction with article 14.

The Danish authorities had refused the application for family reunion because the spouses did not fulfil the requirement that their aggregate ties to Denmark be stronger than their aggregate ties to any other state where they could live together – in this case Ghana ('the attachment requirement'). They submitted that the decision breached their rights under article 8 of the ECHR since it did not pursue a legitimate aim on the ground that it was introduced to target Danish citizens of non-Danish ethnic or national origin. Alternatively, if the refusal was not deemed to be contrary to article 8, they claimed that it was contrary to the prohibition against discrimination, cf. ECHR article 14 read in conjunction with article 8, since particular groups of Danish citizens were treated differently in relation to family reunion in Denmark. In analogous circumstances, those who were born Danish citizens would be exempted from the attachment requirement according to the so-called '28-year rule' which states that the requirement does not apply in cases where the resident person applying for family reunion has been a Danish citizen for 28 years cf. the Aliens Act section 9(7).

The complaint regarding the attachment requirement's conformity with article 8 will not be dealt with here. This paper will primarily deal with the question whether a state lawfully can treat its citizens differently solely on the basis of how and when they acquired their citizenship.

In this context the significance of the European Convention on Nationality (ECN) article 5(2), will be analysed. Article 5(2) states that in matters of nationality, state parties shall be guided by the principle of non-discrimination between their citizens, whether they are citizens by birth or have acquired their citizenship subsequently.

## **Keywords**

Equal citizenship, Non-discrimination, Family reunion, Nationality, Attachment criteria



## 1. The case

The first complainant Mr Biao was born in Togo. From the age of six to 21 he lived in Ghana where he attended school for ten years. He speaks the local language. In 1993, when he was 22 years old, he entered Denmark and applied for asylum, which was refused. In the meantime he married a Danish citizen whom he divorced in 1998. He was granted a permanent residence permit in 1997 and on 22 April 2002 acquired Danish citizenship. On 22 February 2003 he and Asia Adamo Biao married in Ghana where she was born, and on 28 February 2003, at the Danish embassy in Accra, Ghana, Mrs Biao requested a residence permit for Denmark with reference to her marriage with Mr Biao. At that time, Mrs Biao had not visited Denmark. She and her parents lived in Ghana. Mr Biao had no close family in Denmark. He and his wife communicated in the Hausa and Twi languages. On 1 July 2003, the Danish Immigration Service refused the request for family reunion, since it was not established that the spouses' aggregate ties to Denmark were stronger than their attachment to any other country (as required by the Aliens Act, section 9(7)).

In July or August 2003, Mrs Biao entered Denmark on a tourist visa. On 28 August 2003 she appealed the Immigration Service's refusal to the then Ministry of Integration. The appeal did not have suspensive effect, and on 15 November 2003 the couple moved to Sweden (where they could settle according to EU law).

By Act no. 1204 of 27 December 2003, the Aliens Act, section 9(7), 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). In addition persons who were born or had arrived in Denmark as small children could be exempted from the attachment requirement, provided that they had resided lawfully and in essence continuously in the country for 28 years.

In May 2004 Mrs and Mr Biao had a son. He was born in Sweden and acquired Danish citizenship at birth after his father. The same year, the Ministry of Integration upheld the Immigration Service's refusal to grant Mrs Biao a residence permit in Denmark. In 2006, the couple instituted proceedings before the High Court of Eastern Denmark against the Ministry of Integration. They submitted, among other things, that Mr Biao and thus also Mrs Biao were discriminated against as an applicant for family reunion who was born Danish citizen and at the same age as Mr Biao would be exempt from the attachment requirement, while Mr Biao could not be exempted until 2030 when he had reached the age of 59.

By a judgment of 25 September 2007, the High Court unanimously found that the refusal did not contravene the articles of the ECHR or the ECN. In relation to the ECN the Court noted as follows:

ECN article 5 may according to the Explanatory Report be taken to mean that article 5(1) concern the conditions for acquisition of citizenship, while article 5(2) concerns the principle of non-discrimination. It appears from the report that it is not an obligatory rule which the contracting states must follow in all cases. In light of this, article 5 is considered to offer protection against discrimination to an extent that goes no further than the protection against discrimination following from article 14 of the ECHR.<sup>1</sup>

The assessment of whether the refusal implied discrimination would hereafter depend on whether the difference in treatment that occurred regardless of citizenship as a result of the attachment requirement could be considered objectively justified and proportional. The High Court found no sufficient basis for holding that this was not the case.

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<sup>1</sup> See the judgment from the Eastern High Court's 16 Department, 33.

Mrs and Mr Biao appealed the judgment to the Supreme Court, which passed its judgment on 13 January 2010.<sup>2</sup> In the ruling on the question on discrimination, a narrow majority of four judges found no basis in the case law that the 28-year rule implied discrimination in relation to the ECHR. The majority held that it is not in itself contrary to the Convention if a state treats groups of citizens differently in relation to family reunion. In this regard they referred to the judgment of 28 May 1985 from the European Court of Human Rights (ECtHR) in *Abdulaziz, Cabales and Balkandali v the UK*.<sup>3</sup> 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 UK and become a British citizen was treated less favourably as regards the right to family reunion than a citizen born in the UK or whose parents were born in the UK. The criterion of 28 years of Danish citizenship had, according to the Supreme Court, the same aim as the requirement of birth in the UK, namely to distinguish a group of citizens who, from a general perspective, has lasting and long ties with the country.

With regard to article 5(2) of the ECN the majority found, 'for the reasons stated by the High Court, that the convention's article 5(2) cannot lead to the result that the prohibition against discrimination enshrined in the European Convention on Human Rights article 14 read in conjunction with article 8 is given a more far reaching content than what follows from the judgment of 1985.'

Hereafter, the four judges found that the refusal of family reunion did not violate the ECHR article 14 in conjunction with article 8.

The minority of three judges (including the President of the Court) found that the 28-year rule represented indirect discrimination between persons who were born Danish citizens and persons who had acquired Danish citizenship later in life; and 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 time would generally be of foreign ethnic origin, the 28-year rule also entailed indirect discrimination between ethnic Danish citizens and Danish citizens with a different ethnic background. In their opinion, both types of indirect discrimination should be considered within article 14 in conjunction with article 8 of the ECHR.

The Ministry of Integration had held that ECN article 5(2) exclusively concerned issues on deprivation and loss of citizenship. The minority in the Supreme Court contested this view. The three judges doubted whether there was any basis for such restrictive interpretation of the wording of the provision. They considered it to be a general provision establishing that any difference in treatment between different groups of a state's own citizens is basically prohibited. In their opinion this distinguished the case from *Abdulaziz* because difference in treatment on the basis of place of birth is not comparable to difference in treatment on the basis of how long a person has been a citizen. They emphasised in particular that it is not sufficient to compare persons not raised in Denmark who acquire Danish citizenship later in life with the large group of persons who are born Danish citizens and raised in Denmark. The crucial element is to make a comparison with persons who are born Danish citizens and have been Danish citizens for 28 years, but who are not raised in Denmark and may not at any time have had their residence in Denmark. According to the dissenting judges, it can not generally be considered that this group of Danish citizens has stronger ties with Denmark than persons who have acquired Danish citizenship after having entered and resided in Denmark for a number of years. Against this background, the minority did not find the difference in treatment created by the 28-year rule objectively justified; they found it contrary to article 14 read in conjunction with article 8 of the ECHR. The consequence of this was, according to the minority, that when applying the Aliens Act section 9(7) to Danish citizens, the authorities must limit the 28-year rule to being solely an age

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<sup>2</sup> See the judgment at <http://eudo-citizenship.eu/databases/citizenship-case-law/?search=1&name=&year=&country=Denmark&national=1>

<sup>3</sup> See the judgment at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416#{\"itemid\":\[\"001-57416\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416#{\)

requirement, meaning that the attachment requirement should not apply in cases in which the resident spouse was a Danish citizen and at least 28 years old.

## **2. The judgment of the European Court of Human Rights**

Interestingly enough, the ECtHR was divided in its assessment in exactly the same way as the Danish Supreme Court. Among seven judges, four held that there had been no violation of ECHR article 14 in conjunction with article 8, while three judges respectfully disagreed.

First the Court applied the ambit test. Since clearly the case falls within the ambit of ECHR article 8, article 14 was in principle applicable.

Subsequently the Court considered whether there had been a difference in treatment of persons in analogous, or relevantly similar, situations based on ‘status’ (among others race, ethnicity or any other status) covered by article 14.

In this relation, the Court took into consideration the aim of the 28-year rule. The Court agreed with 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 and 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’ (p. 89).

The applicants had alleged that they had been treated differently based partly on Mr Biao’s acquisition of citizenship later in life, and partly, indirectly, on their ethnic origin.

The Court agreed with the minority of the Supreme Court that the 28-year rule had the consequence of creating an indirect difference in treatment between Danish citizens of Danish ethnic origin and Danish citizens of another origin. Still, the Court found that there had been no discrimination based on race etc. In this regard the Court recalled the arguments in *Abdulaziz* that a state’s preferential treatment to citizens or persons from countries with which it had the closest links did not constitute “racial discrimination”. Likewise, on the material before it, and recalling that non-Danish citizens who were born and/or raised in Denmark 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 had failed to substantiate the claim that they were discriminated against on the basis of race or ethnic origin in the application of the 28-year rule (p. 90).

The ECtHR concluded that the applicants were treated differently because the first applicant had been a Danish citizen for fewer than 28 years as opposed to persons who had been Danish citizens for ‘more than 28 years’. The Court accepted that in this respect the applicants enjoyed ‘other status’ (p. 91).

Hereafter, the decisive question was whether the difference in treatment had an objective and reasonable justification.

The Court observed that there had been no recent case law departing from the principles and the conclusions drawn in *Abdulaziz*, ‘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)’. The Court ‘thus accepted that the aim put forward by the Government for introducing the 28-year rule exception was legitimate for the purposes of the Convention’ (p. 94).

In addition, the Court could, briefly, agree with the Supreme Court that Article 5(2) of ECN ‘has no importance for the interpretation of Article 14 of the Convention in the present case’.

It then remained to be determined whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In relation to the proportionality test, the majority of the Supreme Court had compared the material aspects in the case to that of Mrs Balkandali's situation in *Abdulaziz* and found them almost identical since both applicants were citizens and married to a foreign spouse, and both came to their new country (Denmark and the United Kingdom respectively) as adults. In Mr Biao's case, the application for family reunion was refused when he had resided in Denmark for 11 years, two of them as a Danish citizen. In Mrs Balkandali's case, the application was refused after she had resided in the United Kingdom for eight years, two of them as a British citizen.

In addition, the Court found it pertinent to examine more thoroughly the aim of the 28-year rule. It reiterated the viewpoint that the aim of the rule was to distinguish a group of citizens 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 a spouse to be successfully integrated into Danish society.

The remaining question was then, according to the Court, when in general it could 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 (p. 99). The Court noted that the Danish Government considered that 28 years of citizenship were needed in this respect. In this connection the ECtHR remarked:

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.

Moreover, the Court recalled that all persons born as Danish citizens 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. Also non-Danish nationals who had resided in Denmark since early childhood were exempted after 28 years of legal stay in the country. However, persons who were not raised in Denmark and had acquired Danish citizenship later in life were covered by the attachment rule until 28 years had passed after they acquired their Danish citizenship. In light of these facts, the Court endorsed the view of the minority of the Supreme Court that the 28-year rule affected this group of citizens to a far greater extent than persons born with Danish citizenship. The Court realised that this group had very little benefit from the 28 year exemption – a finding, the Court noted, that was in line with that of the Commissioner for Human Rights who in 2004 had called it discriminatory and an excessive restriction to the right to family life (p. 100-102).

All the same, the ECtHR did not follow up on this finding. The reasoning of the Court was as follows:

The Court must point out 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' (p. 103).

After this, the Court returned to the question whether there was proportionality between the means employed and the aim sought to be realised by the 28-year rule in the applicants' case. This was done by analysing the applicants' ties with Denmark, which the Court found 'at the relevant time' (2003) were clearly not stronger than their ties to another country – in this case Togo and Ghana. The Court recalled that the first applicant had been a Danish citizen 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 could not 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’. Accordingly, in the specific circumstances of the present case, the majority of the Court found that there had been no violation of article 14 taken in conjunction with article 8 of the ECHR.

The minority in the ECtHR disagreed. The three judges found it impossible to think of ECHR article 14 as permitting ‘second-class citizenship’ (joint dissenting opinion p. 8). In their opinion the ‘purportedly neutral 28-year rule singled out a group of citizens, naturalised foreigners, and gave privileged treatment to Danish citizens by birth (p. 10). They also pointed to the ECN which they found could not be disregarded in the interpretation of ECHR article 14 even if the majority of the Danish Supreme Court considered it non-binding (p.14). They noted that the special treatment in *Abdulaziz* was not based on *the length of citizenship* but stemmed from birth within the country (p. 17). They dismissed the viewpoint of the majority that the Court’s task is not to review the relevant legislation in the abstract, among other things by reference to the case of *X. and Others v. Austria* where the Grand Chamber found a difference in treatment created by a law to be inherently suspect as the law contained an absolute prohibition making any examination of the specific circumstances of a case unnecessary (p. 22); likewise in the present case where naturalised citizens were treated less favourably than born citizens without an objective justification (p. 23). Consequently the dissenting judges found that ECHR article 14 in conjunction with article 8 had been violated.

### **3. Comments**

#### **3.1. General remarks**

Unfortunately, in certain respects the argumentation of the majority of the ECtHR is relatively brief. Arguably, the aims of the extended attachment requirement and the 28-year rule should have been subjected to closer examination, some viewpoints could have been more thoroughly elaborated and some statements leave unanswered questions as to their premise. In the following this apparent incompleteness will be dealt with.

#### **3.2. The aim of the 28-year rule**

While the ECtHR attaches significant importance to the aim of the 28-year rule, its description of that aim does not appear quite accurate. The Court assumes that the aim of the 28-year rule was to distinguish a group of nationals who ‘seen from a general perspective’ had lasting and long ties to Denmark so that it would be unproblematic to grant family reunion with a foreign spouse from an integration perspective.

This understanding is not accurate since the specific aim of the rule was to help Danish expatriates who, after the introduction of the attachment rule in 2002, had experienced difficulties when they wanted to settle in Denmark with their foreign family. After a number of years abroad, they might not be able to fulfil the attachment requirement. This unforeseen problem, which had to be solved, is explicitly described in the preparatory report to the Bill introducing the 28-year rule.<sup>4</sup>

The Court, however, maintained that the remaining question was when *in general* it could 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 spouse has prospects of being successful from an integration point of

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<sup>4</sup> See L 6 in the Parliamentary Journal, Folketingstidende 2003-04, tillæg A, p. 46 ff. at [http://webarkiv.ft.dk/?samling/20031/lovforslag\\_oversigtsformat/16.htm](http://webarkiv.ft.dk/?samling/20031/lovforslag_oversigtsformat/16.htm)

view. The Court found a requirement of ties for at least 28 years excessively strict; it was not convinced that a person's ties to a country would increase after 10, 15 or 20 years in the country.

The Court did not take into account the broader aim of the extended attachment rule that was introduced in 2002. The Court noticed that the extended rule was introduced with a view to improve the integration of Danish citizens of foreign origin and prevent arranged and forced marriages and that the background was 'a widespread pattern' among immigrants and immigrant descendants to marry a person from their country of origin, among other reasons due to parental pressure – a pattern that had been identified among both resident foreigners and resident Danish citizens with foreign background. For this reason, the attachment rule was extended to include Danish citizens who were not well integrated in Danish society and where integration of a spouse newly arrived in Denmark might therefore entail problems.<sup>5</sup>

Seemingly, the Court did not take into consideration that the extended attachment rule was introduced in 2002 together with the so called 24-year rule requiring that in cases of family reunion of spouses and partners, both applicants must be at least 24 years. The government foresaw that the 24-year rule might have the effect that young Danish citizens of immigrant origin would marry in their country of origin and establish family life there until both spouses turned 24 and thus fulfilled the 24-year age requirement for family reunion in Denmark. Such behaviour could hamper their integration even more, as the then Minister for Integration explained:

if we content ourselves with the 24-year rule... without applying an attachment requirement, we will risk that the conditions become worse than before, namely that young people are sent home when they are 18 and then return to Denmark with family and children when they turn 24. Then, what will we have achieved? If the 24-year rule shall have the effect to curb arranged and forced marriages, the attachment requirement must necessarily also be there.<sup>6</sup>

In the preparatory work to the amendments, the government gave an account of Denmark's international obligations. The extended attachment requirement should apply to both resident foreigners and Danish citizens regardless of whether they had a foreign background or not; as such, it was deemed in accordance with international non-discrimination principles. As stressed by the government 'the conditions apply regardless of the ethnic origin of the resident in Denmark, just as that person's ethnic origin in itself is without importance for the assessment'. Apparently, this broad application was considered important from a non-discrimination perspective.

However, the self-same broad application turned out to have the unintended consequence that it precluded Danish expatriates, who had settled down and started a family abroad, from returning to and live with their family in Denmark. Many Danish expatriates were shocked when they realised this scenario, and they publicly vented their justified anger at being excluded from their native country. This strong and sustained criticism made a political solution to the problem necessary.<sup>7</sup>

The then government had, it seems, to cut the Gordian knot since out of consideration for Danish expatriates it wanted to amend the extended attachment requirement, while insisting that the 24-year rule and the extended attachment should still achieve their originally intended goals (as stated in the preparatory work to the amendment). As already mentioned the attachment requirement should prevent immigrant descendants with Danish citizenship from being forced to marry when they turned for instance 18 and then live with their spouse in their country of origin until they could fulfil the 24-year age requirement for family reunion in Denmark. For that reason, a possible time-limit for exemption from the attachment requirement could not be set lower than 24 years; according to the government, 28 years with Danish citizenship was needed. Consequently, if an immigrant descendant

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<sup>5</sup> See L152 in the Parliamentary Journal, Folketingstidende 2001-02, 2. samling tillæg A, p. 3952 ff. at [http://webarkiv.ft.dk/?samling/20012/lovforslag\\_oversigtsformat/1152.htm](http://webarkiv.ft.dk/?samling/20012/lovforslag_oversigtsformat/1152.htm)

<sup>6</sup> The Parliamentary Journal, Folketingstidende 2001-02, p. 7774 ff.

<sup>7</sup> See Eva Ersbøll: Det lige statsborgerskab, in *Juristen No 4 June 2010*, p. 121 ff.

who had acquired Danish citizenship at birth married in the country of descent at the age of 18, the spouses would have to wait ten years abroad before they could be exempted from the attachment requirement and possibly be granted family reunion in Denmark.<sup>8</sup>

The Danish government did not find that the fundamental aim of extending the attachment requirement to Danish citizens would be forfeited by the introduction of the 28-year rule since

Danish expatriates planning to return to Denmark one day with their family will often have maintained strong ties with Denmark, which are also communicated to their spouse or cohabitant and any children. ... Thus there will normally be a basis for a successful integration of Danish expatriates' family members in Danish society.

Arguably, this argumentation illustrates that it is not a quite adequate description of the aim of the 28-year rule that 'it was to distinguish a group of citizens who, seen from a general perspective, had lasting and long ties with Denmark'. What is more, the considerations appearing from the preparatory work to the 2002 and 2003 amendments illustrate that in 2002 it was not the general perception that attachment to Denmark would increase simultaneously with the number of years a person had been a Danish citizen. By contrast, in 2002 it was assumed that a Danish citizen with immigrant background who moved abroad at the age of 18 would lose attachment to Denmark when turning 24; at that time the attachment rule was expected to prevent family reunion in Denmark. With the adoption of the 28-year rule things changed. Family reunion in Denmark became possible when the Danish-born citizen turned 28; however, it is inconceivable that the then government thought that a citizen, who was assumed to have lost his or her attachment to Denmark turning 24, would have obtained a stronger attachment turning 28.

Instead, it appears as if the government presumed that the 28-year rule would have a different effect on Danish citizens of immigrant origin who were thinking about getting married abroad upon turning 18. While the rule was adopted with the aim of helping Danish emigrants of Danish origin who had started a family abroad, it seems to have been the presumption that for Danish citizens of another ethnic origin it might function as a barrier if they were thinking about getting married abroad and later resettling in Denmark. The different impact seems to relate to the different 'marriage patterns'; if citizens of immigrant origin married very young, they would have to wait about ten years abroad before they could return to Denmark exempted from the attachment requirement.

It must be emphasised that human rights and non-discrimination principles were taken into consideration. Based on such principles it was, as stated in the preparatory work to the amendment, necessary to put persons who were born and/or raised in the country on an equal footing with the country's own citizens. In consequence, persons who are born and raised in Denmark or who have come to Denmark as small children and who have stayed in the country legally and in essence continuously for 28 years are also exempted from the attachment requirement.<sup>9</sup>

The introduction of the 28-year rule raised another question on equal treatment, namely equal treatment of adopted children. It was decided, during the reading of the Bill in Parliament, to treat adopted children equally with children born of Danish parents – however, only small children. The age limit was first set at four years and then raised to six with the effect that 95 per cent of all foreign adopted children are treated equally with children born to Danish parents. The reason for not including the last five per cent of children who are adopted by Danish parents was, according to the then

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<sup>8</sup> See the general remarks to the Bill L 6 (2003-04) at [http://webarkiv.ft.dk/?/samling/20031/lovforslag\\_oversigtsformat/l6.htm](http://webarkiv.ft.dk/?/samling/20031/lovforslag_oversigtsformat/l6.htm)

<sup>9</sup> Ibid. The 28 years' residence period is counted from the day a residence permit has been granted. Essentially, continuous residence for 28 years are required; however, shorter holidays abroad (up to one month) and foreign stays for educational and work purposes, or permitted for other reasons will not be deducted in the calculation of the residence period.

Minister for Integration, that this would place them in an unreasonably better position than persons who had settled in Denmark around the age of one or two years together with their foreign parents.<sup>10</sup>

In summary: The aim of the 28-year rule was to help Danish expatriates while not jeopardising the aim of the 24-year rule and the extended attachment rule aimed at Danish citizens with immigrant background. Therefore, in assessing whether the difference in treatment implied by the 28-year rule can be justified objectively, it is not sufficient to compare Danish citizens with immigrant background with the large group of citizens who are born Danish citizens and raised in Denmark. It is crucial, as the minority in the Danish Supreme Court rightly observed, to make a comparison with persons who are born Danish citizens and have been citizens for 28 years, but who are not raised in Denmark and who may perhaps not at any time have had their residence in Denmark (Danish emigrants or expatriates).

To put it bluntly, the question is whether, from a general perspective, it can be assumed that Danish citizens with emigrant background at the age of 28 have stronger ties with Denmark than Danish citizens with immigrant background.

### **3.3. Difference in treatment based on 'status'**

The ECtHR concluded that the applicants had not suffered indirect discrimination based on their ethnic origin. I do not agree in this view. Although the 28-year rule applies to all citizens, the significance of the rule may, indirectly, as mentioned in section 3.2., differ for Danish-born citizens of Danish ethnic origin and Danish-born citizens of another ethnic origin. And certainly, the significance differs greatly for persons who are born Danish citizens and persons who have acquired Danish citizenship later in their life and since the majority of persons who are born Danish citizens are of Danish ethnic origin whereas persons who acquire Danish citizenship at a later point in life generally are of foreign ethnic origin, the 28-year rule constitutes, in my opinion, indirect difference in treatment based on ethnicity that cannot be considered objectively justified and proportional. I will, however, not go further into this question, since the primary aim of the paper is to discuss whether difference in treatment between citizens can be justified insofar as it solely is based on how and when citizenship has been acquired.

The ECtHR has rightly observed that the applicants were treated differently because the first applicant had been a Danish citizen for less than 28 years as opposed to persons who had been Danish citizens for 28 years or more; therefore, the Court accepts that the different treatment is based on 'other status' for the purpose of article 14.

This is an important observation. In my opinion, the 28-year rule is not a neutral provision. It explicitly provides for different treatment of citizens based on how and when they have acquired their citizenship and it grants the most favourable position to persons who have acquired their Danish citizenship at birth. These citizens form the only group among Danish citizens who are exempted from the attachment requirement when they turn 28. At that age they enjoy preferential treatment in relation to family reunion. This difference of treatment is solely based on how and when they acquired Danish citizenship – at birth or at a later point in time. Also other groups of Danish citizens may, mutually, be treated differently based on when they acquired their citizenship. In any case, in my opinion the 28-year rule provides directly (not indirectly) for difference in treatment between Danish citizens solely based on how and when they have acquired their citizenship and that is, as a matter of principle, contrary to the ECN article 5(2). Notably, in this sense, *Biao* differs fundamentally from *Abdulaziz* that dealt with alleged discrimination between citizens on the ground of birthplace (within or outside the country).

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<sup>10</sup> See the Parliament's journal: Folketingstidende 2003-04, p. 3758.

### **3.4. The ECN article 5(2)**

In order to assess whether ECN article 5(2) is of significance for the present case, two questions of interpretation come about. The first question concerns the scope of the provision: that is whether it applies solely to citizenship legislation or whether it applies more broadly to other regulations dealing with citizenship, such as the Danish 28-year rule. The other question is whether the provision is a norm with some legal effect or whether it is only a declaration of intent.

In relation to the first question on the scope of article 5(2), the viewpoint of the Danish government was, as mentioned above, that the provision solely concerns issues on deprivation and loss of citizenship. In the memorandum from 2005, regarding among other things, criticism from the Danish Institute for Human Rights of the 28-year rule,<sup>11</sup> the then Ministry of Integration referred to the fact that ECN article 5(1) deals with acquisition of citizenship and in this connection and with regard to the scope of the convention, the Ministry considered that article 5(2) was only applicable to questions on deprivation and loss of citizenship. Consequently, according to the Ministry, the provision had no relevance for the 28-year rule.<sup>12</sup>

How the different courts have related to this viewpoint is in my opinion not quite clear. As regards the significance of article 5(2), the Danish Supreme Court found ‘for the reasons stated by the High Court’ that this provision cannot imply that the scope of the ECHR article 14 in conjunction with article 8 is extended further than justified by *Abdulaziz* (p. 24). But what were the reasons of the High Court? This Court had dealt with ECN article 5, mentioning that article 5(1) concerns the conditions for acquisition of nationality, while article 5(2) concerns the principle of non-discrimination and, according to the Explanatory Report, is ‘not a mandatory rule that the Contracting States are obliged to observe in all situations’. Against that background the High Court concluded that ‘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’ (p. 21). The majority of the ECtHR summarily agreed with the Supreme Court and the Danish government that ECN article 5(2) ‘has no importance for the interpretation of Article 14 of the Convention in the present case’ (p. 95).

These rather brief statements from the three courts seem to leave important problems of interpretation unsolved. The minority of the Supreme Court, however, dealt directly with the question of the scope of article 5(2), finding it dubious whether there was any basis for the restrictive interpretation of the provision. When assessing the 28-year rule relative to article 14 read in conjunction with article 8 of the ECHR, these judges found it necessary to include the fact that, at least according to its wording, article 5(2) is a general provision stating that any difference in treatment between different groups of a state party’s own citizens is basically prohibited (p. 25).

This reasoning lies near at hand when employing the methodology of interpretation provided for in the 1969 Vienna Convention on the Law of Treaties.<sup>13</sup> According to article 31 of the Vienna Convention, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 32 provides for supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure, or leads to unreasonable results.

Arguably, the wording of article 5(2) does not lack in clarity. It is not difficult to establish the ordinary meaning of the provision which stipulates that state parties shall be guided by the principle of

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<sup>11</sup> See *Ægtefællesammenføring i Danmark*; Udredning nr. 1, Institut for Menneskerettigheder 2004.

<sup>12</sup> See the Memorandum: Notat af 14. Januar 2005 om Institut for Menneskerettigheders Udredning nr. 1, 2004, *Ægtefællesammenføring i Danmark*.

<sup>13</sup> See Eva Ersbøll: *Dansk indfødsret i international og historisk belysning* (2008), p. 223 f.

non-discrimination between their nationals, whether they are nationals by birth or have acquired their nationality subsequently. Contrary to this delimitation, article 5(1) limits its scope of application to ‘rules of a State Party on nationality’.

Drawing on the context, object and purpose of the ECN, it is significant that its preamble expresses the wish to avoid discrimination in matters of nationality and goes on to express awareness of ‘the right to respect for family life as contained in Article 8 of the Convention for the Protection of Human Rights and Fundamental freedoms’.

The Ministry of Integration expressed the opinion that article 5(2) should be read in conjunction with article 5(1). However, even if we put the clarity of the wording in article 5(2) to one side, draw on the context and take recourse to the preparatory work, there is no support for this viewpoint. Initially, during the drafting of the ECN (in 1995), the two provisions were framed independently; the provision on prohibition of discrimination in rules on nationality (now article 5(1)) was included (as one out of five principles) in the convention’s provision on *principles that the state parties’ rules on nationality shall be based on* (now article 4). By contrast, the provision on non-discrimination between citizens (now article 5(2)) was framed as an independent rule under the broad heading ‘*non-discrimination between nationals at birth and other nationals*’.<sup>14</sup>

Admittedly, the primary aim of the provision was non-discrimination between citizens in relation to deprivation of citizenship due to crimes committed. However, it is natural to understand article 5(2) on a broader basis.<sup>15</sup> The non-discrimination principle in article 5(1) was at that time described as ‘applicable to national rules on the acquisition, retention, loss and recovery of nationality’ and it was explicitly stressed that this provision was not ‘applicable to national rules other than those on nationality’. Against this, it was briefly mentioned that the principle on non-discrimination between citizens (now article 5(2)) applied to ‘rules in matters of nationality’.<sup>16</sup>

Based on the clarity of the wording of article 5(2) and the lack of support in the preparatory work for the restrictive interpretation suggested by the then Danish Ministry of Integration, it seems fair to assume that article 5(2) applies broadly to matters relating to citizenship. This broad interpretation is also supported in the literature.<sup>17</sup>

The other question is to what extent state parties are bound by article 5(2) since the provision is not formulated as a prohibition against discrimination. The provision stipulates that a state party ‘shall be guided by the principle of non-discrimination between its nationals’. According to the preparatory work it aims at eliminating the discriminatory application of rules in nationality matters between nationals at birth and other nationals, including naturalised persons. An earlier draft of the Explanatory Report stated that the words “shall be guided by ...” indicate an obligation of a lesser degree than that resulting from article 4; the obligation is nevertheless included with a view to adopting the necessary provisions to ensure application of this principle’.<sup>18</sup>

The provision in article 5(2) was formulated under the influence of states that wanted continuously to be able to treat their citizens differently in relation to deprivation of citizenship due to crimes committed against the state. France, for instance, argued that reservations to the provision should be allowed.<sup>19</sup> The majority in the Expert Committee, however, did not want to permit reservations and

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<sup>14</sup> Ibid.

<sup>15</sup> The Expert Committee’s meeting report 7-10 February 1995 (CJ-NA(95)4).

<sup>16</sup> See draft explanatory report in working group report of 31 May 1996 (CJ-NA()&6).

<sup>17</sup> See among others Thomas Alexandre Alienikoff and Vincent Chetail: *Migration and International legal norms* (2003), p. 79 and Kay Hailbronner: Nationality in public international law and European law, in *NATAC*, vol. 1 (2006), p. 44.

<sup>18</sup> Working group report of 31 May 1996 (CJ-NA(96)6).

<sup>19</sup> See the report CDCJ(96)50, 22 October 1996.

they reiterated that the provision was a ‘declaration of intent and not a mandatory rule’ – see also the Explanatory Report stressing that article 5(2) is not a rule that must be followed ‘in all cases’.<sup>20</sup>

In my opinion, part of the argumentation in the Explanatory Report indicates that the states/ Expert Committee did not fully understand the very meaning of the notion ‘discrimination’ insofar as they seem to have assumed that different treatment based on a listed distinction would in itself amount to prohibited discrimination.<sup>21</sup> Such a mistake of law may have influenced the formulation of the non-discrimination provisions (article 5(1) and 5(2)).

A similar (mis)understanding was advanced while Protocol No. 12 to the ECHR (2000) was negotiated. Some states wanted a restriction clause to the general non-discrimination principle. However, as it is clarified in the Explanatory Report to the Protocol, a difference in treatment is only discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’. Since not every distinction or difference of treatment amounts to discrimination, and because of the general character of the principle of non-discrimination, it was not considered necessary or appropriate to include a restriction clause in Protocol No. 12. It is mentioned in the Explanatory Report to the Protocol that the law of most if not all member states of the Council of Europe provides for certain distinctions based on citizenship concerning certain rights or entitlements to benefits. The situations where such distinctions are acceptable are sufficiently safeguarded by the very meaning of the notion ‘discrimination’, since distinctions which have an objective and reasonable justification do not constitute discrimination.

The (erroneous) idea that it is necessary *in advance* to identify which distinctions amount to discrimination and which do not (the Explanatory Report to ECN para. 42) may explain both the limited number of (prohibited) grounds for discrimination in article 5(1) and the efforts made to clarify that article 5(2) should not be followed in all cases (para. 45). In 2001, at a Council of Europe conference on nationality, attention was called to this problem.<sup>22</sup> The query may have been effective since an open-ended prohibition against discrimination has been included in the European Convention on the Avoidance of Statelessness in relation to State Succession (2006). The development may indicate an acknowledgement of what is the right conception of law and may thus support the assumption that ECN article 5 was drafted under a misapprehension of the very meaning of the non-discrimination principle.

In any case, it is difficult to comprehend that the ECtHR finds that ECN article 5(2) has no bearing on the interpretation of Article 14 of the ECHR in the present case. It is explicitly stated in the Explanatory Report to the ECN (which the ECtHR has referred to in other cases) that this provision aims at eliminating the discriminatory application of rules in matters of citizenship between citizens at birth and other citizens, including naturalised persons. Further, during the drafting of the ECN it was the general understanding that the Convention should achieve an important status. As stated by a lawyer from the Directorate of Legal Affairs, the ECHR is the only treaty whose acceptance is compulsory for the member states of the Council of Europe; the drafters thought, though, that it would be good if the ECN could acquire the same status as the European Cultural Convention and the European Convention for the Prevention of Torture which all aspiring countries feel they need to sign to be part of the democratic club. The Convention was expected to impact on existing problems and

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<sup>20</sup> See the report Cj-NA(95)14, 7-10 November 1995.

<sup>21</sup> See the Explanatory report to the ECN, para. 40-44.

<sup>22</sup> See critique by Eva Ersbøll: The Principle of non-discrimination in matters relating to nationality law – a need for clarification? in *Proceedings, 2<sup>nd</sup> European Conference on Nationality, “Challenges to national and international law on nationality in the beginning of the new millennium”*, Strasbourg, 8 and 9 October 2001.

future potential problems.<sup>23</sup> In line with this, the Explanatory Report to the Convention (p. 15 and 16) states that the Convention is intended to be of relevance for the implementation of other Council of Europe- and UN conventions.

The ECtHR has also in other cases drawn on the convention.<sup>24</sup>

### 3.5. Law and practice internationally and in the other European states

The ECtHR has not in the *Biao* case dealt with the question whether other European states have introduced difference in treatment between their citizens based on how and when they have acquired their citizenship. Leaving to one side that some countries as an exception have provided for different treatment in relation to specific modes of deprivation of citizenship, that is, as far as I am aware, not the case.

Citizenship is normally considered to be ‘equal’ to all citizens. Some authors have even pointed to the ‘almost definitional feature of citizenship that signifies equality among those who hold that status’.<sup>25</sup>

Also the ECN article 17 can contribute to the understanding of ‘equal citizens’ since it establishes that ‘Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party’. The provision seems to be based on the understanding that a country’s nationals enjoy the same – equal – rights, including dual nationals.

The ECtHR has also dealt with and taken notice of ECN article 17 in *Tanese v Moldova*.<sup>26</sup> In that case, the Court (Grand Chamber) took into consideration the practice of other member states of the Council of Europe, observing that very few states treated dual nationals differently from other nationals in relation to becoming members of parliament. Moreover, the Court observed that different reports and commentaries were unanimous in their criticism of discrimination based on citizenship (p. 177).

It is noteworthy that the principle of ‘non-discrimination of nationals’ (cf. ECN article 5(2)) also applies in EU-law. In the *Auer-I*-case, the European Court of Justice stated as follows:

There is no provision of the Treaty which, within the field of application of the Treaty, makes it possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of that State, as long as, at the time at which they rely on the benefit of the provisions of Community law, they possess the nationality of one of the Member States and that, in addition, the other conditions for the application of the rule on which they rely are fulfilled.<sup>27</sup>

Arguably, it might have contributed to the result in the present case if the ECtHR in its assessment of the justification of the difference in treatment stemming from the 28-year rule had taken into consideration the practice of other European states and the viewpoint of the Commissioner for Human

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<sup>23</sup> See Horst Schade: The Draft European Convention on nationality, in Austrian journal of Public and International Law, Vol 49, no. 1, 1995, p. 103.

<sup>24</sup> See among others the case of *Tanase v. Moldova*, judgment of 27 April 2010.

<sup>25</sup> See David A. Martin: New rules for dual nationality’ in Randal Hansen and Patrick Weil (eds.): *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe* (2002), p. 46. See also David A. Martin and Kay Hailbronner (eds.): *Rights and Duties of Dual Nationals, Evolution and Prospects* (2003), p. 12 ff. and in the same publication p. 85 f: Peter H. Schuck: Plural Citizenship,

<sup>26</sup> Judgment of 27 April 2010.

<sup>27</sup> *Auer I*, case 136/78, judgment of 7 February 1979.

Rights; although the Court drew on the Commissioner's viewpoints, they do not seem to have influenced the judgment.

### **3.6. The objective and reasonable justification test**

With reference to *Abdulaziz*, the ECtHR assumed that the 28-year rule is based on an objective criterion since it is permissible for a state to grant special treatment to persons with strong ties to that state by virtue of birth within its borders, citizenship and long term residence and since the ECN article 5(2) had no relevance for the interpretation of ECHR article 14 in the present case. This last crucial point is dealt with in section 3.4. and 3.5, and arguably this is where the Court took the wrong track.

*Abdulaziz* relates to a state's different treatment of its citizens based on their birthplace (within or outside the state's borders) while the present case concerns different treatment of citizens based on how and when they have acquired their citizenship status. As already mentioned this does not correspond with ECN article 5(2) which establishes that states shall be guided by the principle of non-discrimination between their citizens, whether they are citizens by birth or have acquired their citizenship subsequently.

We must bear in mind that the aim of the 28-year rule was to assure that Danish emigrants could (re)settle in Denmark with their foreign family. The delimited period of 'having been a citizen for 28 years was, however, not fixed out of consideration for them; rather, the 28-year period was determined out of consideration for another group of citizens who were also *Danish at birth*, namely those with immigrant background who might wish to marry in their country of origin at a very young age. Judged upon the preparatory work to the 28-year rule, the reasoning appears to have been that if they were inclined to follow the identified 'marriage pattern' and would marry abroad for instance at the age of 18 with a view to resettle in Denmark whenever possible, the 28-year rule might constitute an obstacle, since they would have to wait for about ten years – and conceivably, such a long waiting period might have a deterrent effect.

For other citizens who have become *Danish after birth*, the 28-year rule has the obvious effect that the attachment requirement is effective until they get on in years; how long will depend on when they have acquired their citizenship. Most likely, many who did not come to Denmark as 'small children' would have to wait at least until they turn 46, since generally, according to Danish law children cannot apply independently for naturalisation.<sup>28</sup>

Even naturalised citizens who are born and raised in Denmark, and who may therefore have the opportunity to be exempted from the attachment requirement when they turn 28, may experience unequal treatment since the exemption possibility is conditional upon continuous residence in Denmark for 28 years. Although there are exceptions from the requirement on continuous residence dependent on the purpose of a possible stay abroad (work, education etc.), they do not in general enjoy the same free movement rights as persons who are born Danish citizens. To that extent, questions on compliance with EU law may also arise.

The Danish government has argued that the difference in treatment is objectively and reasonably justified as there are persuasive social reasons for giving special treatment to persons who have been Danish citizens for 28 year, since this group of persons from a general perspective has lasting and strong ties with Denmark. Admittedly, it may as a rule be legitimate to treat more favourably persons with strong ties to a country. However, this does not in itself establish the legitimacy of the differences

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<sup>28</sup> Recently, the 28-year rule has been amended; today, it is a 26-year rule, meaning that foreigners who are naturalised at the age of 18 are subjected to the attachment requirement until they turn 44, see L 104 at [http://www.ft.dk/RIPdf/samling/2011/lovforslag/L104/2011\\_L104\\_som\\_fremsat.pdf](http://www.ft.dk/RIPdf/samling/2011/lovforslag/L104/2011_L104_som_fremsat.pdf)

made by the 28-year rule regarding different groups of citizens' possibility to live with their family in their country of citizenship.

As mentioned, in other Europe countries, citizens are, as a rule, treated equally, regardless of how and when they have acquired their citizenship (apart from rules on deprivation of citizenship in particular cases). In my opinion this calls for very weighty reasons to be advanced before such difference in treatment can be considered legitimate.

The question of legitimacy must be dealt with on a general basis. As maintained by the minority of the ECtHR, in a case such as the present, a divide between the law and the factual situation resulting from it is not clear cut. This is also in line with the ECtHR's approach in other cases on discrimination, including *Abdulaziz*.

In *Abdulaziz*, the British rules made it easier for a man than for a woman settled in the UK to obtain permission for a non-national spouse to enter and remain in the country. The aim was to protect the domestic labour market. The ECtHR accepted this aim as legitimate, but was not convinced that the difference between the impact of men or women on the labour market was sufficiently important to justify the difference of treatment. Based on this assessment the Court concluded that the applicants had been victims of discrimination on the ground of sex, in violation of article 14 taken together with article 8.<sup>29</sup> As rightly stated elsewhere in the literature, it is almost 'inherent' in a discrimination analysis that a state's legislation must be analysed when difference of treatment flows from a formal legal rule.<sup>30</sup>

In this light it is surprising that the Court so unambiguously points out that where national legislation is the issue, it is not for the Court to review the relevant legislation in the abstract and that instead, the Court must examine the concrete facts in the case before it (p.103). In this connection it is also surprising that the Court has chosen a particular year, 2004, as the relevant time to determine whether there was a lack of proportionality between the means employed and the aim of the 28-year rule; for the applicant it was significant that he could not benefit from the 28-year rule that in his case would apply until 2030.<sup>31</sup>

#### 4. Concluding remarks

As the ECtHR has stated in its case law, a difference of treatment is discriminatory if it has no objective and reasonable justification: that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In the present case, there is no disagreement as to whether a country legitimately can provide for positive treatment in relation to family reunion in favour of persons who have a strong attachment to that country. This is legitimate. There is disagreement, however, as to whether attachment to a country can be measured on the basis of how and when a citizen has acquired his or her citizenship.

In my opinion, the length of time a person has held a country's citizenship is not a suitable criterion. For a number of reasons, that criterion differs from the criteria mentioned in *Abdulaziz*: birth within a country, citizenship as such, and long term residence.

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<sup>29</sup> Se *Abdulaziz* p. 74-83 at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416#{"itemid":\["001-57416"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57416#{)

<sup>30</sup> [http://echrblog.blogspot.dk/2014/04/guest-post-on-biao-v-denmark.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed:+blogspot/KCGaBs+\(ECHR+BLOG\)&m=1](http://echrblog.blogspot.dk/2014/04/guest-post-on-biao-v-denmark.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed:+blogspot/KCGaBs+(ECHR+BLOG)&m=1)

<sup>31</sup> Cf. note ... Since the 28-year rule in 2012 was amended to a 26-year-rule, in the applicant's case, the attachment requirements will now apply until 2028.

Citizenship as such may be seen as an expression of attachment to a country; and yet, the legislation in most countries may (in relation to different rights etc.) pose additional attachment requirements such as birth or residence in the country. In Denmark, for instance, residence in the country is an additional requirement for voting rights at national elections, while on the other hand, birth and residence abroad until the age of 22 is taken as an expression of loss of attachment – and therefore also as a reason for loss of Danish citizenship (in relation to dual citizens if their attachment is not proved in another way, cf. the Nationality Act section 8).

However, citizenship for a longer or shorter period of time seems unfit to constitute a criterion for attachment to a country. Apparently the Danish government also focused on something else, namely Danish citizens' national origin – Danish or foreign. Danish expatriates were exempted from the attachment requirement because they were assumed to speak Danish at home, spend holidays in Denmark and read Danish newspapers etc., while Danish citizens of immigrant origin in 2002 were assumed to lose attachment to Denmark by residence abroad even though they would hold Danish citizenship continuously for a longer and longer period.

Arguably, the ECtHR should have examined whether the alleged aim of providing for family reunion in Denmark for persons with strong and lasting ties to the country was served by the distinction drawn by the 28-year rule between Danish expatriates and Danish immigrants who had acquired their Danish citizenship after birth and consequently, in many cases would not be able to benefit from the 28-year rule when they became of marriageable age.

In the assessment, the Court could have drawn more on the preparatory work to the amendments to the Aliens Act of 2002 and 2003 and maybe also, to some extent, on its own case law on expulsion etc. where it has tested whether immigrants' citizenship in the country of origin (the country they have emigrated from) reflects more than 'a legal fact'.<sup>32</sup>

In addition, the impact of European citizenship should be taken into consideration. Union citizenship has become a desirable status and therefore, it is conceivable that more and more emigrant descendants resident in third countries may attempt, maybe generation after generation, to maintain European citizenship 'inherited' through their ancestors. This may also hold for descendants of Danish emigrants. To that extent, Danish citizenship may not merely be an expression of attachment to Denmark but rather an expression of a desire for free movement rights within the EU.

In any case, the non-discrimination principle in ECN article 5(2) and the lack of a similar practice in other European states should be taken into consideration with a view to establish whether very weighty reasons can justify the difference in treatment following from the application of the 28-year rule. In my opinion such very weighty reasons have not been advanced.

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<sup>32</sup> See among others the cases *Boughanemi*, 24/04/1996, where the applicant's "(l)inks with Tunisia that went beyond the mere fact of his nationality", and *Dalia*, 19/02/1998, where the applicant's citizenship was "not merely a legal fact but reflects certain social and emotional links", compared with *Beldjoudi*, 21/02/1992, who did not appear to have "any links with Algeria apart from that of nationality".

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