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Case Report

Rewriting Abdulaziz: The ECtHR Grand Chamber’s Ruling in Biao v. Denmark

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Abstract

In the case of Biao v. Denmark the ECtHR Grand Chamber found that Danish rules on family reunification amounted to indirect ethnic discrimination of Danish nationals of foreign origin. This judgment entails an important turn in the Court’s case law compared to the classic case of Abdulaziz, Cabales & Balkandali v. the United Kingdom. Its scope is, however, limited to discrimination against naturalised citizens and does not extend to ethnic discrimination against non-nationals. This article argues that the judgment offers welcome protection to foreign born citizens but that it fails to address the use of stereotypes underlying the discrimination complained of.

Keywords
discrimination – European Court of Human Rights – ethnic origin – family reunification – integration
1 The Case

On 24 May 2016 the European Court of Human Rights’ (ECtHR) Grand Chamber issued a judgment in the case of Biao v. Denmark, ruling that the Danish conditions for family reunion violated the prohibition of discrimination of Article 14 ECHR. The case originated in the Danish authorities’ refusal to grant family reunion to Ousmane Biao, a Danish national of Togolese/Ghanaian origin, and his wife, Asia Biao, who was a national of Ghana. The couple have a son who, like his father, is a Danish national.

Before the ECtHR the applicants complained about the Danish requirements for family reunion, in particular the ‘attachment requirement’ and the ‘28-years rule’. The attachment requirement prescribes that family reunion is allowed only if the family as a whole has a greater attachment to Denmark than to any other country. This requirement originally applied only to applicants for family reunion who did not have Danish nationality, but was extended in 2002 to apply also to Danish nationals. According to the preparatory works, this extension was motivated by the government’s assumption that family reunion by both foreign nationals and Danish nationals of foreign origin was more likely to result in integration problems. It quickly turned out, however, that the extended attachment requirement presented a hurdle to Danish expats who had formed a family abroad and sought to return to Denmark with their foreign spouse. This was the reason for the introduction of the 28-years rule, which entails an exception to the attachment requirement for applicants who have been Danish nationals for 28 years or longer.

In the case of Biao, both spouses had ties to Ghana which meant that the attachment requirement was not met. Ousmane Biao had obtained Danish nationality through naturalization at the age of 31 and so would be able to profit from the 28-years rule only at the age of 59. Before the ECtHR the couple complained that the refusal to let them live together in Denmark amounted to a breach of their right to family life (Article 8 ECHR) and that the Danish rules were discriminatory towards Danish nationals of foreign origin and therefore in breach of Articles 14 and 8 ECHR.

A Chamber of the ECtHR’s Second Section ruled on the applicants’ complaint on 25 March 2014, holding that there had been no violation of Articles 8 and/or 14 of the Convention. As to the right to family life, the Chamber held that the family was able to relocate to Ghana and that their interest in living together in Denmark did not outweigh the state’s interest in maintaining the attachment requirement. On the issue of discrimination the Chamber found that the distinction resulting from the 28-years rule, between Danes who had and those who had not been Danish nationals for 28 years, was justified by the
wish to grant preferential treatment to those who had strong ties to Denmark. This latter part of the judgment was strongly contested by a minority of three out of the Chamber’s seven judges. In a dissenting opinion, the minority argued that the 28-years rule amounted to indirect ethnic discrimination against foreign born Danish nationals. On the applicants’ request the case was referred to the Grand Chamber, which confirmed that the 28-years rule discriminated against the applicants on the grounds of their ethnicity and found a violation of Articles 14 and 8 ECHR. The complaint under Article 8 was not treated separately by the Grand Chamber.

2 Selective Immigration Policies versus Non-Discrimination Law: A Return to Abdulaziz

The case of Biao bears strong resemblances to the well-known case of Abdulaziz, Cabales and Balkandali v. the United Kingdom that was decided by the ECtHR in 1985. The latter case concerned a complaint by three women, residents of the United Kingdom, who were refused permission to bring over their husbands. Two of the applicants were foreign nationals with indefinite leave to reside in the United Kingdom whereas the third, Mrs Balkandali, was a British citizen. The Abdulaziz case is famous for being the first case in which the ECtHR accepted that family reunification could come within the scope of the right to family life as protected by the Convention. The ECtHR also took a strong stance against the fact that British immigration law enabled men but not women to reunite with a foreign spouse, which it considered discriminatory on the grounds of sex. However, it dismissed the applicants’ claims to the effect that the legislation discriminated on the grounds of race and birth. According to the applicants, most would-be immigrants to the United Kingdom came from countries belonging to the New Commonwealth or from Pakistan and so the British immigration restrictions affected more coloured than white immigrants. The Court, however, found that this was ‘an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others’ and that the Rules could not be considered ‘racist in character’. Concerning Mrs Balkandali’s complaint that she was treated differently from British women who had been born in the United Kingdom, the Court stated that ‘there are in general

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1 ECtHR 28 May 1985, Application Nos 9214/80, 9473/81 and 9474/81.
2 Abdulaziz, op. cit., para. 85.
persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it.3

Both the cases of Abdulaziz and Biao raise the question to what extent the prohibition of discrimination limits the power of states to select immigrants on the basis of their national or ethnic origin. In a study of ethnic migration in liberal states, Joppke shows how elements of race and ethnicity have influenced and continue to influence immigration policies in liberal democracies. Classic immigration countries such as the United States and Australia conducted explicitly racial immigration policies, excluding Asian immigrants, until well into the 20th century. European countries meanwhile gave or continue to give preferential treatment to postcolonial immigrants considered to belong to the same cultural community (e.g., Brazilians and Angolans in Portugal) or to ‘coethnics’ such as the German Aussiedler.4

Besides documenting the variety of forms that ethnic migration policies can take, Joppke’s study highlights how ethnic selection of immigrants is subject to contradictory normative standards in liberal nation states. Whereas nation states are committed to preserving national identities, liberal states are dedicated to universalist values, including the principle of equality which prohibits differential treatment of people because of their racial or ethnic origin.5 If both commitments are to be upheld, a distinction must be drawn between immigration criteria that legitimately select immigrants on the basis of their proximity to the national identity of the host state and criteria that are racially or ethnically discriminatory. However, the cases of Abdulaziz and Biao precisely show that the site of this distinction is not always clear. In both cases the respondent government’s stated aim was to give preference to immigrants with strong ties to the host state. Also in both cases, the criterion by which those ties were established (birth within the country or having been a citizen for at least 28 years) meant that immigrants of foreign origin had fewer chances of getting in. This illustrates the existence of a grey area where national identity or belonging and ethnic origin overlap. A similar ambiguity exists with regard to integration tests, which have been introduced in the immigration policies of many EU Member States over the past ten years.6

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3 Abdulaziz, op. cit., para. 88.
4 For these and other examples see Ch. Joppke (2005), Selecting by Origin. Ethnic Migration in the Liberal State, Cambridge, MA: Harvard University Press.
5 Joppke (2005), op. cit., p. 18.
When looking at legal standards, there is little doubt that explicit exclusion of immigrants because of their skin colour or ethnic origin would violate international non-discrimination law, including Article 14 ECHR. This was confirmed, a contrario, in the *Abdulaziz* judgment where the ECtHR stated that the disputed British immigration laws ‘did not contain regulations differentiating between persons or groups on the grounds of their race or ethnic origin’ and where therefore not discriminatory on racial or ethnic grounds. As described above, however, in the same judgment the Court accepted that ‘persuasive social reasons’ could justify preferential treatment of immigrants (or their family members) who were born in the host state. It follows that the Court did not consider ‘birth within the country’ to be a racially or ethnically discriminatory criterion.

Since *Abdulaziz* the prohibition of discrimination has not played a significant role in ECtHR case law on migration and family reunification. The Grand Chamber judgment in *Biao* represents an important change of direction because of the Court’s finding that compelling or very weighty reasons are required to justify measures that indirectly differentiate between immigrants depending on their ethnic origin, even if their aim is to prioritize immigrants who have strong ties to Denmark (GC judgment, paras 129–131).

3 **Indirect Discrimination and the Role of Intent**

The case of *Abdulaziz* was decided in 1985, at a time when the concept of indirect discrimination had not yet entered ECtHR case law. Accordingly, the Court found that the British immigration rules did not differentiate between immigrants on racial or ethnic grounds because they were formulated in a neutral manner, without reference to racial or ethnic origins. The fact that the effect of the rules was to exclude many more coloured than white immigrants was not considered relevant. By contrast, the outcome in the *Biao* case hinged on the

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7 *Abdulaziz*, op. cit., para. 85.
8 See, however, *Hode and Abdi v. the United Kingdom*, ECtHR 6 November 2012, Application No. 22341/09.
9 *Abdulaziz*, op. cit., para. 85.
Grand Chamber applying an indirect discrimination analysis. Thus the Danish rules, which formally distinguished only between applicants who had or did not have Danish citizenship for 28 years, were found to indirectly disadvantage applicants of non-Danish ethnic origin. This created a presumption of indirect ethnic discrimination, for which the Danish government could not provide a sufficient justification.

The concept of indirect discrimination was first openly embraced by the ECtHR in the case of *D.H. et al. v. the Czech Republic*, concerning segregation of Roma pupils in Czech schools.\(^1\) In that case the ECtHR stated that ‘a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group’.\(^1\) Since then the concept has mostly been applied in Roma segregation cases, but more recently it has also been used by the Court in other contexts.\(^1\) This increased use of indirect discrimination analysis fits with a trend in the Court’s case law towards a more substantive understanding of equality, which seeks to improve the position of vulnerable or marginalized groups.\(^1\) Accordingly, the key to establishing a *prima facie* case of indirect discrimination is to demonstrate that members of such a group have been disadvantaged by the disputed measure. There is no need to demonstrate discriminatory intent.\(^1\)

The ECtHR has previously established that indirect differential treatment can be proven by means of statistical evidence, but other forms of evidence have not been ruled out.\(^1\) In *Biao* the Grand Chamber had asked the Danish government to provide statistical information to show how many persons had benefited from the 28-years rule and how many of those were Danish nationals of Danish ethnic origin (GC judgment, para. 108). However the Danish government indicated that it could not provide such information because ethnic registration was not permitted under Danish law (GC judgment, para. 44). Thus,

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\(^1\) *D.H. et al. v. the Czech Republic*, ECtHR (GC) 13 November 2007, Application No. 57325/00.
\(^1\) *D.H. et al. v. the Czech Republic*, op.cit., para. 175.
\(^1\) *Eg S.A.S. v. France*, ECtHR (GC) 1 July 2014, Application No. 43835/11; *Di Trizio v. Switzerland*, ECHR 2 February 2016, Application No. 7186/09.
\(^1\) *D.H. et al. v. the Czech Republic*, op. cit., para. 184.
the actual effect of the 28-years rule on persons of Danish and non-Danish ethnic origin could not be established. The Grand Chamber was nevertheless satisfied that the rule entailed a difference in treatment between ethnic groups. It reasoned that Danish nationals by birth, expatriates as well as residents of Denmark, would be able to profit from the 28-years rule from the age of 28. By contrast, persons who acquired Danish nationality later in life would profit from the 28-years rule only 28 years after becoming Danish citizens, which would often be at a much later age. Even though, as the Danish government argued, such persons would not have to wait 28 years after their naturalization to fulfill the attachment requirement, which would also make them eligible for family reunification, they were still at a disadvantage compared to Danish born citizens whose exemption from the attachment requirement was automatic upon reaching the age of 28 and did not depend upon any residence criteria. 

Lastly the Grand Chamber considered that the majority of Danish nationals by birth would be of Danish ethnic origin, whereas persons who acquired Danish nationality later in life would generally be of other ethnic origin. Hence, Danish nationals of non-Danish ethnic origin were more likely to be disadvantaged by the 28-years rule than Danish nationals of Danish ethnic origin.

The conclusion that the Danish immigration rules were indirectly discriminatory towards non-ethnic Danes was supported by a majority of twelve of the Grand Chamber's seventeen judges. However, the qualification as direct or indirect differential treatment and the identification of the discrimination ground led to disagreement amongst judges in various stages of the proceedings. A majority of both the ECtHR Chamber and the Danish Supreme Court focused their assessment of the case on the difference in treatment between applicants who had been Danish citizens for at least 28 years and those who had not, thus finding that the criterion of distinction was duration of citizenship and not ethnic origin. This view was repeated in a dissenting opinion by four judges of the Grand Chamber (Jäderblom, Villiger, Mahoney and Kjølbro).

On the other side of the spectrum, a minority of the Chamber and again of the Danish Supreme Court were of the opinion that the Danish government had deliberately restricted family reunification by persons of non-Danish ethnic origin. This position was also forcefully argued by Judge Pinto de Albuquerque in a concurring opinion to the Grand Chamber judgment. Its supporters emphasize the relevance of the preparatory work relating to the Danish rules, which shows that the extension of the attachment requirement to Danish nationals was motivated by concerns that family reunification by ‘resident aliens and Danish nationals of foreign extraction’ would lead to integration problems. In Pinto de Albuquerque’s words, the extension of the attachment requirement and the subsequent exception for Danish expatriates were
grounded in stereotypes of ‘resident foreigners and Danish nationals of foreign origin [as] helpless, young people, who are either forced to marry persons from their country of origin or tend to engage in an odd, “widespread” marriage pattern of a kind of cultural in-breeding, and later on build “unhappy” families, have “marital problems” and do not integrate well in society’ against ‘an idealised image of ever-faithful Danes, born in Denmark, who live outside the country’ (concurring opinion, para. 18). The majority of the Grand Chamber did not, however, consider the legislative history as evidence of intentional or direct ethnic discrimination. It was also careful not to take a stance on whether the aim of the Danish legislation was merely to distinguish a group of applicants with strong ties to Denmark, or also to exclude applicants of foreign origin for reasons of not having such strong ties (GC judgment, para. 121).

4 Nationality or Ethnicity? Overlapping Concepts

A crucial step in the Grand Chamber’s reasoning is the assumption that the difference in treatment between Danish nationals by birth and Danish nationals by naturalisation results in a difference in treatment between Danes of ‘Danish ethnic origin’ and Danes of ‘foreign ethnic origin’ (GC judgment, para. 112). Following the Court’s earlier case law, differences in treatment based on ethnic origin are subject to a particularly strict justification test.16 The Grand Chamber’s decision to qualify a distinction based on national origin (Danish or non-Danish) as an ethnic classification therefore has the potential to considerably widen the protection offered under the ECHR against discrimination of migrants and foreigners. Critics have previously accused the Court of not being active enough in this field.17 This notwithstanding, the Grand Chamber’s approach of directly linking national and ethnic origin comes with a number of pitfalls.

First, the Grand Chamber’s way of referring to ‘Danish nationals of Danish ethnic origin’ and ‘Danish nationals of foreign ethnic origin’ makes it seem as if these are objectively identifiable categories. Ethnicity is, however, like race, a complex concept. Ethnic and racial discrimination are generally based on the assumption that people possess an immutable ethnic or racial identity,

16 For example, Timishev v. Russia, ECtHR 13 December 2005, Application Nos 55762/00 and 55974/00, para. 58 and D.H. et al. v. the Czech Republic, op.cit., para. 176.
which is expressed through specific features (such as facial traits, clothing or adherence to cultural traditions) and affects personal qualities such as their level of emancipation, loyalties or capacity to integrate. By contrast, social scientists have shown racial and ethnic identities to be social constructions of a dynamic and contextually determined nature. The concepts of ‘race’ and ‘ethnicity’ should therefore be employed in such a way, in non-discrimination law, so as to refer to those constructions and not only to the physical or cultural characteristics that are construed as markers of racial or ethnic identities. This appears to have been recognised by the Court, to a certain extent, in the Timishev judgment. However the Grand Chamber, in the Biao case seems to equate the applicants’ ‘non-Danish ethnic origin’ with the fact that they have not been born Danish, or at least to automatically derive the former from the latter. This creates the impression that the Court itself uses a static concept of ethnicity that fails to capture the processes through which a person’s foreign ethnic origin is made into a ground for social and legal exclusion.

Second, the Grand Chamber’s approach of equating national and ethnic origin raises questions as to the level of scrutiny to be applied in case of differential treatment on the grounds of nationality, including distinctions between citizens and aliens. After all, as a personal characteristic national origin is closely related to nationality so that distinctions between persons of different nationalities will almost always indirectly differentiate between persons of different national origins. The Grand Chamber’s reasoning seems to suggest that such distinctions must henceforth be qualified as indirect differential treatment on grounds of ethnic origin, which merits strict scrutiny. This is reinforced by the majority’s referring to earlier cases in which nationality was identified as a suspect discrimination ground (GC judgment, paras 93–94). However, nationality-based differences in treatment are sometimes regarded as objectively justified. For example, it is generally accepted that the right to vote and free access to the territory are restricted to a state’s own nationals. The exclusion of irregular or temporary migrants from certain welfare benefits is another example of a distinction that is likely to predominantly affect persons of foreign origin, but that has nevertheless been allowed by the Court in

20 Timishev v. Russia, op.cit., para. 55.
21 See also the joint dissenting opinion of judges Jäderblom, Villiger, Mahoney and Kjølbro, para. 14.
recent case law. Hence, it is unlikely that the Court would want to apply a ‘compelling or very weighty reasons’ test whenever nationality is the discrimination ground. In fact, the justification test in the case of Biao confirms that the Grand Chamber is not so much concerned with nationality discrimination generally but rather with differential treatment between nationals of the same State Party, depending on whether or not they are nationals by birth. The justification test is discussed below.

The Justification Test: Protection of Foreign Born Citizens

After establishing a presumption of indirect ethnic discrimination, the Grand Chamber had to decide whether the difference in treatment could be justified by the Danish government’s stated objective of prioritising applications for family reunification by Danish nationals with strong and lasting ties to Denmark, which in turn would help to improve integration. The government’s defence of the 28-years rule was rebuffed by the Grand Chamber on three grounds. First, the Grand Chamber found that the government’s justification of the 28-years rule was based on ‘rather speculative arguments’ concerning the relationship between the duration of citizenship, the development of ties with Denmark and chances for successful integration. Moreover, the 28-years rule did not allow taking into account factors other than time that could also be relevant to determining existing ties, such as long-term residence of proficiency in Danish. The Grand Chamber noted that although the applicant had been a Danish national for only two years when family reunification was refused, he had multiple attachments to Denmark, including a son who was a Danish national. In the applicant’s case, therefore, the requirement of 28 years Danish citizenship was disproportionate (GC judgment, para. 125). It appears from this reasoning that the Court accepts the States Parties’ giving preferential treatment, in the field of family reunification, to persons with strong ties to the host state. However, the 28-years rule is considered too strict and one-dimensional to form an appropriate indicator of such ties.

The Grand Chamber’s second argument refers to the legislative history of the Danish immigration rules. As explained earlier (see Section 3), the Grand Chamber did not rely on this history to establish an intent to discriminate. Under the justification test, however, the government’s arguments for extending the attachment requirement to Danish nationals are taken by the Court to ‘reflect negatively on the lifestyle of Danish national of non-Danish ethnic

22 For example, Dhahbi v. Italy, ECtHR 8 April 2014, Application No. 17120/09, para. 52.
Referring to its earlier judgment in the case of Konstantin Markin, which concerned the use of gender stereotypes, the Grand Chamber repeats that ‘general biased assumptions or prevailing social prejudice in a particular country do not provide sufficient justification for a difference in treatment’. This applies to discrimination against naturalised nationals as well as in the field of gender discrimination (GC judgment, para. 126).

Thirdly and lastly, the Grand Chamber argued that the grant of special treatment by a State Party to its born nationals, as opposed to naturalised persons, was hard to reconcile with existing legal standards and developments within the Council of Europe’s legal order (GC judgment, paras 131–137). Among these standards, the Grand Chamber mentioned state practice in the States Parties to the Convention, as well as the Explanatory Report to the European Convention on Nationality and reports by the Council of Europe’s Commission against Racism and Intolerance (ECRI) and the UN Committee on the Elimination of Racial Discrimination (CEDR).

It follows that the Grand Chamber’s broad gesture in the first part of the judgment, where discrimination of foreign nationals is put on a par with ethnic discrimination, is not consolidated through the justification test. The above arguments make it clear that the scope of the Biao judgment is restricted to situations of differential treatment between a state’s own nationals, whereby naturalised persons are put at a disadvantage compared to nationals from birth. In its final considerations, the Grand Chamber states that the preferential treatment of EU citizens compared to third-country nationals concerns ‘preferential treatment on the basis of nationality; not favourable treatment of “nationals by birth” as compared to “nationals by acquisition later in life” or indirect discrimination between the country’s own nationals based on ethnic origin’ (GC judgment, para. 134). This remark confirms that the Biao judgment is not to be understood as prohibiting all differences in treatment of foreign nationals.

6 A Different Approach?

The Grand Chamber’s ruling in the case of Biao represents an important step forward from the Abdulaziz judgment. It offers protection to migrants who, despite having obtained the nationality of the host state, are not treated equally to born citizens. This confirms the importance of nationality as a criterion for citizenship (understood as membership in a political community) and the ideal of equal treatment associated with it. At the same time, it
is disappointing that the Court has not been more critical of the Danish government’s reliance on negative stereotypes concerning family reunification by foreign born residents.

It is true that the government’s use of stereotypes to defend the extension of the attachment requirement was criticised by the majority of the Grand Chamber in the justification test, but this criticism has not been decisive for the Court’s finding that Article 14 ECHR had been violated. The Grand Chamber established a presumption of discrimination on the grounds that the criterion of 28 years nationality indirectly and unintentionally disadvantaged persons of foreign ethnic origin, without relying on the legislative history. This difference in treatment was then found to be unjustified because it concerned a distinction between persons of the same nationality. This argumentation fails to emphasise the most problematic element of the case, which is that foreign born persons as a group—including both Danish nationals and resident foreigners—were disqualified by the Danish government on the basis of prejudiced assumptions linking their foreign origin to expectations about their integration and their capacity for successful participation in Danish society.

An alternative approach would have been to base a presumption of ethnic discrimination on the fact that the disputed legislation (the attachment requirement and the 28-years rule) was based on stereotypes relating to foreign origin. Such a presumption could still justify strict scrutiny (or even the absence of a justification test on the grounds that intentional ethnic discrimination cannot be justified).23 However the finding of ethnic discrimination would be based on the use of stereotypes instead of on the applicants’ foreign origin, thus showing ethnicity to be a socially constructed category. An additional advantage of the proposed approach is that it would enable the Court to explain why distinctions based on nationality do not always result in indirect differential treatment of ethnic groups: this is so only when the criterion of nationality overlaps with social classifications dividing people along ethnic lines. In the case of Biao such overlap existed because the legislator itself had construed foreign born residents as a separate group, incapable of successful integration. In other situations however, for example where more favourable immigration rules are applied to EU citizens as compared to third-country nationals, the existence of such ethnic classifications is not immediately obvious.

It is clear from the judgment and the separate opinions that the meaning to be attached to the preparatory works, and the stereotypes expressed therein, was a bone of contention for the judges. On a general level, a drawback of making the use of stereotypes central to discrimination analysis could be that such stereotypes are rarely made explicit. Moreover, the effect of such analysis could be limited to making legislators more cautious about openly applying stereotypes. These are, of course, valid concerns. Still, where explicit stereotyping occurs it remains important for the ECtHR, as a human rights court, to condemn such practice and to make it clear that personal characteristics such as sex, colour and national origin should be irrelevant to the enjoyment of the rights and freedoms secured by the Convention.

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