CASE NOTE

CITIZENSHIP REVOCATION AND THE QUESTION OF PROPORTIONATE CONSEQUENCES: LATEST JUDGMENT FROM THE DANISH SUPREME COURT SHEDS NEW LIGHT ON THE LIMITS OF ARTICLE 8 OF *THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

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I INTRODUCTION

On 22 March 2023, the Supreme Court of Denmark ('Supreme Court') delivered a landmark ruling as it overturned an administrative decision to revoke the citizenship of a Danish-Iranian woman who joined the Islamic State ('ISIS') in 2015.[1] The Court found that the decision to revoke citizenship inflicted 'disproportionate consequences' on the applicant due to the woman's lack of ties to Iran, her other country of citizenship.

The judgment, which comes just five months after the Supreme Court reached the opposite conclusion in a similar case,[2] is pivotal in a national as well as European context, as it underlines that without, or with only very limited ties to, another country, citizenship revocation confers disproportionate consequences to a person's private and family life — even in cases concerning serious offences such as joining a terrorist organisation.

In recent years the Danish courts have been presented with a series of cases concerning citizenship revocation in which the courts have repeatedly found that revocation of citizenship did not cause disproportionate consequences to applicants' private and family life.[3] On appeal to the European Court of Human Rights ('ECtHR' or 'Strasbourg Court') the Danish courts have so far also enjoyed

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1 Supreme Court of Denmark, BS-23360/2022-HJR, 22 March 2023 ('Case BS-23360/2022-HJR').

2 Supreme Court of Denmark, BS-16807/2022-HJR, 5 October 2022 ('Case BS-16807/2022-HJR').

3 Including but not limited to the following judgments: Supreme Court of Denmark, 211/2015, 8 June 2016; Case BS-16807/2022-HJR (n 2); Supreme Court of Denmark, 124/2018, 19 November 2018.

the support of the ECtHR, which has consistently found domestic assessments 'adequate and sufficient'.[4]

The ECtHR has, however, on several occasions also emphasised — and indeed demonstrated in the case of *Usmanov v Russia*[5] — that citizenship revocation can be in breach of art 8 of the *European Convention on Human Rights* ('ECHR') if the decision is either *arbitrary* or if it inflicts *disproportionate consequences* on the private or family life of the applicant.[6] Yet, in cases concerning terrorist offences it has long been unclear whether the consequences of revoking citizenship can ever be of such severity that they would be considered disproportionate within the meaning of art 8 ECHR.[7] The minimum requirements for sufficient ties to another country have been particularly unclear. Under which conditions would the Strasbourg Court ever consider a citizenship revocation disproportionate based on lack of ties to another country alone? Amplified by the Strasbourg Court's tendency to grant states a very wide margin of appreciation in cases concerning citizenship revocation in which the Court often emphasises 'the serious threat that terrorist acts themselves pose to human rights',[8] this uncertainty has left national courts with limited guidance and plenty of leeway on the matter.

The Supreme Court's latest judgement sheds new and important light on this particular question. Overturning the administrative revocation decision, the ruling affirms that 'proportionality' is indeed an independent criterion for a lawful revocation of citizenship and, as such, requires *some* degree of social or cultural ties to another country beyond merely being a citizen of another state or having visited the country a few times as a child.

A *Background Context: The Separation of Denationalisation and Repatriation Issues*

As in several neighbouring countries, the Danish courts have, in recent years, dealt with a series of questions pertaining to the women and children stuck in the Al-Roj and Al-Hol camps in Northern Syria. These cases have primarily been

4 *Johansen v Denmark* (European Court of Human Rights, ECLI:CE:ECHR:2022:0201:DEC002780119, 3 March 2022) 17 [71] ('*Johansen*'); *Laraba v Denmark* (European Court of Human Rights, ECLI:CE:ECHR:2022:0322DEC002678119, 22 March 2022) 5 [27] ('*Laraba*'); *Mubarak v Denmark* (European Court of Human Rights, ECLI:CE:ECHR:2019:0122DEC007441116, 22 January 2019) 20 [71] ('*Mubarak*'). See also Christian Prener, *Denationalisation and its Discontents* (Brill 2022) ('*Denationalisation and its Discontents*').

5 *Usmanov v Russia* (European Court of Human Rights, ECLI:CE:ECHR:2020:1222JUD004393618, 22 December 2020).

6 First established in *Ramadan v Malta* (European Court of Human Rights, ECLI:CE:ECHR:2016:0621JUD007613612, 21 June 2016), later confirmed in inter alia: *Ghoumid and others v France* (European Court of Human Rights, ECLI:CE:ECHR:2020:0625JUD005227316, 25 June 2020); *K2 v the United Kingdom* (European Court of Human Rights, ECLI:CE:ECHR:2017:0207DEC004238713, 7 February 2017); *Johansen* (n 4); *Laraba* (n 4); *Mubarak* (n 4). See also Prener, *Denationalisation and its Discontents* (n 4) 107ff.

7 Christian Prener, 'The ECHR on Citizenship Revocation: Solving or Compounding the Confusion?', *EUI Global Citizenship Observatory* (Blog Post, 28 March 2022) <https://globalcit.eu/the-ecthr-on-citizenship-revocation-solving-or-compounding-the-confusion>, archived at <https://perma.cc/U8XX-N8VQ>; Jules Lepoutre, 'Ghoumid and others v France: The Grey Hole of Nationality Revocation', *EUI Global Citizenship Observatory* (Blog Post, 5 August 2020) <https://globalcit.eu/ghoumid-and-others-v-france-the-grey-hole-of-nationality-revocation>, archived at <https://perma.cc/6SNK-G75L>.

8 See, eg, *Laraba* (n 4) 26.

concerned with the legitimacy of ministerial decisions to revoke the citizenship of those who had joined ISIS, but also with whether the Danish Government was under any obligation — due to either administrative or international law — to repatriate the Danish children and their mothers from the Syrian camps.[9] While unrelated from a legal point of view, the two matters — potential repatriation of the women and their children, and the legitimacy of revoking citizenship of the women — have, due to political decisions, been tied together in Denmark. In response to intense political pressure in the spring of 2021, the former Danish Government agreed to repatriate the children held in Kurdish custody in Northern Syria, including their mothers, but only in cases where their mothers held Danish citizenship.[10] In effect, the women who had already had their Danish citizenship revoked by the Danish Ministry of Immigration and Integration were not offered repatriation alongside their children and thus remain in the camps with their children.[11] While the appellant in the present case was among the women caught in this particular predicament, this was not a component in the case, which solely revolved around the legal issue of whether the administrative decision to revoke citizenship on 17 June 2020 had been based on an adequate assessment of the relevant criteria prescribed by s 8B of the *Act on Danish Nationality*.[12]

II FACTS OF THE CASE AND FINDINGS OF THE SUPREME COURT

The case concerned a Danish-Iranian woman who in 2015, at age 20, travelled to the Al-Raqqa province in Syria through Turkey to join ISIS. Shortly after arriving in Syria, she married an ISIS fighter with whom she had three children.[13]

Born and raised in Denmark and with a typical Danish upbringing, the appellant had very strong ties to Denmark. Her parents and sister, with whom she had kept in contact since leaving Denmark in 2015, continued to live in Denmark. She spoke Danish and had a standard Danish education prior to becoming radicalised. The appellant also held an Iranian citizenship but had very limited ties to Iran. Apart from having visited her mother's family in Iran twice as a child, she had not otherwise been in Iran, she had no contact with her mother's sisters and her grandparents were no longer alive. The appellant spoke neither Farsi nor the Azerbaijani language spoken in the part of the country where her grandparents had lived. She spoke only Danish with her parents and sister in Denmark. The appellant also did not have any ties to Syria. Prior to her detention in the Al-Hol and Al-Roj camps she had exclusively lived in the Al-Raqqa province, which at the time was under the control of ISIS.

On 17 June 2020, the Danish Ministry for Immigration and Integration revoked the appellant's citizenship on the grounds that firstly, she had joined ISIS of her own free will and thus acted in a manner seriously prejudicial to vital interests of

9 'UN Report on Syria Conflict Highlights Inhumane Detention of Women and Children', *United Nations News* (online, 11 September 2019) <https://news.un.org/en/story/2019/09/1046102>, archived at <https://perma.cc/F3CT-8MTE>.

10 Repatriate the Children, 'The Five Remaining Danish Children in Captivity', *Repatriate the Children Denmark* (Web Page, 15 October 2021) <https://repatriatethechildren.dk/english/news-events/facts-1>, archived at <https://perma.cc/TH5N-7F35>.

11 See ibid.

12 *Act on Danish Nationality* No 422 of 2004 (Denmark) as amended by Act No 311 of 2004 (Denmark), s 8B.

13 Case BS-23360/2022-HJR (n 1) 5.

the state and secondly, that she held an Iranian citizenship.[14] On appeal, the Eastern High Court ruled in May 2022 that the administrative revocation decision was valid and did not impose disproportionate consequences on the woman's private and family life as the woman had sufficient links to Iran, as well as Syria.[15]

In the proceedings of the Supreme Court, the appellant did not dispute that her actions in the form of joining ISIS were of such a severity that they met the requirements for revocation of citizenship, nor did she dispute the validity of her Iranian citizenship. The appellant's main contestation was that the authorities had not properly considered the consequences that a revocation order would inflict on her due to her lack of ties to Iran and the risk of her of suffering inhumane treatment in Iran. The decision, she argued, inflicted upon her consequences of such severity that, despite the seriousness of her offence, were disproportionate and thus in violation of s 8B of the *Act on Danish Nationality* as well as art 8 ECHR.[16]

The preparatory work to s 8B of the *Act of Danish Nationality* states that:

> [I]n the assessment of whether a person shall be deprived of Danish citizenship, the Courts shall assess the proportionality of, on one side, the severity of the crime and, on the other, the impact that revocation will have on the individual. ... In cases of conviction for severe crimes, Danish citizenship should normally be deprived; the impact that deprivation will have on the person in question can, however, have definitive bearing. In this regard, deprivation should not occur even in cases of very serious crimes if the person in question holds no or a very vague ties to another state. In these cases, Denmark ought to take responsibility for the individual Danish citizen.[17]

Citing the preparatory work, the Supreme Court acknowledged that while the administrative decision to revoke citizenship relied on the seriousness of the appellant's conduct and the fact that she held Iranian citizenship, the authorities had not sufficiently considered the impact that the revocation would inflict on her which, due to her very weak ties to Iran, would amount to disproportionate consequences. Consequently, the Supreme Court overturned the Eastern High Court's ruling and found the administrative decision to revoke citizenship void. As a result, the woman remains a Danish citizen.[18]

The Supreme Court also dismissed the position taken by the Eastern High Court in two rulings,[19] namely that individuals currently detained by Kurdish authorities in camps on Syrian territory have somehow established 'sufficient ties' to the State of Syria within the meaning of art 8 ECHR.[20]

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14 See ibid 7.

15 Danish Eastern High Court, BS-14103/2020-OLR, 11 April 2022 ('Case BS-14103/2020-OLR').

16 Case BS-23360/2022-HJR (n 1) 1–3.

17 Preparatory work to s 8B of the *Act of Danish Nationality* ("Folketingstidende" 2003-04, tillæg A, sp. 4895 ff), (translated from Danish to English by the author).

18 Case BS-23360/2022-HJR (n 1) 8.

19 Case BS-14103/2020-OLR (n 15); Danish Eastern High Court, BS-36662/2020-OLR, 24 May 2022.

20 Case BS-23360/2022-HJR (n 1) 8.

III CONCLUSIONS: TIES TO ANOTHER COUNTRY IS A REQUIREMENT REVOCATION OF CITIZENSHIP

The Supreme Court's judgement is historically significant for several reasons. It marks the first time that a Danish court has overturned an administrative decision to revoke citizenship, and affirms that even in serious cases concerning terrorist offences, citizenship cannot be revoked without the applicant having sufficient ties to another country.[21] While the Danish-Iranian woman was indeed an Iranian citizen and had committed acts considered prejudicial to the vital interests of the Danish State, her ties to Iran were so weak that the loss of Danish citizenship caused disproportionate consequences to her private and family life, according to the Supreme Court.

After years of uncertainty on the issue, the judgment provides an important precedent for future national decisions as it highlights that while the threshold for sufficient ties may be low, *some* level of social or cultural attachment is a requirement for any lawful revocation of citizenship.

Internationally, the Supreme Court's judgment plays into the increasing body of ECtHR case law pertaining to citizenship revocation and its interference with art 8 of the ECHR. In March 2022 in *Johansen v Denmark*, the Strasbourg Court backed the Danish Supreme Court as it dismissed as inadmissible Adam Johansen's claim that his loss of citizenship imposed disproportionate consequences upon him within the meaning of art 8 ECHR due to his weak ties to Tunisia.[22] The Strasbourg Court agreed with the Supreme Court's finding that Johansen's familiarity with Tunisian culture and lifestyle were not insignificant.[23] Johansen spoke and read Arabic, had vacationed in Tunisia several times as a child and had on one occasion lived in Tunisia for a six month period. His father, with whom he had some contact, also lived in Tunisia. Similarly, in *Laraba v Denmark* the ECtHR also found that the administrative revocation of citizenship did not cause disproportionate consequences, emphasising that the applicant spoke some Arabic and had been admitted to the University of Medina to study Sharia in Arabic.[24]

What sets the present case apart from previous cases is the fact that the Danish-Iranian woman did not speak Farsi or any other language of Iran, had only visited the country twice as a child and that neither she nor her parents had any contact with family members in Iran. In the Supreme Court's ruling from October 2022 concerning a similar case with a Danish-Moroccan woman, also detained in the Al-Roj camp, the Court emphasised that while the woman had only limited ties to Morocco, she had spent the first four years of her life in Morocco, both her parents came from Morocco and she had some basic knowledge of Moroccan culture, lifestyle and language.[25]

Based on these factual differences, the Supreme Court's latest decision is not suggestive of the Court taking a 'new stance' on the issue of sufficient ties per se.

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21 Prior to the 2019 introduction of administrative citizenship revocation, the Eastern High Court overturned a judicial decision in 2009 from a city court to revoke citizenship on grounds that the appellant's lack of ties to Jordan rendered the decision disproportionate. See Eastern High Court, S-3007-08 (TfK2009.637/1) 14 May 2009.

22 *Johansen* (n 4).

23 See ibid 71.

24 *Laraba* (n 4) 23.

25 Supreme Court of Denmark, BS-16807/2022-HJR, 5 October 2022, 38.

Rather, the case affirms that in order for a citizenship revocation to be proportionate, the person must have ties to another country and be able to communicate there to some degree.

More broadly, the judgment illustrates how minor factual differences can produce profoundly different outcomes for the persons involved. Shortly after the judgment, the Danish Ministry of Justice confirmed that the previous Government's offer to repatriate Danish children with their Danish mothers was still in effect.[26] As a result, the woman is likely to return to Denmark with her children. While she will presumably be criminally charged for traveling to Syria to support a terrorist organisation, her future is now guided by fundamental rights, the rule of law and the procedural safeguards of the Danish jurisdiction.

In contrast, the woman who lost her case in October 2022 will remain in the Al-Roj camp with her children with her application to the ECtHR pending. Bearing in mind the ECtHR's case law on the matter, it certainly seems most likely that the Strasbourg Court will once again find the Danish Supreme Court's assessment adequate. In any event, this case provides yet another opportunity for the Strasbourg Court to contour with greater accuracy the relevant limits of art 8 ECHR on the issue of citizenship revocation.

26 Kristian Klarskov and Johan Blem Larsen, 'Efter højesteretsdom: Regeringen tilbyder evakuering af IS-kvinde og hendes børn' [After the Supreme Court verdict: The government offers the evacuation of the IS woman and her children], *Politiken Denmark* (online, 22 March 2023) <https://politiken.dk/indland/art9274285/Regeringen-tilbyder-evakuering-af-IS-kvinde-og-hendes-børn>.