**Biao v. Denmark: Discrimination among nationals**

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On 24 May 2016, the Grand Chamber of the European Court of Human Rights (ECtHR) issued the Biao judgment about discrimination among nationals in family reunion matters. The court ruled (with 12 votes against 5) that there had been a violation of the European Convention on Human Rights (ECHR) article 14 read in conjunction with article 8. The violation was caused by the Aliens Act’s exemption (the so-called 28 years rule) to the attachment requirement (that the couple’s aggregate ties with Denmark must be stronger than their aggregate ties with another country), which had the indirect discriminatory effect of favouring Danish nationals of Danish ethnic origin and a disproportionally prejudicial effect on persons who acquired Danish nationality later in life and who were of another ethnic origin than Danish. This short note takes a closer look at the judgment and its legal basis, especially the European Convention on Nationality (ECN). Arguably, with Biao the ECtHR has set an important precedent within the field of discrimination between a state’s own nationals based on ethnic or national origin by taking into consideration the ECN article 5 § 2, on non-discrimination among nationals.

**The Grand Chambers’ judgment**

**General principles**

In Biao, the Grand Chamber started by explaining the general principles that the Court applies in its assessment of cases on discrimination. Only differences in treatment based on identifiable characteristics, or ‘status’ are capable of amounting to discrimination within the meaning of ECHR article 14. There must be a difference in treatment of persons in analogous, or relevantly similar, situations. In addition, such 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 achieved. As to the burden of proof, once the applicant has demonstrated a difference in treatment, it is for the Government to show that the difference in treatment is justified. In this regard, the contracting states enjoy a certain margin of appreciation.
The scope of the margin of appreciation

The scope of the margin of appreciation varies according to the circumstances, the subject matter and its background. According to ECHR article 14 discrimination on any ground within the ambit of the substantive convention rights are prohibited. The grounds of discrimination listed in article 14 are not exhaustive. Discrimination grounds not explicitly mentioned in article 14 may be considered as discrimination based on ‘other status’. Some grounds of discrimination, like ethnic origin and gender, are seen as ‘suspect’. Thus, they have a higher level of protection and trigger a heightened scrutiny and a strict assessment of the justification. In Biao, the Grand Chamber made it clear that very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the ECHR. Moreover, no difference in treatment based exclusively or to a decisive extent on a person’s ethnic origin is capable of being justified in a contemporary democratic society (Biao pr. 93 and 94).

The crux of the case

The 28-year rule treated Danish nationals differently, but on which ground? This was the decisive question in Biao.

The Danish government acknowledged that the 28-year rule, which exempted Danish nationals who had held Danish nationality/citizenship for at least 28 years, from the restrictive attachment requirement, treated Danish nationals differently depending on how long they had been Danish nationals.

Accordingly, the Grand Chamber drew the conclusion that the crux of the case was whether the 28-year rule ‘also created a difference in treatment between Danish-born nationals and those who acquired Danish nationality later in life, amounting to indirect discrimination on the basis of race or ethnic origin’.

The Grand Chamber was not ready to accept the Government’s claim that the difference in treatment was linked solely to ‘the length of nationality’ – which counts as ‘other status’ for the purpose of ECHR article 14 and offers the Government a wide margin of appreciation and a limited burden of proof to show the reasonableness of the difference of treatment. The Grand Chamber found it pertinent to examine whether the 28-year rule had in practice a disproportionate prejudicial effect on persons who were of an ethnic origin other than Danish.

Since no statistics were available, the Grand Chamber examined the possible effect of the 28-year rule on different groups of beneficiaries. On this basis, the Grand Chamber considered that it could reasonably be assumed that the vast majority of those who could benefit from the 28-year rule would usually be of Danish ethnic origin, whereas persons acquiring Danish nationality later in life, like Mr. Biao, and who would not benefit from the rule, would usually be of foreign ethnic origin. Consequently, the burden of proof shifted to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin. As difference of treatment based on ethnic origin could not be justified, and as difference in treatment based exclusively on nationality was only allowed on the basis of
compelling or very weighty reasons unrelated to ethnic origin, it fell to the Government to put forward such strong reasons (*Biao* § 114).

Having regard to the very narrow margin of appreciation in the present case, the Grand Chamber found that the Government had failed to show compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. The Grand Chamber rejected the justifications advanced by the Government with reference to the preparatory work to the 28-year rule and the attachment requirement as, to a large extent, based on speculative arguments.

**Sources of law**

Having pointed out that the discrimination at issue was *not* based on the ‘length of nationality’, but rather based on acquisition of nationality (from birth or later in life); the Grand Chamber took a broader look at other sources of law than the ECHR. First, it made some fundamental starting points clear. In the field of indirect discrimination between a state’s own nationals based on ethnic origin, it is very difficult to reconcile the grant of special treatment with current international standards and developments and, moreover, the court must take into regard the changing conditions within contracting states and respond, for example, to any evolving convergence as to standards to be achieved.

In this regard, the Grand Chamber noted that the applicants had relied on the ECN article 5 § 2, and that 20 member states of the Council of Europe, including Denmark, had ratified the convention. It quoted from the Explanatory Report to the ECN stating that article 5 § 2, although not being a mandatory rule to be followed in all cases, was a declaration of intent, aimed at eliminating the discriminatory application of rules in matters of nationality between nationals from birth and other nationals, including naturalised persons. This was found to suggest a certain trend towards a European standard, which had to be seen as a relevant consideration in the present case. In addition, the Grand Chamber noted that among 29 countries studied, no other state distinguished, like Denmark, between different groups of its own nationals when it came to the determination of the conditions for granting family reunification.

**Comments to the judgment**

The Biao judgment may count as a landmark judgment as it attaches importance to ECN article 5 § 2 when interpreting ECHR article 14. The 28-year rule resulted in a difference in treatment between nationals from birth and other nationals and thus, such discrimination that is meant to be eliminated by article 5 § 2 of the ECN. This was, according to the judgment ‘discrimination based exclusively on nationality’ and indirect discrimination between a country’s own nationals based on ethnic origin.

It may be useful to compare the Grand Chamber’s (the majority’s) observations to the reflections of the minority in the earlier Chamber judgment of 25 May 2014 in *Biao v. Denmark* (§§ 13 and 14). Then, the Chamber minority of three judges disagreed with the Chamber majority of four judges who – in line with the Danish Government and the majority of the Danish Supreme Court –
considered the ground for discrimination to be ‘the length of citizenship’ (nationality) and thus, for the purpose of ECHR article 14, “other status” providing the Government with a wide margin of appreciation. The Chamber minority found instead that the difference in treatment was based ‘exclusively on the citizen’s ‘national origin’ to which the “ethnic criterion” in the non-racist sense applies. The Chamber minority added that ‘The Gaygusuz standard … [Gaygusuz v. Austria, 16 September 1996, § 42] which is also applicable to the national origin criterion, in view moreover of the European Convention on Nationality … does not allow for different treatment of nationals as to citizenship. That convention cannot be disregarded in the interpretation of ECHR article 14 in this case …’.

To sum up, the Grand Chamber majority found indirect discrimination between Danish nationals based on ethnic origin. Arguably, the discrimination could also, as advanced by the Chamber minority, be characterised as direct discrimination between Danish nationals based on national origin in the sense of ‘descent from nationals versus non-nationals’.

In any case, with Biao the ECtHR has expanded its case law on discrimination based on nationality. Before Biao, the Court dealt with cases on discrimination between a country’s nationals and foreigners, and cases on discrimination between nationals from different countries (often EU/EEC nationals versus groups of third country nationals). To these, Biao adds a third category of ‘nationality discrimination’, namely discrimination between a country’s own nationals based on acquisition of nationality (from birth versus later in life). Therefore, and particularly due to the emphasis of the significance of ECN article 5 § 2 for the interpretation of ECHR article 14, there is every good reason to believe that Biao will provide an important precedent.

**References:**

Grand Chamber judgment in Biao [http://hudoc.echr.coe.int/eng?i=001-163115](http://hudoc.echr.coe.int/eng?i=001-163115)

Chamber judgment in Biao [http://hudoc.echr.coe.int/eng?i=001-141941](http://hudoc.echr.coe.int/eng?i=001-141941)