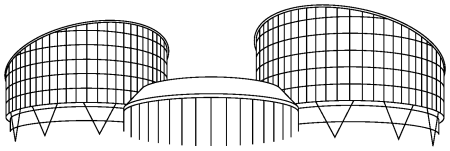

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

DECISION

Application no. 64372/11
Khalil NAZARI
against Denmark

The European Court of Human Rights (Second Section), sitting on 6 September 2016 as a Chamber composed of:

Işıl Karakaş, *President*,
Nebojša Vučinić,
Paul Lemmens,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to the above application lodged on 14 October 2011,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Khalil Nazari, is an Afghan national who was born in 1986 and lives in Copenhagen. He is represented before the Court by Mr Niels-Erik Hansen, from the "Documentation and Advisory Centre on Racial Discrimination" (DACoRD), an NGO in Copenhagen,

2. The Danish Government ("the Government") were represented by their Agent, Mr Tobias Elling Rehfeld, from the Ministry of Foreign Affairs, and their Co-agent, Mrs Nina Holst-Christensen, from the Ministry of Justice.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

4. The applicant was born in Afghanistan. In 2001, when he was 15 years old, he was granted asylum in Denmark as an unaccompanied minor. In that connection he was provided with a travel document in accordance with Article 28 of the 1951 UN Convention Relating to the Status of Refugees.

5. He acquired proficiency in the Danish language and eventually graduated from High School. Currently he is studying at university to become a civil engineer.

6. The applicant maintained that on leaving Afghanistan, he lost contact with his family. Ten years later, in 2011, he regained contact with his parents and siblings, who had been granted residence permits in Canada.

7. In the meantime, on 12 January 2007, the applicant applied for naturalisation. His request was refused on 27 May 2008 because he did not fulfil all the criteria for being granted Danish nationality.

8. Based on a renewed application, on 6 October 2010 the then Ministry for Refugees, Immigrants and Integration (*Ministeriet for flygtninge, indvandrere og integration*) informed the applicant that his name would be on the next bill of naturalisation, which was expected to be presented in Parliament by the end of April 2011 and to be passed by the Parliament in July 2011. It was stated that, before the passing of the law, the Ministry would reassess whether he still satisfied the criteria for obtaining Danish citizenship (on 3 October 2011 the tasks pertaining to nationality were transferred to the Ministry of Justice. Henceforth, both ministries will be referred to as "the Ministry").

9. On 15 April 2011 the Ministry informed the applicant that he was not eligible to have his name on the said bill and that he could not at that time become a Danish national. His name was therefore not listed on the bill introduced to Parliament on the same day. The applicant was informed that he could not expect to have a re-application examined within the next five years. Referring to the principles set out in section 24, subsection 3, and section 15 of the Public Administration Act (*Forvaltningsloven*), it was stated that no grounds could be given for the decision. No appeal lay against the decision by the Parliamentary Committee on Naturalisation.

10. The applicant noted that section 21 of Circular Letter No. 61 of 22 September 2008 on Naturalisation contained a possibility of excluding an applicant from being listed in a naturalisation bill for a specific period if the National Security Service (*Politiets Efterretningstjeneste, PET)* considered that he or she was a danger to national security. Accordingly, since he was excluded from re-applying for five years, he was convinced that the Minister of Justice had received information from the National Security

Service that the applicant was considered to be a danger to national security, and that therefore a security assessment had been submitted to the Parliamentary Committee on Naturalisation with a recommendation that the applicant be excluded from being listed in a naturalisation bill for five years. In his view, though, there was no reason to consider him a danger to national security.

11. Before the Court, the Government have submitted that they can neither confirm nor deny that the decision to exclude the applicant from being listed in the naturalisation bill was taken on the basis of section 21 of the said Circular Letter.

12. On 31 May 2011 the applicant requested that the National Security Service grant him access to the documents concerning him, which was refused on 1 July 2011 with the information that the National Security Service would neither confirm nor deny whether it had any information about him.

13. The applicant complained about that decision to the Ministry of Justice, which upheld it on 16 February 2012.

14. In the meantime, the applicant's request of 22 August 2011 that the Ministry grant him access to the documents concerning him was granted on 12 December 2011 for the major part. A few documents were withheld with reference to the "excepted information" set out under section 15, subsection 1, of the Public Administration Act (*Forvaltningsloven*), which includes considerations for national security or defence.

15. The applicant did not bring the refusal to grant him Danish nationality, or the refusals to grant him access to information, before the Danish courts.

B. Relevant domestic law and practice

The Danish Constitution (*Grundloven*)

16. Article 44 of the Constitution of 1849 set out that "no alien shall be naturalised except by an Act of Parliament".

17. Article 63, section 1, of the Constitution reads as follows:

> "The courts of justice shall be empowered to decide any question relating to the scope of the executive's authority; though any person wishing to question such authority shall not, by taking the case to the courts of justice, avoid temporary compliance with orders given by the executive authority."

Act on Danish nationality

18. Under section 6 (1) of Act No. 422 of 7 June 2004 on Danish nationality, Danish nationality may be acquired through naturalisation granted by virtue of the Danish Constitution.

19. The procedure for applying for nationality involves an interview with the police, preparation of the bill by a Ministry (currently the Ministry

of Justice), a debate and a decision by the Parliamentary Naturalisation Committee, which is made up of seventeen members of Parliament, and finally the passing of the bill by Parliament.

20. The debates and votes of the Parliamentary Naturalisation Committee are confidential and only Committee members can participate in the meetings. The decision to grant or refuse nationality is discretionary and not subject to any form of judicial review (however, see below).

21. Two bills are usually passed per year, in April and October. The passing of naturalisation bills in Parliament follows the same procedure as other bills, which means three readings of the bill before it is passed by Parliament. The Act is then promulgated in the Danish Law Gazette (*Statstidende*).

22. The initial examination of applications for naturalisation by Act of Parliament is carried out by the Ministry of Justice. When preparing naturalisation bills and assessing whether applicants can be listed in a naturalisation bill, the Ministry is obliged to adhere to the Guidelines on Naturalisation contained in a circular (*Cirkulære om dansk indfødsret ved naturalisation*), in force at the relevant time, as agreed by the majority in Parliament (Circular Letter No. 61 of 22 September 2008 at the relevant time). The guidelines stipulate the requirements that must be satisfied in order for applicants to be listed in a naturalisation bill without prior submission of their application to the Parliamentary Naturalisation Committee. Applicants listed in a naturalisation bill therefore have either satisfied the requirements of the Guidelines or have been exempted from certain requirements following the submission of their application to the Committee. On this basis, the parties in Government who agreed on the Guidelines will vote in favour of the Government's naturalisation bill at the readings of the bill in Parliament. If an applicant fails to meet one or more of the requirements set out in the Guidelines on Naturalisation, the Ministry will refuse the application in accordance with the authorisation given to the Ministry by Parliament. The decisions by the Ministry of Justice to submit or refuse to submit cases to the Parliamentary Naturalisation Committee, as well as the decisions of the Committee, are not made pursuant to a statute, but are classified as preparation of a statute. Hence the procedure cannot be characterised as an administrative process. Nevertheless, in resolution no. 36 of 15 January 1998, Parliament instructed the Ministry of Justice to comply with international conventions, and the rules of the Public Administration Act and other principles of public administration to the extent possible, when preparing naturalisation bills.

Domestic case-law regarding Article 63, section 1, of the Constitution

23. By virtue of Article 63, section 1, of the Constitution, review by the courts of the administration's general and specific decisions is a common legal remedy. The courts cannot review the exercise of administrative

discretion (see, for example, Weekly Law Report (*Ugeskrift for Retsvæsen*) for 1973, p. 897 (U.1973.897H)), but they can conduct a judicial review of the competence of the authority, the observance of formal rules, and the legal basis of an administrative decision, including whether it is in accordance with Denmark's obligations under the Convention.

24. Thus, in various cases the Danish courts have reviewed whether the administrative authorities' decision was in accordance with Article 8 of the Convention, alone or taken in conjunction with Article 14 (see, for example, *Biao v. Denmark* [GC], no. 38590/10, §§ 25-30, 24 May 2016; *Osman v. Denmark*, no. 38058/09, §§ 19-21, 14 June 2011 and *Priya v. Denmark* (dec.), 13594/03, 6 July 2006, referring to the Weekly Law Review 2004, p. 1765, concerning respectively family reunification, the lapse of a residence permit and a deportation order; moreover, although a decision by the Refugee Appeals Board (*Flygtningenævnet*) is final pursuant to section 56, subsection 8, of the Aliens Act (*Udlændingeloven*), an alien may, by virtue of Article 63 of the Danish Constitution, bring the case before the courts for a review of the legality of the administrative decision, including the compliance with the Convention: see, *inter alia*, *Panjeheighalehei v. Denmark* (dec.), 11230/07, 13 October 2009, referring to numerous Supreme Court judgments from 1997 to 2007).

25. On 13 September 2013, the Danish Supreme Court (*Højesteret*) passed a judgment (U.2013.3328H) concerning the right to judicial review under Article 63 of the Constitution relating to the process of granting nationality. The Supreme Court stated, among other things:

> "The Supreme Court agrees with the view that the Minister's decisions to refrain from listing an applicant in a naturalisation bill or to refrain from submitting an application to the Parliamentary Naturalisation Committee are elements of the legislative process. Article 63 of the Constitution, according to which the courts are empowered to decide any questions relating to the scope of the executive authority, does not apply to such decisions as no authority is exercised by the executive, see in this respect the Supreme Court's judgment, reproduced on page 903 of the Danish Weekly Law report (UfR) 1972.
>
> Denmark has acceded to the European Convention on Human Rights and several other international conventions that may be significant to the processing of applications for or to the grant of nationality. Accordingly, Denmark has assumed a number of obligations under international law, compliance with which is assumed, also in the preparatory works of the Danish Nationality Act (*Indfødsretsloven*), when Parliament and the Parliamentary Naturalisation Committee exercise their discretion as to whether Danish nationality should be granted to an applicant, see in this respect Bill L 69, Official Report on Parliamentary Proceedings (*Folketingstidende*) 1998-99, supplement A, column 1794. An applicant who has not been included in a naturalisation Act can therefore request the courts to review whether obligations under international law have been breached, and whether the applicant has a claim for damages or compensation in that connection. Such judicial review will not be contrary to the authority of the Government or Parliament under Articles 21 and 41(1) of the Danish Constitution, regarding the introduction of bills, or under Article 44(1) on naturalisation by law. By contrast, these provisions precluded any judicial review of

claims to the effect that the applicant must be listed in a naturalisation bill or must be granted nationality by an Act." ...

In the case in question, the Supreme Court ruled in favour of the appellant and remitted the case to the High Court for retrial on the merits (whether the appellant, on the ground of his diagnosis (PTSD), had suffered discrimination in violation of Article 14 of the Convention in conjunction with Article 8).

COMPLAINTS

26. The applicant complains that the Danish authorities' refusal to grant him Danish citizenship was arbitrary and in breach of Article 8 of the Convention. Moreover, he relies on Article 14 in conjunction with Article 8. He also complains that the lack of any adversarial process by which he could challenge the decision to refuse to grant him Danish citizenship breached his rights under Article 13 of the Convention.

THE LAW

27. Article 8 reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 reads:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

28. The Government maintained that the applicant had failed to exhaust domestic remedies by not bringing his case before the ordinary courts under Article 63, section 1, of the Constitution.

29. The applicant submitted that the application should be declared admissible as he lodged his case before the Court on 14 October 2011, before the Supreme Court judgment of 13 September 2013.

30. The Court reiterates that Article 8 of the Convention does not guarantee a right to acquire a particular nationality or citizenship.

Nevertheless, it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual (see, among others, *Petropavlovskis v. Latvia*, cited above, § 73; *mutatis mutandis, Kurić and Others v. Slovenia* [GC], no. 26828/06, § 339, ECHR 2012 (extracts); *Genovese v. Malta*, no. 53124/09, § 30, 11 October 2011; *Kuduzović v. Slovenia* (dec.), no. 60723/00, 17 March 2005; *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 77, ECHR 2002-II; *Karassev v. Finland* (dec.), no. 31414/96, ECHR 1999-II; and *X. v. Austria*, no. 5212/71, Commission decision of 5 October 1972, DR 43, p. 69). The Court considers it unnecessary to determine whether Article 8 is applicable to the circumstances of the present case, since in any event it finds that the application is inadmissible for the following reasons.

31. In respect of the requirements of exhaustion of domestic remedies, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system. It should be emphasised that the Court is not a court of first instance. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. ...The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress ... Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see, *inter alia*, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-72 and 74, 25 March 2014).

32. The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see, for example, *Henriksson v. Sweden* (dec.), no 7396/10, § 44, 21 October 2014; *Marinkovic v. Sweden*, (dec.), 43570/10, § 34, 10 December 2013; *Andrei Georgiev v. Bulgaria*, no. 61507/00, § 77, 26 July 2007; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX).

33. On 13 September 2013 the Danish Supreme Court issued a judgment, in another case, concluding that an applicant who has not been included in a naturalisation Act can request the domestic courts to review whether obligations under international law have been breached, and

whether the applicant has a claim for damages or compensation in that connection.

34. That finding is in line with long-standing case-law by the Supreme Court on the right to judicial review under Article 63 of the Constitution of the legality of an administrative decision, including a review of whether such a decision is in accordance with Denmark's obligations under the Convention (see paragraphs 23-25 above). Accordingly, although the said Supreme Court judgment was the first judgment on judicial review under Article 63 of the Constitution in relation to the process of granting nationality, the Court is satisfied, in the particular circumstances of the present case, that a court review under Article 63 of the Constitution is a remedy which is sufficiently certain not only in theory but in practice. Moreover, this remedy was available to the applicant for the purposes of Article 35 § 1 at the time when the application was lodged with the Court. The Court notes in this context that had the applicant brought his complaint before the domestic courts, the courts would have had jurisdiction to assess the merits of his complaint, that is whether the refusal to put him on the list for naturalization without providing any reasons amounted to a breach of obligations under international law, including the invoked provisions of the Convention, and they could have provided the applicant with redress in the form of damages or compensation. Furthermore, the Court notes that such a ruling in favour of the applicant would be binding on the authorities, including the Ministry, if a renewed request for naturalization were to be submitted by the applicant.

35. In light of the foregoing, the Court considers that the said remedy existed with sufficient certainty, as stated above, and was effective within the meaning of Article 35 § 1 of the Convention (see *Vučković and Others*, cited above, § 74).

36. It follows that the Government's objection must be accepted and that this part of the application be declared inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 §§ 1 and 4 of the Convention.

37. For the reasons above the applicant's complaint under Article 13 of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 13 October 2016.

Stanley Naismith
Registrar

Işıl Karakaş
President