WRITTEN OBSERVATIONS

submitted to the European Court of Human Rights
in the case

Adam Johansen v. Denmark
(Application No. 27801/19)

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Introduction

Facts and procedure

1. The applicant, Adam Johansen, was born on November 15, 1990, in Tórshavn, the capital of the Faroe Islands, a constituent part of the Kingdom of Denmark. His mother is Danish, and his father is Tunisian; under the citizenship law of these two countries, he held dual Danish and Tunisian citizenship since birth.

2. Mr. Johansen left for Syria in 2013 after buying military equipment from the Internet in preparation to join the terrorist organization "Daech" from Denmark. On September 9, 2013, he was recruited as a "fighter" by the terrorist organization. During Mr. Johansen's stay in Syria until February 19, 2014, he received training in the use of weapons, took part in combat operations, and carried out logistical activities contributing to Daech's military successes.

3. In 2016, two years after his return to Denmark, Mr. Johansen was arrested. The prosecutor requested against him with six years imprisonment, revocation of his Danish citizenship, and deportation to Tunisia with a re-entry ban. In a judgment on October 26, 2017, the Frederiksberg court sentenced Mr. Johansen to four years' imprisonment and rejected the requisition concerning the revocation of citizenship and deportation, by ten to two. This judgment was upheld on appeal on April 20, 2018 (Østre Landsrets, second instance). The Supreme Court of Denmark ruled solely on the issue of citizenship and deportation to Tunisia, handed down a judgment on November 19, 2018 (Østre Landsrets, third instance). Unanimously, the judges decided, unlike the lower courts, to revoke Adam Johansen's Danish citizenship and deport him with a permanent re-entry ban. Consequently, the applicant no longer has Danish citizenship.

4. On May 10, 2019, Mr. Johansen submitted an application to the European Court of Human Rights (hereinafter "ECHR" or "Court"), invoking Article 8 of the European Convention on Human Rights (hereinafter "Convention"). According to Mr. Johansen, his right to be respected for private and family life had been violated by the revocation of his citizenship and deportation. In March 2020, at the time ECLJ submits these observations to the Court, Mr. Johansen will finish his prison sentence within a month. He currently receives no information concerning his deportation, which suggests that the process is unlikely to be immediate due to negotiations between Denmark and Tunisia.

Clarifications on citizenship

5. Citizenship refers to the legal bond between a person and a State.[1] It is the translation into law of a personal bond, of "*a social fact of attachment, a genuine connection of existence, interest, and sentiments, together with the existence of reciprocal rights and duties*."[2] In other words, it is "*the juridical expression of the fact that the individual upon whom it is conferred . . . is more closely connected with the population of the State conferring nationality than with that of any other State.*"[3] Conversely, the revocation of citizenship is the juridical expression of the destruction of such a personal bond. In an interview with the ECLJ regarding a case of terrorists with European citizenship, Bertrand Pauvert, a lecturer at the University of Haute-Alsace, stated: "*the deprivation of citizenship merely translates into law a factual and material reality: that of a person who is an alien in every aspect of his or her being*."[4]

6. Under the very definition of citizenship, the European Convention on Nationality states that "*each State shall determine under its law who are its nationals*"[5]. For a long time, even the organs of the Convention have systematically rejected applications relating to cases of the loss of citizenship on both naturalized or

[1] European Convention on Nationality (Council of Europe), adopted on 6 Nov. 1997 in Strasbourg, art. 2a.
[2] International Court of Justice, *Nottebohm*, 6 April 1955, ICJ Reports 1955, p. 23.
[3] *Ibid.*
[4] Bertrand Pauvert, Director of the Master of Law at the University of Haute-Alsace and Lecturer in Public Law: https://www.youtube.com/watch?v=2B-9orRty2Q
[5] European Convention on Nationality, *op. cit.* art. 3 § 1.

by birth. Such applications were considered incompatible *ratione materiae* with the provisions of the Convention on the grounds that the Convention does not guarantee a right to a nationality.[6]

7. The ECHR regularly recalls that the Convention does not guarantee the right to acquire particular citizenship. However, it now considers that an arbitrary refusal or deprivation of citizenship may, in certain circumstances, raise an issue under Article 8 of the Convention by impacting on private and/or family life of the person concerned.[7]

Clarifications on Article 8

8. Article 8 protects the right to establish and develop relationships with others, the outside world, and sometimes encompasses aspects of an individual's social identity. Depending on the circumstances of the case, the focus can be on family life or solely on private life.[8] For this reason, the revocation of citizenship and deportation from a territory can be an infringement on a person's private and/or family life.

The angle of private life

9. The notion of "*private life*" can "*embrace multiple aspects of the person's physical and social identity*,"[9] which includes having citizenship[10] and the social ties between a person and a country.[11] The applicant was born and lived in Denmark, of which he was a citizen, the revocation of his citizenship and his deportation did indeed constitute interferences with his right to be respected for private life as interpreted by the Court.

The angle of respect for family life

10. Since the applicant is married and his child is from that union, the ties between him, his wife, and his child constitute a family life within the meaning of article 8 of the Convention.

11. For a person, his or her spouse and children, being together is a fundamental element of family life, and measures that prevent them from doing so interfere with the rights protected by Article 8.[12] Therefore, the revocation of Mr. Johansen's citizenship and his deportation constitute a potential interference with his right to respect for family life by geographical separation of family members.

12. That said, the Johansen family is composed of three members, each with an individual right to respect for family life. Hence, it is up to Mrs. Johansen to determine her interests and to exercise her right concerning family life. However, unlike other comparable cases,[13] she is not an applicant; Mr. Johansen is the sole applicant. The wife and child, who are not the subject of a deportation order, may choose either to settle with him in Tunisia or to remain in Denmark to reunite with her husband. Their interests cannot be presumed.

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[6] See, for example, European Commission of Human Rights, *X v. Austria (*dec.), no. 5212/71, 5 October 1972. See also ECHR, *Ramadan v. Malta*, no. 76136/12, 21 June 2016, § 84.
[7] See, for example: *Karassev v. Finland*, no. 31414/96, decision on admissibility, 12 January 1999; *Genovese v. Finland*, no. 31414/96, decision on admissibility, 12 January 1999; *Genovese v. Finland*, no. 31414/96, decision on admissibility, 12 January 1999; *Genovese v. Finland*, no. 31414/96, decision on admissibility, 12 January 1999; *Malta (*dec.), no. 53124/09, 11 October 2011; *Slivenko and Others v. Latvia* [GC], no. 48321/99, 9 October 2003.
[8] *Maslov v. Austria* [GC], no. 1638/03, 23 June 2008, § 63; *Üner v. the Netherlands* [GC], no. 46410/99, 18 October 2006, § 59.
[9] *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 4 December 2008, § 66.
[10] *Mennesson v. France*, no. 65192/11, 26 June 2014, § 97.
[11] *Maslov* [GC], *op. cit.*, §63.
[12] See for example: *Zorica Jovanović v. Serbia,* no. 21794/08, 26 March 2013, § 68; *Elsholz v. Germany* [GC], no. 25735/94, 13 July 2000, § 43; *K. and T. v. Finland* [GC], no. 25702/94, 12 July 2001, § 151.
[13] *Cherif and Others v. Italy*, no. 1860/07, 7 April 2009, § 52.

The issue raised by the case

13. Any interference with the right protected by Article 8 must be permitted by the law by satisfying at least one of the legitimate aims listed in article 8 § 2, and it must be proportionate to the policy aim of a democratic society. The Member State must respect these requirements, balancing the rights and interests involved.

14. The ECHR first addressed the issue of deprivation of citizenship in the context of terrorism and national security in the 2017 decision *K2 v. the United Kingdom*.[14] The Court first relied on Article 8 concerning a situation of deportation in the case of *Berrehab v. the Netherlands* in 1988.[15] Since then, these issues have given rise to numerous judgments and decisions, including the ones by the Grand Chamber,[16] which have enabled the ECHR to identify and develop "guiding principles" to allow it to review the requirements of "proportionality" and "pressing social need."

Purpose of the observations

15. These written observations are intended to contribute to the Court's reflection on the interaction of the right to respect for private and family life with the revocation of citizenship and the deportation of criminals. The revocation of the applicant's Danish citizenship is not arbitrary, and its main consequence is that it renders the applicant an alien in Denmark (I). By deporting the applicant, the Danish State intends to fulfill its core tasks, which serve several legitimate objectives of interference with the right to respect for private and family life (II). The assessment criteria usually used by the ECHR are sufficient to demonstrate the necessity of such interference in the present case (III). These criteria, to assess such an issue even better, would benefit from being supplemented and weighted (IV).

I- The revocation of the applicant's Danish citizenship is legitimate

16. To determine whether the revocation of citizenship violates Article 8, two separate issues must be examined: 1. whether the decision to deprive the person concerned of his or her citizenship was arbitrary; 2. the consequences of that decision for the applicant.[17] We begin by recalling that the applicant, as a Dane by birth, does not enjoy a privilege over Danes by naturalization (A) and then answer the first of these two questions by ascertaining whether the deprivation of citizenship was not arbitrary (B).

A) Non-discrimination based on the mode of acquisition of citizenship

17. In the cases decided or judged on the compatibility of deprivation of citizenship with Article 8 of the Convention, the applicants had been naturalized. Unlike Mr. Johansen, they were not national by birth, but by acquisition. In Mr. Johansen's application to the Court, he argued that a privilege should be granted to him as a Dane by birth and as the son of a Danish mother (and therefore of a non-native parent). He thus wishes to distinguish himself from naturalized and foreign-born nationals whose applications were sometimes rejected by the Court.

18. Denmark, unlike other States such as France,[18] has committed itself in international instruments not to discriminate against its nationals based on the means of acquisition of citizenship. For example, it has

[14] *K2 v. the United Kingdom* (dec.), no. 42387/13, 7 February 2017.
[15] *Berrehab v. the Netherlands*, no. 10730/84, 21 June 1988.
[16] See in particular the first judgment in which the Grand Chamber ruled on the question: *Üner* [GC], *op. cit.*
[17] *Ramadan*, *op. cit.* §§ 86-89; *K2* (dec.), *op. cit.*, § 50.
[18] France has not ratified the European Convention on Nationality of 6 November 1997. Its law distinguishes between measures reserved for naturalized French citizens (Article 25 of the Civil Code), and measures concerning also French citizens by birth (Article 23 §§ 7 and 8 of the Civil Code). See on this subject: B. Pauvert, « Autour de

signed and ratified the European Convention on Nationality, which provides that citizenship "*does not indicate the person's ethnic origin*" (Article 2a) and that "*Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently*" (Article 5 § 2).[19] These provisions are in line with the recent resolution 2263 (2019) of the Parliamentary Assembly of the Council of Europe (PACE) on the withdrawal of citizenship and the fight against terrorism. The latter calls on states not to "*discriminate between citizens on the basis of the way in which they have acquired nationality, in order to avoid indirect discrimination against minorities discriminate between citizens on the basis of the way in which they acquire citizenship, in order to avoid any form of indirect discrimination against minorities*" (§ 9.5), and in particular not to practice "*direct or indirect discrimination against naturalized citizens*" (§ 6).[20] The idea behind this principle of equality between nationals is that how citizenship is acquired as well as ethnic origin, does not always in itself say something crucial about a person's connection with the country.

19. Admittedly, on May 28, 1985, the ECHR has already held in *Abdulaziz, Cabales, and Balkandali* that "*there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it*." However, relying among other things on Article 5 § 2 of the European Convention on Nationality, the Court recently found for Denmark in the Grand Chamber judgment *Biao v.* Denmark of May 24, 2016, for violation of Article 14 in conjunction with Article 8 of the Convention.[21] Denmark favored Danish nationals of Danish ethnic origin in its rules on family reunification through an "attachment requirement," which could only be met by persons who had held Danish citizenship for at least 28 years. Therefore, favoring Mr. Johansen on account of his Danish origins would be contrary to that case-law since it would discriminate against naturalized Danish citizens.

20. While Denmark should not treat nationals differently depending on how they acquired citizenship, it should avoid statelessness under the European Convention on Nationality (art. 4b) and the Convention on the Reduction of Statelessness, which Denmark has also ratified.[22] Revocation of citizenship is only possible for persons with multiple citizenships, not because they are supposed to be "less Danish" than their fellow citizens, but because at least two citizenships are required for revocation to be possible without creating a situation of statelessness. Treating a Dane with no other citizenship differently from a Dane with multiple citizenships does not, therefore, constitute unlawful discrimination.

B) Revocation of citizenship not arbitrary

21. To establish whether the deprivation of citizenship was arbitrary, it is necessary to determine whether the measure was proper under the law, whether it was accompanied by the necessary procedural safeguards, and whether the authorities acted diligently and swiftly.[23] The standard of "arbitrariness" is a stricter standard than that of proportionality.[24]

22. It follows from the Danish Aliens Act (Section 8B (2)) that a person convicted of a violation of one or more provisions under Chapters 12 and 13 of the Criminal Code may be deprived of Danish citizenship unless this results in the person becoming stateless. This provision does not differentiate between native-born or naturalized Danes. In the case of very serious offenses, i.e., as resulted from two-year's imprisonment, the revocation of citizenship is a frequently used measure in practice. Since Mr. Johansen

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la déchéance et du retrait de la nationalité française », note sous Conseil constitutionnel, no. 2014-439 QPC, 23 January 2015, *AJDA*, no. 17/2015, 18 May 2015, p. 1002.

[19] European Convention on Nationality, *op. cit.*

[20] PACE, "Withdrawing nationality as a measure to combat terrorism: a human-rights compatible approach?", Resolution 2263 (2019), adopted on 25 January 2019.

[21] *Biao v. Denmark* [GC], no. 38590/10, 24 May 2016 (see in particular § 132).

[22] Convention on the Reduction of Statelessness (United Nations), adopted on 30 August 1961 in New York.

[23] *K2* (dec.), *op. cit.*, § 50; *Ramadan*, *op. cit.*, §§ 86 à 89.

[24] *K2* (dec.), *op. cit.*, § 61.

was sentenced to four-year imprisonment for offenses violating article 114 of the Criminal Code (Chapter 13), his revocation of citizenship is indeed in accordance with the law.

23. Mr. Johansen's trial was proper with the Court's procedural requirements. The courts maintained the balance of proportionality between the seriousness of the applicant's crime on the one hand and the consideration of his private and family life on the other, in particular his link with Denmark. On November 19, 2018, the Danish Supreme Court held that this consideration did not decisively preclude the forfeiture of the applicant's Danish citizenship. This judgment is in line with the case-law of the Supreme Court, in particular with recent decisions concerning terrorists.[25]

24. The fact that only a little more than a year had elapsed between the decision of the first instance and that of the Supreme Court proved that the Danish authorities had acted promptly and diligently. However, this promptness and diligence were not synonymous with a "preventive" deprivation of citizenship, taking the form of an administrative measure, but with a "reactive" deprivation, following a criminal conviction, in accordance with PACE resolution 2263 (2019).

25. For all these reasons, the decision taken by the Danish authorities to strip the applicant of his Danish citizenship was, therefore, not arbitrary. As recalled in § 16, the second question to be examined to determine whether the decision to strip the applicant of his citizenship infringed Article 8 is that of the consequences of that decision for the applicant's private and family life. Given that the main consequence of such deprivation is that the applicant becomes an alien in Denmark and thus deportable, the consequences of the withdrawal of Danish citizenship are those of his deportation, and it is, therefore, unnecessary to separate the two issues. The legitimacy and proportionality of this deportation are verified in the following observations (Parts II, III, and IV).

II- The possibility of deporting the applicant as an alien

26. At this stage of the observations, as evidenced by the comparable case of *Said Abdul Salam Mubarak v. Denmark*, decided by the Court on January 22, 2019,[26] the applicant must be regarded as an alien. Thus, the fact that he was a Danish national whose citizenship was deprived does not affect the question of the compatibility of his deportation with Article 8. The Court's approach, in this case, is the same as the ones in the case of deportation of an alien who has never had the citizenship of the country from which he is deportee.
Mr. Johansen, therefore, has the rights of an alien as a Tunisian (A), and his deportation meets the legitimate objectives of interfering with his rights protected under article 8 of the Convention (B).

A) The situation and rights of an alien

27. An alien has no right to live in a particular place. On the one hand, Article 8 cannot be interpreted as enshrining such a right.[27] On the other hand, the right to freedom of movement is exercised in the context of a lawful stay in a State and only within that State or to leave it (Article 2 §§ 1 and 2 of Protocol No. 4). Therefore, there is no right for the applicant to remain in a State of which he is not a national.

28. To protect the nation, and the State must be able to determine sovereignly whether an alien may stay on its territory, in accordance with a well-established principle of international law, which confirmed by the ECHR.[28] This State's right exists irrespective of whether an alien entered the host country as an adult or at

[25] Supreme Court of Denmark, UfR 2016.3235, 8 June 2016; UfR 2018.769, 14 November 2017.
[26] *Said Abdul Salam Mubarak v. Denmark*, no. 74411/16, 22 January 2019.
[27] *Ward v. the United Kingdom* (dec.), no. 31888/03, 9 November 2004, § 2; *Codona v. the United Kingdom (*dec.), no. 485/05, 7 February 2006.
[28] *Abdulaziz, op. cit.*, § 67; *Boujlifa v. France*, no. 25404/94, 21 October 1997, § 42.

a very young age or was born there.[29] The Court explained it very clearly: "*Even if a foreign national has a non-precarious residence status and has achieved a high degree of integration, his or her situation cannot be placed on the same footing as that of a State national when it comes to the aforementioned power of the Contracting States to expel aliens for one or more of the reasons listed in Article 8, paragraph 2, of the Convention*."[30]

29. The conventional system thus makes a clear distinction between nationals and aliens.[31] Protocol No. 4 to the Convention prohibits the deportation of nationals by individual measure (Article 3 §1), but not of aliens (Article 4). Moreover, it reserves the right to enter the territory of the State to nationals (art. 3).
This distinction is not discrimination based on national origin. Indeed, presence on a territory is a right for nationals, but a "privilege" for aliens. However, according to former ECHR judge Boštjan Zupančič "*discrimination in terms of unequal treatment is applicable to situations that involve rights; it is not applicable to situations that essentially concern privileges*," in particular "*situations of special treatment reserved for those who are exceptionally deserving*."[32] The privilege of residing in a country of which one is not a national is at the discretion of the institutions of that country. It, therefore, does not imply the same requirements in terms of non-discrimination. The Court accepted this line of reasoning in the Grand Chamber judgment of 2012 *Boulois v. Luxembourg*.[33]

30. Once the applicant has been deported from Denmark, if his wife chooses to remain in the country with their child, Article 8 does not imply a general obligation on the part of the State to allow the applicant to resettle in the territory, despite his status as husband and father.[34] In this case of geographical separation, modern means of communication and regular travel by Mrs. Johansen and the child may enable them to maintain a family life with Mr. Johansen.

B) The fulfillment of the core tasks of a nation-state

31. The possibility for a State to deport aliens is essential for it to effectively fulfill its core tasks, in particular, the guarantee of public safety and the protection of the nation. As such, this possibility is part of its national sovereignty.

32. The protection of national security is one of the legitimate objectives to interference with the right to respect for family life (Article 8 § 2). Terrorist acts, such as those for which the applicant has been convicted, are obviously a serious threat to national security. Not only are their deadly violence, their repetition and their unpredictability a danger to society, but also challenging the State's monopoly of the legitimate use of physical force destabilizes the State itself. The latter is, therefore, a particularly legitimate reason to deport any alien who was convicted of terrorist acts and likely to reoffend.

33. At least two other legitimate objectives (Art. 8 § 2) are pursued by the deportation of Adam Johansen: the prevention of crime and the protection of the rights and freedoms of others. Indeed, unlike the criminal punishment, deportations do not have the punitive purpose, but a preventive one to guarantee the security

[29] *Üner* [GC], *op. cit.*, §§ 54-60.
[30] *Cherif, op. cit.*, § 59.
[31] It should be noted that even the judges of the Court who wish to minimise the distinction between aliens and nationals recognise that it exists and that it must have consequences in terms of presence on a territory. For example, in a joint dissenting opinion in the *Üner* [GC] judgment cited above, Judges Costa, Zupančič and Türmen. Having considered, on the basis of international instruments and against the opinion of the majority of the sitting judges, that the legal status of aliens lawfully resident in the territory should be as close as possible to that accorded to nationals, the three judges admitted: "*Of course, we are not arguing that all these international instruments – which, moreover, do not all have the same legal force – mean that foreign nationals can never be expelled, as is the case with nationals under Article 3 of Protocol No. 4*" (§ 9).
[32] *E.B. v. France*, no. 43546/02, 22 January 2008, dissenting opinion of Judge Zupančič.
[33] *Boulois v. Luxembourg* [GC], no. 37575/04, 3 April 2012, §§ 98-105.
[34] *Youth v. Netherlands* [GC], no. 12738/10, 3 October 2014, § 107; *Biao* [GC], *op. cit.*, § 117.

for the future. According to the ECHR, states "*have the right to take measures to protect society (...) in respect of persons convicted of criminal offenses (...) which are preventive rather than punitive in character*".[35] The prevention of terrorist crimes aims, *inter alia*, to protect the rights of potential victims, in particular, their right to life.

34. Protecting the population against terrorist threats is not only a legitimate objective but also and above all, a positive obligation of States. This is, for example, recalled by the Guidelines on the protection of victims of terrorist acts adopted in 2017 by the Committee of Ministers of the Council of Europe.[36]

35. By the deportation order of Adam Johansen, the Danish State is, therefore, pursuing legitimate objectives. According to the Court's case-law, the margin of discretion left to the State to take measures to protect national security is wide. It is also wide in matters relating to the residence of aliens,[37] which the State decides in the light of national social realities. The Court may nevertheless review whether the State has struck a fair balance between the personal interests of the applicant and the public interest, which it has done several times in such cases using its "guiding principles."

III- "Guiding principles" focused on the individual and his/her family

36. In order to determine whether a deportation order is necessary in a democratic society and proportionate to the legitimate objectives set out in Article 8 of the Convention, the Court has developed criteria in the course of its case-law. Among these ten "guiding principles", eight from *Boultif* (A) and two from *Üner* (B) - and enable the individual situation of the applicant and his or her family to be properly assessed.

A) *Boultif*'s "objective" criteria

37. In the 2001 *Boultif v. Switzerland*[38] judgment, the Court defined eight guiding principles, which could mainly be described as "objectives" (with the meaning of the adjective and not the noun). Indeed, these eight criteria correspond to various factual elements to be weighed up. These criteria include legal characterizations, durations, legal affiliations, or statutes. Without claiming to be exhaustive, it is worth emphasizing that certain elements are corresponding to these eight criteria, which we shall list in italics as formulated by the Court. It should be noted that in assessing the family situation of an alien who is the subject of a deportation order, the Court focuses on the moment when the decision has become final.[39] It was by the judgment of the Supreme Court of Denmark of November 19, 2018, that the applicant's deportation was finally decided (the third instance).

38. Two *Boultif* criteria relate to the assessment of the threat to national security. They are:

- *the nature and the seriousness of the offense committed by the applicant*:
  For several months, the applicant voluntarily joined a terrorist organization and was guilty of many serious crimes, including genocide. Registered as a "fighter" upon arrival in Syria, he had participated in some of these crimes. These acts are, therefore, particularly serious and were formerly punishable by a death sentence in accordance with Article 2 § 1 of the Convention.

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[35] *Cherif, op. cit.*, § 59 (free translation).
[36] Committee of Ministers of the Council of Europe, Revised Guidelines on the protection of victims of terrorist acts, adopted at the 127th Session of the Committee of Ministers in Nicosia, CM(2017)44-final, 19 May 2017, Preamble.
[37] *Berrehab, op. cit.* dissenting opinion of Judge Thór Vilhjálmsson: "*the problem of immigration and residence of foreigners is a very important issue and there is no doubt that restrictions are unavoidable. Generally speaking, in this field the Government must have a wide margin of appreciation when formulating their policy and the necessary legal rules.*"
[38] *Boultif v. Switzerland*, no. 54273/00, 2 August 2001, § 48.
[39] *Cabucak v. Germany*, no. 18706/16, 20 December 2018, § 43.

- *the time elapsed since the offense was committed and the applicant's conduct during that period*:
The offenses for which Mr. Johansen was convicted correspond to the period of his stay in Syria, i.e., from September 9, 2013, to February 19, 2014. Between the end of this period and November 19, 2018, four years and nine months elapsed.

39. The other five *Boultif* criteria relate more directly to the private and family life of the person concerned. They are:

- *the length of the applicant's stay in the country from which he or she is to be expelled*:
Apart from a six-month stay in Tunisia (2005-2006) and his engagement with the Islamic State in Syria (2013-2014), the applicant has always lived in Denmark.

- *the nationalities of the various persons concerned*:
Mr. Johansen has been a Tunisian since birth. In fact, under Tunisian law, a child acquires Tunisian citizenship if the father is Tunisian.[40] He was Danish until November 19, 2018 and would like to regain this second citizenship. His wife and son are Danish.

- *the applicant's family situation, such as the length of a marriage, and other factors expressing the effectiveness of a couple's family life*:
Mr. Johansen was married on February 9, 2009, according to the Islamic rite, which is civilly recognized in Denmark. By November 19, 2018, his family life with Mrs. Johansen had lasted nine years.
During this period, he and his wife took "breaks" in their relationship and considered separating. The fact that he did not inform his wife and parents of his departure to Syria evidenced that the family relationship was deteriorating. In any event, as the Supreme Court of Denmark noted: "*it should be noted that Adam Johansen left his family in Denmark on his own initiative in order to join a war zone in Syria*" (free translation).

- *whether the spouse knew about the offense at the time when he or she entered into a family relationship*:
The offense happened after the marriage, so Mrs. Johansen was not aware of it.

- *whether there are children from the marriage and, if so, their age*:
One son was born of the marriage in January 2010; as of November 19, 2018, he was eight years old. He is a minor and will follow his parents or at least one of them in case of deportation of Mr. Johansen.

- *the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled*:
Mrs. Johansen has no *a priori* close links with Tunisia; her family roots are in Denmark; however, she adheres to Islam, the official religion of Tunisia, and that of the vast majority of Tunisians. According to many testimonies (friends, mother, aunt), her conversion at the age of 18 testifies to a very strong commitment to this religion, despite her Christian upbringing. Married to a Tunisian Muslim, she sought to acquire his way of life and tradition. She will, therefore, not be a real expatriate in Tunisia.

B) *Üner*'s "subjective" criteria

40. In the Grand Chamber *Üner* judgment of 2006, the Court wished to "*make explicit two criteria which may already be implicit in those identified in Boultif*."[41] These two new "guiding principles" are more difficult to objectivize; hence we have qualified them as "subjective." Without claiming to be exhaustive, it is interesting to highlight some elements corresponding to these two criteria, which we shall quote, in italics, as formulated by the Court.

[40] Tunisian Nationality Code, Article 6 §1.
[41] *Üner* [GC], *op. cit.*, § 58.

41. It should first be noted that the addition of "guiding principles" reflects the fact that objective criteria were not sufficient. Indeed, a given family situation does not condition the interest of children to stay or not to stay with their parents in their current country; similarly, a period of residence in a country is not in itself sufficient to ensure the existence of strong ties with that country. The addition of "subjective" criteria enables the Court to gain a better understanding of the complexity of the issue of deportation. For example, the years spent in Europe by some dual nationals or aliens have sometimes enabled them not to create links with the host country but to develop a parallel community that is virtually autonomous in relation to society. It is in these communities that Islamist ideology develops and is transmitted from childhood. In these cases, the long duration of residence and family unity widen the gap between Muslim families of immigrant origin and Western society.

- *the best interests and well-being of the children, in particular, the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled*:
  The Johansen's son was educated in Islam, which is important for integration in Tunisia (see § 39). He attended an Islamic school (Al-Hilal, in Copenhagen) in 2016-2017, including four hours a week of compulsory Arabic language classes, the language is spoken in Tunisia. His mother, Mrs. Johansen, also practiced homeschooling, which can be continued in the same way in Tunisia.

- *the solidity of social, cultural, and family ties with the host country and with the country of destination*:
  Adam Johansen lived in Tunisia between December 2005 and June 2006 (about six months); before this period, he regularly stayed in Tunisia for short periods (8 stays of one or two weeks). Apart from these stays and his Syrian experience, he lived in Denmark. He speaks and reads both Arabic and Danish. He studied in a Muslim school in Copenhagen. He said that he does not know where his family, especially his father, lives in Tunisia. However, he remained in contact with his father since his father moved to Tunisia: his father paid for his plane ticket back to Denmark in 2014 and went to visit him in prison in May 2016. Mr. Johansen is a practicing Muslim, and therefore adheres to the official religion of Tunisia, as do the vast majority of Tunisians.
  The applicant has spent almost all his life in Denmark, but he is poorly integrated there. Despite his mother, sister, and half-sister are in Denmark, and two of his grandparents live in the Faroe Islands, he has never had a permanent link to the Danish labor market. Since 2011, he has been living on social benefits. During his studies, his education was hampered by incidents, including expulsions from institutions. His social ties are limited to Islamist circles. Before his departure to Syria, he was part of a group of young Muslims distributing leaflets on Islam in the streets, for example, urging passers-by not to vote in the elections. He took part in a pro-Jihad and pro-Islamic State demonstration, which was full of provocations: Western flags trampled on, the slogan "Obama we love Osama," black flags symbolizing war... He does not regret it but explains to the judges and to anyone who will believe him that in these demonstrations, the promotion of the "Islamic State" refers to the time of the Prophet and his successors and not to Daech.

42. The application of these "guiding principles" is sufficient to suggest that Mr. Johansen's deportation respects the right balance between the legitimate aims pursued by the authorities and the requirements of respect for his private and family life. While the criteria currently used by the Court are sufficient to conclude that the deportation order did not violate Article 8, it might nonetheless be useful to supplement and weight these criteria. This will enable the ECHR to interpret Article 8 "*in the light of present-day conditions*."[42]

IV- Interpretation of Article 8 "*in the light of present-day conditions*": a proposal for complementing and weighting the "guiding principles"

(N.B.: This fourth part was included as an annex to the observations)

[42] *Tyrer v. the United Kingdom*, no. 5856/72, 25 April 1978, § 31.

43. The criteria for assessing the interaction between the right to respect for family life and the deportation of aliens began to take shape with the *Berrehab* judgment in 1988.[43] Then they were formalized with the *Boultif* judgment of 2001[44] and were completed and listed in their current form in 2006 by the Grand Chamber in the *Üner* judgment.[45]

44. After having evolved for eighteen years, they have been fixed for fourteen years. Nonetheless, they still provide a good understanding of the applicant's private and family life, but not further than the general local social situation. Moreover, as some judges have already pointed out, and as the Court, itself seems to have noted, the criteria must be weighted in order to avoid a long list of "pros" and "cons", which would make it impossible to settle a dispute effectively.

45. Thus, it might be appropriate, in the case of *Johansen v. Denmark*,[46] to add two guiding principles focusing on society and to weight and prioritize all the principles. The ECLJ has already held this reasoning in its written observations submitted to the Court on February 14, 2020, in the case of *Al-Bayati v. Germany*.[47]

New criteria focused on society

46. When considering proportionality, the Court examines the need for a deportation order in a so-called "democratic" society characterized in particular by "pluralism, tolerance, and openness."[48] Between a person and a society, the will to integrate must be mutual, like a synallagmatic (bilateral) contract. The proportionality of a measure must, therefore, relate to the individual situation of the applicant and his or her family, but also to the social situation of the country, region and city concerned, in the light of these three characteristics. After assessing the capacity of a person threatened with deportation to honor the contract, it is important to assess the capacity of society as well. In order to ascertain society's capacity to integrate an alien into a stable and healthy environment, it seems appropriate to suggest two additional guiding principles to the ECHR. These criteria will refine its proportionality assessment in this case and in any similar case.

47.

- *the stability of the society of the host country, in particular, its capacity to integrate the applicant into the social, economic, and cultural life of that country*:
  Danish society is experiencing a growing and deep-rooted protest against Islam, particularly in the wake of the "Mohammed cartoons" affair that appeared in the daily *Jyllands-Posten* on September 30, 2005, and the Islamist shootings in Copenhagen on February 14 and 15, 2015. The terrorist, like Adam Johansen, pledged allegiance to the Islamic State. Community tensions make it increasingly difficult to combine the welfare state with multiculturalism. In this context, the applicant's social, economic, and cultural integration would be difficult.

48.

- *the seriousness of the difficulties which the society is likely to encounter in removing the applicant from the environment that led him to commit criminal offenses*:
  Prior to his departure to Syria, the applicant was part of an environment of Islamists (see paragraph 43 of the observations). At least 150 of them, from Denmark, left the country voluntarily to join jihadist groups in Syria and Iraq.[49] Some have died, others are still in Syria or Iraq, but more than a third of them have returned to Denmark.[50] The State must, therefore, both prevent the danger caused by these returning

[43] *Berrehab v. the Netherlands*, no. 10730/84, 21 June 1988, § 29.
[44] *Boultif v. Switzerland*, no. 54273/00, 2 August 2001, § 48.
[45] *Üner v. the Netherlands* [GC], no. 46410/99, 18 October 2006, §§ 57 and 58.
[46] Application *Johansen v. Denmark*, no. 27801/19, communicated on 11 November 2019.
[47] Application *Al-Bayati v. Germany*, no. 12538/19, communicated on 12 November 2019.
[48] *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 49.
[49] Morten Skjoldager, "Adam er den seneste: Skærpet indsats har ført til domme mod 14 fremmedkrigere", *Politiken*, 22 December 2018.
[50] *Ibid*.

terrorists and address the causes of the phenomenon. Several of them have already been stripped of their citizenship and deported from Denmark, even if they were born there.[51] These judgments have been accompanied by recent legislative changes, which have yet to be proven.[52] Alternative measures to deportation, such as detention in custody on release from prison, are both more costly and less secure for society, even though they often involve greater interference in private and family life.

The weighting and prioritization of criteria

49. The ECHR already seems to weigh the ten criteria it uses to assess the proportionality of a deportation order. As noted by former judges Jean-Paul Costa, Boštjan Zupančič and Rıza Türmen, the Court tends to lend "*added weight*" to the "*nature and gravity of the crime*" and thus to identify "*a method which gives priority to one criterion, relating to the offense, and treats the others as secondary or marginal*."[53]

50. In the current context of frequent terrorist acts, it would be interesting for the ECHR to clarify this weighting, focusing on the two *Boultif* criteria relating to security as well as the second criterion proposed in these observations. Indeed, as a common good, national security must be given primary weight in the assessment. This is the explicit approach chosen by the Supreme Court of Denmark in its judgment of November 19, 2018.

51. Moreover, in all decisions involving children, the Court considers that their best interests must take precedence. This is also the case in decisions to deport a parent.[54] According to the Court, "*whilst alone they cannot be decisive, such interests certainly must be afforded significant weight*."[55] On the contrary, the last *Boultif* criterion relating to the spouse is the only one to have been downplayed by the Court in the judgment: "*the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion*."[56]

52. Given the fragility of children, it would be appropriate to explicitly specify such weighting. In this way, the two criteria concerning children could also be given primary weight. To summarize the reasoning of the last two paragraphs, the ECHR could take the opportunity of this case to define five guiding principles as "major,"i.e., having a greater weight, and the other seven as "minor."

53. The five major criteria would be those relating to the safety and best interests of the child:

- the nature and seriousness of the offense committed by the applicant;
- the time elapsed since the offense was committed and the applicant's conduct during that period;
- the seriousness of the difficulties which the society is likely to encounter in removing the applicant from the environment that led him to commit criminal offenses;
- whether there are children from the marriage and, if so, their age;
- where appropriate: the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled.

Society at the heart of the interaction between Article 8 and security

54. The Court could thus take the opportunity of this litigation to reopen the evolution of these criteria in line with the evolution of reality, as it did between 1988 and 2006. Two new guiding principles could be

[51] Jacob Haislund, "Tre på stribe: Endnu en terrordømt mister sit statsborgerskab", *Jyllands-Posten*, 19 November 2018.
[52] Steen A. Jørgenssen and Sofie Øgård Gøttler, "Partier: Hjemsendte IS-krigere skal straffes - om muligt miste dansk pas", *Jyllands-Posten*, 11 November 2019.
[53] *Üner* [GC], *op. cit.* joint dissenting opinion of Judges Costa, Zupančič and Türmen, § 16.
[54] *Youth v. Netherlands* [GC], no. 12738/10, 3 October 2014, *op. cit.*, §§ 117 and 118.
[55] *Ibid.*, § 109.
[56] *Boultif*, § 48.

defined, and a hierarchy between major and minor principles could be established. This clarification would provide a better understanding of the interaction between deportation of an alien and family life in the context of the many applications lodged with the Court on this subject. This adaptation of the Court's approach would also serve as a reminder that the right to respect for family life is not a right conflictual with security. The one must not be sacrificed for the other, as they are complementary and interdependent.

55. The ECLJ wishes to recall that the right to respect for private and family life is indeed based, like other human rights, on human dignity. Through this right, one fulfills his or her nature, in particular, his or her natural yearning to live in society. A terrorist, by his or her acts, does not fulfill this natural yearning but, on the contrary, destroys society.
56. Finally, as recalled in the Preamble to the Universal Declaration of Human Rights, rights are a foundation of freedom, justice, and peace. Security is another foundation of those same three objectives, and the fight against terrorism aims to ensure it. These two foundations of freedom, justice, and peace are inseparable and serve the same common good.

Conclusion

57. The revocation of Adam Johansen's citizenship is legitimate, for the applicant cannot claim privilege as a Dane by birth, and in that, it is not arbitrary. This revocation makes Mr. Johansen, a Tunisian, deportable on account of his criminal conviction of terrorist acts. The deportation order meets the legitimate objectives of protecting national security, criminal offenses prevention, and the protection of the rights and freedoms of others. It is also proportionate to these objectives when taking into account the seriousness of the offenses committed by the applicant, his private and family life, and the current Danish context. Article 8 of the Convention, therefore, does not appear to be violated by this deportation order, which should be implemented upon the applicant's release from prison in March 2020. Applying the Court's usual ten guiding principles approach, in particular, suffices to establish this non-violation.

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