CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 13594/03
by Yash PRIYA
against Denmark

The European Court of Human Rights (First Section), sitting on 6 July 2006 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr P. LORENZEN,
Mrs N. VAJIĆ,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the decision to apply Article 29 § 3 of the Convention and examine the admissibility and merits of the case together.

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

The applicant, Ms Yash Priya, is an Indian national who was born in 1971. Currently she lives illegally in Denmark. She is represented by Mr Eli Heckscher, a lawyer practising in Stenløse. The Danish Government ("the Government") are represented by their Agent, Mr Peter Taksøe-Jensen, of the Ministry of Foreign Affairs, and their Co-agent, Mrs Nina Holst-Christensen, of the Ministry of Justice.

A. The circumstances of the case

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

In September 1998 the applicant applied for a visa for Denmark at the Danish Embassy in New Delhi. She maintained that the purpose of her stay was business. A visa valid for ninety days was granted her. She entered Denmark on 22 January 1999, at the age of twenty-seven.

Less than two months later, on 20 March 1999, in Denmark she married an Indian national, henceforth called PK. The latter was born in 1965 and had entered Denmark illegally on 22 October 1993, when he was 28 years old. Having married a Danish national on 25 February 1994 he was granted a temporary residence permit, which became permanent on 18 July 1997. PK divorced his Danish wife on 18 December 1997.

On 29 June 1999 the applicant and PK contacted the Aliens Authorities (*Udlændingestyrelsen*), which advised them that at the relevant time they did not fulfil the requirements set out in section 9, subsection (ii) d of the Aliens Act (*Udlændingeloven*, No. 539 of 26 June 1999) for obtaining a family reunification, as according to that provision an alien residing in Denmark, who was neither a Nordic national nor a refugee had to have held a permanent residence permit in Denmark for more than the last three years. The applicant left Denmark on 22 July 1999.

Approximately seven months after her marriage with PK, on 29 October 1999, in India the applicant gave birth to GK.

On 14 July 2000, on a visa valid for thirty days, the applicant re-entered Denmark together with GK and applied for a residence permit.

By decision of 20 February 2001, pursuant to section 9, subsection 1 (ii) d of the Aliens Act (No. 711 of 1 August 2001), taken together with section 9, subsection 10 of the Act, the Aliens Authorities refused to grant the applicant a residence permit because it could not be established that the spouses' aggregate ties with Denmark were at least as strong as the spouses' ties with another country. The applicant was ordered to leave the country within 30 days from the day on which she was notified of the decision.

GK on the other hand was granted a temporary residence permit until 29 October 2017 (when the child turns 18 years old and comes of age).

On 4 April 2001, in Denmark, the applicant gave birth to the couple's second child, SHK, who was granted a temporary residence permit until 4 April 2019.

On 13 November 2002, at the Aliens Authorities' request, the police confirmed that the applicant was still living with her husband and thus remained illegally in Denmark.

The applicant's request of 21 November 2001 that the Aliens Authorities re-open her case was refused on 30 January 2002, and the applicant was ordered to leave the country immediately.

By letter of 20 April 2002 to the Aliens Authorities, the applicant requested anew that she be granted a residence permit. In support thereof she maintained that PK would not allow her to take any of the children with her back to India; that in her view PK was not capable of taking proper care of the youngest child; and that she had initiated proceedings against PK in order to revoke their shared custody of SHK (in order to bring this child with her to India). Also, she applied for a residence permit by invoking humanitarian grounds as set out in section 9, subsection 2 (ii) of the Aliens Act (No. 711 of 1 August 2001).

The applicant's letter was forwarded to the Ministry of Refugee, Immigration and Integration Affairs *(Ministeriet for flygtninge, Indvandrere og Integration)*, which on 2 July 2002 refused the applicant's request since a residence permit pursuant to section 9, subsection 2 (ii) of the Aliens Act could only be granted if the residence permit seeker was also an asylum seeker.

The police contacted the applicant at the spouses address on 30 October 2002 and summoned her to come for an interview at the police station on 5 November 2002. On the latter date, the applicant and PK informed the police that they agreed to the applicant leaving voluntarily with their two children. It was planned that she left for India on 16 November 2002.

On 15 November 2002, however, the applicant appealed against the Aliens authorities' decisions of 20 February 2001 and 30 January 2002 to the Ministry of Refugee, Immigration and Integration Affairs.

On 18 November 2002 the applicant and PK were legally separated. On the same day they signed an agreement before the Copenhagen County (*Statsamtet København*) maintaining shared custody of the children who due to an agreement between the separated spouses were to live with PK. According to the agreement, the applicant was entitled to access to her children every second week from Wednesday to Monday, and two hours on all other days. Three days later, the applicant's counsel wrote to the Ministry that the applicant withdrew her consent to leave voluntarily. Moreover, a request was submitted that the Aliens Authorities re-open the proceedings, which led them to refuse family reunification on 20 February 2001.

The request was refused by the Alien Authorities' decision of 27 November 2002, which the applicant appealed against on 1 December 2002.

On 7 March 2003, the Ministry of Refugee, Immigration and Integration Affairs upheld the Alien Authorities' decisions of 27 November 2002, 20 February 2001 and 30 January 2002. In reaching its decision the Ministry maintained that it could not be established that the spouses' aggregate ties with Denmark were stronger than the spouses' ties with another country as required by section 9, subsection 10, cf. section 9, subsection 1 (ii) b - d and

sections 9, subsection 2 (vii). In this respect, it noted *inter alia* that both spouses were born and raised in India; that PK only entered Denmark at the age of 28; that the parents of both spouses lived in India; and that the spouses communicated in Punjabi and Hindi.

Furthermore, the Ministry found that no exceptional personal circumstances existed which would make the issuing of a residence permit appropriate. Finally, noting that the applicant had resided illegally in Denmark since 22 March 2001, the Ministry did not find that particular reasons made it appropriate to exempt the applicant from complying with the rule of procedure set out in section 9 c, subsection 3 in the Aliens Act, according to which an application for a residence permit under section 9 c, subsection 1 of the Aliens Act has to be submitted or examined before entry into the country.

Finally, the Ministry dismissed the applicant's claim that a refusal to grant her a residence permit would be in violation of Articles 8 and 12 of the Convention. It noted that the fact that the spouses had been legally separated and made an agreement regarding the applicant's access to the children could not alter the outcome, since according to the applicant's counsel the reason for the legal separation had merely been an attempt to improve the applicant's chances to stay in Denmark.

In the meantime, in a letter of 14 December 2002, in which the applicant stated her address to be that of her husband, in vain she requested help from the Queen of Denmark.

On 24 March 2003, on request, the applicant's counsel informed the police that he was unaware of the applicant's address; that he only spoke to her on the telephone; and that she wished to obtain a divorce from PK since allegedly such would be the only possible way of staying in Denmark.

The applicant did not bring her case before the ordinary courts.

According to the Aliens Authorities, the applicant is still married to PK and she continues to live illegally in Denmark.

B. Relevant domestic law.

The Aliens Act (No. 711 of 1 August 2001) applicable at the relevant time.

Upon application, a residence permit could be issued *inter alia* to an alien over the age of 25 who cohabited at a shared residence, either in a marriage or in a regular cohabitation of prolonged duration, with a person permanently resident in Denmark over the age of 25 who had held a permanent residence permit for Denmark for more than the last three years (section 9, subsection 1 (ii) d). However, if the person permanently residing in Denmark did not possess Danish citizenship, it was a condition for issuing a residence permit to the alien (spouse or cohabitant) that the

spouses' or the cohabitants' aggregate ties with Denmark correspond at least to the spouses' or cohabitants' ties with another country, or that exceptional personal circumstances otherwise made it appropriate (section 9, subsection 10, taken together with section 9, subsection 1 (ii) b - d and section 9, subsection 2 (vii)).

Furthermore, a residence permit could be issued *inter alia* to an alien upon application, if exceptional reasons made it appropriate (section 9 c, subsection 1). Such a residence permit had to be obtained before entry into Denmark. After entry, such an application could not be submitted or examined or be allowed to suspend enforcement in Denmark, unless particular reasons made it appropriate (section 9 c, subsection 3). In certain specified cases an alien who has been notified of a final administrative decision (made under section 46) may request within 14 days after the decision is made known to him that the Aliens Authorities bring the case before the competent courts for a review (Section 52). The later provision is, however, a supplement to the general rule in section 63 of the Constitution (see below).

The Danish Constitution of 5 June 1953 (Grundloven).

Section 63 of the Constitution read as follows:

> "1. The courts of justice shall be empowered to decide any question relating to the scope of the executives' 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."

Review by the courts of the Administration's general and specific decisions pursuant to section 63 of the Constitution is a common legal remedy. Consequently, in cases where an alien claims that a refusal to grant a residence permit or a deportation order would be in violation of the Convention, the courts examine intensively whether the Administration's decision is in accordance with Denmark's obligations under the Convention, including Article 8. The Government have submitted various recent judgments (including one printed in the Weekly Law Review (*Ugeskrift for Retsvæsen*) 2004 p. 1765), in which pursuant to section 63 of the Constitution the domestic courts thoroughly examined an alien's allegation that the Administration's refusal to grant a residence permit was in breach of Article 8 of the Convention. The courts cannot grant an alien a residence permit but they can annul the decision of the Administration and thus send the case back to the Administration for a renewed examination, for instance if the courts find that the refusal to grant a residence permit constitutes a violation of the aliens' right to respect for family life according to Article 8 of the Convention.

An application pursuant to section 63 of the Constitution has no automatic suspensive effect. However, the Government have submitted two

Supreme Court decisions printed in the Weekly Law Review 1997 p. 756 and p. 1237, in which an alien, having been refused a residence permit by the Administration, brought the case before the courts and requested that it be granted suspensive effect. In both cases the Supreme Court ruled that even in the absence of a specific legal authority, an application pursuant to section 63 of the Constitution may be granted suspensive effect if very particular circumstances (*ganske særlige omstændigheder*) exist.

COMPLAINT

The applicant complains that an implementation of the order to deport her to India would be in breach of her right to respect for her family life with her children within the meaning of Article 8 of the Convention.

THE LAW

The applicant complains that an implementation of the deportation order would be a violation of Article 8 of the Convention, which reads as follows:

> "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."

The Government maintain principally that the applicant has failed to exhaust domestic remedies in accordance with Article 35 § 1 of the Convention since she failed to bring her case before the ordinary courts.

Pursuant to section 63 of the Constitution the courts' review of the Administration's general and specific decisions is a common legal remedy, which must be exhausted prior to the filing of an application with the Court. The Government have submitted domestic case-law, in which the national courts intensively assessed whether a deportation of an alien would be in accordance with Denmark's obligations under Article 8 of the Convention.

The Government contend that a court review must be considered an effective remedy, although it has no automatic suspensive effect, since in cases where aliens have been refused residence permit, the courts have ruled that even in the absence of a specific legal authority, an application may be granted suspensive effect, if very particular circumstances (*ganske særlige*

omstændigheder) exist. The Government referred to two Supreme Court decisions, printed in the Weekly Law Review (*Ugeskrift for Retsvæsen*) 1997 p. 756 and 1237.

The applicant maintains that she has exhausted domestic remedies although admittedly she did not bring her case before the courts.

Firstly, she alleges that she did not receive any guidance on how to appeal against the Ministry's decision of 2 July 2002.

Secondly, she maintains that she could not have brought the decision before the domestic courts pursuant to section 52 of the Aliens Act and even if she could, the extraordinary short time-limit of fourteen days would have passed long time ago. Nor could she have brought the decision before the domestic courts pursuant to section 63 of the Constitution because in principle she agreed with the administrative authorities' way of assessing the facts of the matter. In such a situation, she alleges, it would be impossible to bring the case before the courts.

The Court takes note of the domestic case-law showing respectively that section 63 of the Constitution can be used to obtain a review of whether a deportation of an alien would be in accordance with Article 8 of the Convention and that in a case where an alien has been refused a residence permit, the courts are empowered to grant an application suspensive effect if very particular circumstances exist. In the present case, however, the Court finds it unnecessary to examine further whether the applicant has complied with the requirement of exhaustion of domestic remedies since the application is in any event manifestly ill-founded for the following reasons.

The Government submit that there are no obstacles to the applicant pursuing a family life with her husband and children in India. In particular, they maintain that the legal separation in November 2002 had to be disregarded since the spouses' family life continued to exist and they never had the intention of separating *de facto*. Thus, the sole purpose of the legal separation was to obtain a residence permit for the applicant.

The applicant disagrees. She contends that the separation and the agreement on custody and access to the children were realities. Thus, since the children have been granted a residence permit in Denmark until they become of age (at the age of eighteen) and since they are to stay with their father, it will be impossible for her to exercise her family life with her children in India.

By way of introduction the Court notes that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligation inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. The Court does not find it necessary to determine whether in the present case the impugned decision, to refuse to grant a residence permit to

the applicant, who had been living illegally in Denmark for five years, constitutes an interference with her exercise of the right to respect for her family life or is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation.

The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *inter alia Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, §§ 67 and 68; *Gül v. Switzerland*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, § 38; and *Ahmut v. the Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-VI, § 63).

Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (*Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998, and *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999).Thus, a distinction must be drawn between those seeking entry into a country to pursue their newly established family life; those who had an established family life before one of the spouses obtained settlement in another country; and those who seek to remain in a country where they have already established close family life and other ties for a reasonable period of time (cf. e.g. *Khannam v. United Kingdom (dec.) no 14112/88, DR 59, pp. 265-273).*

Turning to the circumstances of the present case, the applicant entered Denmark on 22 January 1999 on a three month visa, unmarried and without

any ties to Denmark. She left six month later on 22 July 1999, married to an Indian national, PK, and expecting his child.

On 14 July 2000 the applicant re-entered Denmark together with the child, GK on a visa valid for thirty days. The applicant still remains in the country although her requests to be granted a residence permit has been refused. The first decision in this respect was taken on 20 February 2001 by the Aliens Authorities, which at the same time ordered the applicant to leave the country within 30 days from the day on which she was notified of the decision. Accordingly, most of the applicant's stay in Denmark has been illegal.

The Court is aware that, where Contracting States tolerate the presence of aliens in their territory while the latter await a decision on an application for a residence permit, an appeal against such a decision or a request to re-open such proceedings, this enables the persons concerned to take part in the host country's society and to form relationships and to create a family there. However, as set out above, this does not entail that the authorities of the Contracting State involved are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the alien concerned to settle in their country. In this context a parallel may be drawn with the situation where a person who, without complying with the regulations in force, confronts the authorities of a Contracting State with his or her presence in the country as a *fait accompli*. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them (see *Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003).

In the present case the applicant was never given any assurances that she would be granted a right of residence by the competent Danish authorities. Moreover, having regard to the applicable rules at the relevant time**,** which the applicant and PK were advised on in June 1999, in July 2000 she could hardly expect that any right of residence would be conferred on her and the first child as a *fait accompli* due to their presence in the country. Nor could she expect to be able to continue a family life in Denmark (cf. *Bouchelkia v. France*, judgment of 29 January 1997, *Reports* 1997-I, p. 65, § 53; and *Baghli v. France*, no. 34374/97, § 48, ECHR 1999-VIII).

Furthermore, the Court considers that the present case discloses no exceptional circumstances. It observes in this context that the applicant entered Denmark in January 1999, when she was twenty-seven years old. At the relevant time she had no ties to Denmark. Less than two months later, she married PK, an Indian national, who had entered Denmark illegally in October 1993, when he was twenty-eight years old. At the relevant time he had no ties to Denmark either. Both spouses were born and raised in India, where their family lived, and the applicant and her husband communicated in Punjabi and Hindi.

The applicant alleges that the legal separation of the spouses in November 2002 and the following agreement on custody and access to the children were realities. Consequently, she maintained, since the children have been granted a residence permit in Denmark until they become of age (at the age of eighteen) and they are to stay with their father, it will be impossible for her to exercise her family life with her children in India.

In this connection the Court observes firstly that the Ministry of Refugee, Immigration and Integration Affairs in its decision of 7 March 2003 stated that according to the applicant's counsel the reason for the legal separation had merely been an attempt to enhance the applicant's chances to stay in Denmark. Moreover, on 24 March 2003 the applicant's counsel informed the police that the applicant wished to obtain a divorce from PK since allegedly such would be the only possible way of her staying in Denmark.

Secondly, the Court observes that several elements in the case indicate that the spouses still live together.

Finally, more than three years and six month after the legal separation the applicant has still not submitted any documents or information substantiating that the separation have been followed up by a divorce or a real wish by the spouses to so.

In these circumstances the Court cannot but assume that the applicant and PK are still married.

Thus, there are no obstacles to the applicant, her husband and children enjoying their family life in their home country India, and the respondent State cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President