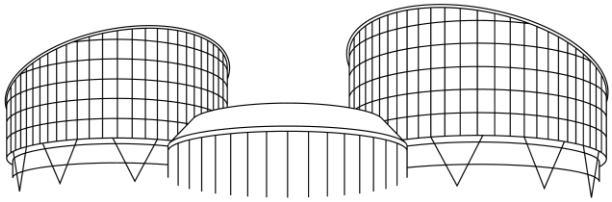

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF OSMAN v. DENMARK

(Application no. 38058/09)

JUDGMENT

STRASBOURG

14 June 2011

FINAL

14/09/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Osman v. Denmark,

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

Nina Vajić, *President*,
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
George Nicolaou,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 24 May 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38058/09) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Somali national, Mrs Sahro Osman ("the applicant"), on 19 July 2009.

2. The applicant was represented by the Aire Centre, an NGO situated in London. The Danish Government ("the Government") were represented by their Agent, Mr Thomas Winkler, from the Ministry of Foreign Affairs, and their Co-Agent, Mrs Nina Holst-Christensen, from the Ministry of Justice.

3. The applicant alleged, in particular, that the Danish authorities' refusal to reinstate her residence permit in Denmark was in breach of Articles 3 and 8 of the Convention.

4. On 25 November 2009 the acting President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1 of the Rules of Court) and the above application was assigned to the newly composed First Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in Somalia on 1 November 1987 as the youngest of five siblings. Currently she lives in Esbjerg.

7. From 1991 to 1995 the applicant lived with her family in Kenya.

8. In April 1994 the applicant's father and a sister were granted asylum in Denmark.

9. Having been granted a residence permit in November 1994, on 11 February 1995 the applicant, who at the relevant time was seven years old, her mother and three siblings joined them. A few years later, the applicant's parents divorced. The parents maintained joint custody of the applicant, who lived with her mother. From 1995 until August 2002, the applicant attended various schools, some of which expelled her due to disciplinary problems.

10. The applicant also had difficulties with her parents, who disapproved of certain aspects of her behaviour. Consequently, in May 2003, when the applicant was fifteen years old, her father decided to take her to Kenya to take care of her paternal grandmother, who was living at the Hagadera refugee camp in north-eastern Kenya. It appears that the applicant's mother did not want her to go but reluctantly agreed on the understanding that it would be a short trip. It also appears that the applicant believed that she was going on a short trip to visit her grandmother.

11. When the applicant's father returned to Denmark, he was summoned for an interview with the Immigration Service on 10 November 2003 because the latter had been informed that he, who had been recognised as a refugee, had visited his country of origin. On 17 December 2003 the Immigration Service (*Udlændingeservice*) took the stand that the applicant's father's residence permit had not lapsed. In that connection, the applicant's father was advised on the regulation regarding lapse of residence permits.

12. On 9 August 2005, three months before the applicant turned eighteen years old, she contacted the Danish Embassy in Nairobi with a view to returning to live with her mother and siblings in Denmark. Her father had joined her in Nairobi to help her submit the application for family reunification. He also remarried in Nairobi at the relevant time. An interview was conducted with the help of an English/Somali interpreter although it was stated that the applicant spoke Danish. The applicant explained that she had taken care of her grandmother, who had fallen seriously ill, until some of the grandmother's children had arrived from Somalia to take over the care of their mother.

13. In a letter of 24 November 2005 to the Immigration Service the applicant's mother stated, *inter alia*, that at the relevant time it had been

decided temporarily to send the applicant to Kenya where the family had a network so that she could attend school and that the applicant had been living with her father's friends.

14. On 21 December 2006 the Immigration Service found that the applicant's residence permit had lapsed pursuant to section 17 of the Aliens Act because she had been absent from Denmark for more than twelve consecutive months; because she had not contacted the Immigration Service until August 2005; and because there was no information indicating that she could not have contacted the authorities in due time. They also considered that the applicant was not entitled to a new residence permit under section 9, subsection 1 (ii), of the Aliens Act, in force at the relevant time, since the applicant was 17 years old and the said provision only extended a right to family reunification to children below the age of 15. Finally, it found that no special circumstances existed to grant her a residence permit under section 9 c, subsection 1, of the Aliens Act. It noted in that connection that the applicant had not seen her mother for four years; that it had been the latter's voluntary decision to send the applicant to Kenya; that she could still enjoy family life with her mother to the same extent as before; that she had stayed with the grandmother; and that except for the grandmother's age, there was no information that the applicant could not continue to live with her or the grandmother's children.

15. On 11 April 2007 the applicant appealed against the decision and maintained that it had not been her decision to leave the country; that from the refugee camp where she lived with her grandmother she was not able herself to go to Nairobi; and that during her stay outside Denmark she had not stayed in her country of origin.

16. According to the applicant, in June 2007 she re-entered Denmark clandestinely to live with her mother. It is disputed whether the Danish authorities were aware of this.

17. On 13 July 2007 the Immigration Service received a questionnaire from the applicant dated 12 July 2007 used for requests for exemption from the authorities revoking a residence permit despite a stay outside Denmark for a certain period. It was partly filled out and stated, *inter alia*, that it had been the applicant's parents' decision that she should leave Denmark at the relevant time; that the applicant spoke Danish, but could not read or write the language; that she spoke the language of the country in which she was currently residing, but that she could not read or write that language either; and that she was very afraid and could not reside in her country of origin as there was unrest. The applicant did not specify that she had actually returned to Denmark, but her signature was dated as set out above in Esbjerg, Denmark. It was also stated that her sister had assisted her in answering the questionnaire.

18. On 1 October 2007 the Ministry of Refugee, Immigration and Integration Affairs (*Ministeriet for flygtninge, indvandrere og integration*)

upheld the decision by the Migration Service of 21 December 2006. It stated among other things:

> "... The Ministry emphasises that there is no information available of any circumstances that would lead to [the applicant's] residence permit being deemed not to have lapsed ... [the applicant's] parents did not apply for retention of [her] residence permit before she left, and neither she nor her parents contacted the immigration authorities during her stay abroad, and it has not been substantiated that illness or other unforeseen events prevented such contact. Thus, the Ministry finds that the illness of [the applicant's] grandmother did not prevent [the applicant] or her parents from contacting the immigration authorities.
>
> Although the distance from Hagadera to Nairobi is significant [485 km] and it can be assumed that [the applicant] did not have the means to travel to Nairobi, the Ministry finds that these circumstances did not prevent [the applicant's] parents from contacting the immigration authorities before [the applicant's] departure, which was planned.
>
> The fact that [the applicant] stayed in Kenya and not in Somalia does not change the fact that [she] has resided abroad for more than twelve consecutive months.
>
> It is stated for the record that it was not [the applicant's] decision to leave Denmark and stay away so long. The ministry finds that this will not lead to a different outcome of the case as [the applicant's] parents had custody over her at the time of her departure ... they could thus lawfully make decisions about [her] personal circumstances..."

19. Upon request from the applicant, who was represented by counsel, on 11 December 2007 the Immigration Service brought the case concerning section 17 and section 9, subsection 1 (ii), of the Aliens Act before the City Court of Copenhagen (*Københavns Byret*), before which the case was decided on the documents submitted, without any parties being summoned. On 25 April 2008 it found against the applicant. It added that section 9, subsection 1 (ii), of the Aliens Act had been amended, limiting the right to family re-unification to children under 15 years instead of under 18 years in order to discourage the practice of some parents of sending their children on "re-upbringing trips" for extended periods of time to be "re-educated" in a manner their parents consider more consistent with their ethnic origins. It was preferable in the legislator's view for foreign minors living in Denmark to arrive as early as possible and spend as many of their formative years as possible in Denmark. It found that such decision did not contravene Article 8 of the Convention as invoked by the applicant.

20. The decision was appealed against to the High Court of Eastern Denmark (*Østre Landsret*), henceforth the High Court, before which the applicant's representative in his written submissions stated that the applicant remained in Kenya. On 30 October 2008 the High Court upheld the City Court's decision. By way of introduction, it stated that according to section 52 of the Aliens Act, it could not review a final administrative decision of refusal of a residence permit under section 9c, subsection 1, of the Aliens

Act. As to section 9, subsection 1 (ii) it confirmed that the applicant failed to fulfil the conditions. It took into account that the applicant's parents had sent her voluntarily to Kenya to live with family for an indefinite period; that the applicant was seventeen years and nine months old, when in August 2005 she applied to re-enter Denmark; that her father visited her during her stay in Kenya; and that her mother would also be able to visit the applicant in Kenya to enjoy family life there.

21. Leave to appeal to the Supreme Court (*Højesteret*) was refused on 19 January 2008.

22. By letter of 27 January 2010 the Ministry of Refugee, Immigration and Integration Affairs advised the applicant of her duty to leave Denmark pursuant to section 30 of the Alien's Act and the possibility of submitting an application for asylum under section 7 of the Aliens Act. The applicant was also advised that an application should be submitted in person to the Immigration Service or the police.

23. So far the applicant has not applied for asylum.

II. RELEVANT DOMESTIC LAW AND PRACTICE

24. Article 63 of the Constitution read as follows:

> The courts have authority to adjudge on any matter concerning the limits to the competence of a public authority. However, anyone wishing to raise such matters cannot avoid temporarily complying with orders issued by the public authorities by bringing them before the courts.

25**.** Applications for asylum are determined in the first instance by the Immigration Service and in the second instance by the Refugee Appeals Board under the Aliens Act (*Udlændingeloven*), the relevant provisions of which at the relevant time read as follows

Section 7

> 1. Upon application, a residence permit will be issued to an alien if the alien falls within the provisions of the Convention relating to the Status of Refugees (28 July 1951).
>
> 2. Upon application, a residence permit will be issued to an alien if the alien risks the death penalty or being subjected to torture or inhuman or degrading treatment or punishment in case of return to his country of origin. An application as referred to in the first sentence hereof is also considered an application for a residence permit under subsection 1.
>
> 3. A residence permit under subsections 1 and 2 can be refused if the alien has already obtained protection in another country, or if the alien has close ties with another country where the alien must be deemed to be able to obtain protection.

Section 8

1. Upon application, a residence permit will be issued to an alien who arrives in Denmark under an agreement made with the United Nations High Commissioner for Refugees or similar international agreement, and who falls within the provisions of the Convention relating to the Status of Refugees (28 July 1951), see section 7(1).

2. In addition to the cases mentioned in subsection 1, a residence permit will be issued, upon application, to an alien who arrives in Denmark under an agreement as mentioned in subsection 1, and who risks the death penalty or being subjected to torture or inhuman or degrading treatment or punishment in case of return to his country of origin, see section 7 subsection 2.

3. In addition to the cases mentioned in subsections 1 and 2, a residence permit will be issued, upon application, to an alien who arrives in Denmark under an agreement as mentioned in subsection 1, and who would presumably have satisfied the fundamental conditions for obtaining a residence permit under one of the provisions of the Aliens Act if he had entered Denmark as an asylum-seeker.

4. In the selection of aliens issued with a residence permit under subsections 1 to 3, the aliens' possibilities of establishing roots in Denmark and benefiting from the residence permit, including their language qualifications, education and training, work experience, family situation, network, age and motivation, must be emphasised unless particular reasons make it inappropriate.

5. Unless particular reasons make it inappropriate, it must be made a condition for a residence permit under subsections 1 to 3 that the alien assists in a special health examination and consents to the health information being transmitted to the Danish Immigration Service and the local council of the municipality to which the alien is allocated, and signs a declaration concerning the conditions for resettlement in Denmark.

6. The Minister of Refugee, Immigration and Integration Affairs decides the overall distribution of the aliens to be issued with a residence permit under subsections 1 to 3.

26. Before 1 July 2004 section 9, subsection 1 (ii) had the following wording:

Section 9

1. Upon application, a residence permit may be issued to: -

(i) ....

(ii) an unmarried child of a person permanently resident in Denmark or of that person's spouse, provided that the child lives with the person having custody of him or her and has not started his or her own family through regular cohabitation, and provided that the person is permanently resident in Denmark;

27. As from 1 July 2004 section 9 had the following wording:

Section 9

1. Upon application, a residence permit may be issued to: -

(i) ....

(ii) an unmarried child under the age of 15 of a person permanently resident in Denmark or of that person's spouse, provided that the child lives with the person having custody of him or her and has not started his or her own family through regular cohabitation, and provided that the person is permanently resident in Denmark:

a. is a Danish national;

b. is a national of one of the other Nordic countries;

c. is issued with a residence permit under section 7 or 8; or

d. is issued with a permanent residence permit or a residence permit with a possibility of permanent residence.

(iii) ...

28. The age limit referred to in section 9, subsection (ii) was reduced from 18 to 15 years old by Act no. 427 of 9 June 2004. The amendment entered into force on 1 July 2004. The following appears from the explanatory notes:

"It has turned out that some parents living in Denmark send their children back to the parents' country of origin or a neighbouring country on so-called "re-education journeys" to allow them to be brought up there and be influenced by the values and norms of that county. This particularly occurs in situations where the child has social problems in Denmark. Moreover, there are examples of parents who consciously choose to let a child remain in his or her country of origin, either together with one of the parents or with other family members, until the child is nearly grown up, although the child could have had a residence permit in Denmark earlier. The result of this is that the child grows up in accordance with the culture and customs of its country of origin and is not influenced by Danish norms and values during its childhood. In the Government's view, under-age aliens who will live in Denmark should come to Denmark as early as possible and spend the longest period of their childhood in Denmark in consideration of the child and for integration reasons. Similarly, children and young aliens who already live in Denmark should grow up here, to the extent possible, and not in their parents' country of origin. Against that background, the Government finds that the age limit for under-age children's entitlement to family reunification should be reduced from 18 to 15 years. The purpose of such reduction of the age limit for family reunification of children is to counteract both re-education journeys and the cases in which the parents consciously choose to let a child remain in its country of origin until the child is nearly grown up.

However, a residence permit will still have to be issued to children over 15 years of age based on an application for family reunification if a refusal would be contrary to

article 8 of the Convention... In cases where refusal of family reunification will be contrary to Denmark's treaty obligations, and where section 9, subsection 1 (ii), of the Aliens Act does not allow for family reunification, a residence permit will thus have to be issued under section 9c, subsection 1, of the Aliens Act...

In cases where the child has spent by far the largest part of his or her childhood in Denmark, and where the ties with the parents' country of origin are very poor, including where the child has attended school in Denmark only, or where the child speaks Danish, but not the language spoken in the parents' country of origin, regard for the best interest of the child might also imply, in these circumstances, that family reunification in Denmark must be granted. Circumstances may also exist in other situations which make it cogently appropriate to grant a residence permit in consideration of the best interest of the child even though the child is 15 years old or more at the time of the application.

29. Furthermore, the Aliens Act set out:

Section 9c

1. Upon application, a residence permit may be issued to an alien if exceptional reasons make it appropriate, including regard for family unity...

Section 17

1. A residence permit lapses when the alien gives up his residence in Denmark. The permit also lapses when the alien has stayed outside Denmark for more than 6 consecutive months. Where the alien has been issued with a residence permit with a possibility of permanent residence and has lived lawfully for more than 2 years in Denmark, the residence permit lapses only when the alien has stayed outside Denmark for more than 12 consecutive months. The periods here referred to do not include absence owing to compulsory military service or any service substituted for that.

2. Upon application, it may be decided that a residence permit must be deemed not to have lapsed for the reasons given in subsection 1.

3. ...

Section 30

1. An alien who is not, under the rules of Parts I and III to Va, entitled to stay in Denmark, must leave Denmark.

2. If the alien does not leave Denmark voluntarily, the police must make arrangements for his departure. The Minister of Refugee, Immigration and Integration Affairs lays down more detailed rules in this respect.

3. ...

Section 31

1. An alien may not be returned to a country where he will be at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment, or where the alien will not be protected against being sent on to such country.

2. An alien falling within section 7(1) may not be returned to a country where he will risk persecution on the grounds set out in Article 1 A of the Convention relating to the Status of Refugees (28 July 1951), or where the alien will not be protected against being sent on to such country. This does not apply if the alien must reasonably be deemed a danger to national security or if, after final judgment in respect of a particularly dangerous crime, the alien must be deemed a danger to society, but see subsection 1.

Section 46

1. Decisions pursuant to this Act are made by the Immigration Service, except as provided by sections 9(19) and (20), 46a to 49, 50, 50a, 51(2), second sentence, 56a, (1) to (4), 58i and 58j, but see section 58d, second sentence.

2. Apart from the decisions mentioned in sections 9g(1), 11d, 32a, 33, 34a, 42a(7), first sentence, 42a (8), first sentence, 42b(1), (3) and (7) to (9), 42d(2), 46e, 53a and 53b, the decisions of the Immigration Service can be appealed to the Minister of Refugee, Immigration and Integration Affairs ...

Section 52

1. An alien who has been notified of a final administrative decision made under section 46 may request, within 14 days after the decision has been notified to the alien, that the decision is submitted for review by the competent court of the judicial district in which the alien is resident or, if the alien is not resident anywhere in the Kingdom of Denmark, by the Copenhagen City Court, provided that the subject matter of the decision is:

(i) refusal of an application for a residence permit with a possibility of permanent residence under section 9, subsection 1 (ii);

(ii) lapse, revocation, or refusal of renewal of such permit;

...

2. The case must be brought before the court by the Danish Immigration Service, which shall transmit the case to the court, stating the decision appealed against and briefly the circumstances relied on, and the exhibits of the case.

3. The court shall see that all facts of the case are brought out and shall itself decide on examination of the alien and witnesses; procuring of other evidence; and whether proceedings are to be heard orally. If the alien fails without due cause to appear in court, the court shall decide whether the administrative decision appealed against is to

be reviewed without the alien being present or the matter is to be dismissed or proceedings stayed.

4. If found necessary by the court, and provided that the alien satisfies the financial conditions under section 325 of the Administration of Justice Act, counsel must be assigned to the alien, except where he himself has retained counsel.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicant complained that the refusal to reinstate her residence permit in Denmark was in breach of Articles 3 of the Convention, which reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Admissibility

31. The applicant pointed out that she had raised her fear of being returned to Somalia in the questionnaire of 12 July 2007. It had thus been open to the immigration authorities to consider the said questionnaire as an application for asylum. In any event she maintained that an asylum application was inappropriate and irrelevant to the substance of her claim which was centred on the refusal to re-instate her residence permit.

32. The Government contended that this complaint should be declared inadmissible due to non-exhaustion of domestic remedies because the applicant had failed to raise before the relevant Danish authorities, either in form or substance, the complaint made to the Court.

33. They pointed out that a deportation was always subject to the conditions in section 31, subsection 1, of the Aliens Act according to which an alien may not be returned to a country where he will be at risk of the death penalty or of ill-treatment.

34. The judicial review that took place in the present case under section 52 of the Aliens Act as to the lapse of residence permit and on family reunification did not include an assessment of the possible risk upon return to Somalia.

35. Moreover, when the decisions in dispute were issued, the authorities were not aware that the applicant had re-entered Denmark illegally. They

assumed that she was still in Kenya and therefore did not go further into the question of deportation. Accordingly, it was only later that the applicant was advised of the possibility of submitting an application for asylum under section 7 of the Aliens Act, of which she did not avail herself.

36. Finally, for the sake of completeness, the Government submitted that if the applicant wished to return to Kenya, she would have to apply to enter that country herself; the immigration authorities were not in a position to apply for her.

37. The Court reiterates that the purpose of the rule on exhaustion of domestic remedies is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

38. Under Danish law the question of whether an alien risks the death penalty or being subjected to torture or inhuman or degrading treatment or punishment in case of return to his country of origin is examined by the Immigration Service and, on appeal, by the Refugee Appeals Board.

39. During her stay in Denmark, the applicant has not applied for asylum, even though the Ministry of Refugee, Immigration and Integration Affairs, in their letter of 27 January 2010, in addition to advising the applicant of her duty to leave Denmark, also advised her of the possibility of submitting an application for asylum under section 7 of the Aliens Act. It was specified that an application should be submitted in person to the Immigration Service or to the police. The applicant did not avail herself of that possibility.

40. Accordingly, the Danish authorities have not had the opportunity to consider whether the applicant would risk being subjected to treatment contrary to Article 3 upon return to Somalia.

41. It follows that this part of the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

42. The applicant further complained that the refusal to reinstate her residence permit in Denmark was in breach of Articles 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."

A. Admissibility

43. The Government contested that argument.

44. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

45. The applicant maintained that the Danish authorities' decision to refuse to reinstate her residence permit had been disproportionate to the aim pursued. She grew up in Denmark, spoke the language, went to school there and had her close family there. Accordingly, Denmark was the only place where she could develop aspects of her personality and relationships with others that were vital to private life.

46. In the applicant's view, the Danish authorities had completely disregarded the manner in which she had been removed as a minor from Denmark by her father and subsequently exploited by being forced to take care of her paternal grandmother. The applicant thus alleged that she had been a victim of human trafficking as defined in Article 4(a) and 4(c) of the Council of Europe Convention on Action against Trafficking in Human Being. In such a case, where her father's actions amounted to a criminal offence and were clearly not in her best interests, the State had a duty to look past the exercise of parental authority in order to protect her interest. Accordingly, when in August 2005, the applicant, who was still a minor, applied to re-enter Denmark and the Danish authorities became aware of her situation, they had an obligation to protect her best interest, namely to reinstate her residence permit, allow her to resume her education, and reunite her with her mother and siblings in Denmark.

47. Finally, she maintained that in the light of the conditions in Somalia and the considerable expense of travelling elsewhere, it could not be expected that the applicant's future family life should take place outside Denmark.

48. The Government maintained that a fair balance had been struck between the applicant's interest on the one hand and the State's interest in controlling immigration on the other hand. It had been noted that the applicant lived lawfully in Denmark from the age of seven to the age of fifteen and thus spent a large part of her childhood there. She had some Danish skills, and from 1995 until August 2002 she attended various schools, from some of which she was expelled. However, it had also been noted that the applicant had strong ties with Kenya and Somalia. She had

family there and spoke Somali fluently. The applicant stayed in Kenya from 1991 to 1995 and from 2003 to 2005. The applicant's father escorted her there in 2003 and visited her in 2005; there were thus no obstacles for him to enter that country. Likewise, the applicant's mother had resided in Somalia and Kenya and there were no obstacles for her to enter any of those countries to exercise family life with the applicant there. The applicant's siblings had all attained the age of majority.

49. In addition, the interruption of the applicant's stay in Denmark and her separation from her family there was caused by a conscious decision by her parents because the applicant had problems in school and difficulties with her parents, who disapproved of certain aspects of her behaviour. Accordingly, apart from the applicant's own statement, there was no evidence establishing that she was sent to Kenya for the purpose of exploitation and that she had been a victim of human trafficking.

50. As to the applicant's allegation that she was prevented from resuming her education, the Government pointed out that the applicant was expelled from various schools in Denmark due to discipline problems. Moreover, according to the applicant's mother's letter of 24 November 2005 the purpose of sending the applicant to Kenya had been for her to attend school there, although this never happened. The Government thus contend that the applicant's educational problems could not be attributed to others than herself and her parents.

51. In these circumstances they found that it had not been disproportionate to refuse to reinstate the applicant's residence permit when she applied at the age of seventeen years and nine months, after more than two years of absence.

52. Finally, the Government noted that the applicant could submit a new application for a residence permit based on family unification under section 9c of the Aliens Act.

2. The Court's assessment

53. 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 private and 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 reinstate the applicant's residence permit, constitutes an interference with her exercise of the right to respect for her private and 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. 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.

54. 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; *Ahmut v. the Netherlands*, judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-VI, § 63 and no. 13594/03, and *Priya v. Denmark* (dec.), 6 July 2006.

55. The applicant was still a minor when, on 9 August 2005, she applied to be reunited with her family in Denmark. She had reached the age of majority when the refusal to reinstate her residence permit became final on 19 January 2008, when leave to appeal to the Supreme Court was refused. The Court has accepted in a number of cases concerning young adults who had not yet founded a family of their own that their relationship with their parents and other close family members also constituted "family life". Furthermore, Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (*Maslov v. Austria* [GC], no. 1638/03, §§ 62-63, 23 June 2008.

56. Accordingly, the measures complained of interfered with both the applicant's "private life" and her "family life".

57. Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned.

58. It is not in dispute that the impugned measure had a basis in domestic law, namely sections 17 and 9 subsection 1 (ii), and pursued the legitimate aim of immigration control.

59. The main issue to be determined is whether the interference was "necessary in a democratic society" or more concretely whether the Danish authorities were under a duty to reinstate the applicant's residence permit after she had been in Kenya for more than two years.

60. The Court observes that the applicant spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old. She speaks Danish and received schooling in Denmark until August 2002. Her divorced parents and older siblings live in Denmark. The applicant therefore had social, cultural and family ties in Denmark.

61. The applicant also had social, cultural and family ties in Kenya and Somalia. She was born in Somalia and lived there from 1987 to 1991. She resided in Kenya from 1991 to 1995. The applicant spoke Somali. It was unclear whether the applicant had family in Somalia but certain that she had family in Kenya. The applicant returned to Kenya in 2003 and took care of her parental grandmother. Her application in August 2005 to re-enter Denmark was refused but she re-entered the country illegally, apparently in June 2007. The applicant's father was a recognised refugee from Somalia. He visited Kenya at least twice, namely in 2003 and 2005. The second time he remarried there. There was no indication that the applicant's mother could not enter Somalia and Kenya.

62. The applicant alleged that she had been a victim of human trafficking and that this fact was ignored by the Danish authorities in their decision to refuse to reinstate her residence permit. The Court notes, however, that the applicant never reported being a victim of human trafficking to the police or to any other Danish authority, including the Danish Embassy in Nairobi, or to the lawyer representing her before the courts in Denmark. Moreover, although the applicant's mother, who shared custody with the applicant's father may not have agreed to the length of the applicant's stay in Kenya or to the fact that the applicant did not receive any schooling there, there are no elements indicating that she did not agree to the applicant being accompanied by her father to Kenya in August 2003 with a view to residing there temporarily. Nor did the applicant's mother at any time subsequently express openly that the applicant had been a victim of human trafficking. The Danish authorities had thus no reason to take this allegation into account.

63. The applicant also maintained that the Danish authorities had a duty to look past the exercise of parental authority in order to protect her interest and that it was obvious that her father's decision to send her to Kenya was not in her best interest.

64. The Court reiterates in this connection that the exercise of parental rights constitutes a fundamental element of family life, and that the care and upbringing of children normally and necessarily require that the parents decide where the child must reside and also impose, or authorise others to

impose, various restrictions on the child's liberty (see, for example *Nielsen v. Denmark*, 28 November 1988, § 61, Series A no. 144).

65. It also reiterates that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in a host country, very serious reasons are required to justify expulsion (see, *Maslov v. Austria* [GC], quoted above, § 75). In the present case the applicant was refused restoration of her lapsed residence permit, as opposed to being expelled due to having committed a crime. Nevertheless, it is undisputed that she spent the formative years of her childhood and youth in Denmark, namely from the age of seven to fifteen years old, that she spoke Danish, that she had received schooling in Denmark until August 2002, and that all her close family remained in Denmark. In these circumstances, the Court also considers that very serious reasons were required to justify the authorities' refusal to restore the applicant's residence permit, when she applied from Kenya in August 2005.

66. The Government pointed out that the 12 months time-limit for stay abroad set out in section 17, subsection 1, of the Aliens Act had not changed since the applicant's first entry into Denmark in 1995. Moreover, with effect from 1 July 2004, section 9, subsection (ii), of the Aliens Act was amended, limiting the right to family re-unification to children under 15 years instead of under 18 years, specifically to discourage the practice of some parents of sending their children on "re-upbringing trips" for extended periods of time to be "re-educated" in a manner their parents consider more consistent with their ethnic origins, as it was preferable in the legislator's view for foreign minors living in Denmark to arrive as early as possible and spend as many of their formative years as possible in Denmark.

67. The Court does not question that the said legislation was accessible and foreseeable and pursued a legitimate aim. The crucial issue remains though whether, in the circumstances of the present case, the refusal to reinstate the applicant's residence permit was proportionate to the aim pursued.

68. The Court notes in particular that the applicant was granted a residence permit in Denmark in November 1994 and subsequently entered the country in February 1995, when she was seven year old. Moreover, at the relevant time the applicant had already legally spent more than eight formative years of her childhood and youth in Denmark before, at the age of fifteen, she was sent to Kenya, which was not her native country. The case thus differs significantly from *Ebrahim and Ebrahim v. the Netherlands* (dec.) of 18 March 2003, in which the first applicant entered the Netherlands with his family when he was ten years old and applied for asylum or a residence permit. When the boy was thirteen years old, serious tensions had developed between him and his stepfather who disapproved of the boy's behaviour in the Netherlands. Therefore, the boy was returned to Lebanon to stay with his maternal grandmother in a refugee camp to

become acquainted with his native country. Neither the boy nor any members of his family had at that time been granted a residence permit in the Netherlands. After three years in Lebanon, having reached the age of sixteen, the boy applied in vain to return to the Netherlands. The Court stated specifically in that case that " that due consideration should be given to cases where a parent has achieved settled status in a country and wants to be reunited with her child who, for the time being, finds himself in the country of origin, and that it may be unreasonable to force the parent to choose between giving up the position which she has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company, which constitutes a fundamental element of family life (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 68). The issue must therefore be examined not only from the point of view of immigration and residence, but also with regard to the mutual interests of the applicants".

69. The Court also notes that although the legislation at issue aimed at discouraging parents from sending their children to their countries of origin to be "re-educated" in a manner their parents consider more consistent with their ethnic origins, the children's right to respect for private and family life cannot be ignored.

70. In the present case, the applicant maintained that she had been obliged to leave Denmark to take care of her grandmother at the Hagadera refugee camp for more than two years; that her stay there was involuntary; that she had no means to leave the camp; and that her father's decision to send her to Kenya had not been in her best interest.

71. The Ministry of Refugee, Immigration and Integration Affairs addressed some of these issues in its decision of 1 October 2007. It stated, among other things, "neither [the applicant] nor her parents contacted the immigration authorities during her stay abroad, and it has not been substantiated that illness or other unforeseen events prevented such contact. Although the distance from Hagadera to Nairobi is significant [485 km] and it can be assumed that [the applicant] did not have the means to travel to Nairobi, the Ministry finds that these circumstances did not prevent [the applicant's] parents from contacting the immigration authorities before [the applicant's'] departure, which was planned. ...It is stated for the record that it was not [the applicant's] decision to leave Denmark and stay away so long. The ministry finds that this will not lead to a different outcome of the case as [the applicant's] parents had custody over her at the time of her departure ... they could thus lawfully make decisions about [her] personal circumstances...". The Court notes in this respect that the immigration authorities had discretionary powers by virtue of section 9 c to issue a residence permit to the applicant if exceptional reasons made it appropriate, including regard for family unity and by virtue of section 17, subsection 2 of the Aliens Act to decide that a residence permit must have been deemed

not to have lapsed for the reasons given in subsection 1. However, under both provisions the immigration authorities found against the applicant.

72. The immigration authorities have submitted that they were not aware at the relevant time that the applicant had re-entered Denmark. The same applied to the applicant's appointed lawyer, the City Court and the High Court. Accordingly, the applicant was only heard in person at the Danish Embassy in Nairobi in August 2005, when she was seventeen years and nine months old.

73. Moreover, the applicant's view that her father's decision to send her to Kenya for so long had been against her will and not in her best interest, was disregarded by the authorities with reference to the fact that her parents had custody of her at the relevant time. The Court agrees that the exercise of parental rights constitutes a fundamental element of family life, and that the care and upbringing of children normally and necessarily require that the parents decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty (see, for example *Nielsen v. Denmark*, 28 November 1988, § 61, Series A no. 144). Nevertheless, in respecting parental rights, the authorities cannot ignore the child's interest including its own right to respect for private and family life.

74. The applicant's view on her right to respect for family life was also disregarded by, for example, the Migration Service with reference to the fact that she had not seen her mother for four years; that it had been her mother's voluntary decision to send the applicant to Kenya; and that the applicant could still enjoy family life with her mother to the same extent as before. In the Court's view, however, the fact that the applicant's mother did not visit the applicant in Kenya, or that mother and child apparently had very limited contact for four years, can be explained by various factors, including practical and economical restraints, and can hardly lead to the conclusion that the applicant and her mother did not wish to maintain or intensify their family life together.

75. Finally, in May 2003, when the applicant was fifteen years old and sent to Kenya, even if section 17 of the Aliens Act set out that the applicant's residence permit may lapse after twelve consecutive months abroad, the applicant could still apply for a residence permit in Denmark by virtue of Section 9, subsection 1(ii) of the Aliens Act in force at the relevant time. The latter provision was amended, however, as from 1 July 2004, when the applicant was still in Kenya, reducing the right to family reunification to children under fifteen years old instead of eighteen years old. The Court does not question the amended legislation as such but notes that the applicant and her parents could not have foreseen this amendment when they decided to sent the applicant to Kenya or at the time when the twelve month lime-limit expired.

76. Having regard to all the above circumstances, it cannot be said that the applicant's interests have sufficiently been taken into account in the

authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on the one hand and the State's interest in controlling immigration on the other.

77. There has accordingly been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 4, 13 AND 14 OF THE CONVENTION AND OF ARTICLE 2 OF PROTOCOL NO.1 TO THE CONVENTION.

78. The applicant has also contended that the refusal to reinstate her residence permit in Denmark contravened Article 4, 13 and 14 of the Convention and of Article 2 of Protocol No. 1 to the Convention.

79. The Court notes that under the notion of Article 35 § 1 of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. This condition is not met by the mere fact that an applicant has submitted his or her case to the various competent courts. It is also necessary for the complaint brought before the Court to have been raised by the applicant, at least in substance, during the proceedings in question. On this point the Court refers to its established case-law. In the present case, the applicants failed to raise either in form or in substance the above complaints that are made to the Court.

80. The Court notes that the applicant failed to raise, either in form or substance, before the domestic courts the complaint made to it under Article 4, 13 and 14 of the Convention and of Article 2 of Protocol No. 1 to the Convention.

81. It follows that this part of the application is inadmissible for non-exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

83. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

84. The Government found the amount excessive and submitted that finding a violation would in itself constitute adequate just satisfaction.

85. The Court awards the applicant EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

86. The applicant also claimed 8,625 GBP pounds (equivalent to EUR 10,435[1]) for the costs and expenses incurred before the Court.

87. The Government found the amount excessive and noted that the applicant had failed to apply for legal aid under the Danish Legal Aid Act (*Lov 1999-12-20 nr. 940 om retshjælp til indgivelse og førelse af klagesager for internationale klageorganer i henhold til menneskerettigheds-konventioner)* according to which applicants may be granted free legal aid for their lodging of complaints and the procedure before international institutions under human rights conventions.

88. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession, the above criteria, and awards made in comparable cases against Denmark **(**see, among others, *Hasslund v. Denmark*, no. 36244/06, § 63, 11 December 2008 and *Christensen v. Denmark*, no. 247/07, § 114, 22 January 2009), the Court considers it reasonable to award the sum of EUR 6,000 covering costs for the proceedings before the Court.

C. Default interest

89. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 8 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

[1] On 10 June 2010, the date on which the claim was submitted.

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage;

(ii) EUR 6,000 (six thousand euros), in respect of costs and expenses;

(iii) any tax that may be chargeable to the applicant on the above amounts;

(b) that these sums are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President