Regulating Spousal Migration in Denmark

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At a glance

Denmark has a reputation for having the most restrictive controls on family migration in Europe, and, although their full rigour has recently diminished slightly, the Danish regime has been cited by Coalition government representatives as a model for the UK to follow. This article analyses the Danish rules for admitting the spouses and partners of citizens and permanent residents. It outlines the nature of the regime and then discusses the factors that led to the current state of affairs. It concludes by briefly considering the likely problems of attempting to implement a Danish-style regime in the UK.

Introduction

Denmark has a reputation for having the most restrictive controls on family migration in Europe, although their full rigour has recently diminished slightly. Recent changes are relatively minor but suggest the end of a journey which the UK, in its turn, has recently begun. The Danish regime has been cited by Coalition government representatives as a model for the UK to follow. The Family Migration Consultation proposed introducing a version of the Danish combined attachment requirement, a suggestion which the Immigration Minister, Damian Green, appeared to support. Other government representatives have spoken in general terms of the virtues of the Danish regime, regarding it as a more appropriate exemplar for a small, crowded nation than the rules in countries such as US or Australia.

This is not surprising; family migration policy has recently become more restrictive in many European countries and states have looked to each other when contemplating strategies for its control. Scholars have noted the ‘Europeanisation’ of migration policy, observing that it operates both ‘vertically’, through negotiation and adoption of European legal norms, and ‘horizontally’, through the informal transmission and replication of policy. The vertical

1 As well as the English language academic and other literature, this article draws on nine expert interviews with academics and lawyers carried out in Denmark in May 2012. The author thanks the interviewees for being so generous with their time and expertise. Thanks go also to Professor Lisbet Christoffersen for her incisive comments on an earlier version of this article. The author is grateful for the financial support of the Nuffield Foundation in carrying out the research for this article. All errors remain her own. All websites were accessed on 28 February 2013.
3 For example, Julian Brazier Conservative MP at a meeting of the All-Party Parliamentary Group on Migration, House of Commons 16 May 2012.
4 For a discussion, see L Block and S Bonjour Fortress Europe or Europe of Rights? Enabling and Constraining Dynamics in the Europeanisation of family migration policies in France, Germany and the Netherlands (2013) European Journal of Migration Law.
dimension is of limited applicability to family migration, particularly in Denmark and the UK. In EU law, the Citizens’ Directive 2004/38 does not directly explain more restrictive national laws, both because it operates independently of national immigration laws and because, in the UK and Denmark as across most of Europe, it provides rights that are more expansive than those available under national laws. Its effect may be more indirect as member states, obliged to admit the third country national family members of non-national EU citizens, seek to reassert visible control through ever more restrictive national measures. The Family Reunification Directive 2003/86 establishes a minimum floor of obligations to nuclear family members of long-term third country nationals. It permits but does not compel restrictions of the type increasingly seen in Western European countries: integration measures (although not pre-entry tests for adults), income criteria and age restrictions, and does not, by itself, explain why these have become so popular. In any event, both Denmark and the United Kingdom have exercised their opt-out from the Directive. The jurisprudence of the European Court of Human Rights meanwhile has placed only modest constraints on the operation of national policy, particularly where it concerns admission of family members.

Claims of horizontal Europeanisation have more relevance to family migration. To clarify, this means more than the horizontal direct effect of EU legal measures but refers to the widely noted tendency of states in Western and Northern Europe to observe and learn from each other when formulating and applying policy.\(^5\) However, the extent to which there is actual convergence is disputed and there is a risk of over-generalisation.\(^6\) There are common concerns which led Denmark to its previously restrictive position and the UK to change course. Yet the differences between Danish policy over the past twenty years and current UK policy are as great if not greater than the similarities and the two regimes still look very different, even as the UK regime tightens and the Danish one loosens. In the UK, for instance, the ‘combined attachment’ requirement has not, at least so far, been adopted and other salient elements of the Danish rules such as an effective ban on cousin marriage have not been seriously proposed. On the other hand, the UK has gone furthest, beyond any other European regime except Norway where wages and living costs are very high, in its minimum income requirement, an issue in which Denmark has, comparatively speaking, exercised some restraint. It seems probable that national characteristics still play a significant role in determining the specific contours if not the general direction of policy.

This article analyses the Danish rules for admitting the spouses and partners of citizens and permanent residents. It starts by outlining the nature of the regime and then turns to a discussion of the factors that led to the current state of affairs. It concludes by briefly considering the likely problems of attempting to implement a Danish-style regime in the UK. It argues that replicating its main elements in the UK would not only be undesirable but problematic legally and politically.

The Danish regime

Despite some minor loosening of the requirements, obtaining the right for a spouse to live permanently in Denmark still resembles a game of snakes and ladders. Progress may easily be reversed and reaching the end point requires stamina and luck. The game is not the same for everyone. National origins, ethnicity, education and social capital are factors in determining

\(^5\) Ibid.
Regulating Spousal Migration in Denmark

whether ladders can be successfully climbed and the scale of the reverses. One interviewee, a practising lawyer specialising in family cases, spoke vehemently of the absence of guidance and support from the authorities so that applicants were left to navigate the system in ignorance.\[7\]

**Source of immigration law**

Under domestic law, the Alien’s Act controls almost every aspect of a foreigner’s arrival and stay in Denmark. It is supplemented by other laws and regulations such as the Integration Act and social welfare and discrimination laws. However, some differences in the treatment of foreigners are permitted, particularly as regards social benefits. Certain additional Acts are relevant to family migrants, such as the Formation and Dissolution of Marriage Act. There are also internal memoranda that are now published.\[8\]

**Conditions on the sponsor**

The sponsor is the Danish citizen or resident spouse or partner of the applicant. There is, perhaps surprisingly, no minimum income requirement imposed on the sponsor. The sponsor must be self-sufficient and not in receipt of public assistance (as defined) for the previous three years. They must also provide collateral of DKK50,000 (reduced in 2012 from DKK100,000), about £5,700, in the form of an irrevocable guarantee issued by a Danish financial institution for five years (formerly four years) against future claims by the incoming spouse on social assistance. The guarantee may be reduced or revoked in some circumstances, for example, if the partner passes a Danish language test, obtains a permanent residence permit or leaves Denmark. However, breakdown of the relationship will not lead to revocation. The guarantee must be provided by the sponsor themselves but families often assist the sponsor by supplying the necessary funds.\[9\]

There are also minimum housing standards that must be met in relation to tenure (a tenancy must extend for at least three years from the date of application) and size of the accommodation. The lease must be in the sponsor’s own name so living as part of an extended family is not possible. There are limited exemptions for those who are refugees, who have children under 18 living in Denmark or for health reasons.\[10\]

A sponsor who is not a Danish or Nordic citizen must have held a permanent residence permit for at least three years. The period before which a new migrant can sponsor has increased concomitantly with the period of qualification for permanent residence. When the minimum went from three to seven years in 2002, migrants had to wait for ten instead of six years before being eligible for family reunification. As the minimum period for acquiring permanent residence is now five years, sponsors must have been in Denmark for at least eight years. The rigorous criteria for becoming a permanent resident have prevented many recent arrivals from ever qualifying as sponsors.\[11\]

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7 Interviewee 7.
Unless in possession of refugee or other protected status, non-citizen sponsors must, at the
time of application, meet some conditions of permanent residence even if these did not apply
when they became permanent residents or they were exempted from them. These include
absence of criminal convictions, public debt above a certain level or receipt of public assistance
within the past three years, passing a Danish language examination and sufficient periods of
work or study. Partial exemptions are available to those with minor children or serious illness.
These additional conditions make it harder for permanent residents, many of whom were
born in Denmark given the absence of *jus soli* citizenship, than for citizens to sponsor spouses.
Minor infractions, such as a speeding fine or unpaid taxes, can result in a delay of three years
in eligibility for sponsorship, periods of unemployment can also cause delay and migrants
may have to take a language test if this was not required when they qualified for permanent
residence.12

**Conditions on the applicant**

*The (former) points system*

In 2010, a points system for spousal migrants was introduced. Until it was abolished in
September 2012, applicants had to score points across categories which included employment,
language skills and education. Points were also available for residence outside a ‘marginalised
housing area (ghetto)’ or a period of at least at least one year’s voluntary work with a ‘global
humanitarian organisation’ based on ‘democratic values’. Where either party was below 24, the
migrant partner had to obtain 120 points under the headings above; those aged 24 or above
needed 60. The 120 points tariff was very difficult to achieve and acted as an effective bar to
those aged under 24 unless very highly educated. In September 2012, as part of the partial
liberalisation of the rules, the points were abolished and the minimum age is now 24 in all
cases.13

*The ‘combined attachment’ and age*

As just discussed, the effective minimum age for both entry and sponsorship has been 24
since 2002 and is the highest in Europe. The ‘combined attachment’ requirement imposes
additional criteria on those below the age of 26 or who have moved to Denmark or acquired
citizenship after birth. The attachment requirement was introduced in 1999 and extended to
Danish citizens in 2002. After significant numbers of expatriate Danish citizens were unable
to settle in Denmark with their families, the law was amended again in 2003, exempting those
who had held Danish citizenship for 28 years (now 26 years).14

The attachment criterion requires the parties’ combined connection to Denmark to be
greater than their combined connection to another country. Between July 2011 and May

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14 E Ersbøll *Country Report: Denmark (Revised)* EUDO Citizenship Observatory (2010) at p 3; Ersbøll supra fn 11, p 122;

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Regulating Spousal Migration in Denmark

2012, the requirement was for the attachment to Denmark be ‘considerably greater’, a criterion that was almost impossible to meet. Factors to be considered include the sponsor’s length of residence in Denmark, whether either party has family or other connections in Denmark, responsibilities for a child under 18 in Denmark, whether one or both have completed an educational programme in Denmark or have a solid connection to the Danish labour market, the parties’ ability to speak Danish, their ties to other countries including whether they have made extended visits and the presence of children in other countries. The sponsor is normally expected to have resided in Denmark for twelve years (reduced from fifteen) but this may be reduced by a combination of education and employment in Denmark or a strong connection with the labour market, with ‘integration-furthering’ work (involving considerable contact and communication in Danish, preferably, according to one interviewee, in a middle class occupation) capable of reducing the required period still further to four to five years. The incoming spouse is also normally expected to have visited Denmark at least once (reduced from twice).\(^{15}\)

The marriage

A marriage entered outside Denmark is regarded as valid if it was in accordance with the rules in the country where it took place, and if the circumstances surrounding the marriage do not violate fundamental Danish legal principles, excluding proxy marriages and where one party is under 15. Couples in a permanent unmarried or unregistered relationship are also eligible and evidence of eighteen months cohabitation is usually required.\(^{16}\)

Applications will be refused if there are ‘particular reasons to assume that your marriage or partnership was established with the main purpose of obtaining a residence permit’. Relevant factors for determining a marriage of convenience include lack of a common language, lack of pre-marital relationship (while cohabitation would be seen as evidence of a ‘real marriage), the age difference (where 15 years or more difference between the parties is seen as suggesting a marriage of convenience, especially if the woman is older than the man), previous marriages (particularly if the sponsor has sponsored before and the marriage broke down soon after the grant of permanent residence) and whether there are children.\(^{17}\)

The immigration service will evaluate ‘all relevant information’ to decide whether a marriage is forced. Marriages involving relatives are assumed to be forced and the application will normally be refused. The rule does not seem to be related to the genetic disadvantages for the children of first cousin marriages and the effective prohibition extends to those who share a common great-great-grandparent.\(^{18}\) Interviewees were critical of the evidence base for the assumption that such marriages are forced. It is almost impossible, in practice, at least until appealed, to prove that a cousin marriage is voluntary. According to official guidelines, other factors in deciding if a marriage is forced include the relationship between the parties before the wedding and the involvement of the family in the marriage, the parties’ personal characteristics.

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including imbalance with regard to age, education and occupation and whether contact has been made by either spouse to a crisis or counselling centre. It is however said that an arranged marriage will not automatically be characterised as forced.\textsuperscript{19}

A conviction of violence against a former partner or spouse results in a ten year ban on sponsorship unless this can be attributed to mental illness or substance addiction which are now cured. There is also an exemption for long cohabitation but, unlike other conditions, not where there are children living in Denmark.\textsuperscript{20}

\textit{Integration and language tests}

Integration criteria have been part of the spousal migration process for some years and now have a strong instructional flavour. The first policies were implemented in 1999 and applied to refugees and family migrants from outside the EEA. They comprised an introduction to Danish society and language over three years, monitored by local authorities. Incentives included financial support and possible refusal of permanent residence for non-participation. The purpose at that stage was to guarantee equal participation in all aspects of Danish life, economic self-sufficiency and an understanding of Danish society’s fundamental values.\textsuperscript{21}

From February 2002, foreigners were required to enter an ‘individual’ contract lasting three years. In 2005, an amendment to the Aliens Act made family reunification dependent on a declaration and ‘integration contract’ that remained in place until permanent residence was achieved, monitored by the municipality every three months and fulfilment of which was a pre-condition of permanent residence. The declaration aimed to ‘clarify Danish society’s values for the individual foreigner’ and the expectations on them. It required migrants to recognise gender equality and to acknowledge the illegality of force or violence against family members, female circumcision, forced marriage, gender, race or religious discrimination and terrorism.\textsuperscript{22}

Legislation requiring pre-entry integration tests for third country family members and ministers of religion, based on the Dutch model, was passed in 2007. However, implementation would have been costly given the relatively low number of applicants and high number of countries involved. Instead, it was decided that the test should be taken in Denmark once the other pre-entry conditions had been met. New legislation was passed to this effect in April 2010 and a post-entry test came into force on 15 November 2010. This had to be passed within three months of arrival although the period was, in reality, shorter as the result had to be obtained before the visa expired. The test consisted of two parts, a computer-based oral language test at level A1 minus and a knowledge test of ‘Danish norms, values and fundamental rights’ which, in practice, required a higher level of language ability although questions and answers were all oral. Its aim was said to be not to limit the numbers of successful applications but to foster rapid integration and ensure that migrants take responsibility for their own integration and demonstrate their intention of doing so. For that reason, the idea of offering preparatory language courses was rejected. Those who failed the test were required to leave Denmark.

\textsuperscript{19} Interviewees 1 and 7; http://www.nyidanmark.dk/enus/coming_to_dk/familyreunification/spouses/forced_marriages.htm.


\textsuperscript{22} Ersbøll and Gravesen, \textit{ibid} pp 9–10; Jensen, \textit{ibid} p 195–6; Ersboll, supra fn 11, pp 114, 123.
Regulating Spousal Migration in Denmark

Exemptions applied to nationals of Australia, Canada, Israel, Japan, New Zealand, Switzerland, South Korea and the USA.  

As part of the reform of family migration in September 2012, this test was withdrawn and was replaced in March 2013 by a Danish language test at A1 level taken within six months of entry with a further three month period to retake it. If the test is not passed by the deadline, the residence permit may be revoked. The exemptions for certain nationalities have been removed. Passing the test will cause a reduction in the level of bond. While the new test will be at a higher level than before (A1 instead of A1 minus), this is offset by the additional time available to take it although the stress of having to pass an examination during the first few months of joint life will still be present.

Permanent residence

As part of the reforms in September 2012, permanent residence was made easier including for spouses. This ended a long period, starting in 1999, during which obtaining permanent residence had become progressively more difficult as qualification periods and work, integration and language requirements increased. In February 2002, the minimum period before permanent residence could be obtained increased from three years to seven years (now five years) although ‘well-integrated migrants’ were later permitted to qualify in four years.

In 2010, a points system was introduced for permanent residence, a different scheme to the former points system for entry already discussed. In addition to the other criteria discussed below, this required either ‘active citizenship’ ie volunteering in an approved manner for at least one year or passing a citizenship exam, and one of several years employment, a high level Danish education or a very high level of Danish language (equivalent to CEFR B3). The points test was removed in September 2012 but the other criteria remain in place: applicants must have been legally resident for five years (increased from four years), be free from criminal convictions (minor crimes cause a delay, major crimes are a bar), state debt and welfare support, in the latter case for the previous three years. Applicants must sign a ‘Declaration on Integration and Active Citizenship in Danish Society’ and have been in ‘regular’ and unsubsidised full-time employment or in education for three of the previous five years, a less onerous requirement than before September 2012. The ability to qualify while in education is a significant improvement as, under previous rules, only work counted and students sometimes abandoned their studies in order to qualify.

The rise and rise of immigration in Danish politics

By the mid-nineteenth century, Denmark was a small nation-state with a homogenous political culture and identity surrounded by larger and more powerful neighbours. Apart from small and well-integrated Jewish and German communities, “Denmark was a country without

26 Erbsoll, supra fn 82; Erbsoll and Gravesen, supra fn 21, pp 28–30.
27 Interviewee 3.
ethnic conflicts, simply because only one ethnic group lived there“ although some scholars believe that there was both more diversity and more intolerance than is officially admitted.29 Denmark was also, from the mid-nineteenth century, known more as a country of emigration than immigration.30 Along with Norway, Denmark was the last European country to import foreign labour. From the end of the 1960s, migrants entered from Yugoslavia, Turkey and Pakistan. They were regarded as guest workers coming to do jobs that Danes didn’t want, their presumed short stay reflected in the vocabulary commonly used to describe them; as well as gæstearbejdere or guest workers, the term fremmedarbejdere, approximating to strangers, is popularly used to describe even the descendants of immigrants.31 Regarded as temporary residents, their capacity for integration or right to family reunification was not discussed. When the oil crisis and economic recession of 1973 ended official labour immigration, there were still only about 91,000 immigrants and descendants living in Denmark. They did not return home and increases in immigration were sustained by family reunification and, more rapidly in the 1980s, through the entry of refugees from the Middle East and other countries. In 1980, there were about 135,000 migrants, a figure that had increased to 297,000 by 2000, about 5.6% of the population. By 2005, this had risen to 8.4% and by 2010 to close to 10% when the population of immigrant descent is included. In 2005, the biggest minority ethnic group were Turks at 12.1% of the total, more than twice the size of the next largest group, Iraqis (5.8%). Other groups of significant size (4% or above of the total) came from Germany, Lebanon, Bosnia and Pakistan.32

Denmark thus underwent a fairly rapid transformation from a homogeneous society to one with a substantial and visible ethnic minority population, although it was not necessarily faster than elsewhere, for example the UK in the 1950s and 1960s experienced large scale non-white immigration which, after initial ambivalence due to colonial ties, also resulted in policies of closure over several decades. Perceptions may have been distorted by the uneven distribution of migrants throughout Denmark.33 It was also an unexpected development; Denmark did not have the recent colonial legacy of countries such as UK, France or the Netherlands. The rise of permanent family-based migration was particularly unexpected as the belief had been that access to Denmark’s social welfare system would encourage assimilation rather than facilitate international marriage and perpetuation of different cultural norms.34 Nonetheless the salience of immigration and its presumed associations with racial and cultural threats in electoral politics during this period is remarkable.

Immigration began to have purchase as a political and electoral issue after 1983, when an Aliens Act with very liberal admissions criteria passed under the aegis of a Conservative coalition but driven by the opposition. The Act created a presumption in favour of family reunification, resulting in a substantial increase in numbers and was subject to criticism even

30 Erbsoll, supra fn 14, p 5.
31 Jensen, supra fn 21, p 189; Wren, supra fn 28, p 147.
33 Togeby, supra fn 29, p 1141; T Bjorklund and J Goul Andersen Anti-Immigration Parties in Denmark and Norway: The Progress Parties and the Danish People’s Party (University of Aarlborg, 1999) p 9.

146
at the time it was enacted. From that time, the political climate changed with new parties entering Parliament, including the populist Progress Party standing against high taxation and a big public sector. The composition of governments also altered and their parliamentary base became narrower. There followed a period of short-lived governments and frequent elections, during which refugee and immigration issues moved into the centre of debate. This reached a new level of intensity in 1993 when the Conservative Prime Minister resigned following ‘the ‘Tamil Case’ when an official enquiry found that he had misled parliament about an illegal policy of delaying family reunification visas for Tamil refugees. The ‘Tamil case’ had a major impact on the centrality of immigration as a political issue as did laws passed granting rights of establishment in Denmark to stateless Palestinians and those fleeing the former Yugoslavia.

The outcome of the 1993 election was a new social-democratic government and the atmosphere had become highly charged on the subject of immigration. Claims that naturalisation was too easily obtained were made by the Progress Party, joined later by other parties. A parliamentary resolution stressed the importance of citizenship as an element of integration. However, the pressure continued on related issues such as the acquisition of citizenship by the children of immigrants and deprivation of citizenship, leading to some legislative changes. By 1998, 35% of the electorate cited immigration as a significant electoral issue. Attempts by parties to outflank each other on the issue and to exploit divisions or perceived weaknesses in their opponents made immigration even more prominent in the 1998 election for all parties. The outcome, in 1999, was the first integration policy and the combined attachment requirement.

The Danish People’s Party, which split from the Progress Party in 1995 and entered Parliament in 1998, stood on a platform of opposition to immigration and the EU, and support for ‘Danish’ values and welfare for the poor and these brought immigration, and its connection with welfare, to the fore in the 2001 elections. The elections led to a Liberal-Conservative coalition supported by the DPP, which lasted until 2011. The tone of debate during the election was ‘acrimonious, bordering on vengeful; immigration was projected as the most imminent and serious threat to the history, culture, identity and homogeneity of “little Denmark”’. In that year, 41% of the population saw the issue of refugees and immigrants as ‘challenging’. While this was not the only issue, there was particular concern around family reunification, seen as a route to Denmark’s generous welfare provision. The ethnic implications were apparent. One campaign poster featured a Danish girl with the slogan ‘When she retires Denmark will have a Muslim majority’.

Having raised anxiety and expectations, the new government was compelled to act decisively. Responsibility for immigration issues was transferred from the Home Office to the Ministry of Immigrants, Refugees and Integration.

35 Ersbøll, supra fn 14, p 16; Mouritsen et al, supra fn 32, p 11; Schmidt, ibid, p 259; E Cochran Bech and P Mouritsen ‘Restricting the Right to Family Migration in Denmark: When Human Rights Collide with a Welfare State under Pressure’ in G Brochmann and E Jurado (eds) Re-thinking Immigration after the Downturn (I B Tauris, forthcoming).


37 Ersbøll, supra fn 11, p 109; Ersbøll, supra fn 14, pp 16–8.

38 Bjørklund and Goul Andersen, supra fn 33, pp 3–4.

39 Ersbøll, supra fn 11, pp 111–2.

40 Jensen, supra fn 21, p 191; Ersbøll, supra fn 14, p 18.


42 Schmidt, supra fn 34, p 259; Rubin supra n 34, p 323.

43 Jensen, supra fn 21, p 191.
as ‘the strictest in the world’, was adopted, based on the principles of respecting Denmark’s international obligations, limiting the number of immigrants and strengthening requirements of self-sufficiency. The 2002 Act repealed the previous right to family reunification and introduced a minimum age of 24, extension of the minimum period for permanent residence from three years to seven years and more onerous integration obligations. The ‘attachment’ requirement for spouses was extended to Danish citizens and the criteria for naturalisation made more stringent. More restrictions on nationality followed, aimed particularly at the children of polygamous marriages born abroad, second generation entitlement to nationality, dual citizenship and deprivation of citizenship.

In 2005, after new elections, an amendment to the Aliens Act made family reunification dependent on a declaration of commitment to integration and the ‘individual contract’ was replaced by an ‘integration contract’, already discussed. In 2006, there were yet more changes as part of an agreement with the Danish People’s Party including an integration test for permanent residence. By the time of the 2007 elections, all parties including those on the left saw the need to support the restrictive regime if they were to retain influence.

There were further changes to the requirements for permanent residence and naturalisation after the election and, in 2010, the points system and the ‘immigration test’ of Danish language and culture on entry, both discussed earlier, were introduced. The moves were supported by the Liberal, Conservative and Danish People’s Party and opposed by left wing and green parties.

In 2011, the ‘combined attachment’ requirement was made even more onerous and it was proposed that the immigration test should, at an unspecified future date, be raised to A2, a dramatic increase calculated to require 600 hours of tuition. This latter policy was not implemented and 2011 marked the high-water mark for restrictive policy. In October 2011, the Liberal-Conservative coalition lost power to a left-leaning coalition of three parties led by Helle Thorning-Schmidt after elections in which immigration was overshadowed by the economic crisis. Policy was adjusted in the ways already discussed and the Immigration Service shifted to the Justice Ministry. The new government promised a clean break with their predecessor’s immigration policy but major retreat is politically difficult given that two of the coalition parties voted for the most restrictive measures under the previous government.

Denmark is not alone amongst European states in having implemented highly restrictive immigration policies, particularly if a historical perspective is taken. The UK, for example, reacted in extreme ways to the non-white Commonwealth immigration of the 1950s and 1960s. Nor is it the only country to focus on the presumed integration deficit of migrants; the Dutch government has been subject to wide international criticism for its integration programme, the original inspiration for the Danish immigration test. Yet amongst contemporary European governments, Denmark seems to have gone furthest and, as the account above shows, immigration played an important role in its electoral politics for nearly three decades.

44 Schmidt, supra fn 34, p 259 (emphasis in original).
45 Ersbøll, supra fn 11, pp 122; Ersbøll and Gravesen, supra fn 21, pp 26, 57–8; Ersbøll, supra fn 14, p 19.
46 Ersbøll and Gravesen, supra fn 21, pp 9–10; Jensen, supra fn 21, p 196; Ersbøll, supra fn 11, pp 123–4.
47 Ersbøll and Gravesen, supra fn 21, pp 10–11, 15, 28.
49 ‘Denmark’s first female prime minister has been dealt an unenviable hand’ Guardian, 16 September 2011.
50 ‘New government, same immigration practices’ The Copenhagen Post, 15 December 2011; Interviewees 1 and 4.
51 Human Rights Watch The Netherlands: Discrimination in the Name of Integration – Migrants’ Rights under the Integration Abroad Act (2008); Ersbøll and Gravesen, supra fn 21, p 19.
Regulating Spousal Migration in Denmark

The legal context

One striking feature of this period appears to have been the absence of significant legal challenge. The next section of this article, which considers some of the factors particular to Denmark and which may explain its particular trajectory, starts by considering the legal context.

Domestic legal challenge

As administrative decisions, immigration refusals carry a right of appeal, within the administrative system or before the Ombudsman who is concerned principally with process and whose judgments have no legal effect but are sometimes persuasive. If an administrative appeal fails, a judicial appeal may be brought. Appeals are usually decided according to whether the original decision was intra vires although the courts have become more active in applying administrative legal norms such as fairness, equality and proportionality as well as human rights standards. Still, appeals are not easily won. The government generally has superior resources and, if an appeal is lost, the appellant is usually ordered to pay a proportion of the government’s legal costs. Good legal advice is critical; unsuccessful applicants are not told all the reasons that their initial application failed or how they might succeed another time and may appeal with no chance of success. One practising lawyer said that he avoids bringing appeals wherever possible, regarding it as unethical when the chances of success are so low. Instead, he searches for an alternative strategy such as moving to Sweden, obtaining nationality or procuring entry through another route. Legal aid may be available where an appeal is considered meritorious. Nonetheless, this does not cover much of the preliminary work, for which a sympathetic lawyer is needed.

While the constitution permits review of administrative decisions for legality, it is silent on the whether the constitutionality of legislation may be reviewed although it has been found to be possible. The Supreme Court has not historically acted as a constitutional court and, although it does take human rights obligations into account, the state itself is regarded as the primary protective agent: ‘democracy … has long been equated with majority rule and the idea of Parliament as elevated above the other branches of government’. Judges are influenced by a strong tradition of self-restraint, Denmark has relatively few lawyers and, while the Tamil case discussed earlier did lead to an increase in judicial activism, this has now ended and, compared to countries such as the US and UK, there is not a culture of litigation. There is thus no strong tradition of using judicial means to assert the incompatibility of legislation with fundamental rights.

That position has been challenged by the influence of supranational European courts that have ‘have brought judicial review and judicial activism with them through the back door’. The emergence of a pan-European human rights regime, incorporated into domestic law, and the development of more divisive and less consensual forms of politics have led to more readiness to use judicial review and rights discourse in Denmark as in other Nordic countries.

52 Interviewee 7; Interviewee 9.
53 Interviewee 3.
55 Rytter and Wind, ibid pp 471, 498; Interviewee 3.
56 Rytter and Wind, ibid pp 475–6; Hirschl, supra fn 54, pp 467–8.
57 Rytter and Wind, ibid pp 475–6.
58 Hirschl, supra fn 54, pp 451–2.
There has been a growing recognition, observed in a 1996 government report, that the courts “must exercise to a greater degree than before an autonomous law-making function”, applying a broader style of interpretation and looking at a wider range of sources of law than heretofore. The result is a more active engagement than before although it has so far led to tangible results.

The ECHR was incorporated into Danish law in 1992. The Act of Incorporation gave courts the power to strike down an Act of Parliament if it contravenes the Convention. However, one aim of incorporation was to prevent defeat before the Strasbourg court and the incorporating Act was founded on two principles: that the legislator holds primary responsibility for maintaining compliance and that the courts should refrain from autonomous interpretations of the Convention. The discretion inherent in Convention standards should be determined by government not the courts although its exercise may be challenged through administrative appeal. This cautious approach has been widely criticised for ignoring the dynamism of the Convention and the role of a domestic court.

In practice, the courts have not been entirely passive. The Danish Supreme Court has frequently applied art 8 above domestic administrative practice in cases involving the expulsion of migrants convicted of criminal acts. A few cases on the family rules have also been heard by the Supreme Court of which the most significant was in 2010 when, by a narrow majority (4 to 3), the exemption from the combined attachment requirement was upheld for those who had been Danish citizens for 28 years. The law permits exceptions in individual cases so no breach of art 8 on its own was found. The majority found against the art 14 claim, regarding Abdulaziz as authority for permitting more favourable treatment of those connected to a country by birth although the minority dissented, finding that the rule discriminated indirectly on the grounds of ethnic origin. An application has been made to the European Court of Human Rights but is unlikely to be decided for some time.

International and European law

Like other European states, Denmark is signatory to the main human rights conventions that protect family life including the UN Conventions on Civil and Political Rights, on Economic, Social and Cultural Rights, on the Rights of the Child and the European Convention on Human Rights and these have all been incorporated into Danish law. The Convention on the Elimination of Race Discrimination and other non-discrimination statutes have also been implemented in national law and there is an extensive array of domestic anti-discrimination laws.

There has been substantial international criticism of the Danish regime. The age requirement was subject to adverse comment by the Committee on Economic, Social and Cultural Rights in 2004 and the Committee on Elimination of Discrimination Against Women, in its 2006 report, criticised the spousal reunification rules and, in its next report in 2009, regretted that these had not been addressed. The European Commission Against Racism and
Intolerance reported on Denmark in 2001, 2006 and in 2012 and, in each report, has been critical of family reunification policies as well as the general tone of discussion about immigrants and minorities. The Committee on Elimination of Racial Discrimination, in its concluding observations on Denmark in 2010 criticised the restrictive conditions for family reunification, including the minimum age of 24, the combined attachment requirement and the exemption of those who had been Danish nationals for more than 28 years. While this international disapproval may influence administrative practice, it has not had much effect on overall policy. Early criticism by the relevant international committees, which are not backed by enforcement mechanisms, did not prevent later changes going further.

It is more difficult to know why more art 8 claims have not been made to the European Court of Human Rights, either alone or in conjunction with art 14. There have been no unfavourable findings against Denmark in the European Court of Human Rights on its spouse admission rules although the Osman case found that refusal to admit a 15 year old child violated art 8. The uncertainty attaching to the Strasbourg jurisprudence may have been one factor as may the absence of a culture of litigation within Denmark. Given the Strasbourg court’s role as a court of last resort, domestic remedies must be exhausted before a claim can be admitted and one interviewee suggested that lawyers do not always do this.

As a member of the European Union, Denmark is bound by the Charter of Fundamental Rights in respect of EU law but it opted out of Directive 2003/86 on Family Reunification which creates obligations to third country nationals. Transposition of the Citizens Directive, 2004/38, has sometimes been problematic, including in respect of family members. The ability, already discussed, to bypass national laws using the Surinder Singh principle has been a major obstacle to the effectiveness of national laws and Danish authorities have been criticised for obscuring the nature of the right to return. Even some (non-legal) academics did not fully understand that the right is not only to reside in another member state but, in due course, to return and live together in Denmark.

Danish law formerly permitted exercise of Surinder Singh rights subject to conditions which unlawfully narrowed its scope as it required the Danish national to have worked in the other state, the third country national to have been resident legally on the basis of marriage and the Danish national to be economically active after return to Denmark. The 2008 decision in Metock, which found that prior lawful residence in another state by the third country national was not a precondition for a family permit, caused an outcry. The Integration Minister said that the judgment opened ‘the way for wide-scale approval of illegal immigration’ through marriages of convenience, while the Danish People’s Party leader, Pia Kjaersgaard, initially suggested that the ruling should be ignored although there is now reluctant compliance.

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in 2010, students and those with the means of subsistence were permitted to re-enter with their spouses. Nonetheless, the documentary evidence of the stay in Sweden demanded by the authorities is regarded by some as excessive and unlawful.\textsuperscript{73}

The electoral system and the Danish People’s Party

The character of Danish electoral politics facilitated the emergence of immigration as a decisive issue within politics. Denmark has one of the most open access structures of Western European political systems with a proportional voting system and a threshold of only 2\% for representation within Parliament.\textsuperscript{74} Government is invariably by coalition and the anti-immigration Danish People’s Party (DPP) has had an influence on policy that it might not expect elsewhere given its limited electoral support. In 1998, the Party had 7.2\% of the vote, rising to 12\% in 2001 and 13.9\% in 2007. It fell back slightly in the 2011 election to 12.3\%. From 2001 to 2011, the DPP supported the governing coalition in Parliament and had significant influence over policy.\textsuperscript{75}

The DPP had emerged from a split with the Danish Progress Party in 1995, which subsequently declined in influence, and entered Parliament in 1998. The Progress Party was principally a populist anti-tax party, although it adopted an anti-immigrant stance in the 1980s, so that the DPP, despite its more virulent policies, was not tainted by association with the neo-fascist far right. It was more disciplined and professional than the Progress Party, avoided the language of biological racial superiority which had failed to gain electoral support for the Progress Party, and succeeded in attracting talented and ambitious politicians who might, under another electoral system, have chosen to stay within mainstream parties.\textsuperscript{76} Its politics successfully seeped into the wider political arena as established political parties adopted similar forms of discourse, ‘revealing for the voters the indirect influence and power of the Danish People’s Party, as well as lending [it] legitimacy’.\textsuperscript{77}

The DPP is not only anti-immigration and anti-European integration but anti-Muslim. While its current programme does not mention Islam, it has, in the past, treated Muslims as incapable of integration and hinted at conspiracies of world domination as well as playing on more traditional fears about migrant criminality and exploitation of welfare, and elite indifference and weakness. The ethnic implications are apparent and sometimes explicit. In 2002, a DPP representative commenting in Parliament on naturalisation proposals, said that ‘Danes are increasingly becoming foreigners in their own country (…). Parliament is permitting the slow extermination of the Danish people’.\textsuperscript{78}

Anti-immigrant politics went wider however than the DPP and, before it, the Progress Party. The Danish Association, a far-right circle of intellectuals established in 1987, was a background feature, collecting and presenting information and raising the issue in the media.\textsuperscript{79}
Its objectives include safeguarding Danish culture, language and traditional lifestyle apparently in danger of being swamped by an enormous influx of immigrants.\(^8^0\) After the Social Democrats came to power in 1993, mainstream right-wing parties increased their focus on immigration issues in the hope of building a coalition against the government. When the DPP entered Parliament in 1998, it competed with the Social Democrats for voters and the latter introduced some anti-immigration measures. However, differences within the Social Democratic Party itself and amongst their electorate were exploited by other parties, and the increased prominence of immigration principally benefited right-wing parties who won the 2001 elections.\(^8^1\) There was also ‘the absence of any sophisticated and co-ordinated anti-racist opposition from the political left’. Instead, left-wing politics became involved in a construction of Muslim culture, in particular, as a threat to gender equality which did little to undermine the premises of DPP politics.\(^8^2\)

The success of the policies promoted by the DPP cannot be seen only as the consequence of a political system which awards influence to and thereby enhances the electoral reach of small parties. There was a pre-existing receptiveness to politics of the kind that the DPP articulated on the right but also, to some extent, on the left. This, it has been argued, reflected voter alienation and the end of the traditional alignment of parties and voters causing more volatile voting patterns and distrust in mainstream politics.\(^8^3\) It was also connected to Denmark’s particular experience of and perspective on issues of race, integration and multiculturalism.

### Race, integration and multiculturalism

There is little, on the surface, to suggest why Denmark should have become so apparently intolerant of difference. Denmark does not have a history of intolerance towards foreigners and ethnic minorities and, indeed, implemented anti-racist criminal laws as early as 1938 to protect the Jewish population. There was a relatively minor involvement in the slave trade and its ideological underpinnings and a paternalistic attitude towards the indigenous Greenland population. Fascism and Nazism were not strongly supported as the Second World War evacuation of Jews from Denmark to Sweden demonstrates but Danish resistance was often nationalistic in character, an expression of longstanding resentment of German dominance.\(^8^4\)

It is not self-evident that Danes have become more intolerant. On the contrary, there is evidence that views have become more tolerant particularly in areas with high numbers of migrants. It is more likely that the rise in immigration highlighted a pre-existing but invisible strand of ethnocentrism.\(^8^5\) Between 1971 and 1984, immigration was not mentioned by voters as a significant issue. In 1985, 23% and, in 1987, 47% of voters agreed that immigration was ‘a serious threat against our distinctive national character’. In 1998, the figure was still 42% while 43% agreed that “in the longer run, the Muslim countries are a serious threat against Denmark’s security” In 1997, more Danes reported themselves as racist than nationals of countries then associated with neo-Nazi movements such as Austria.

\(^{80}\) For Danish Association, see http://www.dendanskeforening.dk/side27.html; Rydgren 2004, supra fn. 75, pp 481–3.


\(^{82}\) Wren, supra fn 28, p 158.

\(^{83}\) See Rydgren, 2004 supra fn 75 and Green-Pedersen and Krogstrup, supra fn 81 for a discussion.

\(^{84}\) Wren, supra fn 28, p 145; Enoch 1994 cited in Togeby, supra fn 29, p 1138; Rydgren 2004, supra fn 75, p 479; Interviewee 8.

\(^{85}\) Bjørklund and Goul Andersen, supra fn. 33, p 3; Wren, supra fn 28 pp 146, 152–153.
and Germany although there is little support for such extremism within Denmark itself. A 1995 survey found that 85% of ethnic Danes had no social interaction with individuals from ethnic minority communities and there was particular resistance to close social relations with Muslims. Several commentators have noted that anxiety about migrants is highest in those places where fewest migrants are located and thus where there may be little or no direct experience of co-residence. In that context, the media has been criticised as playing a significant role in fostering concern.

The position is not one of uncomplicated intolerance however. Denmark has a culture of plain speaking which means that views which may be suppressed or modified elsewhere are more easily articulated. Relatively high levels of support for refugees, anti-discrimination policies and cultural understanding have co-existed alongside anxiety about migrants and attribution of social problems to their presence. A law banning religious and political symbols in court was enacted in 2010 but other restrictions on public expressions of religion have not been adopted although there has been substantial public debate around the head scarf, seen as inimical to Danish values of gender equality and sexual emancipation and an indicator of unwillingness to integrate. There is still the right to state support for language teaching, although some provision was removed after 2002, and Muslim free schools are permitted as part of the longstanding tradition of free schools in Denmark although a requirement that schools “prepare pupils to live in a society of freedom and democracy” was primarily aimed at them as well as some evangelical schools. Other areas of social provision, such as housing have been subject to assimilationist perspectives. Ethnic minorities have been welcomed as participants in Danish democracy but not as representatives of their community.

Tolerance has thus been based upon quite specific assumptions about how migrants should behave. Cultural diversity is not necessarily a problem in itself but it is frequently seen as the cause of exclusion from the benefits of Danish society and the creation of a parallel society whose dominant values are seen as in opposition to it. Numerous commentators have observed that Denmark has never adopted policies of multiculturalism in the normative sense of promoting accommodation even when it was still embraced in other developed countries and amongst liberals or progressives whose support might otherwise be expected. This became increasingly apparent over the years as the philosophy of integration became explicitly based on values of equality, moral reciprocity (including a duty to work and pay taxes) and a civic liberalism resistant to at least some manifestations of religiosity. Denmark is particularly strongly committed to the Scandinavian notion of equality in the sense of ‘imagined sameness’, drawing on the intertwining of state and religion and implying consensus and an urge to suppress difference and disagreement, seen as a pre-condition for the equality which is so valued within Danish society. Scholars have described a ‘civic’ nationalism that takes pride in democracy and equality as a structural feature of everyday life but which associates it with particularly Danish characteristics. This has been linked to elements of Danish national history and identity: a small
nation, linguistic and cultural homogeneity, traditions of anti-authoritarianism, egalitarianism and democracy and a religious tradition rooted in liberalism and individualism have all made Danish society more resistant than others to cultural diversity, particularly where the difference is rooted in apparently opposing traditions.93

In this context, integration has come to mean something close to assimilation, the process of becoming part of a mono-cultural Danish society. Since the early or mid-1990s, there have been increased affirmations of national pride and cultural superiority, associating Denmark with universalistic concepts such as democracy, equality and human rights and presenting these as more enlightened and morally rigorous values than the presumed moral relativism of multiculturalism. This is a perspective that has found widespread public support but which has also permitted other cultures, Islam in particular, to be constructed as the opposite pole of these values. This has sometimes spilt over into overt declarations of cultural superiority as in an editorial in one of Denmark’s leading newspapers which frankly declared that “not all cultures are equally good”.94 This appropriation of values as particularly Danish (or perhaps European) implies that they are absent in non-European migrants, particularly Muslims, who must consciously learn them. Thus, as mentioned above, the 2006 integration declaration required migrants to recognise gender equality and the illegality of family violence, female circumcision, forced marriage and gender, race or religious discrimination. The expectation is that migrants, particularly minorities of European descent who retain their language and culture, should and will make the accommodations necessary to fit into the new society.95

There is thus a contradiction in the Danish conception of integration. Denmark is presented as a liberal democratic egalitarian society but it will accept only those who subscribe to a set of pre-determined values: ‘[n]ot only is there little tolerance of the non-liberal – there is also little appreciation that there might be different reasonable ways to be liberal’.96 There are clear limits to the amount of diversity which will, in practice, be permitted and migrants are presumed to need pedagogic input to incorporate Danish values, investing ‘culture’ with a normative force. Migrants’ cultural values are presumed to be in opposition to those prevailing in Denmark and must be broken down, at least in their ethical and normative dimensions, if integration is to take place. There is particular antagonism towards Islam and, in much discourse, ‘immigrant’ has become almost entirely synonymous with ‘Muslim’.97 This polarisation was perhaps most dramatically enacted through the ‘Danish cartoons crisis’ where free speech was pitched as an absolute value against Islamic censorship and, just as critically, self-censorship although, in the succeeding years, there has been some self-reflection about whether such aggressively binary divides are the only or best way to manage difference.98

The consequence is that migrants may engage in superficial manifestations of culture, such as cuisine, but a profound internal journey is needed. In his 2003 New Year speech, the then Prime Minister Anders Fogh said:

‘There should be freedom to be dissimilar. We neither can nor will meddle in how people are dressed or what they eat, or what they believe in. Danishness is more than meatballs and brown gravy. But Danish society builds on some basic values that one has

94 Hedetoft, supra fn 41; Mouritsen et al, supra fn 32, p 19; Wren, supra fn 28, pp 147–8.
95 Mouritsen et al, supra fn 32, pp 27–8; Interviewee 8.
96 Mouritsen et al, supra fn 32, p 24.
to respect if one wants to live here … Those immigrants who fled the darkness of the mullahs shall not experience us now letting medieval forces take root in Danish society’. 99

It is not only politicians who have encouraged this polarity. The media has been seen as critical in disseminating and promoting these perspectives and in failing to challenge conventional paradigms about the ‘problem’ of integration and its causes. 100

**Family and welfare**

Family migration, particularly spousal migration, therefore takes place within a highly contested arena. A hierarchical ordering of family norms has been frequently made explicit even by mainstream politicians, with some slippage visible between rejection of practices that are clearly unacceptable and practices which are merely contrary to Danish norms. For example, the former Minister of Refugee, Immigration and Integration Affairs and centre-right politician, Bertel Haarder, said that: ‘Arranged marriages and honour killings make every Dane shiver and feel pushed back to the Middle Ages’. 101 In this way marriage conducted across boundaries has become a political act: ‘Whom one marries has, in the Danish context, also become a practice defining who you are as a citizen’. 102

The politicisation of migrant family life is intensified by the association between migrant families and welfare so that some types of family migration are perceived to undermine not only Danish cultural values but the highly valued welfare system. Concern for the welfare state has always been a central element of Danish immigration discourse and became increasingly prominent over time. The success of the Danish welfare model depends on perceptions of reciprocity, mutualism and fairness which are unsustainable if not everyone contributes fairly and which feed the assumed necessity of conformity and cultural homogeneity already discussed. Migrants to Denmark have had relatively low level of skills and education (particularly amongst the numerically largest group of Turkish origin) while opportunities for low-skilled service jobs are relatively few and have become fewer in Denmark. There have been correspondingly low levels of labour market participation and high levels of welfare dependency amongst some migrants. Failure to integrate due to linguistic or cultural factors were associated with barriers to employment and thus with a perceived failure to contribute so that an interventionist approach to family life is seen as justified. There were reported strains on services in some towns and cities and even claims that over 40% of welfare spending went to Muslim families. 103 A consequence was an increased emphasis on labour market integration of migrants, their ability to work and pay taxes and so to contribute to the welfare state. This led, in its turn, to an emphasis on the potential economic contribution of family migrants as the principle criterion of entry. 104

**Effect of the regime**

In 2000, 6,399 spouses came to Denmark through family reunification with a success rate of about two thirds. In 2003, the number of permits granted was about 2,500 (less than half of applicants). In 2009, the figure was 3,662. The reduction was not uniform between nationalities

99 Jensen, supra fn. 21, p 199.
100 Wren, supra fn 28, pp 156–158; Hussain, supra fn 76, p 99; Togeby, supra fn 29, p 1142; Interviewee 8.
101 Taken from Larsen 2002 cited in Schmidt, supra fn. 34, p 262; Interviewee 9.
102 Schmidt, supra fn 34, p 272.
103 Rubin, supra fn 34, p 319; Ersboll, supra fn 11, p 109; Cochran Bech and Mouritsen, supra fn 35; Mouritsen et al, supra fn 32, pp 9, 15; Schmidt, supra fn 34, p 258; Interviewees 1 and 4.
104 Ersboll, supra fn 11, p 112; Mouritsen et al, supra fn 32, pp 11–15, 24; Cochran Bech and Mouritsen, supra fn 35.
with applicants from Somalia and Turkey particularly affected. The average marriage age of those of non-Western migrant descent rose, with fewer marrying between the ages of 17 and 21 in 2009 than in 2001, although a correlation with the immigration regime is not accepted by everyone. A very small rise in the number of intra-ethnic marriages (larger amongst the Turkish community) within Denmark has been found but no substantial change in the number of marriages with ethnic Danes or with those from other ethnic groups. It has been suggested that many of those affected by the rules may not marry at all as they pass the age at which an international arranged marriage usually takes place and do not marry elsewhere and that the long term demographic profile of Denmark had been altered.105

Reductions in the number admitted led to fewer permanent residents. Successful applications for permanent residence decreased dramatically from 2003, representing a drop both in numbers applying and in the proportion of successful applications. Numbers fell particularly sharply from 2006 when the effects of the extension in 2002 of the minimum period for permanent residence to seven years began to be visible. However numbers fell further after 2006 presumably because of the more demanding criteria introduced in 2007. It seems that women, particularly older women, from non-Western countries, have greater difficulty with the language requirements and thus are less likely to meet the criteria for permanent residence.106

Ease of access between Copenhagen and the Swedish town of Malmö after the opening of the Øresund Bridge in 2000 and across the Danish/German border in the south have led to a substantial number of Danish nationals adopting the ‘Swedish solution’ of residing temporarily in Sweden, or less frequently Germany where greater linguistic adaptation is needed, and either working locally or commuting to Denmark for work (while some German nationals have made the reverse journey, moving to Denmark for the same purpose).107 A practising lawyer interviewed for this article regarded the Swedish route as the most practical solution in many cases particularly, after the Metock decision, for irregular migrants in Denmark who moved with their Danish citizen partners to Sweden to avoid removal. He described dramatic scenarios in which clients raced to cross the bridge and make a family permit application before they were detained.108 Of about 3,300 people who moved from Denmark to the Skåne region of Sweden in 2004 alone, nearly 20% cited the Danish family reunification rules as an important factor. It has been estimated that between 2,000 and 3,000 Danes have moved to Sweden since 2002 to obtain family reunification and the community of Pakistani origin living in Malmö has increased in size substantially in the same period. By 2007, 12 per cent of Danish Pakistanis had emigrated to Sweden by the age of 25 although fewer Turks made the journey because, as later arrivals, they were less likely to have Danish nationality. The reliance on the ‘love bridge’ to enable the exercise of free movement rights in this way even led to calls by the Danish People’s Party for its closure.109

The perceptions of those affected have begun to be examined. The regime’s complexity and mutability led interviewees in one study to believe that, whatever they did, they would never qualify. There was a strong sense of injustice and discrimination, fed by the apparently capricious and byzantine nature of the rules. For example, it was reported that couples unable to achieve reunification in Denmark due to their age or some other criterion, spent as much time as possible with their spouse in the country of origin, with the consequence that the

105 Rytter, supra fn 62, p 92; Cochran Bech and Mouritsen, supra fn 35; Schmidt, supra fn 34, pp 265–6; Interviewee 1.
106 Ersbøll and Gravesen, supra fn 21, pp 33–37.
108 Interviewee 7.
109 Rytter, supra fn 62, pp 94–5; Cochran Bech and Mouritsen, supra fn 35; Interviewee 1; Rubin, supra fn 34, p 335.
couple showed an insufficient tie to Denmark and failed the ‘combined attachment’ test. The difficulties they faced were compared to the ease with which migrants from more favoured countries could move. Another small study found respondents willing to learn Danish but they regarded the other permanent residence conditions as unduly onerous. The combination of requirements was a problem; applicants had to work, learn Danish and, at that time, participate in Danish society. The frequency of change and the lengthy period before permanent residence was granted created insecurity. Regulation was seen as over-complex, unclear and obliging people to follow particular patterns and norms, for example, of full-time work. One respondent sold his shop in order to have enough time to meet the study requirements. The process was often not seen as relevant to actual integration, which takes place in other ways. Many perceived the requirements as sending out a message of rejection by the state and feel insecure and unwelcome.

The impossibility of having personal norms accepted legally and socially has contributed to oppositional attitudes and defiance rather than adaptation to majority norms. Schmidt identifies a complex response whereby both the superiority of arranged marriages and their compliance with majority norms are asserted. Their voluntary nature is particularly stressed, emphasising, in this way, their congruence with values claimed as Danish while also claiming that these marriages provide an opportunity to reinforce the values of their own community. The Danish laws were seen as hypocritical in that, while proclaiming to uphold values of liberty, they effectively restrict freedom. This contradiction should be resolved by Danish society through due respect for their marriages and, by implication, their culture, and not through changes to their own conduct. The real motive was suspected to be the restriction of immigration.

The option of moving to Sweden or Germany is available only to those with sufficient resources for such flexibility and the knowledge or networks to uncover rights the Danish government is not keen to promote. Because job opportunities and salaries are generally better in Copenhagen than in Malmö, many Danish nationals commute back to Copenhagen daily for work, with some added strain if homes and jobs are not centrally located. Parties must also begin married life at some distance from family although some see that as an opportunity to establish a more independent life. Tensions sometimes surface when the question of return to Denmark arises. The Danish national may welcome a return to their previous life while the migrant partner and children may have settled into Swedish life. There is also the need to ensure that sufficient time is spent in Sweden to maintain the residency requirements, which can lead to subterfuges and stratagems, which have aroused the attentions of the Swedish authorities. The need to show documentary evidence of life in Sweden to satisfy the Danish authorities on return forces parties into artificial practices such as abandoning rather than sub-letting Danish accommodation, taking more extensive accommodation than needed just so residence is more easily evidenced, doing food shopping on return to Malmö late in the evening and by credit card rather than earlier in the day before leaving Denmark or ensuring that the use of utilities is commensurate with what the Danish authorities expect. There are increasingly expectations that participation in Swedish clubs and associations be demonstrated.

Despite the overwhelming criticism of these policies, it has been argued that their effect overall on the migrant population has been beneficial. There have been reports that the position

110 Rytter, supra fn 62, pp 95–103.
111 Ersbøll and Gravesen, supra fn 21, pp 38–55.
112 Schmidt, supra fn 34, pp 265–72; Interviewee 8.
113 Interviewee 1.
114 Rytter, supra fn 62; Interviewee 7.
of migrants has improved according to many measures, particularly, most recently, amongst the young and women. Interviewees identified an increase in educational achievement for women but did not see it as caused by the increases in minimum age and other restrictions. They also identified a reduction in pressure not only from parents on children but from relatives abroad on parents to arrange marriages although that did not necessarily outweigh the anguish caused when marriages were genuinely desired.

Conclusion: is the UK going Danish?

As noted in the introduction, the recent trend in Europe has been towards more exclusionary regimes of family migration. Denmark is generally regarded as having gone furthest during this period although, as the introduction also points out, a perspective taken over time suggests that restrictionism in Denmark may have peaked just as the UK started down the same road. This article has suggested several factors that contributed to the nature of the Danish regime, specifically, Danish legal culture, Denmark’s electoral system, the Danish experience of immigration, and its interaction with national and cultural identity, and the desire to protect the Danish welfare state. While some UK politicians may see Denmark as a model to follow, the particularity of these national factors mean that replication may not be straightforward. This final part of this article considers the difficulties that would face attempts to introduce key aspects of the Danish model into British law.

In the UK, there is not the aversion to litigation reported in Denmark. While cuts to legal aid mean that legal challenges will be more difficult to bring, it is likely that appeals will continue and some judicial reviews will still be made. A new factor is the intense involvement of the UK’s highest court in family migration after the Human Rights Act. It has so far refrained from finding immigration statutes and rules unlawful, although it has come very close on occasion, having preferred to point out flaws and permit government to choose the method of compliance. In doing so, they have established several principles which would make application of Danish-style amendments difficult for the government to defend. The combined attachment rule, for example, goes far beyond the test established in EB (Kosovo) that, for refusal of a family claim to be proportionate, it must be reasonable for the parties to reside abroad, a test that, after Quila, unambiguously applies to admission as well as expulsion cases. With courts required, after Huang and Quila, to make their own decision on proportionality, the evidential basis of government policy is liable to examination by the courts while EB (Kosovo) emphasised the need for individual decision-making. It is difficult, in this context, to see how refusals of cousin marriages, let alone marriages between more distant relatives, could be refused on the basis of a blanket determination that they are forced. The policy would soon become unworkable. Differentiation by nationality or between those born in the UK and those who acquired citizenship later or not at all, as used in Denmark, risk, in the absence of compelling justification, being found to discriminate unlawfully.

The government has attempted to neutralise this judicial oversight through inserting its own interpretation of art 8 into the immigration rules. So far, and unsurprisingly, the Upper

116 Interviewees 1, 2, 3 and 4.
117 See H Wray (forthcoming) ‘Greater than the sum of their parts: UK Supreme Court decisions on family migration’ Public Law.
118 EB (Kosovo) v SSHD [2008] UKHL 41; R (on the application of Quila and another) v SSHD [2011] UKSC 45.
Tribunal has not been constrained by the new rules in deportation cases. It is likely that, in removal and admission cases also, the courts will continue to apply art 8 ECHR outside the immigration rules unless prevented by primary legislation (as is now apparently planned) although it is difficult to predict the effects of this unless there is an express repeal of the Human Rights Act. Although the government may eventually succeed in its efforts to clip the wings of the courts, there is little doubt that, in the immediate future, the possibility of a successful legal challenge is a likely inhibiting factor on government.

This degree of inhibition should not be overstated. This government has not refrained from introducing policies such as the pre-entry language test and the minimum financial requirements whose compliance with human rights is doubtful and which have predictably resulted in judicial reviews, although the final outcome of these is not yet known. It is unlikely that fear of litigation was the sole reason for adopting or refraining from particular policies. Other factors must be looked to. One such may be the desire of all mainstream politicians to minimise ethnic division. Race discrimination has a long and sorry history in British immigration control but there is nonetheless little appetite now for policies that rely too clearly on ethnic distinctions. Compared to Denmark’s population of migrant descent, the UK’s non–white population is well-established and has been incorporated into the political mainstream, even while problems of discrimination and disadvantage remain. Britain’s Muslims are regarded as a problematic group in some respects but they form only a part of the UK’s non–white population and, while some of the Danish discourse around universal values is familiar, openly anti-Islamic sentiment tends to be confined to the political margins. Even when rejecting ‘state multiculturalism’, the right wing Prime Minister David Cameron used more nuanced and conciliatory language than the Danish examples cited earlier in this article: ‘Someone can be a devout Muslim and not be an extremist. We need to be clear: Islamist extremism and Islam are not the same thing.’

The British electoral system means that marginal political parties find it difficult to obtain parliamentary representation. Discounting the far-right, the anti-Europe and anti-immigration United Kingdom Independence Party has some popular support as the repository of protest votes (polling, for example, more than 25% of the votes in the 2013 Eastleigh by-election) but has so far been unable to win a single constituency, having received only 3% of the national vote in the 2010 election. However, its potential to split the vote in marginal constituencies means that mainstream parties, particularly the Conservative Party, have felt obliged to partially accommodate its perspective. Nonetheless, British identity is more ambiguous and less unitary than the Danish equivalent for a number of reasons and, despite some efforts, it is difficult to imagine politics coalescing successfully around a set of specifically British values as happened in Denmark. Attempts by the previous Labour government to implement a conditional path to citizenship based around civic nationalism including ‘active citizenship’ on the Danish

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122 The outcome of a judicial review of the financial requirements heard in Birmingham in February 2013 is awaited at the time of writing. A judicial review of the pre-entry language test recently failed in the Court of Appeal.
123 For a discussion, see H Wray Regulating Marriage Migration: A Stranger in the Home (Ashgate, 2011) at 139–154.
model, were unwieldy and lacked credibility.\textsuperscript{126} They were swiftly abandoned by the Coalition government who favoured a more direct approach.

It seems likely therefore that, while there may be some broad congruence in overall aims, in particular the desire to minimise unskilled family migration and avoid cultural fragmentation, other strategies are more appropriate to the British context. The new financial requirements are as savage in their effect as the Danish policies have been but lack their clear ethnic and cultural focus even though they discriminate indirectly by ethnicity as well as by gender, age and region.\textsuperscript{127} They are however consistent with the general direction of current UK government policy which is to make immigration an elite activity from which the poor and disadvantaged are precluded regardless of their skin colour. While the UK government relies on claims about welfare and social inclusion to legitimise policy, these have less resonance in an inegalitarian UK whose welfare protections are currently being diminished.\textsuperscript{128} This contrasts with the Danish preoccupation with equality and welfare, which however contested the consequences, was seen in the literature and by interviewees as presenting a genuine dilemma for government.\textsuperscript{129} It is interesting that the new Danish government chose to remove the fee for family reunification applications, a gesture towards equality of access that is hard to imagine in the UK where high fees featured even before the present process of closure.

This is not to say that ethnicity and culture have disappeared from British immigration policy. The pre-entry language test discriminates by nationality and amongst those most affected by the income requirement are the UK’s minority ethnic communities because of their relative disadvantage and their greater degree of involvement in transnational family life. Nonetheless, it is perhaps more important in the UK than it has been in Denmark to avoid making the connection between policy and such exclusion explicit while Denmark is perhaps reluctant to embrace policies that are seen to magnify social inequality too crudely. The general direction of policy is broadly similar but the detail, so far, is tellingly different.

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\textsuperscript{126} For a discussion, see D McGhee ‘The paths to citizenship: a critical examination of immigration policy in Britain since 2001’ (2009) Vol 43, No 1 \textit{Patterns of Prejudice} 41–64.

\textsuperscript{127} E Kofman and H Wray \textit{Divided Families – but some more divided than others: Submission to the APPG on Migration – Family Migration Inquiry} (2013).

\textsuperscript{128} \textit{Ibid}.

\textsuperscript{129} Cochran Bech and Mouritsen, supra fn 34; Interviewees 1, 4, 5 and 6.