

# Living in another Member State: barriers to EU citizens' full enjoyment of their rights

## Austria

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Contractor: European Training and Research Centre for  
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1. Table 1 – Case law

<p><b>1.</b> <b>Subject matter concerned</b></p>	<p><input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality  <input type="checkbox"/> 2) freedom of movement and residence  - linked to which article of Directive 2004/38  <input type="checkbox"/> 3) voting rights  <input type="checkbox"/> 4) diplomatic protection  <input type="checkbox"/> 5) the right to petition</p>
<p><b>Decision date</b></p>	<p>5 March 2013</p>
<p><b>Deciding body (in original language)</b></p>	<p>Verfassungsgerichtshof (VfGH)</p>
<p><b>Deciding body (in English)</b></p>	<p>Constitutional Court</p>
<p><b>Case number (also European Case Law Identifier (ECLI) where applicable)</b></p>	<p>B533/2013  ECLI: AT: VFGH: 2015: B533.2013</p>
<p><b>Parties</b></p>	<p><i>Medical University of Vienna v. a German citizen</i></p>

<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&amp;Dokumentnummer=JFT_20150305_13B00533_00">www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vfgh&amp;Dokumentnummer=JFT_20150305_13B00533_00</a>
<b>Legal basis in national law of the rights under dispute</b>	<p>B-VG Art139 Abs1<sup>1</sup>  B-VG Art140 Abs1  UniversitätsG 2002 §124b Abs1, Abs5<sup>2</sup>  ZulassungsV des Rektorats der Medizinischen Universität Wien über die Zulassungsbeschränkung zu den Diplomstudien Human- und Zahnmedizin idF Mitteilungsblatt der Medizinischen Universität Wien, 24.10.2012, 2. Stück, Nr 2 §4 Abs2, §10 Abs1, §11<sup>3</sup>  StGG Art18<sup>4</sup></p>
<b>Key facts of the case (max. 500 chars)</b>	<p>Note that this executive summary has the purpose to make us understand the:</p> <ol style="list-style-type: none"> <li>1. Facts of the case (so the “real life story”)</li> </ol> <p>On 6 July 2012, the complainant completed the aptitude test in order to be admitted to the diploma study in human and dental medicine at the Medical University of Vienna. The assessment of the test, which was conducted in a gender-segregated manner, revealed a test value of 114. Based on this result, the complainant – a German citizen with a German certificate of eligibility for university entrance – ranked 146<sup>th</sup> in the so-called ‘EU-quota’, which is managed by the Medical University of Vienna (also including a gender-segregated evaluation). On 22 March 2013, the Senate of the Medical University of Vienna decided to dismiss the complainant’s application for admission to the diploma study in human and dental medicine for reasons of</p>

<sup>1</sup> Austria, Federal Constitution (*Bundes-Verfassungsgesetz, B-VG*), [StF: BGBl. Nr. 1/1930 \(WV\) idF BGBl. I Nr. 194/1999 \(DFB\)](#).

<sup>2</sup> Austria, University Act (*Bundesgesetz über die Organisation der Universitäten und ihre Studien - Universitätsgesetz 2002 – UG*), [StF: BGBl. I Nr. 120/2002 idF BGBl. I Nr. 11/2017](#).

<sup>3</sup> Medical University of Vienna, Admission regulation of the rectorate of the Medical University of Vienna regarding admission restrictions to diploma study in humane and dental medicine (*ZulassungsV des Rektorats der Medizinischen Universität Wien über die Zulassungsbeschränkung zu den Diplomstudien Human- und Zahnmedizin*), [Mitteilungsblatt der Medizinischen Universität Wien, 24.10.2012, 2. Stück, Nr. 2](#).

<sup>4</sup> Austria, Basic Law (*Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder - Staatsgrundgesetz, StGG*), [RGBl. Nr. 142/1867 idF BGBl. Nr. 684/1988](#).

	<p>groundlessness - the last place in the course was awarded to the candidate with position 145 in the EU-quota. Had his test been assessed without gender-segregated evaluation, the complainant would have ranked 111<sup>th</sup>, and thus, he would have been admitted to the diploma study in human and dental medicine.</p> <p>On 31 December 2013, the complainant lodged a complaint to the Constitutional Court based on Article 144 B-VG. The lodged complaint included allegations of violations of constitutionally guaranteed rights as well as the application of a statutory or unconstitutional regulation. Fundamentally, the complainant argued that, inter alia, he, as a German citizen, was discriminated against on the basis of his nationality because his application for admission to the studies was strictly limited by a quota allowing for 20% of non-citizens. Moreover, he complained about the gender-segregated evaluation.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied)  The Constitutional Court referred to <i>UnivG §124b Abs1, Abs5, ZulassungsV des Rektorats der Medizinischen Universität Wien über die Zulassungsbeschränkung zu den Diplomstudien Human- und Zahnmedizin idF Mitteilungsblatt der Medizinischen Universität Wien §4 Abs2, §10 Abs1, §11</i>; Charter of Fundamental Rights Article 21, paragraphs 1 and 2, Article 23, paragraph 2, Article 51, paragraph 1; TFEU Article 18; DtGG Article 18 and ECHR 1 Additional Protocol, Article 2.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Constitutional Court found that there had not been any violation of constitutionally guaranteed rights, as well as no violation of rights due to the application of general norms. In particular, there was no discrimination on grounds of nationality because of the so-called EU-quota. The Constitutional Court joins the European Commission's opinion that, at the present time, the regulation of §124b Abs5 of the University Act 2002 serves the protection of public health and that the measure of quotas is used to ensure the health care in Austria is appropriate, necessary and adequate. Basically, §124 Abs5 of the University Act 2002 serves the prevention of a shortage of doctors because an increased number of German students pursues their doctor's profession in Germany after completing their studies in Austria.</p>
<p><b>Key issues (concepts, interpretations)</b></p>	<p>The key issue was whether there was discrimination on grounds of both nationality, caused by quotas which limit the admission of non-citizens, and the gender-segregated evaluation. With regard to the issue of public health and in accordance with the opinion of the European Commission, the Constitutional Court clarified that</p>

<b>) clarified by the case</b> (max. 500 chars)	the measure of quotas was in order to ensure the health care in Austria was appropriate, necessary and adequate.
<b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The complaint was dismissed by the Constitutional Court and assigned to the Supreme Administrative Court for a decision as to whether the complainant had been infringed in another right due to the contested decision.
<b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)	<p><i>Das in Art21 Abs1 GRC unter anderem enthaltene Diskriminierungsverbot wegen des Geschlechts ist durch die Regelung des §10 Abs1 der Zulassungsverordnung nicht verletzt. Angesichts ihrer begrenzten Wirkung als punktuelle Übergangsregelung und des nachgewiesenen Fehlschlagens anderer (Begleit-)Maßnahmen, um die nachgewiesenen Geschlechterunterschiede bei der Auswertung des EMS hintanzuhalten, handelt es sich bei der in §10 Abs1 der Zulassungsverordnung vorgesehenen genderspezifischen Auswertung um eine angemessene und – auch im Hinblick auf Art23 Abs2 GRC – gerechtfertigte Maßnahme. Dabei ist zu beachten, dass die hier zu beurteilende Maßnahme anders gelagert ist als jene Formen von Quotenregelungen, die der Gerichtshof der Europäischen Union in den vom Beschwerdeführer herangezogenen Fällen zu beurteilen hatte (so führt die konkrete Ausgestaltung der Testauswertung dazu, dass Testteilnehmerinnen nur solange bevorzugt werden, als Frauen beim Test systematisch schlechter abschneiden als Männer, womit bei Vorliegen der entsprechenden Voraussetzungen die Regelung grundsätzlich auch Männer bevorzugen könnte).</i> / The prohibition of discrimination on the grounds of gender, as contained in Article 21 of the CFR, is not violated by §10 of the admission regulation of the rectorate of the Medical University of Vienna regarding admission</p>

restrictions to diploma study in human and dental medicine. In light of their limited effect as selective transitional regulation and the proven lack of other (accompanying) measures to take into account gender differences detected during the evaluation of the EMS, i.e. aptitude test for the study of medicine, the gender-specific evaluation, as provided for in Article 10 paragraph 1 of the admission regulation, is an appropriate and, in regard to Article 23 paragraph 2 CFR, justified measure. It should be noted that the measure to be assessed here is different from the forms of quotas which the CJEU had to assess in the cases used by the complainant (the specific design of the test results in the fact that female test participants are preferred only as long as women systematically have worse results than men during the test, whereby in principle, the regulations could also favor men if corresponding conditions are met).

*§124b Abs5 UG 2002 sieht im Gefolge der Entscheidung des Gerichtshofes der Europäischen Union vom 7. Juli 2005 (Rs. C-147/03, Kommission/Österreich, Slg. 2005, I-5969), vor, dass unbeschadet der Aufnahmeverfahren gemäß §124b Abs1 UG 2002 unter anderem in den hier einschlägigen Studien 95% der jeweiligen Gesamtstudienplätze für Studienanfängerinnen und Studienanfänger den EU-Bürgerinnen und EU-Bürgern (und ihnen im Hinblick auf den Studienzugang gleichgestellten Personen) vorbehalten sein sollen. 75% der jeweiligen Gesamtstudienplätze für Studienanfängerinnen und Studienanfänger sollen dabei den Inhaberinnen und Inhabern in Österreich ausgestellter Reifezeugnisse zur Verfügung stehen. / Article 124b (5) of the University Act 2002 provides that, in the light of the decision of the CJEU of 7 July 2005 (C-147/03, *Commission v. Austria* [2005] ECR I-5969) irrespective to the admission procedures pursuant to § 124b Abs1 of the University Act 2002, inter alia, 95% of the respective total study places for commencing students shall be reserved for EU citizens (and persons with equal study access as EU citizens); 75% (out of the 95%) of the respective total study places for commencing students shall be reserved for the bearers of an Austrian certificate of eligibility for university entrance.*

*Daher kann allein der Umstand, dass eine nationale Maßnahme in einen Bereich fällt, in dem die Union zwar über Zuständigkeiten verfügt, diese aber im konkreten Fall keine bestimmte Verpflichtung der Mitgliedstaaten schaffen, ebensowenig zur Anwendbarkeit der GRC führen [...] wie der alleinige Umstand, dass ein nationales*

*Gesetz das Funktionieren unionsrechtlich geregelter Bereiche mittelbar beeinflussen kann [...]. / Therefore, the mere fact that a national measure falls within an area in which the Union has competences, but which does not create a specific obligation on the part of the Member States in the specific case, can just as little lead to the applicability of the CFR [...] just as the sole fact that a national law can indirectly influence the functioning of areas regulated by EU law [...].*

*Art21 Abs2 GRC verbietet Diskriminierungen aus Gründen der Staatsangehörigkeit. Dieses Grundrecht entspricht seinem Inhalt nach Art18 Abs1 AEUV (so ausdrücklich die Erläuterungen zu Art21 Abs2 GRC; siehe Blanck-Putz/Köchle, in: Holoubek/Lienbacher [Hrsg.], Charta der Grundrechte der Europäischen Union. GRC-Kommentar, 2014, Art21, Rz 20; Jarass, Charta der Grundrechte der Europäischen Union2, 2013, Art21, Rz 33 ff.). Demzufolge sind Ungleichbehandlungen wie die in §124b Abs5 UG 2002 vorgesehene Quotenregelung zu Gunsten von Inhabern in Österreich ausgestellter Reifezeugnisse, die lediglich mittelbar an die Staatsangehörigkeit anknüpfen, einer Rechtfertigung durch objektive, von der Staatsangehörigkeit der Betroffenen unabhängige Erwägungen zugänglich, wenn diese Regelung verhältnismäßig ist (siehe nur EuGH, Kommission/Österreich, Rz 48 mwN). / Article 21, paragraph 2 of the CFR prohibits discrimination on the grounds of nationality. This fundamental right corresponds to Article 18, paragraph 1 of the TFEU (according to the explanatory notes regarding Article 21, paragraph 2 of the CFR; see Blanck-Putz/Köchle (2014), in: Holoubek/Lienbacher (eds.), Charter of Fundamental Rights of European Union. CFR-Commentary, 2014, Art. 21, para. 20; Jarass (2013), Charter of Fundamental Rights of European Union2, 2013, Art. 21, para. 33 and the following.). Accordingly, unequal treatment, such as the above-mentioned quotas provided for in Article 124b (5) of the UG 2002 which favour holders of certificates of eligibility for university entrance issued in Austria and are merely indirectly linked to nationality, are justified by objective considerations which are independent of the nationality of the persons concerned.*

*Der Verfassungsgerichtshof kommt damit zum selben Ergebnis wie die Europäische Kommission. Wie der Bundesminister für Wissenschaft, Forschung und Wirtschaft in seiner Stellungnahme ausführt, besteht im Zusammenhang mit dem Vertragsverletzungsverfahren, das zum Urteil des Gerichtshofes der Europäischen*



	<p><i>Union vom 7. Juli 2005 (Rs. C-147/03, Kommission/Österreich) geführt hat, ein laufender Dialog mit der Europäischen Kommission, in dessen Rahmen Österreich unter anderem jährlich einen Bericht über die Situation im Zusammenhang mit den Studien der Human- und Zahnmedizin an die Europäische Kommission erstellt, in dem auf Basis statistischer Daten die Frage der Notwendigkeit und Erforderlichkeit der Regelung des §124b Abs5 UG 2002 beurteilt werden soll. In diesem Prozess hat die Europäische Kommission zuletzt mit Schreiben vom 18. Dezember 2012 ein Moratorium für das angesprochene Vertragsverletzungsverfahren und somit zum Ausdruck gebracht, dass zum derzeitigen Zeitpunkt eine Verletzung von Unionsrecht durch Österreich nicht festgestellt werden kann. / The Constitutional Court thus comes to the same conclusion as the European Commission. As the Federal Minister for Science, Research and the Economy points out in his statement, there is, in the context of the infringement procedure which led to the judgment of the CJEU of 7 July 2005 (C-147/03, Commission v. Austria), an ongoing dialogue with the European Commission in which, among other things, Austria issues an annual assessment report on the situation based on statistical data regarding studies of human and dental medicine to the European Commission and the necessity of §124b Abs5 of the University Act 2002. In this process, the European Commission at last, by letter of 18 December 2012, expressed a moratorium on the infringement proceedings referred to above, and expressed the view that at the present time a violation of Union law cannot be found in Austria.</i></p>
<p><b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b></p>	<p>The Constitutional Court referred specifically to Article 21, paragraphs 1 and 22, Article 23, paragraph 2, and Article 51, paragraph 1 of the Charter of Fundamental Rights.</p>

<b>2. Subject matter concerned</b>	<input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality <input type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	24 June 2010
<b>Deciding body (in original language)</b>	Verfassungsgerichtshof (VfGH)
<b>Deciding body (in English)</b>	Constitutional Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	B538/09 ECLI:AT:VFGH:2010:B538.2009
<b>Parties</b>	<i>Supreme Court of Appeals and Discipline v. German/Italian citizen</i>
<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=afcd45c2-2acf-46bd-8bd0-672962c3497f&amp;Abfrage=Vfgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;SucheNachRechtsatz=True&amp;SucheNachText=True&amp;GZ=&amp;VonDatum=30.04.2006&amp;BisDatum=13.02.2017&amp;Norm=AEUV+Art18&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JFT_09899376_09B00538_00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=afcd45c2-2acf-46bd-8bd0-672962c3497f&amp;Abfrage=Vfgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;SucheNachRechtsatz=True&amp;SucheNachText=True&amp;GZ=&amp;VonDatum=30.04.2006&amp;BisDatum=13.02.2017&amp;Norm=AEUV+Art18&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JFT_09899376_09B00538_00</a>

<b>Legal basis in national law of the rights under dispute</b>	B-VG Art7 Abs1 <sup>5</sup> B-VG Art7 Abs1 B-VG Art83 Abs2 StGG Art6 Abs1 <sup>6</sup> StGG Art18 RAO §2, §5a <sup>7</sup> RechtsanwaltsprüfungsG §2, §8 <sup>8</sup>
<b>Key facts of the case</b> (max. 500 chars)	<p>Note that this executive summary has the purpose to make us understand the:</p> <p>1. Facts of the case (so the “real life story”)</p> <p>The complainant – a German/Italian citizen – received his law degree in 1997 and his PhD in law in 1999 at the University of Salzburg, Austria. In 2005, the complainant applied for the admission to the bar exam. The president of the regional appeal court (i.e. the competent authority) dismissed the complainant’s request for the admission to the bar exam because the complainant had not been registered with any bar association. However, this registration is necessary in order to be admitted to the bar exam (and at the same time it establishes jurisdiction for the president of the regional appeal court in this regard). The facts of the case do not mention a clear reason why he was not registered with any bar association (his German/Italian citizenship does not constitute any obstacle in this regard). The complainant appealed to the Supreme Board of Appeal and Disciplinary Committee, yet the appeal was rejected without order for improvement pursuant to § 13 AVG, as being deficient in June 2007. The following appeal to the Constitutional Court was granted and the contested decision was annulled for infringement of the constitutionally guaranteed right to a trial before the</p>

<sup>5</sup> Austria, Federal Constitution (*Bundes-Verfassungsgesetz, B-VG*), [StF: BGBl. Nr. 1/1930 \(WV\) idF BGBl. I Nr. 194/1999 \(DFB\)](#).

<sup>6</sup> Austria, Basic Law (*Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder - Staatsgrundgesetz, StGG*), [RGBl. Nr. 142/1867 idF BGBl. Nr. 684/1988](#).

<sup>7</sup> Austria, Lawyer Regulation (*Rechtsanwaltsordnung, RAO*), [RGBl. Nr. 96/1868 idF BGBl. I Nr. 10/2017](#).

<sup>8</sup> Austria, Law on the bar exam and other requirements for the practice of legal profession (*Bundesgesetz vom 12. Dezember 1985, mit dem Bestimmungen über die Rechtsanwaltsprüfung und über sonstige Erfordernisse zur Ausübung der Rechtsanwaltschaft getroffen werden - Rechtsanwaltsprüfungsgesetz, RAPG*), [BGBl. Nr. 556/1985 idF BGBl. Nr. 612/1986 \(DFB\)](#).

	<p>statutory judge. The Supreme Board of Appeal and Disciplinary Committee held another proceeding and came to the same result that the registration with the bar association is necessary in order to be admitted to the bar exam. The complainant lodged another complaint to the Constitutional Court and claimed that the Supreme Board of Appeal and Disciplinary Committee had practiced arbitrariness through an abundant misunderstanding of the legal situation and carried out a deficient procedure. Furthermore, the provisions applied by the Supreme Board of Appeal and Disciplinary Committee were contrary to the Community law (now Union law), explaining why the complainant sought a preliminary ruling procedure before the CJEU.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Constitutional Court referred to B-VG Article 7, paragraph 1, Article 83, paragraph 2, Article 6, paragraph 1; StGG Article 6, paragraph 1, Article 18; RAO §2, §5a; RechtsanwaltsprüfungsG §2, §8, and TFEU Article 18.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Constitutional Court found that there has not been a violation of constitutionally guaranteed rights by non-admission of a citizen to the bar exam in the absence of an entry into a list of lawyers in Austria. Moreover, it found that there are no reservations of practical use (i.e. working at a law firm in order to gain experience) as it is required by the Law of Attorneys and the Law on the Bar Exam. In the light of the constitutional harmlessness of the applied legislation and the fact that there is no indication that the authorities mistakenly implied such, the applicant could have only been infringed on the constitutionally guaranteed right to equality of all citizens before the law, if the authority had acted purely arbitrary. This, so the Constitutional Court, has not been the case because the competent authority has carried out an adequate preliminary investigation procedure and has given sufficient reasons for its decision (including the comprehensive consideration of evidence).</p>
<p><b>Key issues (concepts, interpretations ) clarified by</b></p>	<p>The key issue is whether the requirement of being registered in a bar association in order to be admitted to the bar exam is contrary to, inter alia, Union law and whether the competent authority acted arbitrarily. Moreover, the key issue is whether the complainant has been violated in his constitutionally guaranteed right to freedom of employment. The Constitutional Court stated that in the area of application of the law of the Union, the reservation of Article 7 B-VG regarding citizenship does not apply because the prohibition of discrimination against citizens of the country on grounds of nationality (Article 18 of the TFEU) requires that citizens of the</p>

<p><b>the case</b> (max. 500 chars)</p>	<p>Union are not put worse off against nationals in the field of Union law. In further consequence, the constitutionally guaranteed right to freedom of employment is, according to the Constitutional Court, violated by a decision if an Austrian citizen or a Union citizen is banned from taking up or pursuing a certain activity of employment; if there is no law authorising the authority to take such a restrictive measure; if the legislation, which the decision is based on, is unconstitutional or unlawful, or if the authority applied a constitutional law or a statutory regulation in an arbitrary manner. This has not taken place in the present case.</p>
<p><b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)</p>	<p>The complaint was dismissed by the Constitutional Court. The Constitutional Court found that there has not been any violation of constitutionally guaranteed rights.</p>
<p><b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)</p>	<p><i>Das nach Art7 B-VG verfassungsgesetzlich gewährleistete Recht auf Gleichheit aller Staatsbürger vor dem Gesetz kommt seinem Wortlaut nach lediglich Staatsbürgern zu. Im Anwendungsbereich des Unionsrechts findet der Staatsbürgervorbehalt des Art7 B-VG allerdings keine Anwendung, weil das Verbot der Diskriminierung der Unionsbürger aus Gründen der Staatsangehörigkeit (Art18 AEUV) verlangt, dass im Anwendungsbereich des Unionsrechts Unionsbürger gegenüber Staatsbürgern nicht schlechter gestellt werden dürfen; eine von einem Unionsbürger erhobene Beschwerde nach Art144 B-VG darf nicht wegen der fehlenden (österreichischen) Staatsangehörigkeit ab- oder zurückgewiesen werden, weshalb mit Blick auf den Gleichheitsgrundsatz davon auszugehen ist, dass sich sein Schutz auch auf Unionsbürger mit nicht-österreichischer Staatsangehörigkeit erstreckt (vgl. VfGH 10.6.2010, B887/09).</i> / The right to equality of all citizens before the law, which is guaranteed by constitutional law under Article 7 B-VG, is, according to its wording, only applicable to citizens. However, in the area of application of the law of the Union, the reservation</p>

	<p>regarding citizenship of Article 7 B-VG does not apply because the prohibition of discrimination against citizens of the country on grounds of nationality (Article 18 of the TFEU) requires that citizens of the Union are not put worse off against nationals in the field of Union law. A complaint lodged by a non-citizen in accordance with Article 144 B-VG cannot be dismissed or rejected because of the missing (Austrian) nationality, which is why, with a view to the principle of equality, it is also intended to protect citizens of non-Austrian nationality (cf. VfGH 10.6.2010, B887/09).</p> <p><i>Das verfassungsgesetzlich gewährleistete Recht auf Freiheit der Erwerbsbetätigung ist seinem Wortlaut nach Personen vorbehalten, die die österreichische Staatsbürgerschaft besitzen. Allerdings findet - wie bereits zu Art7 B-VG ausgeführt - der Staatsbürgervorbehalt im Anwendungsbereich des Unionsrechts keine Anwendung: Das Verbot der Diskriminierung von Unionsbürgern aus Gründen der Staatsangehörigkeit (Art18 AEUV) verlangt, dass im Anwendungsbereich des Unionsrechts Unionsbürger gegenüber Staatsbürgern nicht schlechter gestellt werden dürfen. Eine von einem Unionsbürger erhobene Beschwerde nach Art144 B-VG darf nicht wegen der fehlende Staatsangehörigkeit ab- oder zurückgewiesen werden. Somit ist im Anwendungsbereich des Unionsrechts im Ergebnis von einer Ausdehnung des persönlichen Geltungsbereiches der Freiheit der Erwerbsbetätigung auf Unionsbürger auszugehen (vgl. VfGH 10.6.2010, B887/09).</i> / The constitutionally guaranteed right to freedom of employment is, according to its wording, reserved to persons with Austrian citizenship. However, as already stated in relation to Article 7 of the B-VG, the reservation of citizenship is not applicable within the scope of Union law. The prohibition of discrimination against citizens of the Union on the grounds of nationality (Article 18 of the TFEU) requires that citizens of the Union are not put worse off than nationals within the scope of Union law. A complaint lodged by a citizen of the Union pursuant to Article 144 B-VG may not be dismissed or rejected because of the lack of nationality. Thus, in the area of application of the law of the Union, the result of an extension of the personal scope of the freedom to engage in employment with non-citizens is to be assumed.</p>
<p><b>Has the deciding body referred to the</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>

<b>Charter of Fundamental Rights? If yes, to which specific article.</b>	
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<b>3. Subject matter concerned</b>	<input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality <input type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	10 June 2010
<b>Deciding body (in original language)</b>	Verfassungsgerichtshof (VfGH)
<b>Deciding body (in English)</b>	Constitutional Court
<b>Case number (also European Case Law Identifier)</b>	B887/09 ECLI: AT: VfGH: 2010: B887.2009

<b>(ECLI) where applicable)</b>	
<b>Parties</b>	<i>Federal Minister of Finance v. a Maltese gambling company</i>
<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=70ae48d6-6536-485f-b49a-c1bac74fafcf&amp;Abfrage=Vfgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=&amp;VonDatum=30.04.2006&amp;BisDatum=13.02.2017&amp;Norm=AEUV+Art18&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JFT_09899390_09B00887_00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=70ae48d6-6536-485f-b49a-c1bac74fafcf&amp;Abfrage=Vfgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=&amp;VonDatum=30.04.2006&amp;BisDatum=13.02.2017&amp;Norm=AEUV+Art18&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JFT_09899390_09B00887_00</a>
<b>Legal basis in national law of the rights under dispute</b>	B-VG Art7 Abs1 <sup>9</sup> B-VG Art7 Abs1 B-VG Art7 Abs1 StGG Art6 Abs1 <sup>10</sup> GlücksspielG §21, §56 Abs2 <sup>11</sup>
<b>Key facts of the case (max. 500 chars)</b>	Note that this executive summary has the purpose to make us understand the:  1. Facts of the case (so the “real life story”) In March 2009, a Maltese online gambling company applied for an authorisation pursuant to §56 (2) of the law on the regulation of the gambling industry to the Federal Minister of Finance for the purpose of promoting the participation in the online gambling games it offered in Austria. The Federal Minister of Finance dismissed the application by stating that the company’s concession would not include the “physical” visit of their business premises in Austria (i.e. the offering of gambling via Internet is not part of a casino concession in Austria). The complainant lodged a complaint against this decision to the Constitutional Court and stated that the decision

<sup>9</sup> Austria, Federal Constitution (*Bundes-Verfassungsgesetz, B-VG*), [StF: BGBl. Nr. 1/1930 \(WV\) idF BGBl. I Nr. 194/1999 \(DFB\)](#).

<sup>10</sup> Austria, Basic Law (*Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder - Staatsgrundgesetz, StGG*), [RGGBl. Nr. 142/1867 idF BGBl. Nr. 684/1988](#).

<sup>11</sup> Austria, Law on the regulation of the gambling industry (*Bundesgesetz vom 28. November 1989 zur Regelung des Glücksspielwesens – Glücksspielgesetz, GSpG*), [BGBl. Nr. 620/1989 idF BGBl. I Nr. 118/2016](#).



	<p>constitutes a violation of the constitutionally guaranteed rights to property (Article 5 StGG, Article 1, paragraph Additional Protocol to the ECHR), to freedom to engage in gainful employment (Article 6 StGG), and equality of all citizens before the law (Article 7 B-VG), as well as a violation due to the application of unconstitutional law.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Constitutional Court referred to B-VG, Article 7, paragraph 1; StGG, Article 6, paragraph 1 and Article 18, and GlücksspielG §§21, 56 paragraph 2.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Constitutional Court found that there has not been any violation of constitutionally guaranteed rights by rejecting an application from a Maltese online gambling company regarding the permit to advertise for a visit of their business premises. Moreover, it found that the citizenship right regarding the freedom to take up any employment is also applicable to EU-citizens and that there is no contradiction to Union law. In the light of the constitutional harmlessness of the applied legislation and the fact that there is no indication that the authorities mistakenly implied such, the applicant could have only been infringed on the constitutionally guaranteed right to the equality of all citizens before the law if the authority acted purely arbitrary.</p>
<p><b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)</p>	<p>The key issues are whether the constitutionally guaranteed rights to equality of all citizens before the law and the right to freedom of employment have been violated by the decision dismissing the complainant's application to promote the participation in the online gambling games it offered in Austria.</p>
<p><b>Results (e.g. sanctions) and key consequences or implications</b></p>	<p>The complaint was dismissed by the Constitutional Court and assigned to the Supreme Administrative Court for a decision as to whether the complainant had been infringed in another right by the contested decision.</p>

<b>of the case</b> (max. 500 chars)	
<b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)	<p><i>Das verfassungsgesetzlich gewährleistete Recht auf Freiheit der Erwerbsbetätigung ist seinem Wortlaut nach ein Staatsbürgerrecht, dh. es steht nur Personen zu, die die österreichische Staatsbürgerschaft besitzen. Allerdings findet der Staatsbürgervorbehalt im Anwendungsbereich des Unionsrechts keine Anwendung: Das Verbot der Diskriminierung der Unionsbürger aus Gründen der Staatsangehörigkeit (Art18 AEUV) verlangt, dass im Anwendungsbereich des Unionsrechts Unionsbürger gegenüber Staatsbürgern nicht schlechter gestellt werden dürfen. Eine von einem Unionsbürger auf ein Staatsbürgerrecht gestützte Beschwerde nach Art144 B-VG darf nicht wegen der fehlenden Staatsangehörigkeit ab- oder zurückgewiesen werden. Somit ist im Anwendungsbereich des Unionsrechts im Ergebnis von einer Ausdehnung des persönlichen Geltungsbereichs der Freiheit der Erwerbsbetätigung auf Unionsbürger und juristische Personen mit Sitz in einem Mitgliedstaat der Europäischen Union auszugehen [...]. / The constitutionally guaranteed right to freedom of labour is, according to its wording, a citizenship right, i.e. only persons with Austrian citizenship are eligible. However, this citizens' right does not apply within the scope of Union law. The prohibition of discrimination of citizens of the Union on the grounds of nationality (Article 18 of the TFEU) requires that citizens of the Union are not put worse off than nationals within the scope of Union law. A complaint pursuant to Article 144 B-VG, supported by a Union citizen and directed on a citizenship right, cannot be dismissed or rejected because of the lack of nationality. Thus, within the scope of Union law, the extension of the personal scope of the freedom to engage in gainful employment onto Union citizens and legal persons is to be assumed [...].</i></p> <p><i>Eine Rechtfertigung der von Art18 AEUV erfassten Ungleichbehandlung in Hinblick auf Art6 StGG kommt nicht in Betracht, da es sich um eine ausdrückliche Diskriminierung aus Gründen der Staatsangehörigkeit handelt (vgl. Eberhard, aaO, 299). / A justification for the unequal treatment covered by Article 18 of the TFEU with</i></p>

	<p>regard to Article 6 of the StGG can not be considered because refers to an explicit discrimination on grounds of nationality.</p> <p><i>Das nach Art7 B-VG verfassungsgesetzlich gewährleistete Recht auf Gleichheit vor dem Gesetz kommt seinem Wortlaut nach lediglich Staatsbürgern zu. Im Anwendungsbereich des Unionsrechts findet der Staatsbürgervorbehalt des Art7 B-VG allerdings keine Anwendung, da das Verbot der Diskriminierung der Unionsbürger aus Gründen der Staatsangehörigkeit (Art18 AEUV) verlangt, dass im Anwendungsbereich des Unionsrechts Unionsbürger gegenüber Staatsbürgern nicht schlechter gestellt werden dürfen; eine von einem Unionsbürger oder von einer juristischen Person mit Sitz in einem Mitgliedstaat der Europäischen Union erhobene Beschwerde nach Art144 B-VG darf nicht wegen der fehlenden (österreichischen) Staatsangehörigkeit bzw. unter Hinweis auf den Sitz im Ausland ab- oder zurückgewiesen werden, weshalb mit Blick auf den Gleichheitsgrundsatz ebenso davon auszugehen ist, dass sich sein Schutz auch auf Unionsbürger mit nicht-österreichischer Staatsangehörigkeit bzw. juristische Personen mit Sitz im EU-Ausland erstreckt. /</i></p> <p>The right to equality before the law, which is guaranteed by a constitutional law pursuant to Article 7 B-VG, is in its wording only granted to citizens. However, in the area of application of the Union law, the nationality reservation of Article 7 B-VG does not apply, as the prohibition of discrimination against citizens of the country on grounds of nationality (Article 18 of the TFEU) requires that Union citizens are not put worse off than nationals. A complaint lodged by a Union citizen, or by a legal person established in a Member State of the European Union, in accordance with Article 144 B-VG, shall not be dismissed or rejected because of the missing (Austrian) nationality or the residence abroad, which is why, with a view to the principle of equality, it should also be assumed that its protection also extends to non-Austrian nationals of non-Austrian citizenship, or to legal persons established in EU countries.</p>
<p><b>Has the deciding body referred to the Charter of Fundamental</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>

<b>Rights? If yes, to which specific article.</b>	
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<b>4. Subject matter concerned</b>	<input checked="" type="checkbox"/> 1) non-discrimination on grounds of nationality <input type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	18 June 2012
<b>Deciding body (in original language)</b>	Verfassungsgerichtshof (VfGH)
<b>Deciding body (in English)</b>	Constitutional Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	U1553/11 ECLI:AT:VFGH:2012:U1553.2011

<b>Parties</b>	<i>Asylum court v. a Turkish citizen</i>
<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=21d1ba23-b1da-41d1-8856-5960dca43a3f&amp;Position=1&amp;Abfrage=Vfgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=U1553%2f11&amp;VonDatum=&amp;BisDatum=07.04.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JFT_09879382_11U01553_00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=21d1ba23-b1da-41d1-8856-5960dca43a3f&amp;Position=1&amp;Abfrage=Vfgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=U1553%2f11&amp;VonDatum=&amp;BisDatum=07.04.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JFT_09879382_11U01553_00</a>
<b>Legal basis in national law of the rights under dispute</b>	AsylG 2005 §10 Abs2 Z1 <sup>12</sup> BVG-Rassendiskriminierung ArtI Abs1 <sup>13</sup> Niederlassungs- und Aufenthaltsg (NAG) §51 ff <sup>14</sup>
<b>Key facts of the case</b> (max. 500 chars)	Note that this executive summary has the purpose to make us understand the:  1. Facts of the case (so the “real life story”) The complainant, a Turkish citizen, entered the federal territory of Austria illegally in January 2005. With a decision of September 2005, the application for asylum was dismissed and deportation declared as admissible. Against this decision, the complainant lodged an appeal (now: complaint). In October 2008, the Asylum Court received a notification from the Salzburg Registry Office dated 1 October 2008, according to which the complainant intended to conclude a marriage with a Swiss citizen who was residing in Salzburg. In May 2011, the complainant submitted the marriage certificate of 29 November 2008, after a written request from the Asylum Court, (among others) to present the current life situation in Austria. By the contested decision of July 2011, the Asylum Court dismissed the appeal, with the expulsion being formulated and based on § 10 (1) (2) of the Asylum Act 2005. The Asylum Court essentially justified the dismissal of the asylum application with the

<sup>12</sup> Austria, Asylum Act 2005 (*Bundesgesetz über die Gewährung von Asyl - Asylgesetz 2005, AsylG 2005*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 24/2016](#).  
<sup>13</sup> Austria, Federal constitutional law on abolishing race discrimination (*Bundesverfassungsgesetz vom 3. Juli 1973 zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung*), [BGBl. Nr. 390/1973](#).  
<sup>14</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz, NAG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 122/2015](#).

	<p>lack of credibility, and the fact that his justification for flight was not recent (meaning that there was no real risk of inhumane treatment, especially since the complainant was not suffering from a life-threatening illness and he had both a social network and a place to live in his country of origin). With regard to the expulsion of the complainant, the Asylum Court first stated that the complainant had no relatives in Austria because "a review in the Central registry had revealed that his wife as of 29 November 2008, who was from Switzerland [...] had already passed away". The complainant alleges the violation of constitutionally guaranteed rights under Articles 5, 6 and 8 of the ECHR and the violation of the right to equal treatment of foreigners.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Constitutional Court referred to §10 Abs2 Z1 AsylG 2005; ArtI Abs1 BVG-Rassendiskriminierung; §§ 51 NAG and Directive 2004/38/EC.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Constitutional Court found that the complainant has been violated in his right to equal treatment of foreigners by the expulsion. Concretely, the investigation results regarding the death of his wife had not been brought to the attention of the complainant. He was thus deprived from the possibility to state that he has been living in a life partnership with another woman since his wife passed away. Thus, the behaviour of the court resulted in unequal treatment of foreigners because it acted in an arbitrary way. Besides, according to the Constitutional Court, the passing of the complainant's wife must by no means mean the loss of the right of residence.</p>
<p><b>Key issues (concepts, interpretations ) clarified by the case</b> (max. 500 chars)</p>	<p>One of the key issues whether the complainant's right to reside ceased to exist because his Swiss wife had passed away, and whether the Asylum Court had to take Directive 2004/38/EC into consideration (which it had not done). According to the Constitutional Court, the Asylum Court had to take Directive 2004/38/EC into account when examining its expulsion decision. The fact that the wife has now passed away cannot alter this obligation, especially since her passing away must by no means mean the loss of the right of residence.</p>

<p><b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)</p>	<p>The contested decision has been repealed by the Constitutional Court. The federal government (Federal Chancellor) is obliged to pay the complainant the costs of the proceedings (EUR 2,400) within 14 days, otherwise facing execution.</p>
<p><b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)</p>	<p><i>Der Asylgerichtshof hat diesbezüglich in seiner Entscheidung keinerlei Erwägungen angestellt und insbesondere auch die in Umsetzung der Richtlinie 2004/38/EG des Europäischen Parlaments und des Rates vom 29. April 2004 über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, zur Änderung der Verordnung (EWG) Nr. 1612/68 und zur Aufhebung der Richtlinien 64/221/EWG, 68/360/EWG, 72/194/EWG, 73/148/EWG, 75/34/EWG, 75/35/EWG, 90/364/EWG, 90/365/EWG und 93/96/EWG, ABI. 2004 L 158, S 77, erlassenen Bestimmungen der §§51 ff. Niederlassungs- und Aufenthaltsgesetz, BGBl. I 100/2005 idF BGBl. I 38/2011, (im Folgenden: NAG) nicht näher in die Prüfung der Ausweisungsentscheidung miteinbezogen. Dazu wäre der Asylgerichtshof - angesichts der vom Beschwerdeführer vorgelegten Heiratsurkunde, wonach am 29. November 2008 die Verehelichung mit einer in Österreich wohnhaften Staatsbürgerin der Schweiz (vgl. §57 NAG) stattgefunden hatte - jedoch verpflichtet gewesen (vgl. VfSlg. 18.985/2010; VfGH 30.11.2010, U833/10 mwH). Dass die Ehefrau mittlerweile verstorben ist, vermag an dieser Verpflichtung nichts zu ändern, zumal das Ableben des Zusammenführenden keineswegs den Verlust des Aufenthaltsrechtes bedeuten muss (s. §54 Abs3 NAG; vgl. zur vorliegenden Problematik weiters auch VwGH 9.11.2010, 2007/21/0558). / In its decision, the Asylum Court has not raised any consideration in this regard and, in particular, has not included the implementation of the Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States</i></p>

	<p>amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, S 77, the enacted provisions of §§51 NAG, BGBl, I 100/2005 idF BGBl, I 38/2011, into the examination of the expulsion decision. The Asylum Court was, however, obliged to do so in light of the marriage certificate presented by the appellant, according to which the marriage with a Swiss citizen, a resident in Austria (cf. §57 NAG) had taken place on 29 November 2008 (cf VfSlg 18.985 / 2010; VfGH 30.11.2010, U833 / 10 mwH). The fact that the wife has passed away cannot alter this obligation, especially since the passing of the complainant's wife must by no means mean the loss of the right of residence.</p> <p><i>Der Beschwerdeführer wurde daher durch die angefochtene Entscheidung, soweit damit die Beschwerde gegen die Ausweisung aus dem österreichischen Bundesgebiet abgewiesen wird, im verfassungsgesetzlich gewährleisteten Recht auf Gleichbehandlung Fremder untereinander verletzt. Die angefochtene Entscheidung ist daher insoweit - ohne, dass auf das Beschwerdevorbringen zu Art8 EMRK näher einzugehen gewesen wäre - aufzuheben. / The complainant has been therefore violated in his constitutionally guaranteed right to equal treatment of foreigners by the contested decision, insofar as the appeal against expulsion from the Austrian federal territory is dismissed. The contested decision must therefore – without considering the argument on Article 8 of the ECHR – be repealed in that regard.</i></p>
<p><b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>



<b>5.</b> <b>Subject matter concerned</b>	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 - Article 27 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	13 December 2012
<b>Deciding body (in original language)</b>	Verwaltungsgerichtshof (VwGH)
<b>Deciding body (in English)</b>	Supreme Administrative Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	2012/21/0181
<b>Parties</b>	<i>Federal Police Headquarters v. a Slovenian citizen</i>

<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=af3a8bdd-c342-4627-9b8f-ef5e6b518440&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;AenderungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2012%2f21%2f0181&amp;VonDatum=&amp;BisDatum=10.04.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2012210181_20121213X00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=af3a8bdd-c342-4627-9b8f-ef5e6b518440&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;AenderungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2012%2f21%2f0181&amp;VonDatum=&amp;BisDatum=10.04.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2012210181_20121213X00</a>
<b>Legal basis in national law of the rights under dispute</b>	FrPolG 2005 §66 Abs1 idF 2011/I/038 <sup>15</sup> FrPolG 2005 §67 Abs1 idF 2011/I/038 FrPolG 2005 §67 idF 2011/I/038 NAG 2005 §53a idF 2011/I/038 <sup>16</sup> SMG 1997 §28a Abs2 Z3 <sup>17</sup>
<b>Key facts of the case</b> (max. 500 chars)	Note that this executive summary has the purpose to make us understand the:  1. Facts of the case (so the “real life story”) In April 2011, the federal police headquarters ( <i>Bundespolizeidirektion</i> ) in Linz decided to issue a residence ban for seven years against the complainant (a Slovenian citizen). The federal police headquarters justified the residence ban because the complainant had been convicted three times in the past because of offences against the controlled substances law ( <i>Suchtmittelgesetz/SMG</i> ). The complainant lodged an appeal against the residence ban. The relevant authority, i.e. the Independent Administrative Board ( <i>Unabhängiger Verlwatungssenat</i> ) confirmed the first decision with the proviso that the residence ban was reduced to three years. A public hearing was not conducted. From a legal point of view, the Independent Administrative Board, i.e. competent authority then stated that the complainant is a Slovenian national who had exercised her

<sup>15</sup> Austria, Aliens Police Act (*Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln - Fremdenpolizeigesetz 2005, FPG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 24/2016](#). However, the present case refers to the version as amended by BGBl. I Nr. 38/2011.

<sup>16</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz, NAG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 122/2015](#). However, the present case refers to the version as amended by BGBl. I Nr. 38/2011.

<sup>17</sup> Austria, Controlled substances law (*Bundesgesetz über Suchtgifte, psychotrope Stoffe und Drogenausgangsstoffe - Suchtmittelgesetz , SMG*), [BGBl. I Nr. 112/1997 idF BGBl. I Nr. 23/2016](#).

	<p>freedom of movement by residing in Austria (and thus, falling within the scope of §67 paragraph 1, first sentence of FPG). It is clear for the competent authority that the complainant's past behaviour (i.e. drug trafficking) affects the fundamental interest of society and thus, the residence ban was justified. The complainant's remarks (regarding her stable living situation) were rejected by the authority and a negative prognosis for the future was attested. The complainant then lodged a complaint against this decision to the Supreme Administrative Court.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Supreme Administrative Court referred to Articles 16, 27, 28 of Directive 2004/38/EC; §§ 66, 67 FrPolG, § 53a NAG and § 28 SMG.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Supreme Administrative Court argued that it had to be assumed that the Slovenian citizen, who had been resident in Austria for nine years at the time of the decision making, had the right of permanent residency. An expulsion may only be granted on grounds of "serious" threats to public policy or public security, whereas here as well according to Article 27 (2) of the directive, it is also necessary to take into account the personal conduct which must be a real, present and substantial risk which affects a fundamental interest of the society, but in general requires a greater degree of risk. Therefore, an expulsion would have only been permissible had the complainant's stay posed a serious threat to public order or security. This, according to the Constitutional Court, has not been the case.</p>
<p><b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)</p>	<p>One of the key issues whether the complainant's past offences (i.e. drug trafficking) justify a residence ban. Indeed, the competent authority applied correctly § 67 of the FPG as the legal basis for the residence ban. However, it is unjustified that the relevant authority considered the first two sentences of § 67 (1) of the FPG - the (mere) threat of public order and security by means of conduct which constitutes a real, present and considerable risk which affects the fundamental interests of society – to be significant as standards of measurement.</p>
<p><b>Results (e.g. sanctions) and key</b></p>	<p>The contested decision has been repealed because of the illegality of its content. The Federal Republic is obliged to pay the complainant expenses of EUR 1,106.40 within two weeks, otherwise facing execution.</p>

<p><b>consequences or implications of the case</b> (max. 500 chars)</p>	
<p><b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)</p>	<p><i>Die belangte Behörde hat grundsätzlich zutreffend § 67 FPG als Rechtsgrundlage für das Aufenthaltsverbot gegenüber der Beschwerdeführerin, einer Unionsbürgerin, herangezogen. Richtigerweise ist sie auch davon ausgegangen, dass für die Gefährdungsprognose nicht der Maßstab des fünften Satzes dieser Bestimmung - der eine nachhaltige und maßgebliche Gefährdung der öffentlichen Sicherheit der Republik verlangt - anzuwenden war, weil die Beschwerdeführerin ihren Aufenthalt noch nicht seit zehn Jahren im Bundesgebiet hatte. / The relevant authority has, in principle, correctly applied § 67 of the FPG as the legal basis for the residence ban against the complainant, a citizen of the Union. It was also correctly assumed that the risk measure for the threat assessment was not the same as the fifth sentence of this provision - which required a sustainable and significant threat to the public security of the Republic - because the applicant had not been in the federal territory for ten years.</i></p> <p><i>Dennoch erweist es sich als rechtswidrig, dass die belangte Behörde den Maßstab der ersten beiden Sätze des § 67 Abs. 1 FPG - die (bloße) Gefährdung der öffentlichen Ordnung und Sicherheit durch ein Verhalten, das eine tatsächliche, gegenwärtige und erhebliche Gefahr darstellt, die ein Grundinteresse der Gesellschaft berührt - für maßgeblich erachtete. Auf Basis der Feststellungen der belangten Behörde, wonach die Beschwerdeführerin seit 2003 - also zum Bescheiderlassungszeitpunkt seit rund neun Jahren - (offenbar rechtmäßig) in Österreich aufhältig und bis Mai 2010 fast durchgehend erwerbstätig war, war nämlich davon auszugehen, dass sie das unionsrechtliche Recht auf Daueraufenthalt erworben hatte (vgl. Art. 16 der Richtlinie 2004/38/EG - Unionsbürgerrichtlinie sowie § 53a Niederlassungs- und Aufenthaltsgesetz - NAG). Für Unionsbürger und ihre Familienangehörigen, die das Recht auf Daueraufenthalt genießen, bestimmt aber</i></p>

Art. 28 Abs. 2 der Unionsbürgerrichtlinie, dass eine Ausweisung nur aus "schwerwiegenden" Gründen der öffentlichen Ordnung oder Sicherheit verfügt werden darf, wobei zwar auch hier gemäß Art. 27 Abs. 2 der Richtlinie auf das persönliche Verhalten abzustellen ist, das eine tatsächliche, gegenwärtige und erhebliche Gefahr darstellen muss, die ein Grundinteresse der Gesellschaft berührt, insgesamt aber ein größeres Ausmaß an Gefährdung verlangt wird. Diese Vorgaben der Unionsbürgerrichtlinie wurden im FPG insofern umgesetzt, als nach dessen § 66 Abs. 1 die Ausweisung von EWR-Bürgern, Schweizer Bürgern und begünstigten Drittstaatsangehörigen, die bereits das Daueraufenthaltsrecht erworben haben, nur dann zulässig ist, wenn ihr Aufenthalt eine schwerwiegende Gefahr für die öffentliche Ordnung oder Sicherheit darstellt. § 67 Abs. 1 FPG enthält zwar nur zwei Stufen für die Gefährdungsprognose, nämlich einerseits (nach dem ersten und zweiten Satz) die Gefährdung der öffentlichen Ordnung und Sicherheit, wobei eine tatsächliche, gegenwärtige und erhebliche, ein Grundinteresse der Gesellschaft berührende Gefahr auf Grund eines persönlichen Verhaltens vorliegen muss, und andererseits (nach dem fünften Satz) die nachhaltige und maßgebliche Gefährdung der öffentlichen Sicherheit der Republik Österreich im Fall von EWR-Bürgern, Schweizer Bürgern und begünstigten Drittstaatsangehörigen mit mindestens zehnjährigem Aufenthalt im Bundesgebiet (bzw. im Fall von Minderjährigen). Es muss aber angenommen werden, dass hinsichtlich Personen, die das Daueraufenthaltsrecht erworben haben, nicht nur bei der Ausweisung, sondern (arg. a minori ad maius) auch bei der Erlassung eines Aufenthaltsverbotes der in Art. 28 Abs. 2 der Unionsbürgerrichtlinie und § 66 Abs. 1 letzter Satzteil FPG vorgesehene Maßstab - der im abgestuften System der Gefährdungsprognosen zwischen jenen nach dem ersten und dem fünften Satz des § 67 Abs. 1 FPG angesiedelt ist - heranzuziehen ist. Dies gebietet im Anwendungsbereich der Unionsbürgerrichtlinie eine unionsrechtskonforme Interpretation, weil das Aufenthaltsverbot eine Ausweisungsentscheidung im Sinn der Richtlinie beinhaltet. Zum gleichen Ergebnis führt eine verfassungskonforme Interpretation, weil die Anwendung eines weniger strengen Maßstabes für Aufenthaltsverbote als für bloße Ausweisungen sachlich nicht zu rechtfertigen wäre. / However, it is unjustified that the relevant authority considered the first two sentences of § 67 (1) of the FPG - the (mere) threat of public order and security by means of conduct which constitutes a real, present and considerable risk which affects the fundamental interests of society – to be considered as standards of measurement. On the basis of the findings of the relevant authority, according to which the appellant had been resident in Austria since 2003

	<p>- that is to say at the decision-making time for some nine years - and was almost completely employed until May 2010, it was to be assumed that she had the right of permanent residency (see Article 16 of Directive 2004/38/EC - Union Citizenship Directive and § 53a of the NAG). However, Article 28 (2) of the Unions Citizenship Directive stipulates that expulsion may only be granted on grounds of "serious" threats to public policy or public security, whereas, here as well according to Article 27 (2) of the Directive, it is also necessary to take into account the personal conduct which must be a real, present and substantial risk which affects a fundamental interest of the company, but in general requires a greater degree of risk. These provisions of Directive 2004/38/EC were implemented in the FPG insofar as, according to § 66 paragraph 1, the expulsion of EEA citizens, Swiss citizens and of third-country beneficiaries, who have already acquired the permanent resident right, is only permissible if their stay poses a serious threat to public order or security. Article 67 (1) of the FPG contains only two stages for the risk prognosis, namely, on one hand a threat to public order and security (according to the first and second sentences), whereby a real, present and considerable danger affecting a fundamental interest of society has to be present, and on the other hand (according to the fifth sentence), a significant threat to the public security of the Republic of Austria in the case of EEA citizens, Swiss nationals and third-country nationals with at least ten years of residence in the Federal territory (or in the case of minors). It must, however, be assumed that, in the case of persons who have acquired the right of permanent residence, not only in the case of expulsion, but also (<i>a minori ad maius</i>) in the case of prohibition of residence, the required standard laid down in Article 28 (2) of the Directive 2004/38/EC and § 66 paragraph 1, last sentence of the FPG - which is located in the graded system of the hazard prognoses between those according to the first and fifth sentences of § 67 (1) FPG – has to be adduced. This demands, within the scope of Directive 2004/38/EC, an interpretation consistent with the Union law because the prohibition of residence contains an expulsion decision within the meaning of the Directive. The same result is interpreted in conformity with the constitution because the application of a less stringent standard for prohibitions of residence than for mere expulsions would not be justifiable.</p>
<p><b>Has the deciding body referred to the</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>

<b>Charter of Fundamental Rights? If yes, to which specific article.</b>	
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<b>6. Subject matter concerned</b>	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 – Article 7 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	23 February 2012
<b>Deciding body (in original language)</b>	Verwaltungsgerichtshof (VwGH)
<b>Deciding body (in English)</b>	Supreme Administrative Court
<b>Case number (also European Case Law Identifier)</b>	2010/22/0011

<b>(ECLI) where applicable)</b>	
<b>Parties</b>	<i>Federal Minister of Interior v. a Nigerian citizen</i>
<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=5d757c69-6192-4705-a0c5-1708cdbda733&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;AenderungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2010%2f22%2f0011&amp;VonDatum=&amp;BisDatum=11.04.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2010220011_20120223X00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=5d757c69-6192-4705-a0c5-1708cdbda733&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;AenderungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2010%2f22%2f0011&amp;VonDatum=&amp;BisDatum=11.04.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2010220011_20120223X00</a>
<b>Legal basis in national law of the rights under dispute</b>	FrPolG 2005 §54 <sup>18</sup> NAG 2005 §2 Abs1 Z14 idF 2009/I/122 <sup>19</sup> NAG 2005 §2 Abs1 Z14 NAG 2005 §51 NAG 2005 §52 NAG 2005 §54 NAG 2005 §57
<b>Key facts of the case (max. 500 chars)</b>	Note that this executive summary has the purpose to make us understand the:  1. Facts of the case (so the “real life story”) In 2009, the complainant (a Nigerian citizen) applied (pursuant to § 54 in connection with § 57 of the NAG) for a permanent residence card, which was dismissed by the relevant authority. The relevant authority referred to

<sup>18</sup> Austria, Aliens Police Act (*Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln - Fremdenpolizeigesetz 2005, FPG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 24/2016](#). However, the present case refers to the version as amended by BGBl. I Nr. 122/2009.

<sup>19</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz, NAG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 122/2015](#). However, the present case refers to the version as amended by BGBl. I Nr. 122/2009.



	<p>the fact that the complainant entered Austria in 2004 and applied for asylum. The asylum application was dismissed by a decision of July 2007 in the second instance.</p> <p>In February 2006, the complainant married an Austrian citizen and, in February 2009, applied for a permanent residence card for the purpose of family reunification. The complainant had been registered in Austria since December 2005, with an interruption of 18 days in September 2007. He had been employed from 14 August to 28 November 2007. His wife had been registered in Austria since August 2002, and employed since September 2003. When submitting his application, the complainant presented a Spanish Residence Certificate issued to him on 15 September 2008 and a Spanish "Certificate of Registration" issued to his wife on 9 June 2008. In appealing against the first instance decision, the complainant claimed that his wife had pursued a short-term "independent" activity for an Internet shop in Spain (it was confirmed that she had been in Spain on 9 June 2008 and 14 December 2008). According to the relevant authority, i.e. the Federal Ministry of Interior, the complainant had not shown that his wife had claimed the right to free movement as ensured by Community law. Therefore, the complainant, according to the relevant authority, married a Union citizen who did not exercise her right to free movement, and thus, he falls outside the scope of §54 of the NAG.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Supreme Administrative Court referred to Articles 2, 6 and 7 of Directive 2004/38/EC; § 54 of the FrPolG and §§ 51, 52, 54, and 57 of the NAG.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Supreme Administrative Court stated that only if the Austrian citizen exercises his right under Article 7 of the directive (and subsequently returns not merely temporarily to Austria), his family member is also entitled to reside in the federal territory for more than three months or permanently, just as the family members of a citizen of the Union who claim the same right under Article 7 of the directive in Austria.</p>
<p><b>Key issues (concepts, interpretations)</b></p>	<p>One of the key issues is related to the application of Directive 2004/38/EC and the scope of the very same. The competent authority (i.e. the Federal Ministry of Interior) stated that the marriage as such is not sufficient to establish a right to residence. According to the Supreme Administrative Court, in contrast to the right of free</p>

<b>) clarified by the case</b> (max. 500 chars)	movement of Union citizens, which is enshrined in Article 18 (1) EC (now Article 21 TFEU) and is only further developed by the directive, the right of free movement of the family members of Union citizens, insofar they are third-country nationals, who "wandered" into another Member State, is not included by Article 21 of the TFEU, but only regulated by the directive.
<b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The contested decision has been repealed because of the illegality of its content. The Federal Republic is obliged to pay the complainant expenses of EUR 1,326.40 within two weeks, otherwise facing execution.
<b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)	<p><i>Diese Richtlinie stellt einen bedeutsamen Rechtsakt zur Erleichterung der Ausübung der unionsrechtlichen Freizügigkeit dar und bewirkt eine erhebliche Vereinheitlichung und Vereinfachung der Aufenthaltsrechte. Die Einreise- und Aufenthaltsrechte aller Unionsbürger und ihrer Familienangehörigen werden durch die genannte Richtlinie umfassend geregelt (vgl. Calliess/Ruffert, EUV/AEUV4, Art. 45 AEUV Rn. 81). Die Unionsbürger können sich gemäß Art. 6 RL drei Monate in einem Mitgliedstaat aufhalten und brauchen lediglich im Besitz eines gültigen Personalausweises oder Passes zu sein. Bei einem Aufenthalt von über drei Monaten ist das Aufenthaltsrecht jedoch an bestimmte Bedingungen geknüpft: Die Unionsbürger müssen Arbeitnehmer oder Selbständige sein oder aus anderen Quellen als der eigenen Erwerbstätigkeit im Aufenthaltsstaat über ausreichende Existenzmittel für sich und ihre Familienangehörigen verfügen, damit sie keine Sozialhilfeleistungen des Aufnahmemitgliedstaates in Anspruch nehmen müssen, und über einen umfassenden Krankenversicherungsschutz verfügen (vgl. Calliess/Ruffert, aaO, Art. 21 AEUV Rn. 24).</i> / This Directive constitutes an important instrument for facilitating the exercise of the right to free movement of the Union and brings about a substantial harmonization and simplification of the right of residence. The right to entry and</p>

residence of all Union citizens and their family members is comprehensively regulated by the above-mentioned Directive (see Calliess / Ruffert, EUV / AEUV4, Art. 45 TFEU para. 81). According to Article 6 of the Directive, Union citizens may reside in a Member State for three months and are only required to hold a valid identity card or passport. However, for a period of more than three months, the right of residence shall be subject to certain conditions: Union citizens must be employed or self-employed persons or have sufficient resources for themselves and their family members from sources other than their own employment in the State of residence, so that they do not receive social assistance from the host Member State (see Calliess / Ruffert, cited above, Art. 21 TFEU para. 24).

*Das Unionsrecht untersagt demnach nicht eine Benachteiligung der eigenen Staatsbürger (vgl. Streinz, EUV/AEUV2, Art. 45 AEUV Rn. 34). Im Gegensatz zum Freizügigkeitsrecht der Unionsbürger, das in Art. 18 Abs. 1 EG (nunmehr Art. 21 AEUV) primärrechtlich verankert ist und durch die Richtlinie lediglich näher ausgestaltet wird, ist das Freizügigkeitsrecht der Familienangehörigen der in einen anderen Mitgliedstaat "gewanderten" Unionsbürger, soweit sie Drittstaatsangehörige sind, von Art. 21 AEUV nicht umfasst, sondern nur in der Richtlinie geregelt (vgl. Obwexer, Grundfreiheit Freizügigkeit (2009), 219). / Union law therefore does not prohibit discrimination against one's own citizens (see Streinz, EUV / AEUV2, Art. 45 TFEU para. 34). In contrast to the right of free movement of citizens of the Union, which is enshrined in Article 18 (1) EC (now Article 21 TFEU) and is only further developed by the Directive, the right of free movement of the family members, insofar they are third-country nationals, of Union citizens, who "wandered" into another member states, is not included by Article 21 of the TFEU, but only regulated by the Directive (see Obwexer (2009), Grundfreie Freiheitskitizigkeit, p. 219).*

*Nur wenn also der österreichische Staatsbürger sein Recht nach Art. 7 RL ausgeübt hat (und im Anschluss daran nicht bloß vorübergehend nach Österreich zurückgekehrt ist), ist seinen Familienangehörigen ebenso das Recht einzuräumen, sich für mehr als drei Monate oder auf Dauer im Bundesgebiet aufzuhalten, wie den Familienangehörigen eines Unionsbürgers, der dasselbe Recht nach Art. 7 RL in Österreich in Anspruch nimmt. Zur Klarstellung wird darauf hingewiesen, dass die §§ 51 ff NAG nicht das unionsrechtliche Aufenthaltsrecht*

	<p>nach Art. 6 RL für einen Zeitraum von bis zu drei Monaten umsetzen. In diesem Sinn spricht der EuGH im Urteil "Metock" von Familienangehörigen nach Art. 2 Nr. 2 RL einer zusammenführenden "Ankerperson", die sich in einem anderen Mitgliedstaat niedergelassen hat (Rn. 73). Als der von § 57 NAG umfasste Personenkreis ist jener zu verstehen, der sich in Österreich niederlassen will. Dieser entspricht somit jener Gruppe von Angehörigen von Unionsbürgern, die abgeleitete Rechte nach Art. 7 Abs. 2 RL geltend machen. / Thus, only if the Austrian citizen exercised his right under Article 7 of the Directive (and subsequently returned not merely temporarily to Austria), his family member is also entitled to reside in the federal territory for more than three months or permanently, just as the family members of a citizen of the Union who claim the same right under Article 7 of the Directive in Austria. For the sake of clarity, it is pointed out that §§ 51 et seq. of the NAG does not implement the right of residency under Article 6 of the Directive for a period of up to three months. In this respect, the CJEU refers to family members pursuant to Article 2 (2) of the Directive as to "anchor" persons who have settled in another Member State (para. 73). The group of persons covered by § 57 of the NAG is to be understood as the one that wants to settle in Austria. This corresponds, therefore, to the group of members of Union citizens who claim derived rights under Article 7 (2) of the Directive.</p>
<p><b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>

<p><b>7.</b></p>	<p><input type="checkbox"/> 1) non-discrimination on grounds of nationality  <input checked="" type="checkbox"/> 2) freedom of movement and residence</p>
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<b>Subject matter concerned</b>	- linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	14 December 2012
<b>Deciding body (in original language)</b>	Verwaltungsgerichtshof (VwGH)
<b>Deciding body (in English)</b>	Supreme Administrative Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	2008/22/0175
<b>Parties</b>	<i>Federal Minister of Interior v. a Nigerian citizen</i>
<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=ed24187b-e8dd-4075-ae85-c82966c6dd3e&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;Aend erungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2008%2f22%2f0175&amp;VonDatum=&amp;BisDatum=12.04.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2008220175_20101214X00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=ed24187b-e8dd-4075-ae85-c82966c6dd3e&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;Aend erungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2008%2f22%2f0175&amp;VonDatum=&amp;BisDatum=12.04.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2008220175_20101214X00</a>

<b>Legal basis in national law of the rights under dispute</b>	FrPolG 2005 §2 Abs4 Z11 <sup>20</sup> NAG 2005 §52 <sup>21</sup>
<b>Key facts of the case</b> (max. 500 chars)	<p>Note that this executive summary has the purpose to make us understand the:</p> <ol style="list-style-type: none"> <li>1. Facts of the case (so the “real life story”) <p>The complainant (a Nigerian citizen) applied for a permanent residence card, which, however was dismissed by the Federal Minister of Interior. In 2004, he entered Austria and applied for asylum. The procedure on this request has not yet been finalised. The appellant, therefore, has a provisional residence permit under the Asylum Act. In January 2006, the complainant married a British citizen. The competent authority (i.e. the Federal Minister of the Interior) stated that the NAG was not applicable to the complainant because he was provisionally entitled to reside in Austria under the provisions of the Asylum Act. The complainant then lodged a complaint to the Constitutional Court, which dismissed the complaint and transferred it to the Supreme Administrative Court.</p> </li> <li>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) <p>The Supreme Administrative Court referred to Article 3, paragraph 1 of Directive 2004/38/EC; § 2, paragraph 4 of the FrPolG and § 52 of the NAG.</p> </li> </ol>
<b>Main reasoning / argumentation</b>	The Supreme Administrative Court based its decision on the fact that it is irrelevant whether third-country nationals, who are the family members of Union citizens, entered the Member State before or after becoming members of the family of the citizen of the Union. In further consequence, the relevant authority’s assumption

<sup>20</sup> Austria, Aliens Police Act (*Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln - Fremdenpolizeigesetz 2005, FPG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 24/2016](#).

<sup>21</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz, NAG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 122/2015](#).

(max. 500 chars)	that the application of Directive 2004/38/EC onto the complainant requires him to have married his (British) wife prior to his entry into Austria as a host Member State, results in the unlawfulness of the decision.
<b>Key issues (concepts, interpretations ) clarified by the case</b> (max. 500 chars)	One of the key issues is whether Directive 2004/38/EC is applicable because the competent authority (i.e. the Federal Minister of the Interior) stated that the complainant had not fulfilled the criteria of accompanying or following his wife (a British citizen). The Supreme Administrative Court stated that a permanent residence card for a period of ten years is to be issued upon request. Pursuant to § 52, subsection of the 1 NAG (also in its official version), persons, who are themselves EEA citizens and who are family member of EEA citizens, are entitled to settle if they are spouses and if they accompany or follow EEA citizens. The phrases “and accompany” or “follow” are not, according to the CJEU, of relevance in regard to whether third-country nationals, who are the family members of Union citizens, entered the Member State before or after becoming members of the family of the citizen of the Union.
<b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The contested decision has been repealed because of the illegality of its content. The Federal Republic is obliged to pay the complainant expenses of EUR 1,286.40 within two weeks, otherwise facing execution.
<b>Key quotations in original language and translated into English with</b>	<i>Zu den Ausführungen des Beschwerdeführers in Hinblick auf die Richtlinie 2004/38/EG des Europäischen Parlaments und des Rates vom 29. April 2004 über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten (Freizügigkeitsrichtlinie), werde festgehalten, dass der Beschwerdeführer die dort festgelegten Voraussetzungen nicht erfülle. Zwar habe die Ehefrau des Beschwerdeführers ihr Recht auf die (gemeinschaftsrechtliche) Freizügigkeit in Anspruch</i>

**reference details** (max. 500 chars)

*genommen, indem sie sich in Österreich niedergelassen habe. Das abgeleitete Recht des Beschwerdeführers als eines Angehörigen einer EWR-Bürgerin setze allerdings voraus, dass er die EWR-Bürgerin begleitet habe oder zu ihr nachgezogen sei. Beide Alternativen habe der Beschwerdeführer nicht erfüllt, weil er seine Ehefrau erst nach seiner Einreise nach Österreich geheiratet habe. / With regard to the complainant's remarks in relation to Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the Free Movement Directive), it is stated that the complainant does not meet the requirements laid down therein. It is true that the complainant's wife had exercised her right to freedom of movement (Community law) by settling down in Austria. However, the complainant's derived right as a citizen of an EEA citizen presupposes that he has accompanied the EEA citizen or has followed her. The complainant had not fulfilled either of these alternatives because he had married his wife only after he had entered Austria.*

*Gemäß § 1 Abs. 2 Z. 1 NAG (in der hier maßgeblichen Stammfassung) gilt dieses Bundesgesetz nicht für Fremde, die nach dem Asylgesetz 2005 und nach vorigen asylgesetzlichen Bestimmungen zum Aufenthalt berechtigt sind, soweit das NAG nicht anderes bestimmt. Diese Bestimmung wird allerdings im Anwendungsbereich der Richtlinie 2004/38/EG durch das Gemeinschaftsrecht verdrängt. / Pursuant to § 1, paragraph 2, subsection 1 of the NAG (in the authoritative version), this Federal Act does not apply to strangers who are entitled to stay under the Asylum Act 2005 and under previous asylum-seekers' provisions unless otherwise specified by the NAG. This provision is, however, displaced by Community law within the scope of Directive 2004/38/EC.*

*Gemäß § 54 Abs. 1 NAG (in der hier maßgeblichen Stammfassung) sind Angehörige von freizügigkeitsberechtigten EWR-Bürgern, die nicht EWR-Bürger sind und die die in § 52 Z. 1 bis 3 NAG genannten Voraussetzungen erfüllen, zur Niederlassung berechtigt. Ihnen ist auf Antrag eine Daueraufenthaltskarte für die Dauer von zehn Jahren auszustellen.*

*Nach § 52 Z. 1 NAG (ebenfalls in der Stammfassung) sind Angehörige von freizügigkeitsberechtigten EWR-Bürgern, die selbst EWR-Bürger sind, zur Niederlassung berechtigt, wenn sie Ehegatte sind und den EWR-*



*Bürger begleiten oder zu ihm nachziehen.* / Pursuant to § 52, paragraph 1 of the NAG (in the authoritative version), members of EEA citizens who are not EEA citizens and who fulfil the conditions set out in § 52, subsections 1 to 3 of the NAG are entitled to settle. A permanent residence card for a period of ten years is to be issued upon request. Pursuant to § 52, subsection 1 of the NAG (also in its official version), persons, who are themselves EEA citizens and who are family members of EEA citizens, are entitled to settle if they are spouses and if they accompany or follow EEA citizens.

*Zwar enthält diese Bestimmung - in Anlehnung an Art. 3 Abs. 1 der Richtlinie 2004/38/EG - die Wendung "und diesen begleiten oder zu ihm nachziehen", der Europäische Gerichtshof hat allerdings zu dieser Richtlinienbestimmung ausgesprochen, dass es keine Rolle spielt, ob Drittstaatsangehörige, die Familienangehörige eines Unionsbürgers sind, in den Aufnahmemitgliedstaat eingereist sind, bevor oder nachdem sie Familienangehörige des Unionsbürgers wurden (vgl. dazu wiederum das hg. Erkenntnis vom 26. Jänner 2010, mwN, insbesondere mit Hinweis auf das Urteil des Europäischen Gerichtshofes vom 25. Juli 2008, Rs Metock u.a., C-127/08).*

*Die belangte Behörde, die davon ausgegangen ist, die Anwendung der Richtlinie 2004/38/EG auf den Beschwerdeführer setze voraus, dass dieser bereits vor der Einreise in Österreich als Aufnahmemitgliedstaat seine (britische) Ehefrau heiraten hätten müssen, hat dadurch den angefochtenen Bescheid mit inhaltlicher Rechtswidrigkeit belastet; dieser ist daher gemäß § 42 Abs. 2 Z. 1 VwGG aufzuheben.* / It is true that, according to Article 3 (1) of Directive 2004/38/EC, that provision contains the phrases "and accompany" or "follow", the CJEU stated that it is irrelevant whether third-country nationals, who are the family members of Union citizens, entered the Member State before or after becoming members of the family of the citizen of the Union (see, in particular, the judgment of the European Court of Justice of the European Communities of 26 January 2010 in particular with reference to CJEU, C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* [GC], 25 July 2008).

The relevant authority assumed that the application of Directive 2004/38/EC onto the complainant requires him to have married his (British) wife prior to his entry into Austria as a host Member State, which resulted in

	the unlawfulness of the decision; this had to be then repealed according to §42, paragraph 2, subsection 1 of the VwGG.
<b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b>	The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.

<b>8. Subject matter concerned</b>	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	20 March 2012
<b>Deciding body (in original language)</b>	Verwaltungsgerichtshof (VwGH)

<b>Deciding body (in English)</b>	Supreme Administrative Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	2010/21/0438
<b>Parties</b>	<i>Federal Minister of Interior v. a Serbian citizen</i>
<b>Web link to the decision (if available)</b>	<a href="https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=601550f4-604f-4be3-bb52-c251f31f0e8b&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;Aend erungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2010%2f21%2f0438&amp;VonDatum=&amp;BisDatum=13.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2010210438_20120320X00">https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=601550f4-604f-4be3-bb52-c251f31f0e8b&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;Aend erungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2010%2f21%2f0438&amp;VonDatum=&amp;BisDatum=13.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2010210438_20120320X00</a>
<b>Legal basis in national law of the rights under dispute</b>	NAG 2005 §54 Abs1 idF 2009/I/0122 <sup>22</sup> NAG 2005 §54a idF 2009/I/122 NAG 2005 §57 idF 2009/I/122
<b>Key facts of the case (max. 500 chars)</b>	Note that this executive summary has the purpose to make us understand the:  1. Facts of the case (so the “real life story”) The complainant, a Serbian citizen, entered the federal territory on 7 January 2007 on the basis of a visa C (‘Schengen Visa’), which was issued in Belgrade. Her mother is an Austrian citizen, her father a Serbian one.

<sup>22</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz, NAG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 122/2015](#). However, the present case refers to the version as amended by BGBl. I Nr. 122/2009.

	<p>On 23 January 2007, the complainant applied for documentation in terms of a permanent residence card. The complainant claimed that her mother, who provided her alimony, exercised her right to freedom of movement by moving to Germany on 12 October 2006 because of an argument with her husband, where she also reported her stay at the police (in November 2006, the administrative district office in Berchtesgarden confirmed this by issuing a certificate). The complainant herself lived with her mother in Germany only from 11-22 January 2007. Regardless of the inadvertent missing of her notice of departure in Austria, they both claimed that they had the centre of their lives in Germany (officially, their main place of residence was still registered in Austria). On 22 January 2007, the complainant and her mother moved back to Austria and used the common apartment in Salzburg. The complainant claimed therefore to fall under the category of EEA citizens, and is thus, according to §54 NAG, entitled to be issued a permanent resident card for a period of 10 years. The competent authority (i.e. Federal Ministry of Interior) dismissed the application by stating that there was no real and effective exercise of the right of free movement (by the complainant's mother) to Germany because she moved to Germany only for a short time, and on the grounds of a marriage dispute. The mother had not pursued any employment in Germany, but had been employed in Austria. The complainant is, according to the competent authority, not a family member of an EEA citizen and therefore does not fall under § 54 of the NAG.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Supreme Administrative Court referred to §§ 54, 54a and 57 of the NAG; Article 7 of Directive 2004/38/EC and Article 21 of the TFEU.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Supreme Administrative Court found that the complainant's right to reside under the terms of §54, paragraph 1 of the NAG, which derived from her mother, cannot be conclusively assessed according to the content of the contested decision. The competent authority has not made any statements as to the beginning and duration of the factual residence of the complainant's mother in Germany (which cannot be equated with a police report). In any case, the actual and effective housing in Germany lasted for more than three months (according to the complainant's allegations from 12 October 2006 to 22 January 2007), which provides,</p>

	<p>according to §57 of the NAG, a sufficient basis for the documentation of a complainant's right to reside under the law of the Union.</p>
<p><b>Key issues (concepts, interpretations ) clarified by the case</b> (max. 500 chars)</p>	<p>One of the key issues is whether employment - next to the establishment of a place of residence - in Germany is required for a relevant exercise of the right of freedom of movement. The Supreme Administrative Court found that this is no requirement in that regard. If the mother of the complainant, as an Austrian citizen, exercised her right under Article 7 of Directive 2004/38/EC and, subsequently, did not return to Austria temporarily, the complainant is entitled, as a member of her family, to reside for more than three months or permanently in the Federal territory.</p>
<p><b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)</p>	<p>The contested decision has been repealed because of the illegality of its content. The Federal Republic is obliged to pay the complainant expenses of EUR 991.20 within two weeks, otherwise facing execution.</p>
<p><b>Key quotations in original language and translated into English with reference</b></p>	<p><i>Jedenfalls dann, wenn eine tatsächliche, effektive (und nicht bloß - was der Begründung des angefochtenen Bescheides allerdings nicht entnommen werden kann - zum Schein erfolgte) Wohnungnahme in Deutschland von mehr als drei Monaten (laut Vorbringen der Beschwerdeführerin vom 12. Oktober 2006 bis zum 22. Jänner 2007) hervorgekommen wäre, erschiene dies gemäß § 57 NAG als ausreichende Grundlage für die Dokumentation eines unionsrechtlich begründeten Aufenthaltsrechts der Beschwerdeführerin. / However, if an actual and effective housing (and not merely - as cannot be abstracted from the reasoning of the contested decision – a fictitious one) in Germany had emerged for more than three months (according to the</i></p>

<p><b>details</b> (max. 500 chars)</p>	<p>complainant's allegations from 12 October 2006 to 22 January 2007), this would, according to §57 of the NAG, provide a sufficient basis for the documentation of a complainant's right to reside under the law of the Union.</p> <p><i>Eine neben der Begründung eines Wohnsitzes ausgeübte Berufstätigkeit in Deutschland kann dagegen für eine relevante Ausübung der Freizügigkeit nicht gefordert werden. Auch die ohne wirtschaftliche Zweckbindung erfolgende Ausübung der Freizügigkeit nach Art. 21 AEUV samt daraus folgender Inanspruchnahme des unionsrechtlichen Aufenthaltsrechtes ist nämlich von § 57 NAG erfasst. Hat also die Mutter der Beschwerdeführerin als österreichische Staatsbürgerin ihr Recht nach Art. 7 der Richtlinie 2004/38/EG ausgeübt und ist sie im Anschluss daran nicht bloß vorübergehend nach Österreich zurückgekehrt, so ist der Beschwerdeführerin als ihrer Familienangehörigen ebenso das Recht einzuräumen, sich für mehr als drei Monate oder auf Dauer im Bundesgebiet aufzuhalten. / Employment in Germany cannot, next to an establishment of a place of residence, be required for a relevant exercise of the right of freedom of movement. Also, §57 of the NAG encompasses the exercise of the freedom of movement under Article 21 of the TFEU, which takes place without an economic purpose, including the exercise of the right to reside according to Union law. Therefore, if the mother of the complainant, as an Austrian citizen, exercised her right under Article 7 of Directive 2004/38/EC and, subsequently, did not merely return to Austria temporarily, the complainant would be entitled, as a member of her family, to reside for more than three months or permanently in the Federal territory.</i></p>
<p><b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>

<b>9.</b> <b>Subject matter concerned</b>	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input checked="" type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	18 September 2013
<b>Deciding body (in original language)</b>	Verfassungsgerichtshof (VfGH)
<b>Deciding body (in English)</b>	Constitutional Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	WIII4/2013 ECLI: AT: VFGH: 2013: WIII4.2013
<b>Parties</b>	<i>Vienna City Electoral Commission v. (1) a political party with two mandates in the district representation for the first district of Vienna; (2) a member of the community who is entitled to vote in the referendum and who is a district council member for the first district of Vienna, and (3) a French citizen who has had principal</i>

	<i>residence in Vienna for more than five years and who is also a district council member for the first district in Vienna</i>
<b>Web link to the decision (if available)</b>	<a href="https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=ff218212-4348-481e-8bb2-cf3528cf7882&amp;Position=1&amp;Abfrage=Vfgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=WIII4%2f2013&amp;VonDatum=&amp;BisDatum=13.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JFT_20130918_13W_III00004_00">https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=ff218212-4348-481e-8bb2-cf3528cf7882&amp;Position=1&amp;Abfrage=Vfgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=WIII4%2f2013&amp;VonDatum=&amp;BisDatum=13.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JFT_20130918_13W_III00004_00</a>
<b>Legal basis in national law of the rights under dispute</b>	B-VG Art 117 (2 ) and (8) <sup>23</sup> B-VG Art 141 (3) Volksbefragungsgesetz 1989 §16 <sup>24</sup> Wr Volksbefragungsgesetz §2 (3) and §18a (5) <sup>25</sup> Wr Stadtverfassung §112a <sup>26</sup> Wr GemeindewahlO 1996 §16 (1) Z1 <sup>27</sup>
<b>Key facts of the case</b> (max. 500 chars)	Note that this executive summary has the purpose to make us understand the: 1. Facts of the case (so the “real life story”) On 14 December 2012, the municipal council of the city of Vienna decided to conduct a referendum in Vienna in March 2013, including questions such as, inter alia, “How should the parking situation and quality of life be improved for district residents?”, “Should the city make efforts regarding the Olympic Games in 2028?” or “Municipal enterprises offer important services to the Viennese population, such as water, canal, garbage collection, energy, hospitals, community houses and public transport. Are you in favour of protecting these

<sup>23</sup> Austria, Federal Constitution (*Bundes-Verfassungsgesetz, B-VG*), [StF: BGBl. Nr. 1/1930 \(WV\) idF BGBl. I Nr. 194/1999 \(DFB\)](#).

<sup>24</sup> Austria, Referendum Act (*Volksbefragungsgesetz 1989, VBefrG*), [StF: BGBl. Nr. 356/1989 idF BGBl. I Nr. 106/2016](#).

<sup>25</sup> Austria, Viennese Referendum Act (*Wiener Volksbefragungsgesetz, WVBefrG*), [StF.: LGBl. Nr. 05/1980 idF LGBl. Nr. 20/2016](#).

<sup>26</sup> Austria, Viennese City Constitution (*Wiener Stadtverfassung – WStV*), [LGBl. Nr. 50/2013](#).

<sup>27</sup> Austria, Viennese Municipal Election Act (*Gesetz über die Gemeindewahlordnung der Stadt Wien - Wiener Gemeindewahlordnung 1996 – GWO 1996*), [StF.: LGBl. Nr. 16/1996 idF LGBl. Nr. 20/2016](#).



	<p>businesses from privatisation?”. With reference to this decision of the municipal council, the Mayor of the City of Vienna published the referendum in the Official Gazette of the City of Vienna with a notice of 10 January 2013, and set the period for conducting the referendum from 7 to 9 March 2013. After the referendum was conducted, the overall result was determined by the city electoral commission of the city of Vienna on 21 March 2013 and published in the Official Gazette of the City of Vienna on 28 March 2013 according to §19 Abs2 of the Wiener Volksbefragungsgesetz - WVBefrG. With their motion, which was put forward on 19 April 2013 and based on Article 141 (3) of the B-VG, the complainants challenged the proceedings and the result of the referendum due to the unlawfulness of the questions and the unrighteous exclusion of Union citizens from voting in the referendum. The complainants demanded that the results of the referendum be revoked due to unlawfulness. (Note: The following information refers to only the exclusion of the Union citizens from the referendum.)</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Constitutional Court referred to Wr Stadtverfassung §112a; Wr Volksbefragungsgesetz §2 (3) and §18a (5); Wr GemeindewahlO 1996 §16 (1) Z1; B-VG Art 141 (3); Article 22 of the TFEU and Article 40 CFR.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Constitutional Court found that there is no violation of Union law regarding the restriction of the entitlement to vote in a referendum onto Austrian citizens only. The Constitutional Court found that Article 22 of the TFEU encompasses only the participation in municipal elections and, thus, does not provide for any other direct democratic rights. Also, it found that Article 40 of the Charter of Fundamental Rights does not grant any rights beyond Article 22 of the TFEU.</p>
<p><b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)</p>	<p>The key issue is whether a French citizen, who has had principal residence in Vienna for more than five years and who is also a district council member for the first district in Vienna, is entitled to vote in a referendum in Austria. The Constitutional Court came to the conclusion that Union law does not provide for any provisions which entitle the French citizen to vote in the referendum on the basis of her Union citizenship. This is due to Article 22 of the TFEU and Directive 94/80/EC which grant Union citizens, who are residents in another Member State whose nationality they do not possess, solely active and passive suffrage rights. Those active and</p>

	<p>passive suffrage rights only refer to municipal elections (Article 22, paragraph 1 of the TFEU) and elections to the European Parliament (Article 22, paragraph 2 of the TFEU). Moreover, the Constitutional Court concluded that Article 40 of the Charter of Fundamental Rights does not grant any rights beyond Article 22 of the TFEU.</p>
<p><b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)</p>	<p>Dismissal of the appeal regarding the Viennese referendum of March 2013 due to the absence of legitimacy of the appellants.</p>
<p><b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)</p>	<p><i>Art22 Abs1 AEUV, Art1 der Kommunalwahlrichtlinie sowie Art40 GRC sehen vor, dass Unionsbürgern mit Wohnsitz in einem anderen Mitgliedstaat, dessen Staatsangehörigkeit sie nicht besitzen, in diesem Mitgliedstaat das aktive und passive Wahlrecht bei Kommunalwahlen zukommt. Gemäß Art2 Abs1 litb der Kommunalwahlrichtlinie sind unter "Kommunalwahlen" jene allgemeinen, unmittelbaren Wahlen zu verstehen, die darauf abzielen, die Mitglieder der Vertretungsorgane einer lokalen Gebietskörperschaft der Grundstufe zu bestimmen; gemäß dem Anhang zu dieser Richtlinie gelten in Österreich als "lokale Gebietskörperschaften der Grundstufe" die "Gemeinden, Bezirke in der Stadt Wien".</i> / Article 22, paragraph 1 of the TFEU, Article 1 of Directive 94/80/EC and Article 40 CFR provide that citizens of the Union, who reside in another Member State of which they are not a national, are entitled to vote and to stand as a candidate in municipal elections in that Member State. According to Article 2, paragraph 1 litb of Directive 94/80/EC, "local elections" refers to those general, direct elections aimed at determining the members of the representative bodies of a local authority of</p>

the basic level; in accordance with the Annex to this Directive, "municipalities, districts in the city of Vienna" are defined as "local authorities of the basic level" in Austria.

*Auch das Unionsrecht gebietet im vorliegenden Fall nicht, dass der Drittanfechtungswerberin auf Grund ihrer Unionsbürgerschaft eine Stimmberechtigung bei der Volksbefragung zukommt, weil Art22 AEUV und die Kommunalwahlrichtlinie Unionsbürgern mit Wohnsitz in einem anderen Mitgliedstaat, dessen Staatsangehörigkeit sie nicht besitzen, ausschließlich das aktive und passive Wahlrecht bei Kommunalwahlen – dies sind in Wien nach dem Anhang zur Kommunalwahlrichtlinie die Bezirksvertretungen, nicht aber der Gemeinderat (s. auch VfSlg 15.063/1997) – gewähren. Auch Art40 GRC räumt keine über Art22 AEUV hinausgehenden Rechte ein. Die Mitgliedstaaten sind überdies unionsrechtlich nicht verpflichtet, Unionsbürgern über die Teilnahme an den Kommunalwahlen hinaus auch sonstige, insbesondere direktdemokratische Beteiligungsrechte in der Gemeinde einzuräumen (vgl. Oberndorfer, 8. Teil. Einrichtungen der direkten Demokratie in den Gemeinden, in: Klug/Oberndorfer/Wolny [Hrsg.]). / Also, in the present case, Union law does not mandate that the third-party claimant is entitled to vote in the referendum on the basis of her Union citizenship because Article 22 of the TFEU and Directive 94/80/EC grant Union citizens, who are residents in another Member State whose nationality they do not possess, solely active and passive suffrage rights; according to the Annex to Directive 94/80/EC, in Vienna these are the district representatives, but not the municipal council [...]. Article 40 CFR does not grant any rights beyond Article 22 of the TFEU as well. In addition, Member States are not obliged to grant any other direct democratic rights, other than the participation in municipal elections, to citizens of the Union (cf. Oberndorfer, 8. Teil, Einrichtungen der direkten Demokratie in den Gemeinden, in: Klug/Oberndorfer/Wolny (eds.)).*

*Auch aus dem Diskriminierungsverbot des Art18 AEUV ergibt sich für den vorliegenden Fall nichts anderes (vgl. Streinz, Art18 AEUV, in: Streinz [Hrsg.], EUV/AEUV2, 2012, Rz 25). / Also, the non-discrimination clause of Article 18 of the TFEU does not provide anything different for the present case (cf. Steinz (2012), Art. 18 TFEU, in: Steinz (ed.), TEU/TFEU2, 2012, para. 25).*

<b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b>	The Constitutional Court referred to Article 40 of the Charter of Fundamental Rights twice. Concretely, the Constitutional Court states that Article 22, paragraph 1 of the TFEU, Article 1 of Directive 94/80/EC and Article 40 of the Charter provide that citizens of the European Union, who reside in another Member State of which they are not nationals, are entitled to vote and to stand as a candidate in municipal elections in that Member State. It adds that Article 40 of the Charter does not grant any rights beyond Article 22 of the TFEU.
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<b>10. Subject matter concerned</b>	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	25 March 2010
<b>Deciding body (in original language)</b>	Verwaltungsgerichtshof (VwGH)
<b>Deciding body (in English)</b>	Supreme Administrative Court

<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	2008/21/0362
<b>Parties</b>	<i>Federal Minister of Interior v. Serbian citizens (mother and son)</i>
<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=7a8ef18a-d669-4038-b3b8-a55cf2334b37&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;AenderungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2008%2f21%2f0362&amp;VonDatum=&amp;BisDatum=14.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2008210362_20100325X00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=7a8ef18a-d669-4038-b3b8-a55cf2334b37&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;AenderungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2008%2f21%2f0362&amp;VonDatum=&amp;BisDatum=14.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2008210362_20100325X00</a>
<b>Legal basis in national law of the rights under dispute</b>	Niederlassungs- und Aufenthaltsg (NAG) §§52 Z2, 54 Abs1, 55, 56, 57 <sup>28</sup>
<b>Key facts of the case (max. 500 chars)</b>	Note that this executive summary has the purpose to make us understand the: 1. Facts of the case (so the “real life story”) The complainants (mother and son) are Serbian citizens. The complainants applied for issuance of a permanent residence card in June 2007 and referred to their mother/grandmother (an Austrian citizen) for this purpose. In the last instance, the Federal Minister of the Interior dismissed these applications according to §54 Abs1 in connection to §52 Z1-3 of the NAG. According to the Federal Minister of the Interior, the complainants

<sup>28</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz*, NAG), [BGBl. I Nr. 100/2005](#) idF [BGBl. I Nr. 122/2015](#).

	<p>applied for issuance of a residence permit (a so-called 'residence permit – relative') already in 2006, which was rejected. The complainants then received a visa valid from 1 June to 30 June 2007 via the Austrian Embassy in Belgrade. They travelled to Germany, where the complainants' mother/grandmother was registered since 14 December 2006. On 1 June 2007, the complainants were registered at their mother's/grandmother's German address as visitors. On 6 June 2007, the complainants and their mother/grandmother all lodged a notice of departure in Germany and registered in Austria on 8 June 2007.</p> <p>The Federal Minister of Interior stated that a previously existing family unit (<i>Familieneinheit</i>) must be maintained in order to establish a free movement case - a recreation of a family unit does not lead to free movement case. The court of lower instance had argued that the complainants have not established a place of residence in Germany, as they were merely registered as guests for six days. Furthermore, the complainants have reported at the embassy in Belgrade that they wanted to visit the brother/uncle, who lived in Germany. The Federal Minister of the Interior assessed all these facts as a pretence of a free movement case and a pretence of maintenance of a family unit. Basically, the complainants' application was rejected because – according to the Federal Minister of the Interior – there was no free movement case and, as for the grandchild (i.e., the second complainant), the issuance of a permanent residence card is not intended by §54 Abs1 in connection to 52 Z1-3 of the NAG.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Supreme Administrative Court referred to NAG §§52 Z2, 54 Abs1, 55, 56, 57; Directive 2004/38/EG, and FPG §31, §120.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Supreme Administrative Court found that it only has to be determined whether the Austrian citizen (i.e. the mother/grandmother of the complainants) has exercised her right of free movement. In case the Austrian citizen has exercised his/her right to free movement, his/her relatives are entitled to reside in Austria in accordance with §§ 54 to 57. The court shall not bring forward any considerations on the pretence of a free movement case. Moreover, the Supreme Administrative Court found that grandchildren do fall under the category of people covered by §52 Z2 of the NAG.</p>

<b>Key issues (concepts, interpretations ) clarified by the case</b> (max. 500 chars)	<p>One of the key issues is whether the present case displays a free movement case or whether the maintenance of the family unit had been pretended (i.e. whether the whole case was in fact a recreation of a family unit, which does not lead to a free movement case). The Supreme Court clarified that it is not up to the courts to bring forward the considerations on the pretence of a free movement case as it was done by a lower court in the present case. Furthermore, one of the key issues is whether grandchildren fall under the category of people covered by §52 Z2 of the NAG.</p>
<b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)	<p>The contested decision has been repealed because of the illegality of its content. The Federal Republic is obliged to pay the complainants expenses of EUR 1,286.40 within two weeks, otherwise facing execution.</p>
<b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)	<p><i>Von daher gleicht der vorliegende Fall in den entscheidungswesentlichen Gesichtspunkten jenem, der dem hg. Erkenntnis vom heutigen Tag, Zl. 2008/21/0342, zu Grunde liegt. Gemäß § 43 Abs. 2 VwGG wird daher des Näheren auf die Begründung dieses Erkenntnisses verwiesen. Ergänzend ist darauf hinzuweisen, dass den "Missbrauchsüberlegungen" der belangten Behörde, soweit sie sich über das von ihr angenommene Vortäuschen der Familieneinheit hinaus auf die Ausübung der Freizügigkeit durch die österreichische Mutter/Großmutter der Beschwerdeführer beziehen sollten, vor dem Hintergrund des im Wege des § 57 NAG auch für die vorliegende Konstellation maßgeblichen Gemeinschaftsrechts keine Relevanz zukommen kann (vgl. das Urteil des EuGH vom 23. September 2003, C-109/01, Akrich, Randnr. 55 ff.). / For this reason, the present case is, in the essential points, the same as the one which corresponds to Decision 2008/21/0342. Pursuant to Section 43 (2) of the VwGG, the reader is, therefore, referred to the reasons for this finding. In</i></p>

	<p>addition, it should be pointed out that the Federal Minister of the Interior's considerations regarding pretence, insofar they go beyond its assumption of pretence of a family unit and refer to the exercise of free movement on behalf of the Austrian mother/grandmother, cannot be relevant in the context of community law applicable (see the ECJ, C-109 / 01, <i>Akrich</i>, Judgment of 23 September 2003, para. 55 et seq., cited above).</p> <p><i>Aus den im zitierten Erkenntnis angeführten Gründen sind auch die vorliegenden Bescheide mit Rechtswidrigkeit ihres Inhaltes behaftet - der den Zweitbeschwerdeführer betreffende Bescheid überdies deshalb, weil Enkelkinder entgegen der Ansicht der belangten Behörde dem Personenkreis des § 52 Z 2 NAG unterfallen (vgl. zur insoweit identen Umschreibung der Begünstigten in § 47 Abs. 3 Z 2 Fremden-gesetz 1997 etwa das hg. Erkenntnis vom 13. März 2007, ZI. 2006/18/0010; zur gebotenen Auslegung vor dem Hintergrund der "Unionsbürgerrichtlinie" vgl. auch das hg. Erkenntnis vom 13. Dezember 2007, ZI. 2007/09/0228) -, weshalb sie gemäß § 42 Abs. 2 Z 1 VwGG aufzuheben waren. / For the reasons given in the above citation, the decisions in question are illegal; the decision affecting the second complainant is also illegal because, contrary to the opinion of the authority concerned, the grandchildren are subject to the group of persons of Article 52 (2) of the NAG (see the description of the beneficiaries in Section 47 (3) (2) of the Law on Foreigners (<i>Fremden-gesetz</i>) 1997 for example; the relevant statement of 13 March 2007, point 2006/18/0010, on the interpretation offered against the background of the Union Citizenship Directive; also the edict of 13 December 2007, ZI. 2007/09/0228), which is why they had to be repealed in accordance with Article 42 (2) (1) of the VwGG.</i></p>
<p><b>Has the deciding body referred to the Charter of Fundamental Rights? If yes,</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>



<b>to which specific article.</b>	
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<b>11. Subject matter concerned</b>	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	15 September 2016
<b>Deciding body (in original language)</b>	Verwaltungsgerichtshof (VwGH)
<b>Deciding body (in English)</b>	Supreme Administrative Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	Ra 2016/21/0262
<b>Parties</b>	<i>Federal Administrative Court v. German citizen</i>

<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=063bd0b0-b559-47ee-8320-d12f40ebd14c&amp;Abfrage=Gesamtabfrage&amp;SearchInAsylIGH=&amp;SearchInAvn=&amp;SearchInAvsv=&amp;SearchInBegut=&amp;SearchInBgblAlt=&amp;SearchInBgblAuth=&amp;SearchInBgblPdf=&amp;SearchInBks=&amp;SearchInBundesnormen=&amp;SearchInDok=&amp;SearchInDsk=&amp;SearchInErlaessee=&amp;SearchInGbk=&amp;SearchInGemeinderecht=&amp;SearchInJustiz=&amp;SearchInBvwg=&amp;SearchInLvwg=&amp;SearchInLgbl=&amp;SearchInLgblNO=&amp;SearchInLgblAuth=&amp;SearchInLandesnormen=&amp;SearchInNormenliste=&amp;SearchInPvak=&amp;SearchInRegV=&amp;SearchInUbas=&amp;SearchInUmse=&amp;SearchInUvs=&amp;SearchInVerg=&amp;SearchInVfgh=&amp;SearchInVwgh=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=Ra+2016%2f21%2f0262&amp;Dokumentnummer=JWT_2016210262_20160915L00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=063bd0b0-b559-47ee-8320-d12f40ebd14c&amp;Abfrage=Gesamtabfrage&amp;SearchInAsylIGH=&amp;SearchInAvn=&amp;SearchInAvsv=&amp;SearchInBegut=&amp;SearchInBgblAlt=&amp;SearchInBgblAuth=&amp;SearchInBgblPdf=&amp;SearchInBks=&amp;SearchInBundesnormen=&amp;SearchInDok=&amp;SearchInDsk=&amp;SearchInErlaessee=&amp;SearchInGbk=&amp;SearchInGemeinderecht=&amp;SearchInJustiz=&amp;SearchInBvwg=&amp;SearchInLvwg=&amp;SearchInLgbl=&amp;SearchInLgblNO=&amp;SearchInLgblAuth=&amp;SearchInLandesnormen=&amp;SearchInNormenliste=&amp;SearchInPvak=&amp;SearchInRegV=&amp;SearchInUbas=&amp;SearchInUmse=&amp;SearchInUvs=&amp;SearchInVerg=&amp;SearchInVfgh=&amp;SearchInVwgh=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=Ra+2016%2f21%2f0262&amp;Dokumentnummer=JWT_2016210262_20160915L00</a>
<b>Legal basis in national law of the rights under dispute</b>	BFA-VG 2014 §18 Abs3; §9 <sup>29</sup> B-VG Art133 Abs4 <sup>30</sup> FrPolG 2005 §66 Abs1; §67 Abs1; §67 Abs2; §70 Abs3 <sup>31</sup> SMG 1997 §28a Abs1; §28a Abs2 Z3 <sup>32</sup> VerbotsG 1947 §3g <sup>33</sup> Niederlassungs- und Aufenthaltsg (NAG) 2005 §53a Abs1; §53a Abs2 Z1 <sup>34</sup>

<sup>29</sup> Austria, Act on the proceedings before the Federal Office on Aliens and Asylum (*Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden, BFA-VG*), [StF: BGBl. I Nr. 87/2012 idF BGBl. I Nr. 25/2016](#).

<sup>30</sup> Austria, Federal Constitution (*Bundes-Verfassungsgesetz, B-VG*), [StF: BGBl. Nr. 1/1930 \(WV\) idF BGBl. I Nr. 194/1999 \(DFB\)](#).

<sup>31</sup> Austria, Aliens Police Act (*Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln - Fremdenpolizeigesetz 2005, FPG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 24/2016](#).

<sup>32</sup> Austria, Controlled Substances Law (*Bundesgesetz über Suchtgifte, psychotrope Stoffe und Drogenausgangsstoffe, SMG*), [StF: BGBl. I Nr. 112/1997 idF BGBl. I Nr. 23/2016](#).

<sup>33</sup> Austria, Prohibition Act of 1947 (*Verbotsgesetz 1947, Verbotsg 1947*), [StF: StGBI. Nr. 13/1945](#).

<sup>34</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz, NAG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 122/2015](#).

<p><b>Key facts of the case</b> (max. 500 chars)</p>	<p>Note that this executive summary has the purpose to make us understand the:</p> <ol style="list-style-type: none"> <li>1. Facts of the case (so the “real life story”) <p>In the context of the legally binding criminal conviction of 17 June 2015 (i.e. prison sentence of two years according to the SMG), the Federal Office for Foreigners and Asylum (BFA) issued a residence ban of nine years against the appellant (who is a German citizen) on 29 October 2015, because he was regarded as a threat to the public order and security. In the explanatory statement, the appellant refers to the finding in the contested decision that he "has been in Austria since September 2010" and the assumption that "the appellant has been living in Austria for six years". He deduces from this that he is entitled to a right of permanent residence according to Union law. He argued that, according to the Supreme Administrative Court’s jurisprudence, a person has to constitute a serious threat in order to justify a residence ban (as it is provided for in §66 Abs1 of the FPG, a "serious danger to public order or security"). The BVwG, on the other hand, had merely referred to the existence of a lesser threat within the meaning of § 67 Abs1, first and second sentences, of the FPG ("endangering public order and security"), derogating from the aforementioned case law of the Supreme Administrative Court. Moreover, the appellant stated that he entered Austria in September 2010 and stayed there until February 2011. Then, he came back to Austria again and had been staying there since August 2012.</p> </li> <li>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) <p>The Supreme Administrative Court referred to NAG §53a Abs1, §53a Abs2 Z1 and Directive 2004/38/EG; FPG §66 Abs1, §67 Abs1, §67 Abs2, §70 Abs3, B-VG Art133 Abs4, BFA-VG 2014 §18 Abs3, §9; VerbotsG 1947 §3g and SMG 1997 §28a Abs1, §28a Abs2 Z3.</p> </li> </ol>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Supreme Administrative Court found that the appellant’s offences have reached the higher benchmark of threat which is required by §66 Abs 1 FPG in order to justify a residence ban. Since the BVwG had examined the case thoroughly and had not failed to state reasons, the appeal had to be rejected.</p>

<b>Key issues (concepts, interpretations ) clarified by the case</b> (max. 500 chars)	One of the key issues is when a residence ban for EU citizens is justified by terms of §66 Abs 1 of the FPG (including its higher benchmark for the measurement of a threat).
<b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The appeal has been rejected. The BVwG's reasoning has not raised any legal questions of importance.
<b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)	<i>In Bezug auf den Erwerb des Rechts auf Daueraufenthalt verlangt der hier in Betracht kommende § 53a Abs. 1 iVm Abs. 2 Z 1 NAG - entsprechend Art. 16 Abs. 1 und 3 der Freizügigkeitsrichtlinie - einen fünf Jahre rechtmäßigen und ununterbrochenen Aufenthalt im Bundesgebiet, wobei die Kontinuität des Aufenthalts durch Abwesenheiten von bis zu insgesamt sechs Monaten im Jahr nicht unterbrochen wird.</i> / With regard to the acquisition of the right to a permanent residence, § 53a (1) in conjunction with Paragraph 2 (1) of the NAG – in accordance with Article 16 (1) and (3) of the Freedom of Movement Directive – requires a five-year legal and uninterrupted stay in the federal territory, whereby the continuity of the stay is not interrupted by absences of up to six months a year.

*Im Übrigen ist nach Auffassung des Verwaltungsgerichtshofes durch die Verübung des im angefochtenen Erkenntnis näher beschriebenen Verbrechens des Suchtgifthandels nach § 28a Abs. 1 zweiter und fünfter Fall sowie Abs. 2 Z 3 SMG (Einfuhr und Überlassen von Suchtgift jeweils in einer großen Menge im Zeitraum zumindest seit Jahresbeginn 2013 bis zur Festnahme am 1. März 2015), was zur Verhängung einer Freiheitsstrafe von zweieinhalb Jahren führte, ihrer Art und Schwere nach auch der in der Revision angesprochene erhöhte Gefährdungsmaßstab erfüllt, zumal der Revisionswerber im Laufe des Beschwerdeverfahrens überdies noch wegen der auf näher festgestellte Weise erfolgten Betätigung im nationalsozialistischen Sinn nach § 3g VerbotsG 1947 zu einer bedingt nachgesehenen Zusatzfreiheitsstrafe von sechs Monaten verurteilt werden musste. Dieser Annahme stehen die in der Revision ins Treffen geführten "Schritte für eine erfolgreiche Resozialisierung" nicht entgegen, zumal der Gesinnungswandel eines Straftäters nach ständiger Rechtsprechung des Verwaltungsgerichtshofes grundsätzlich daran zu messen ist, ob und wie lange er sich - nach dem (beim Revisionswerber noch andauernden) Vollzug der Haftstrafe - in Freiheit wohlverhalten hat (vgl. etwa nur den Beschluss vom 22. Mai 2014, Ra 2014/21/0014, mwN). Das gilt auch im Fall einer (erfolgreich) absolvierten Therapie (vgl. beispielsweise das Erkenntnis vom 22. September 2011, Zl. 2009/18/0147, mwN, und darauf Bezug nehmend etwa den Beschluss vom 22. Mai 2014, Ro 2014/21/0007). / Besides, in the opinion of the Supreme Administrative Court, the increased benchmark for the measurement of a threat, as referred to in the appeal, is, through the conduct of the crime described in the contested decision according to Article 28a (1), second and fifth cases, as well as para. 2 (3) of the SMG (import and leasing of addictive drugs in a large quantity in the period from the beginning of 2013 until the arrest of 1 March 2015), which resulted in the infliction of a two year prison sentence, fulfilled, especially since the appellant has been condemned to an additional six-month prison sentence, which was made conditional, because of national-socialist related activities during the course of the appeal proceedings. This assumption cannot be countered by the "steps for a successful re-socialisation" which took place during the appeal, especially since the change in the mind of a criminal offender is, according to the established case law of the Supreme Administrative Court, always to be measured in principle whether, and for how long, he has behaved (after the enforcement of the sentence, which is still ongoing with the appellant) in compliance with the law (see, for example, Decision Ra 2014/21/0014, mwN of 22 May 2014). This also applies in the case of a*

	(successfully) completed therapy (cf., for example, the findings of 22 September 2011, cf. 2009/18/0147, mwN), and, for example, Decision Ro 2014/21 / 0007 of 22 May 2014).
<b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b>	The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.

<b>12. Subject matter concerned</b>	<input type="checkbox"/> 1) non-discrimination on grounds of nationality <input checked="" type="checkbox"/> 2) freedom of movement and residence - linked to which article of Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	29 September 2011
<b>Deciding body (in original language)</b>	Verwaltungsgerichtshof (VwGH)

<b>Deciding body (in English)</b>	Supreme Administrative Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	2009/21/0386
<b>Parties</b>	<i>Federal Administrative Court v. Nigerian citizen</i>
<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=7a8385b7-65d7-460e-b07e-4adf78fde4b6&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;Aend erungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2009%2f21%2f0386&amp;VonDatum=&amp;BisDatum=14.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2009210386_20110929X00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=7a8385b7-65d7-460e-b07e-4adf78fde4b6&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;Aend erungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2009%2f21%2f0386&amp;VonDatum=&amp;BisDatum=14.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2009210386_20110929X00</a>
<b>Legal basis in national law of the rights under dispute</b>	Niederlassungs- und AufenthaltsG (NAG) 2005 §2 Abs1 Z14; §51; §52; §53; §54 Abs1; §54; §55; §56; §57 <sup>35</sup>
<b>Key facts of the case (max. 500 chars)</b>	Note that this executive summary has the purpose to make us understand the: 1. Facts of the case (so the “real life story”) The complainant (a Nigerian citizen) entered the Federal territory of Austria in September 2004 and applied for asylum. In November 2006, the complainant married an Austrian citizen. In May 2009, the complainant,

<sup>35</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz, NAG*), [BGBl. I Nr. 100/2005](#) idF [BGBl. I Nr. 122/2015](#).

	<p>referring to his marriage, requested the issuance of a permanent residence card in accordance with §57, in conjunction with §54 Abs 1 of the NAG. He reasoned his request by stating that his wife travelled to the Czech Republic in order to give German lessons to a person twice a week (one lesson included 2,5 hours and she earned €5 per hour). She pursued this activity from 24 January to 12 June 2007 while using the company car of her former employer. However, she did not establish any place of residence in the Czech Republic (i.e she travelled back to Austria the same day). The district authority (<i>Bezirkshauptmannschaft</i>) dismissed the complainant's request. The Federal Minister of Interior gave no effect to the appeal by mainly stating that there is no 'free movement case'.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Supreme Administrative Court referred to NAG §2 Abs1 Z14; §51; §52; §53; §54 Abs1; §54; §55; §56; §57 and Directive 2004/38/EG.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Supreme Administrative Court found that also the pursuit of free movement of persons without an economic purpose according to Article 18 EC (now Article 21 of the TFEU) is covered by §57 of the NAG. The fact that the complainant's wife did not establish a place of residence in the Czech Republic and that she had not "registered" her employment does not oppose her right to freedom of movement within the meaning of Article 57 of the NAG. The Supreme Administrative Court considers it relevant that the Austrian anchor person (i.e. the wife in this case) has made use of his/her freedom of movement with a certain degree of sustainability. As for sustainability, the Supreme Administrative Court refers to the ECJ's jurisprudence regarding the concept of an employee (i.e. a "real and genuine activity" which is not so small that it is a "completely subordinate and immaterial activity" is required in this regard).</p>
<p><b>Key issues (concepts, interpretations ) clarified by</b></p>	<p>One of the key issues is whether the complainant's wife's work as a tutor for German in the Czech Republic for a limited period of time is sufficient to establish a free movement case within the meaning of Directive 2004/38/EC.</p>



<b>the case</b> (max. 500 chars)	
<b>Results (e.g. sanctions) and key consequences or implications of the case</b> (max. 500 chars)	The contested decision has been repealed because of the illegality of its content. The Federal Republic is obliged to pay the complainants expenses of EUR 1,326.40 within two weeks, otherwise facing execution.
<b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)	<i>Demzufolge kommt es nicht nur auf die Niederlassung in Ausübung der Arbeitnehmerfreizügigkeit an, sondern sind auch die Freizügigkeit in Ausübung der Dienstleistungsfreiheit (vgl. dazu auch das Urteil des EuGH vom 2. Februar 1989, 186/87, Cowan, Rz 17) und - allgemeiner - auch die ohne wirtschaftliche Zweckbindung erfolgende Ausübung der Freizügigkeit nach Art. 18 EG (nunmehr Art. 21 AEUV; zu einem derartigen Fall in der Rechtsprechung des EuGH vgl. etwa dessen Urteil vom 11. Juli 2002, C-224/98, Marie-Nathalie D 'Hoop, insbesondere dessen Rz 29 f.) von § 57 NAG erfasst. Das Recht auf Freizügigkeit im Sinn des Art. 18 EG (nunmehr Art. 21 AEUV) umfasst u.a. das Recht, in einen anderen Mitgliedstaat einzureisen (vgl. auch die Richtlinie 2004/38 EG des Europäischen Parlaments und des Rates vom 29. April 2004 über das Recht der Unionsbürger und ihrer Familienangehörigen, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen und aufzuhalten, die schon in ihrem Titel neben das Aufenthaltsrecht das Recht, sich im Hoheitsgebiet der Mitgliedstaaten frei zu bewegen, stellt; vgl. insbesondere auch Art. 5 dieser Richtlinie). Dass die Ehefrau des Beschwerdeführers in Tschechien keinen Wohnsitz begründet und ihre Erwerbstätigkeit "nicht angemeldet" hatte, steht daher der Annahme, sie habe ihr Recht auf Freizügigkeit im Sinn des § 57 NAG in Anspruch genommen, entgegen der Auffassung der belangten Behörde ebenfalls nicht entgegen (vgl. allgemein in Bezug</i>

auf Grenzgänger das Urteil des EuGH vom 18. Juli 2007, C-212/05, Hartmann, Rz 18). / Consequently, it is not only the settlement in regard to the exercise of free movement which matters, but also the free movement of persons in the exercise of freedom to provide services (see also the judgment of the ECJ, 186/87, Cowan, of 2 February 1989, para. 17) and, more generally, the pursuit of the free movement of persons without an economic purpose according to Article 18 EC (now Article 21 of the TFEU; see, for example, C-224/98, Marie-Nathalie D 'Hoop, in particular para. 29) are covered by §57 of the NAG. The right to free movement within the meaning of Article 18 EC (now Article 21 of the TFEU) covers, inter alia, the right to enter another Member State (see also Directive 2004/38 EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which includes in its title, next to the right of residence, also the right to move freely in the Member State; cf. in particular Article 5 of the Directive). The fact that the complainant's wife did not establish a place of residence in the Czech Republic, and that she had not "registered" her employment does therefore not oppose (contrary to the opinion of the authorities concerned) her right to freedom of movement within the meaning of Article 57 of the NAG (in general the Judgment of the ECJ in C-212/05, Hartmann of 18 July 2007, para. 18).

*Vielmehr wird es für die Anwendung der genannten Bestimmung erforderlich sein, dass die österreichische Ankerperson mit einer gewissen Nachhaltigkeit von ihrer Freizügigkeit Gebrauch gemacht hat (in diesem Sinn, wenn auch vor rein unionsrechtlichem Hintergrund, von einem "Bagatellvorbehalt" sprechend das Urteil des Deutschen Bundesverwaltungsgerichtes vom 11. Jänner 2011, 1C 23.09, Rz 13; dies andeutend auch der Verwaltungsgerichtshof in seinem Erkenntnis vom 24. September 2009, ZI. 2007/18/0347, in dem ein zweiwöchiger Sprachaufenthalt zu beurteilen war). Was die Festlegung der Nachhaltigkeitsgrenze - auch unter dem hier relevanten Blickwinkel des § 57 NAG - anlangt, so liegt es nahe, auf die Rechtsprechung des EuGH zum Arbeitnehmerbegriff abzustellen. Der EuGH verlangt für die Qualifikation als Arbeitnehmer im Sinn von Art. 39 EG (nunmehr Art. 45 AEUV) jenseits des Erfordernisses einer abhängigen Beschäftigung gegen Entgelt in einem anderen Mitgliedstaat einschränkend eine "tatsächliche und echte Tätigkeit", die keinen so geringen Umfang hat, dass es sich um eine "völlig untergeordnete und unwesentliche Tätigkeit" handelt. Dieser Maßstab*

	<p><i>lässt sich allgemein dergestalt auf alle Freizügigkeitsrechte übertragen, dass eine "tatsächliche und effektive" Ausübung derselben vorliegen muss. / Rather, it will be necessary for the application of the above-mentioned provision that the Austrian anchor person has made use of his/her freedom of movement with a certain degree of sustainability (in this sense, even in the context of purely non-Union law background, the verdict of the German Federal Administrative Court of 11 January 2011, 1C 23.09, No. 13, as the Administrative Court in its finding of 24 September 2009, 2007/18/0347, in which a two - week language stay was to be assessed). Regarding the determination of the sustainability limit, even under the relevant angle of view of § 57 of the NAG, it is obvious to refer to the jurisprudence of the ECJ on the concept of an employee. The ECJ requires, in order to be qualified as an employee within the meaning of Article 39 EC (now Article 45 of the TFEU), beyond the requirement of dependent employment for compensation, a "real and genuine activity" which is not so small that it is a "completely subordinate and immaterial activity". This standard can generally be applied to all free movement rights, which must be "effective and effective".</i></p>
<p><b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>

<p><b>13.</b></p>	<p><input type="checkbox"/> 1) non-discrimination on grounds of nationality  <input checked="" type="checkbox"/> 2) freedom of movement and residence  - linked to which article of Directive 2004/38</p>
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<b>Subject matter concerned</b>	<input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
<b>Decision date</b>	18 June 2013
<b>Deciding body (in original language)</b>	Verwaltungsgerichtshof (VwGH)
<b>Deciding body (in English)</b>	Supreme Administrative Court
<b>Case number (also European Case Law Identifier (ECLI) where applicable)</b>	2012/18/0005
<b>Parties</b>	<i>Federal Administrative Court v. Tunisian citizen</i>
<b>Web link to the decision (if available)</b>	<a href="http://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=4de15d5b-4a7c-4567-bb84-4c00a5b230a4&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;AenderungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2012%2f18%2f0005&amp;VonDatum=&amp;BisDatum=14.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2012180005_20130618X00">www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=4de15d5b-4a7c-4567-bb84-4c00a5b230a4&amp;Position=1&amp;Abfrage=Vwgh&amp;Entscheidungsart=Undefined&amp;Sammlungsnummer=&amp;Index=&amp;AenderungenSeit=Undefined&amp;SucheNachRechtssatz=True&amp;SucheNachText=True&amp;GZ=2012%2f18%2f0005&amp;VonDatum=&amp;BisDatum=14.06.2017&amp;Norm=&amp;ImRisSeit=Undefined&amp;ResultPageSize=100&amp;Suchworte=&amp;Dokumentnummer=JWT_2012180005_20130618X00</a>

<b>Legal basis in national law of the rights under dispute</b>	FrPolG 2005 §31 Abs1 Z2, §52 Abs1, §53, §66 <sup>36</sup> Niederlassungs- und Aufenthaltsg (NAG) 2005 §9, §53 Abs2, §54 Abs2, §54 Abs6, §54, §55 <sup>37</sup>
<b>Key facts of the case</b> (max. 500 chars)	<p>Note that this executive summary has the purpose to make us understand the:</p> <ol style="list-style-type: none"> <li>1. Facts of the case (so the “real life story”)</li> </ol> <p>Based on §§ 9, 52, 53, 55 and 61 FPG, the Independent Administrative Board (<i>Unabhängiger Verwaltungssenat</i>) issued a return decision and a residence ban of 18 months against the complainant (a Tunisian citizen). The complainant has been resident in Austria since September 2008. From May 2007 to November 2009 he was married to a Slovakian citizen. Consequently, he has been issued a permanent residence card. In August 2011, the complainant submitted the divorce decision to the court of first instance, which showed that, at the time of the divorce, the marriage had not existed for three years. The Independent Administrative Board assumed that the Tunisian citizen was no longer a relative of an EEA citizen and therefore no longer a beneficiary third-country national within the meaning of Article 2 (4) 11 FPG. Therefore, his rights as a family member of an EEA citizen had also ended. Pursuant to § 54 (6) NAG, he would have had to notify the divorce decision without any delay to safeguard his right of residence. According to § 54 (5) (1) of the NAG, his right of residence after the divorce would, however, have remained unchanged only if the marriage had existed for at least three years. The Independent Administrative Board assumed that the issuance of the permanent residence card did not grant the applicant any right of residence, but it had</p>

<sup>36</sup> Austria, Aliens Police Act (*Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln - Fremdenpolizeigesetz 2005, FPG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 24/2016](#). However, the present case refers to the version as amended by BGBl. I Nr. 2011/I/038 and BGBl. I Nr. 2009/I/122.

<sup>37</sup> Austria, Settlement and Residence Act (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich - Niederlassungs- und Aufenthaltsgesetz, NAG*), [BGBl. I Nr. 100/2005 idF BGBl. I Nr. 122/2015](#), However, the present case refers to the version as amended by BGBl. I Nr. 2011/I/038 and BGBl. I Nr. 2009/I/122.

	<p>documented the "right of residence". According to the Independent Authority Board, the complainant was staying illegally in the Federal territory because he had no longer the right to reside there after the divorce.</p> <p>2. Legal background against which the case unfolded (what are the relevant legal norms that are applied) The Supreme Administrative Court referred to FrPolG 2005 §31 Abs1 Z2, §52 Abs1, §53, §66; NAG 2005 §9, §53 Abs2, §54 Abs2, §54 Abs6, §54, §55 and Directive 2004/38/EC.</p>
<p><b>Main reasoning / argumentation</b> (max. 500 chars)</p>	<p>The Supreme Administrative Court found that the issuance of a permanent residence card is merely a documentation of the right to residence, which had already been established on the basis of Union law. Moreover, a foreigner is residing in the Federal territory lawfully, if he is entitled (among other things) to reside or stay on the basis of a documentation of the right of residence under the NAG. A foreigner, for whom a documentation of a right of residence has been issued, remains lawfully resident until the conclusion of the procedure provided for in § 55 of the NAG according to § 31, para. 1 Z 2 of the FPG, even if he/she loses his/her right to residence based on Union law. According to the Supreme Administrative Court the issuing of a return decision based on § 52 para. 1 of the FPG and a prohibition of entry connected with it, pursuant to § 53 of the FPG is not permissible, if the complainant is legally a resident in the Federal territory on the basis of a document issued for him/her under the NAG.</p>
<p><b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)</p>	<p>One of the key issues is whether the issuance of a permanent residence card grants any right of residence. Moreover, the question is whether a divorce leads to losing the right to residence.</p>
<p><b>Results (e.g. sanctions) and key consequences</b></p>	<p>The contested decision has been repealed because of the illegality of its content. The Federal Republic is obliged to pay the complainants expenses of EUR 1,326.40 within two weeks, otherwise facing execution.</p>

<p><b>or implications of the case</b> (max. 500 chars)</p>	
<p><b>Key quotations in original language and translated into English with reference details</b> (max. 500 chars)</p>	<p><i>Es trifft zwar ausgehend von § 9 NAG zu, dass es sich bei der Ausstellung (u.a.) einer Daueraufenthaltskarte an sich bloß um eine Dokumentation eines Aufenthaltsrechtes handelt, das bereits auf Grund unionsrechtlicher Vorschriften (und in Umsetzung unionsrechtlicher Vorgaben auch nach den Bestimmungen des NAG von Gesetzes wegen) besteht. / It is true that the issuing of a permanent residence card is merely a documentation of the right to residence, which has already been established on the basis of the Union law (and in accordance with the provisions of the NAG).</i></p> <p><i>Der Gesetzgeber hat allerdings darüber hinaus in § 31 Abs. 1 Z 2 FPG ausdrücklich festgelegt, dass sich ein Fremder rechtmäßig im Bundesgebiet aufhält, wenn er (u.a.) auf Grund einer Dokumentation des Aufenthaltsrechts nach dem NAG zur Niederlassung oder zum Aufenthalt berechtigt ist. / However, the legislator explicitly stated in § 31 para. 1 Z. 2 of the FPG that a foreigner is residing in the Federal territory legally, if he is entitled (among other things) to reside or stay on the basis of a documentation of the right of residence under the NAG.</i></p> <p><i>Anhand der Bestimmungen des NAG ergibt sich ferner, dass bei Wegfall des unionsrechtlichen Aufenthaltsrechts, welches eine (Dauer-)Aufenthaltskarte dokumentieren soll, nicht automatisch auch der rechtmäßige Aufenthalt im Bundesgebiet beendet ist. / It is also clear from the provisions of the NAG, that the lawful residence in the Federal territory is not automatically terminated, if the right to residence based on Union law - which is documented by a (permanent) residence card - ends.</i></p>

*Daraus ist nun abzuleiten, dass ein Fremder, für den eine Dokumentation eines unionsrechtlichen Aufenthaltsrechts ausgestellt wurde, selbst bei Wegfall des unionsrechtlichen Aufenthaltsrechts bis zum Abschluss des nach § 55 NAG vorgesehenen Verfahrens gemäß § 31 Abs. 1 Z 2 FPG rechtmäßig aufhältig bleibt. / It can now be concluded from this that a foreigner, for whom a documentation of the right of residence has been issued, remains, lawfully resident until the conclusion of the procedure provided for in § 55 of the NAG according to § 31 para. 1 Z 2 of the FPG, even if he loses his/her Union-law based right to residence.*

*Demnach soll es einem Drittstaatsangehörigen möglich sein, trotz des Wegfalles der Voraussetzungen für ein aus dem Unionsrecht abgeleitetes Aufenthaltsrecht während seines Aufenthalts im Inland auf einen für seinen künftigen Aufenthaltszweck passenden Aufenthaltstitel "umzusteigen", ohne dass dies zur Folge hätte, dass während dieses Verfahrens sein Aufenthalt unrechtmäßig wäre. / Despite the fact that the conditions for a right to residence derived from the Union law are lacking, a third-country national should be able to "switch to" a residence permit suitable for his/her future residence, without, as a consequence, having his/her stay seen as unlawful during that procedure.*

*War der Beschwerdeführer aber auf Grund einer für ihn nach dem NAG ausgestellten Dokumentation rechtmäßig im Bundesgebiet aufhältig (vgl. dazu schon Pkt. 6.3. der Begründung des zur früheren, aber ähnlich gelagerten Rechtslage des FPG und NAG ergangenen hg. Erkenntnisses vom 24. November 2009, Zl. 2007/21/0011), stellt sich die Erlassung einer auf § 52 Abs. 1 FPG gestützten Rückkehrentscheidung und eines damit nach § 53 FPG verbundenen Einreiseverbotes als nicht zulässig dar. Zudem geht aus § 55 Abs. 4 NAG infolge des darin enthaltenen - wie den zitierten Erläuterungen zu entnehmen ist: bewusst gesetzten - Verweises klar hervor, dass in den davon erfassten Konstellationen die Frage der Zulässigkeit einer Aufenthaltsbeendigung anhand des § 66 FPG zu prüfen ist. Diesfalls kommt es auf das Vorliegen einer Eigenschaft des Fremden als begünstigter Drittstaatsangehöriger im Sinn des § 2 Abs. 4 Z 11 FPG nicht an. Ebenso wenig ist für das zu wählende Verfahren - was die belangte Behörde offenbar vor Augen hat - maßgeblich, zu welchem Zeitpunkt die Meldung nach § 54 Abs. 6 NAG erstattet wurde. / However, if the*



	<p>complainant is lawfully resident in the Federal territory on the basis of a document issued for him/her under the NAG (see also para. 6.3 of the explanatory statement of the previous, but similar legal situation of the FPG and NAG, ZI. 2007/21/0011), the issuing of a return decision based on § 52 para. 1 of the FPG and a prohibition of entry connected with it pursuant to § 53 FPG is not permissible. In addition, it is clear from the reference included in §55 Abs 4 of the NAG – as can be seen from the cited explanatory notes – that the question of the admissibility of a termination must be examined in accordance with § 66 of the FPG in the constellations covered by it. In this case, the existence of a quality of the stranger as a beneficiary third-country national within the meaning of § 2 (4) 11 of the FPG does not apply. Nor is it decisive for the procedure to be chosen, as the authorities concerned have in mind, at which time the report pursuant to § 54 (6) NAG was reimbursed.</p>
<p><b>Has the deciding body referred to the Charter of Fundamental Rights? If yes, to which specific article.</b></p>	<p>The Constitutional Court has not referred to the Charter of Fundamental Rights in this case.</p>

2. Table 2 – Overview

	<b>non-discrimination on grounds of nationality</b>	<b>the right to move and reside freely</b> in another Member State	<b>the right to vote and to stand as candidates</b>	<b>the right to enjoy diplomatic protection</b> of any Member State	<b>the right to petition</b>
<b>Please provide the total number of national cases decided and relevant for the objective of the research if this data is available (covering the reference period)</b>	5	Number not available	1	0	0