

Subject-matter concerned	<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 the Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Decision date	25 March 2010
Deciding body (in original language)	Verwaltungsgerichtshof (VwGH)
Deciding body (in English)	Supreme Administrative Court
Case number (also European Case Law Identifier (ECLI) where applicable)	2008/21/0362
Parties	Federal Minister of Interior vs Serbian citizens (mother and son)
Web link to the decision (if available)	www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=7a8ef18a-d669-4038-b3b8-a55cf2334b37&Position=1&Abfrage=Vwgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=2008%2f21%2f0362&VonDatum=&BisDatum=14.06.2017&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JWT_2008210362_20100325X00

Legal basis in national law of the rights under dispute	Niederlassungs- und Aufenthaltsg (NAG) §§52 Z2, 54 Abs1, 55, 56, 57 ¹
Key facts of the case (max. 500 chars)	<p>Note that this executive summary has the purpose to make us understand:</p> <ol style="list-style-type: none"> the 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 with §52 Z1-3 NAG. According to the Federal Minister of the Interior, the complainants 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 mothers/grandmothers 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>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 lives 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 is 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 NAG.</p> <ol style="list-style-type: none"> the 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 and Directive 2004/38/EG, FPG §31, §120.
Main reasoning / argumentation	The Supreme Administrative Court found 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

¹ 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, available at: www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004242.

<p>(max. 500 chars)</p>	<p>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.</p> <p>Moreover, the Supreme Administrative Court found that grandchildren do fall under the category of people covered by §52 Z2 NAG.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>One of the key issues is about 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.</p> <p>Furthermore, one of the key issues is about whether grandchildren fall under the category of people covered by §52 Z2 NAG.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The contested decision was 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>
<p>Key quotations in original language and translated into English with reference details (max. 500 chars)</p>	<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.).</i></p> <p>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 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</p>

	<p>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 judgment of the ECJ of 23 September 2003, C-109 / 01, Akrich, cited above, paragraph 55 et seq.).</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, Zl. 2006/18/0010; zur gebotenen Auslegung vor dem Hintergrund der "Unionsbürgerrichtlinie" vgl. auch das hg. Erkenntnis vom 13. Dezember 2007, Zl. 2007/09/0228) -, weshalb sie gemäß § 42 Abs. 2 Z 1 VwGG aufzuheben waren.</i></p> <p>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) NAG (See, for this purpose, the description of the beneficiaries in Section 47 (3) (2) of the Fremden-gesetz (Law on Foreigners) 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, Zl. 2007/09/0228) -, which is why they had to be repealed in accordance with Article 42 (2) (1) of the VwGG.</p>
<p>Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.</p>	<p>The Constitutional Court has not referred to the CFR in this case.</p>