

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

Legal basis in national law of the rights under dispute	FrPolG 2005 §31 Abs1 Z2, §52 Abs1, §53, §66 ¹ Niederlassungs- und Aufenthaltsg (NAG) 2005 §9, §53 Abs2, §54 Abs2, §54 Abs6, §54, §55 ²
Key facts of the case (max. 500 chars)	Note that this executive summary has the purpose to make us understand: the facts of the case (so the “real life story”): 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. As a consequence, 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 time of the divorce, the marriage had not existed for three years. The Independent Administrative Board assumed that the Tunesian citizen was no longer a relative of an EEA citizen and therefore no longer as 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 delay, in order 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 issuing of the permanent residence card did not grant the applicant any right of residence, but it had documneted the "right of residence". According to the Independent Authority Board, the complainant was staying illegally in the Federal territory because he had no longer a right to reside there after the divorce.

¹ Austria, Aliens Police Act (*Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel - Fremdenpolizeigesetz 2005, FPG*), BGBl. I Nr. 100/2005 idF BGBl. I Nr. 24/2016, available at: www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004241. However, the present case refers to the version as amended by BGBl. I Nr 2011/I/038 and BGBl I Nr 2009/I/122.

² 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. However, the present case refers to the version as amended by BGBl. I Nr 2011/I/038 and BGBl I Nr 2009/I/122.

	2. the 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.
Main reasoning / argumentation (max. 500 chars)	The Supreme Administrative Court found 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 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 an right of residence has been issued, remains lawfully resident until the conclusion of the procedure provided for in § 55 NAG according to § 31 para 1 Z 2 FPG, even if he/she lost 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 FPG and a prohibition of entry connected with it pursuant to § 53 FPG is not permissible, if the complainant was legally resident in the Federal territory on the basis of a document issued for him/her under the NAG.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	One of the key issues is about whether the issuance of a permanent residence card grants any right of residence. Moreover, the question is about whether a divorce leads to losing the right to residence.
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	The contested decision is 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.
Key quotations in original language and translated into English with reference details (max. 500 chars)	<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.</i> 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 Union law (and in accordance with the provisions of the NAG). <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.</i>

However, the legislator explicitly stated in § 31 para. 1 Z. 2 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.

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.

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 NAG according to § 31 para 1 Z 2 FPG, even if he lost 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 Aufenthaltswert passenden Aufenthaltstitel "umzusteigen", ohne dass dies zur Folge hätte, dass während dieses Verfahrens sein Aufenthalt unrechtmäßig wäre.

Despite of the fact that the conditions for a right to residence derived from Union law have ceased to exist, a third-country national should be able to "switch to" a residence permit suitable for his/her future residence, without having the consequence that his/her stay would be 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 complainant was lawfully resident in the Federal territory on the basis of a document issued for him/her under the NAG (see also paragraph 6.3 of the explanatory statement of the previous, but similar legal situation of the FPG and NAG) , Zl. 2007/21/0011), the issuing of a return decision based on § 52 para. 1 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 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 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 FPG does not apply. Nor is the

	decisive factor for the procedure to be chosen - as the authorities concerned has in mind - at which time the report pursuant to § 54 (6) NAG was reimbursed.
Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.	The Constitutional Court has not referred to the CFR in this case.