

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	24 June 2010
Deciding body (in original language)	Verfassungsgerichtshof (VfGH)
Deciding body (in English)	Constitutional Court
Case number (also European Case Law Identifier (ECLI) where applicable)	B538/09 ECLI:AT:VFGH:2010:B538.2009
Parties	Supreme Court of Appeals and Discipline vs German/Italian citizen
Web link to the decision (if available)	www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=afcd45c2-2acf-46bd-8bd0-672962c3497f&Abfrage=Vfgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=True&GZ=&VonDatum=30.04.2006&BisDatum=13.02.2017&Norm=AEUV+Art18&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JFT_09899376_09B00538_00

Legal basis in national law of the rights under dispute	B-VG Art7 Abs1 ¹ B-VG Art7 Abs1 B-VG Art83 Abs2 StGG Art6 Abs1 ² StGG Art18 RAO §2, §5a ³ RechtsanwaltsprüfungsG §2, §8 ⁴
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”): 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

¹ Austria, Federal Constiution (*Bundes-Verfassungsgesetz, B-VG*), StF: BGBl. Nr. 1/1930 (WV) idF BGBl. I Nr. 194/1999 (DFB), available at: www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138.

² 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, available at: www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000006.

³ Austria, Lawyer Regulation (*Rechtsanwaltsordnung, RAO*), RGBl. Nr. 96/1868 idF BGBl. I Nr. 10/2017, available at: www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001673.

⁴ 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), available at: www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002683.

	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 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 would be contrary to Community law (now Union law), explaining why the complainant is seeking a preliminary ruling procedure before the CJEU. 2. the legal background against which the case unfolded (what are the relevant legal norms that are applied) The Constitutional Court referred to B-VG Articles 7 para 1, 83 para 2, 6 para 1, StGG Articles 6 para 1, 18, RAO §2, §5a, RechtsanwaltsprüfungsG §2, §8, TFEU Art18.
Main reasoning / argumentation (max. 500 chars)	The Constitutional Court found that there has not been any 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 by 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).
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The key issues is about whether the requirement of being registered in a bar association in order to be admitted to the bar exam is contrary to, <i>inter alia</i>, Union law and whether the competent authority acted arbitrary. Moreover, the key issue is about 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 regarding citizenship of Art7 B-VG does not apply because the prohibition of discrimination against citizens of the country on grounds of nationality (Article 18 TFEU) requires that citizens of the Union cannot be 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 are banned from taking up or pursuing a certain activity of employment if there is no law authorizing the authority to take such a restrictive measure, or 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.
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	The complaint was dismissed by the Constitutional Court. The Constitutional Court found that there has not been any violation of constitutionally guaranteed rights.
Key quotations in original language and translated into English with reference details (max. 500 chars)	<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 Art. 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 regarding citizenship of Art7 B-VG does not apply because the prohibition of discrimination against citizens of the country on grounds of nationality (Article 18 TFEU) requires that citizens of the Union cannot be put worse off against nationals in the field of Union law; a complaint lodged by a non-citizen in accordance with Art. 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). <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</i>

	<i>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 TFEU) requires that citizens of the Union cannot be put worse off than nationals within the scope of Union law. A complaint lodged by a citizen of the Union pursuant to Art. 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.
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.