

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 2012
Deciding body (in original language)	Verfassungsgerichtshof (VfGH)
Deciding body (in English)	Constitutional Court
Case number (also European Case Law Identifier (ECLI) where applicable)	U1553/11 ECLI:AT:VFGH:2012:U1553.2011
Parties	Asylum court vs a Turkish citizen
Web link to the decision (if available)	www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=21d1ba23-b1da-41d1-8856-5960dca43a3f&Position=1&Abfrage=Vfgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&SucheNachRechtssatz=True&SucheNachText=True&GZ=U1553%2f11&VonDatum=&BisDatum=07.04.2017&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchwort=&Dokumentnummer=JFT_09879382_11U01553_00

Legal basis in national law of the rights under dispute	AsylG 2005 §10 Abs2 Z1¹ BVG-Rassendiskriminierung ArtI Abs1² Niederlassungs- und Aufenthaltsg (NAG) §51 ff³
Key facts of the case (max. 500 chars)	Note that this executive summary has the purpose to make us understand: 1. the 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 is 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 lack of credibility and the fact that his justification for flight was not recent (meaning that there is no real risk of inhumane treatment, especially since the complainant is not suffering from a life-threatening illness and he has 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.

¹ 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, available at: www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004240.

² Austria, Federal constitutional law on abolishing race *discrimination* (*Bundesverfassungsgesetz vom 3. Juli 1973 zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassistischer Diskriminierung*), BGBl. Nr. 390/1973, available at: www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR12007758.

³ 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.

	2. the 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.
Main reasoning / argumentation (max. 500 chars)	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.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	One of the key issues is about whether the complainant's right to reside ceased to exist because his Swiss wife 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 can not alter this obligation, especially since her passing must by no means mean the loss of the right of residence.
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	The contested decision has been repealed by the Constitutional Court. The federal government (Federal Chancellor) is guilty of paying the complainant the costs of the proceedings (€ 2,400,) - within 14 days, otherwise facing executions.
Key quotations in original language and translated into English with reference details (max. 500 chars)	<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, ABl. 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,</i>

	<i>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).</i> 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 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, 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 of 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 now passed away can not alter this obligation, especially since the passing of the complainant's wife must by no means mean the loss of the right of residence. <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.</i> 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.
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.