

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 Article 31 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Decision date	11 December 2007
Deciding body (in original language)	<i>Migrationsöverdomstolen</i>
Deciding body (in English)	Migration Court of Appeal
Case number (also European Case Law Identifier (ECLI) where applicable)	UM2261-07
Parties	A. v. the Swedish Migration Agency (<i>Migrationsverket</i>)
Web link to the decision (if available)	Web link to the decision is not available. Search in www.rattsinfosok.dom.se/lagrummet/index.jsp Choose: <i>Avancerad; Domstol: Migrationsöverdomstolen; Målnummer: UM2261-07</i>
Legal basis in national law of the rights under dispute	<ul style="list-style-type: none"> • Alien Act (<i>Utlänningslag [2005:716]</i>), chapter 3a, sections 1, 3 and 4 and chapter 8, section 7a, first paragraph • Directive 2004/38/EC 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>Europaparlamentets och rådets direktiv 2004/38/EG av den 29 april 2004 om unionsmedborgares och deras familjemedlemmars rätt att fritt röra sig och uppehålla sig inom medlemsstaternas territorier</i>)

	<i>[rörlighetsdirektivet]]</i> , article 31
Key facts of the case (max. 500 chars)	<p>A., a Polish citizen, arrived in Sweden in September 2006 and applied for residence permit (<i>uppehållstillstånd</i>) in November the same year. In her application she referred to her connection with two daughters already living in Sweden and argued that she from time to time lived with them. The daughters supported their mother with clothes, money and medicine. A. suffers from depression and Parkinson's disease, and has not had anyone to care for her since her daughter in Poland passed away in 2005. The Swedish Migration Agency (<i>Migrationsverket</i>) rejected A's application in March 2007 and she was therefore to be expelled from Sweden. The Agency argued that A. did not have right to residence permit in Sweden in accordance with Chapter 3a, section 3 of the Alien Act (<i>Utlänningslag [2005:716]</i>) since she did not apply for residence permit shortly after her daughters received permanent residence permits in Sweden. Furthermore, the Agency did not consider A's health condition to constitute any extraordinary reasons for granting her a residence permit. A. appealed the Migration Agency's decision to the Migration Court (<i>Migrationsdomstolen</i>) arguing that she could not be deported because of her health condition. The Migration Court rejected A's appeal and supported the decision of the Migration Agency, since it assessed that there were no unusual or distressing circumstances that could be reason to grant A. a residence permit according to the Alien Act (<i>Utlänningslag [2005:716]</i>). At the same time the Court decided not to try the question of A's right of residence in accordance to the Directive.</p>
Main reasoning / argumentation (max. 500 chars)	<p>The Migration Court of Appeal granted a reviewing permit (<i>prövningstillstånd</i>) on the ground that the implementation of Directive 2004/38/EC of the European Parliament and the Council had ended the necessity to grant residence permits for union citizens and other EEA-citizens, when the concept of right to residence (<i>uppehållsrätt</i>) was introduced. Consequently, EEA citizens have the right to residence if they have sufficient assets to support themselves and if they have a valid health insurance. EEA citizens who have the right to residence cannot be deported, and according to the directive union citizens have the right to a review of their cases if decisions in focus can be said to restrict the freedom of movement.</p> <p>In its review the Migration Court of Appeal found that A. is a union citizen with a valid Polish passport and must therefore be covered by the legislation under Directive 2004/38/EC of the European Parliament and the Council, has resulted in abolition of the system of residence permits for Union citizens and other EEA citizens and their family members. Instead the concept of right to residence has been introduced in relation to this group of aliens. According to the Court of Appeal, chapter 3a, section 1 of the Alien Act (<i>Utlänningslag [2005:716]</i>) defines this right of residence. Consequently, EEA nationals and their family members have a right to stay in Sweden for over three months without a applying for a residence permit in accordance with the provisions in question. Section 3 of the same chapter specifies the conditions necessary for EEA citizens to have a right of residence. EEA citizens has a right of residence if they have sufficient assets to support themselves and comprehensive health insurances from their countries of origin.</p> <p>The Court of Appeal considered the fact that the Migration Court did not try the question of A's right of residence to be a serious</p>

	<p>shortcoming in the court's application of the law, which cannot be remedied by the Court of Appeal itself. Therefore, the decision by the Migration Court shall be annulled and the case remanded to the Migration Court for further processing.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>A decision to deport an EEA citizen must be preceded by an investigation into the person's possible right of residence.</p>
<p>Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Migration Court of Appeal (<i>Migrationsöverdomstolen</i>) annulled the judgement of the Migration Court and referred the case back to the Migration Court for proceeding.</p>
<p>Key quotations in original language and translated into English with reference details (max. 500 chars)</p>	<p><i>"Migrationsöverdomstolen konstaterar att A genom att visa upp ett giltigt polskt hemlandspass är att anse som unionsmedborgare och att hon därför omfattas av rörlighetsdirektivets bestämmelser. Migrationsverket har också prövat frågan om hon har uppehållsrätt. Migrationsdomstolen har emellertid inte prövat denna fråga. Migrationsdomstolens dom innebär att Migrationsverkets beslut om utvisning fortfarande gäller. Eftersom EES-medborgare har rätt att vistas i Sverige om de har uppehållsrätt har det ålagt migrationsdomstolen att pröva om A har uppehållsrätt innan beslutet om utvisning fastställdes genom att hennes överklagande av Migrationsverket beslut avslogs.</i></p> <p><i>Att migrationsdomstolen inte har prövat frågan om A har uppehållsrätt utgör en allvarlig brist i domstolens rättstillämpning som inte kan avhjälpas i denna instans. Migrationsdomstolens dom skall därför undanröjas och målet visas åter till migrationsdomstolen för fortsatt handläggning."</i></p> <p>"The Migration Court of Appeal finds that A. through presenting a valid Polish homeland passport must be considered as a citizen of the Union,, and therefore a subject to the provisions under the Mobility Directive. The Migration Agency has also tried whether A. has a right to residence. However, the Migration Court has not tried the question. The decision by the Migration Court means that the Migration Agency's decision of expulsion is still applicable. Since EEA citizens have the right to stay in Sweden if they have right of residence, the Migration Court should have tried A's right of residence before the expulsion decision was determined by the rejection of her appeal of the Migration Agency's decision.</p>

	The fact that the Migration Court has not tried the question of A's right of residence constitutes a serious shortcoming in the court's application of the law, which cannot be remedied by this instance. Therefore, the decision by the Migration Court shall be annulled and the case remanded to the Migration Court for further processing."
Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.	No.