

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 – Article 7 ☐ 3) voting rights ☐ 4) diplomatic protection ☐ 5) the right to petition
Decision date	23 February 2012
Deciding body (in original language)	Verwaltungsgerichtshof (VwGH)
Deciding body (in English)	Supreme Administrative Court
Case number (also European Case Law Identifier (ECLI) where applicable)	2010/22/0011
Parties	Federal Minister of Interior vs a Nigerian citizen
Web link to the decision (if available)	www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=5d757c69-6192-4705-a0c5-1708cdbda733&Position=1&Abfrage=Vwgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=2010%2f22%2f0011&VonDatum=&BisDatum=11.04.2017&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JWT_2010220011_20120223X00

Legal basis in national law of the rights under dispute	FrPolG 2005 §54¹ NAG 2005 §2 Abs1 Z14 idF 2009/I/122² NAG 2005 §2 Abs1 Z14 NAG 2005 §51 NAG 2005 §52 NAG 2005 §54 NAG 2005 §57
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”) In 2009, the complainant (a Nigerian citizen) applied (pursuant to § 54 in connection with § 57 NAG) for a permanent residence card, which was dismissed by the relevant authority. The relevant authority referred to the fact that the complainant entered Austria in 2004 and applied for asylum. The asylum application was dismissed by decision of July 2007 in the second instance. In February 2006, the complainant married an Austrian citizen and applied in February 2009 for a permanent residence card for the purpose of family reunification. The complainant had been registered since December 2005 – with an interruption of 18 days in September 2007 – in Austria. He had been employed from 14 August to 28 November 2007. His wife had been registered in Austria since August 2002, and since September 2003 she has been working as an employee. When submitting his application, the complainant presented a Spanish Residence Certificate issued to him on 15 September 2008 and a Spanish "Certificate of Registration" issued to his wife on 9 June 2008. In appealing against the first instance decision, the complainant submitted that his wife had pursued a short-term “independent” activity for an Internet shop in Spain (it is confirmed that she had been in Spain on 9 June 2008 and 14 December 2008) . According to the relevant

¹ Austria, Aliens Police Act (*Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreiseteil - 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. 122/2009.

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. 122/2009.

	authority (i.e. the Federal Ministry of Interior), the complainant had not shown that his wife had claimed the right to free movement as ensured by Community law. Therefore, the complainant – according to the relevant authority – married an Union citizen who did not exercise her right to free movement, and thus, he falls outside the scope of §54 NAG. 2. the legal background against which the case unfolded (what are the relevant legal norms that are applied) The Supreme Administrative Court referred to Articles 2, 6 and 7 of Directive 2004/38/EC, § 54 FrPolG and §§ 51, 52, 54 and 57 NAG.
Main reasoning / argumentation (max. 500 chars)	The Supreme Administrative Court stated that only if the Austrian citizen exercised his right under Article 7 of the Directive (and subsequently returned not merely temporarily to Austria), his family member is also entitled to reside in the federal territory for more than three months or permanently, just as the family members of a citizen of the Union who claim the same right under Article 7 of the Directive in Austria.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	One of the key issues is about the application of Directive 2004/38/EC and the scope of the very same. The competent authority (i.e. the Federal Ministry of Interior) stated that the marriage as such is not sufficient to establish a right to residence. According to the Supreme Administrative Court, in contrast to the right of free movement of Union citizens, which is enshrined in Article 18 (1) EC (now Article 21 TFEU) and is only further developed by the Directive, the right of free movement of the family members of Union citizens, insofar they are third-country nationals, who "wandered" into another member states, is not included by Art. 21 TFEU, but only regulated by the Directive.
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 complainant 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>Diese Richtlinie stellt einen bedeutsamen Rechtsakt zur Erleichterung der Ausübung der unionsrechtlichen Freizügigkeit dar und bewirkt eine erhebliche Vereinheitlichung und Vereinfachung der Aufenthaltsrechte. Die Einreise- und Aufenthaltsrechte aller Unionsbürger und ihrer Familienangehörigen werden durch die genannte Richtlinie umfassend geregelt (vgl. Calliess/Ruffert, EUV/AEUV4, Art. 45 AEUV Rn. 81). Die Unionsbürger können sich gemäß Art. 6 RL drei Monate in einem Mitgliedstaat aufhalten und brauchen lediglich im Besitz eines gültigen Personalausweises oder Passes zu sein. Bei einem Aufenthalt von über drei Monaten ist das Aufenthaltsrecht jedoch an bestimmte Bedingungen geknüpft: Die Unionsbürger müssen Arbeitnehmer oder Selbständige sein oder aus anderen Quellen als der eigenen Erwerbstätigkeit im Aufenthaltsstaat über ausreichende Existenzmittel für sich und ihre Familienangehörigen verfügen, damit sie</i>

keine Sozialhilfeleistungen des Aufnahmemitgliedstaates in Anspruch nehmen müssen, und über einen umfassenden Krankenversicherungsschutz verfügen (vgl. Calliess/Ruffert, aaO, Art. 21 AEUV Rn. 24).

This Directive constitutes an important instrument for facilitating the exercise of the right to free movement of the Union and brings about a substantial harmonization and simplification of the right of residence. The right to entry and residence of all Union citizens and their family members is comprehensively regulated by the above-mentioned Directive (see Calliess / Ruffert, EUV / AEUV4, Art. 45 TFEU para. 81). According to Article 6 of the Directive, Union citizens may reside in a Member State for three months and are only required to hold a valid identity card or passport. However, for a period of more than three months, the right of residence shall be subject to certain conditions: Union citizens must be employed or self-employed persons or have sufficient resources for themselves and their family members from sources other than their own employment in the State of residence, so that they do not receive social assistance from the host Member State (See Calliess / Ruffert, cited above, Article 21 TFEU paragraph 24).

Das Unionsrecht untersagt demnach nicht eine Benachteiligung der eigenen Staatsbürger (vgl. Streinz, EUV/AEUV2, Art. 45 AEUV Rn. 34). Im Gegensatz zum Freizügigkeitsrecht der Unionsbürger, das in Art. 18 Abs. 1 EG (nunmehr Art. 21 AEUV) primärrechtlich verankert ist und durch die Richtlinie lediglich näher ausgestaltet wird, ist das Freizügigkeitsrecht der Familienangehörigen der in einen anderen Mitgliedstaat "gewanderten" Unionsbürger, soweit sie Drittstaatsangehörige sind, von Art. 21 AEUV nicht umfasst, sondern nur in der Richtlinie geregelt (vgl. Obwexer, Grundfreiheit Freizügigkeit (2009), 219).

Unions law therefore does not prohibit discrimination against one's own citizens (see Streinz, EUV / AEUV2, Art. 45 TFEU para. 34). In contrast to the right of free movement of citizens of the Union, which is enshrined in Article 18 (1) EC (now Article 21 TFEU) and is only further developed by the Directive, the right of free movement of the family members, insofar they are third-country nationals, of Union citizens, who "wandered" into another member states, is not included by Art. 21 TFEU, but only regulated by the Directive (see Obwexer, Grundfreie Freiheitskitizigkeit (2009), 219).

Nur wenn also der österreichische Staatsbürger sein Recht nach Art. 7 RL ausgeübt hat (und im Anschluss daran nicht bloß vorübergehend nach Österreich zurückgekehrt ist), ist seinen Familienangehörigen ebenso das Recht einzuräumen, sich für mehr als drei Monate oder auf Dauer im Bundesgebiet aufzuhalten, wie den Familienangehörigen eines Unionsbürgers, der dasselbe Recht nach Art. 7 RL in Österreich in Anspruch nimmt. Zur Klarstellung wird darauf hingewiesen, dass die §§ 51 ff NAG nicht das unionsrechtliche Aufenthaltsrecht nach Art. 6 RL für einen Zeitraum von bis zu drei Monaten umsetzen. In diesem Sinn spricht der EuGH im Urteil "Metock" von Familienangehörigen nach Art. 2 Nr. 2 RL einer zusammenführenden "Ankerperson", die sich in einem anderen Mitgliedstaat

	<i>niedergelassen hat (Rn. 73). Als der von § 57 NAG umfasste Personenkreis ist jener zu verstehen, der sich in Österreich niederlassen will. Dieser entspricht somit jener Gruppe von Angehörigen von Unionsbürgern, die abgeleitete Rechte nach Art. 7 Abs. 2 RL geltend machen.</i> Thus, only if the Austrian citizen exercised his right under Article 7 of the Directive (and subsequently returned not merely temporarily to Austria), his family member is also entitled to reside in the federal territory for more than three months or permanently, just as the family members of a citizen of the Union who claim the same right under Article 7 of the Directive in Austria. For the sake of clarity, it is pointed out that §§ 51 et seq. of the NAG does not implement the right of residency under Article 6 of the Directive for a period of up to three months. In this respect, the CJEU refers to family members pursuant to Article 2 (2) of the Directive as to “anchor” persons who have settled in another member state (para 73). The group of persons covered by § 57 of the NAG is to be understood as the one that wants to settle in Austria. This corresponds, therefore, to the group of members of Union citizens who claim derived rights under Article 7 (2) of the Directive.
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.