

Subject-matter concerned	<input type="checkbox"/> 1) non-discrimination on grounds of nationality X 2) freedom of movement and residence - linked to which article of the Directive 2004/38 linked to Art. 3 (2) sentence 1 a Directive 2004/38 <input type="checkbox"/> 3) voting rights <input type="checkbox"/> 4) diplomatic protection <input type="checkbox"/> 5) the right to petition
Decision date	17 November 2016
Deciding body (in original language)	Oberverwaltungsgericht Berlin-Brandenburg (OVG)
Deciding body (in English)	Higher Administrative Court of Berlin-Brandenburg
Case number (also European Case Law Identifier (ECLI) where applicable)	OVG 2 B 13.16
Parties	Pakistani national Local aliens' registration office
Web link to the decision (if available)	www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/13qw/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=JURE160020322&doc.part=L&doc.price=0.0&doc.norm=all#focuspoint
Legal basis in national law of the rights under dispute	Sections 2, 3 and 11 of the German Act on the General Freedom of Movement for EU Citizens (<i>Freizügigkeitsgesetz/EU</i> , <i>FreizügG/EU</i>), www.gesetze-im-internet.de/freiz_gg_eu_2004/ , www.gesetze-im-internet.de/englisch_freiz_gg_eu/index.html ,

	Sections 7 and 36 of the German Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory Residence Act (<i>Aufenthaltsgesetz, AufenthG</i>), www.gesetze-im-internet.de/aufenthg_2004/ , www.gesetze-im-internet.de/englisch_aufenthg/index.html .
Key facts of the case (max. 500 chars)	The claimant applied for residence in Germany as a family member of his brother, a British national. He claimed that they had lived in one household in Pakistan where he as a consequence of unemployment, was dependant on his brother. The local aliens' registration office denied his application. The Administrative Court of Berlin reasoned that there was no entitlement to residence since the brother was not a family member in the sense of Section 3 of the FreizügG/EU. There was also no entitlement with regard to Section 11 of the FreizügG/EU, in conjunction with 36 of the AufenthG. The wording of Section 36 of the AufenthG required unreasonable hardship. Since the brother could lead an independent life, this was not the case. The OVG Berlin-Brandenburg essentially followed the reasoning of the VG and dismissed the appeal. According to the OVG (telephone call of 10 February 2017) the decision is final.
Main reasoning / argumentation (max. 500 chars)	The claimant argued that he was entitled to a right of residence through the application of Article 3 (2), Sentence 1 of Directive 2004/38/EG. The OVG has stated that the claimant had no right to residence. Section 3 of the FreizügG/EU did not apply since the definition of a family member in this section did not apply to the brother. Unreasonable hardship in the sense of Section 36 of the AufenthG was not confirmed. A right to the direct application of Article 3 (2), Sentence 1 of Directive 2004/38/EG in national law did not exist. An interpretation of Section 3 of the FreizügG/EU in the light of the directive was not necessary since there was no gap in Section 3 that made such an interpretation necessary. The same applied to Section 36 of the AufenthG. The duty to adopt EU directives from Article 288 (3) of the TFEU had its limits regarding the principle of division of power from Article 20 (2) of the Basic Law for the Federal Republic of Germany (<i>Grundgesetz, GG</i> , www.bundestag.de/grundgesetz) and in the principle of legal certainty if the wording of a provision was clear and not in accordance with the directive.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The OVG has stated very clearly that an interpretation of Section 3 of the FreizügG/EU and Section 36 of the AufenthG in light of Directive 2004/38/EG, as demanded in the legal literature (see, for instance, Bergmann/Dienelt, commentary to the AufenthG, 11 th Edition, Section 36, Paragraphs 62-65), was not in accordance with the principle of the division of powers and the principle of legal certainty. It has further stated that a direct application of Directive 2004/38/EG was not admissible, even if the Directive was not completely implemented under German law.
Results (e.g. sanctions) and key consequences or implications of the	It has been repeatedly stated in the legal literature that the insufficient implementation of Article 3 (2), Sentence 1 of Directive 2004/38/EG into German law could be healed by interpreting the provisions of the FreizügG/EU and the AufenthG in the light of the provision (see, for instance, Schönberger/Thym in Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen, 2014, page 569, http://fide2014.eu/pdf/FINAL-Topic-2-on-Union-Citizenship.pdf). The decision of the OVG shows that this not only necessarily the case

case (max. 500 chars)	<p>but that there are also opposing arguments. The decision of the OVG shows that there is no legal certainty on the topic and that a gap between German Law and the directive exists.</p>
Key quotations in original language and translated into English with reference details (max. 500 chars)	<p><i>“...der Kläger kann seinen Anspruch auf Familiennachzug nicht unmittelbar aus Art. 3 Abs.2 Satz 1 lit. a) UnionsbürgerRL herleiten, selbst wenn die Richtlinie nicht oder nur unvollständig umgesetzt worden sein sollte. ...Schließlich kann der Kläger den Anspruch auf Erteilung eines Visums zum Familiennachzug zu seinem Bruder nicht auf eine richtlinienkonforme Auslegung des innerstaatlichen Rechts stützen. Zwar sind die nationalen Gerichte aufgrund des Umsetzungsgebots des Art. 288 Abs.3 AEUV verpflichtet, bei der Anwendung des innerstaatlichen Rechts so weit wie möglich anhand des Wortlauts und des Zweckes dieser Richtlinie auszulegen....die unionsrechtliche Pflicht zur Verwirklichung des Richtlinienziels im Wege der Auslegung findet jedoch ihre Grenzen an dem nach innerstaatlichen Rechtsstradition methodisch Erlaubten“</i> (OVG Berlin-Brandenburg, decision of 17 November 2016, OVG 2 B 13.16, Paragraphs 1 and subsequent) .</p> <p>The claimant does not have a direct right to residence as a family member according to Article 3 (2), Sentence 1 a of Directive 2004/28/EG, even if the directive has not been fully or incompletely transformed. The claimant does not have a right to residence through the application of German law interpreted in light of the directive. National courts, according to Article 288 (3) of the TFEU, are obliged to apply the directive when interpreting German law as far as possible. This obligation is however limited by what is allowed within the methods of national legal tradition.</p>
Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.	<p>No.</p>