

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	20 March 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)	2010/21/0438
Parties	Federal Minister of Interior vs a Serbian citizen
Web link to the decision (if available)	https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=601550f4-604f-4be3-bb52-c251f31f0e8b&Position=1&Abfrage=Vwgh&Entscheidungsart=Undefined&Sammlungsnummer=&Index=&AenderungenSeit=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=2010%2f21%2f0438&VonDatum=&BisDatum=13.06.2017&Norm=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=&Dokumentnummer=JWT_2010210438_20120320X00

Legal basis in national law of the rights under dispute	NAG 2005 §54 Abs1 idF 2009/I/0122¹ NAG 2005 §54a idF 2009/I/122 NAG 2005 §57 idF 2009/I/122
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 Serbian citizen, entered – on basis of a visa C (‘Schengen Visa’), which was issued in Belgrade – the federal territory on 7 January 2007. Her mother is an Austrian citizen, her father a Serbian one. On 23 January 2007, the complainant applied for documentation in terms of a permanent residence card. The complainant claimed that her mother, who provided her alimony, exercised her right to freedom of movement by moving to Germany – because of an argument with her husband – on 12 October 2006, where she also reported her stay at the police (- in November 2006, the administrative district office in Berchtesgarden confirmed this by issuing a certificate). The complainant herself had lived with her mother in Germany only from 11 January to 22 January 2007. Regardless of the inadvertent missing of her notice of departure in Austria, they both claimed that they had the centre of their lives in Germany (officially, their main place of residence was still registered in Austria). On 22 January 2007, the complainant and her mother moved back to Austria and used the common apartment in Salzburg. The complainant claimed therefore to fall under the category of a EEA-citizen, who is, according to §54 NAG, entitled to be issued a permanent resident card for a period of 10 years. The competent authority (i.e. Federal Ministry of Interior) dismissed the application by stating that there was no real and effective exercise of the right of free movement (by the complainant’s mother) to Germany because she moved to Germany only for a short time, and on the grounds of marriage dispute. The mother had not pursued any employment in Germany, but had been employed in Austria. The complainant is, according to the competent authority, not a family member of an EEA citizen and therefore does not fall under § 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 §§ 54, 54a and 57 NAG, Art7 of Directive 2004/38/EC and Art21 TFEU.
Main reasoning / argumentation (max. 500 chars)	The Supreme Administrative Court found that the complainant's right to reside under the terms of §54 para 1 NAG, which is derived from her mother, cannot be conclusively assessed according to the content of the contested decision. The competent authority has not made any statements as to the beginning and duration of the factual residence of the complainant’s mother in Germany (which can not be equated with a police report). In any case, the actual and effective housing in Germany had emerged for more than three months

¹ 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.

	(according to the complainant's allegations from 12 October 2006 to 22 January 2007), which provides, according to §57 NAG, a sufficient basis for the documentation of a complainant's right to reside under the law of the Union.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	One of the key issues is about whether employment - next to the establishment of a place of residence - in Germany is required for a relevant exercise of the right of freedom of movement. The Supreme Administrative Court found that this is no requirement in that regard. If the mother of the complainant, as an Austrian citizen, exercised her right under Article 7 of Directive 2004/38/EC and, subsequently, did not return to Austria temporarily, the complainant is entitled, as a member of her family, to reside for more than three months or permanently in the Federal territory.
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 991,20 within two weeks, otherwise facing execution.
Key quotations in original language and translated into English with reference details (max. 500 chars)	<i>Jedenfalls dann, wenn eine tatsächliche, effektive (und nicht bloß - was der Begründung des angefochtenen Bescheides allerdings nicht entnommen werden kann - zum Schein erfolgte) Wohnungnahme in Deutschland von mehr als drei Monaten (laut Vorbringen der Beschwerdeführerin vom 12. Oktober 2006 bis zum 22. Jänner 2007) hervorgekommen wäre, erschiene dies gemäß § 57 NAG als ausreichende Grundlage für die Dokumentation eines unionsrechtlich begründeten Aufenthaltsrechts der Beschwerdeführerin.</i> However, if an actual and effective housing (and not merely - as can not be abstracted from the reasoning of the contested decision – a fictitious one) in Germany had emerged for more than three months (according to the complainant's allegations from 12 October 2006 to 22 January 2007), this would, according to §57 NAG, provide a sufficient basis for the documentation of a complainant's right to reside under the law of the Union. <i>Eine neben der Begründung eines Wohnsitzes ausgeübte Berufstätigkeit in Deutschland kann dagegen für eine relevante Ausübung der Freizügigkeit nicht gefordert werden. Auch die ohne wirtschaftliche Zweckbindung erfolgende Ausübung der Freizügigkeit nach Art. 21 AEUV samt daraus folgender Inanspruchnahme des unionsrechtlichen Aufenthaltsrechtes ist nämlich von § 57 NAG erfasst. Hat also die Mutter der Beschwerdeführerin als österreichische Staatsbürgerin ihr Recht nach Art. 7 der Richtlinie 2004/38/EG ausgeübt und ist sie</i>

	<i>im Anschluss daran nicht bloß vorübergehend nach Österreich zurückgekehrt, so ist der Beschwerdeführerin als ihrer Familienangehörigen ebenso das Recht einzuräumen, sich für mehr als drei Monate oder auf Dauer im Bundesgebiet aufzuhalten.</i> Employment in Germany cannot, next to an establishment of a place of residence, be required for a relevant exercise of the right of freedom of movement. Also, §57 NAG encompasses the exercise of the freedom of movement under Article 21 TFEU, which takes place without an economic purpose, including the exercise of the right to reside according to Union law. If, therefore, the mother of the complainant, as an Austrian citizen, exercised her right under Article 7 of Directive 2004/38/EC and, subsequently, did not merely return to Austria temporarily, the complainant is entitled, as a member of her family, to reside for more than three months or permanently in the Federal territory.
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.