



FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 8.09
VG 35 V 47.08

Released
on 30 March 2010
by Ms. Förster
Senior Court Official
as Clerk of the Court

in the administrative case

Translator's Note: The Federal Administrative Court, or *Bundesverwaltungsgericht*, is the Federal Republic of Germany's supreme administrative court. This unofficial translation is provided for the reader's convenience and has not been officially authorised by the *Bundesverwaltungsgericht*. Page numbers in citations of international texts have been retained from the original and may not match the pagination in the parallel English versions.

the First Division of the Federal Administrative Court
upon the hearing of 30 March 2010
Chief Justice of the Federal Administrative Court Eckertz-Höfer presiding,
assisted by Federal Administrative Court Justices Prof. Dr. Dörig, Richter, Beck
and Fricke

decides:

The Complainants' appeals against the judgment of the
Berlin Administrative Court of 17 February 2009 are de-
nied.

The Complainants shall each bear 1/6 of the costs of this
appeal, except for the non-court costs of the interested
third party, who will bear them itself.

R e a s o n s :

I

- 1 The Complainants, a Turkish national and her five children born between 1994 and 2006, seek a visa for the subsequent immigration of dependents.
- 2 The husband of Complainant 1 and father of Complainants 2 through 6 is likewise a Turkish national. He came to Germany in 1998. After his petition for asy-

lum met with no success, in March 2001 he married a German national and now holds a settlement permit. After divorcing his German wife, in December 2006 he married Complainant 1. Previously, even during his marriage to the German woman, he visited the Complainants for a month each year.

- 3 In July 2007 the Complainants sought a visa for the subsequent immigration of dependents. The German Embassy in Ankara rejected the applications in April 2008. Among the reasons, it indicated that Complainant 1 had not provided evidence that she could communicate in the German language, on a basic level at least.
- 4 In the original actions, the Complainants claimed that the requirement of a basic knowledge of the German language was unconstitutional, and at least that an exceptional case of hardship existed here. Complainant 1, they said, cannot meet this requirement. She is illiterate, lives in a village in eastern Turkey, and is fully occupied with caring for her children. Acquiring literacy near their residence is not possible, they alleged, nor are any language courses offered there either. They stated that her husband cannot reasonably be expected to return. He has established employment and social contacts in Germany. He had left Turkey because he felt threatened on account of his political involvement.
- 5 In a judgment of 17 February 2009, the Berlin Administrative Court rejected the suits. As grounds, it stated that Complainant 1 did not meet the requirements for a visa to immigrate subsequently as a spouse, since she was unable to provide the evidence required under Section 30 (1) Sentence 1 No. 2 of the Residence Act that she could communicate in German, on a basic level at least. In this regard, said the court, it could leave open the question of what specific knowledge was required from her, since she had no knowledge of German at all. There were no exceptional circumstances, the court said, and in particular there had been neither arguments nor evident indications that her illiteracy was caused by a physical, intellectual or emotional illness or handicap. Section 30 (1) Sentence 1 No. 2 of the Residence Act is compatible with higher-level law, the court found. Article 6 of the Basic Law grants no entitlement to residence. The court found that there is a substantial public interest in swiftly and smoothly integrat-

ing into the economic and social environment a spouse who immigrates subsequently to join another spouse, and also in preventing forced marriages from the viewpoint of residence law. The burdens imposed on foreigners are proportionate to that interest, said the court. There is no reason to fear that acquiring a basic knowledge of the German language would be entirely impossible for a foreigner, or would take so long as to be intolerable in view of the constitutional status of marriage and the family. A period of about one year at least, held the court, is a reasonable expectation. Given the requisite generalised, blanket consideration, there was no reason to believe that the spouse's subsequent immigration would be delayed significantly longer. The courses offered at the Goethe Institutes take substantially less than a year. A basic knowledge of a foreign language can also be acquired and broadened with the assistance of audio and video language courses. Moreover, a foreigner as a rule can draw upon the assistance of his or her spouse living here. Furthermore, attending language courses in regions of one's homeland farther removed from one's place of residence is within the realm of reasonable expectation, as is acquiring literacy. There is no reason, the court found, to assume that acquiring a language, together with acquiring literacy, would take a significantly longer time here than had been mentioned. The court said it can be assumed that opportunities for acquiring literacy exist and are offered in Turkey. Nor does the language requirement violate the general equal treatment clause of Article 3 (1) of the Basic Law. Insofar as Section 30 (1) Sentence 3 No. 4 of the Residence Act permits the spouses of certain nationals to immigrate subsequently without providing evidence of a language knowledge, this serves to comply with international agreements, or to preserve the public interest. Non-political special considerations are appropriate to justify giving preferential status to foreigners from certain countries, the court held. The other exceptional provisions are based on a corresponding public interest, or on serious humanitarian grounds, or on requirements of European law. There is also no apparent reason to believe there is a particular hardship that would require a constitutional interpretation or analogous application of the statutory exceptions in light of Article 6 of the Basic Law. If learning a language entails a substantial burden on the marriage because of personal circumstances, this lies solely within the sphere of responsibility of Complainant 1 and her husband. The court held that the husband can

reasonably be expected to return to his family in order to avoid this burden. He lived in Turkey for 32 years, and is familiar with its culture and way of life. He has never abandoned his ties with Turkey and with his family there. In spite of his application for asylum, moreover, he has had no reservations or problems about returning regularly to Turkey; he has always been able to leave again undisturbed. To be sure, he is well integrated in Germany and would have to give up a steady job and a regular income. But even Article 6 of the Basic Law affords no protection against the economic difficulties associated with a return. If Complainant 1 has no entitlement to immigrate subsequently, granting a visa to Complainants 2 through 6 is also out of the question, since their father is not entitled to sole custody. The court ruled that there was no evidence of a hardship case under Section 32 (4) of the Residence Act.

- 6 In their (leapfrog) appeals made to this Court by leave of the Administrative Court, the Complainants claim in particular that the Administrative Court improperly dismissed the nature and scope of the language knowledge to be acquired. This factor, they say, affects the constitutionality of that court's ruling. Only an oral ability at the lowest performance level ('German A 1') need be evidenced. Even this, they say, is impossible for Complainant 1. The period that the Administrative Court assumes will be necessary in order to learn the German language, including an acquisition of literacy, is too short; at least three years must be estimated for this purpose. The requirement of providing evidence of a basic language knowledge as early as the visa proceedings is a violation of Article 6 of the Basic Law. In this regard, the Complainants say, it is irrelevant whether the husband could return to Turkey. Providing evidence does not prevent forced marriages, and at most plays a minor role in integration. Furthermore, integration courses subsequent to entering the country are a less demanding means. They also question whether the Court's decision is compatible with Article 3 of the Basic Law with regard to privileging foreigners from within the EU over German nationals, and with regard to privileging certain states whose nationals can enter the country without a visa, and also whether it is compatible with the Family Reunification Directive, which distinguishes between 'integration measures' and 'integration conditions'. Moreover, Article 8 of the ECHR prohibits a separation that significantly exceeds the two-year period.

7 The Respondent defends the appealed decision.

II

8 The Complainants' (leapfrog) appeals are denied. The matter in these proceedings is their request for a national visa for subsequent immigration of dependents. In compliance with appealable law (Section 137 (1) Code of Administrative Court Procedure) the Administrative Court correctly found that Complainant 1 does not meet the requirements for an entitlement to subsequent immigration as a spouse (1.). Consequently Complainants 2 through 6 also have no entitlement to subsequent immigration (2.).

9 1. According to Section 6 (4) Sentence 2 in conjunction with Section 30 (1) Sentence 1 No. 2 of the Residence Act, an entitlement to a visa for subsequent immigration as a spouse to join a foreigner is subject to the prerequisite, inter alia, that the spouse must be able to communicate in the German language, on a basic level at least.

10 1.1 The Administrative Court properly assumed that this requirement for subsequent immigration, which was incorporated without transitional provisions into the Residence Act by the Act for the Transposition of Directives of the European Union on Residence and Asylum Law of 19 August 2007 – the Directive Transposition Act – (BGBl I p. 1970) which took effect on 28 August 2007, also applies to old cases for which the application, as is the case here, was filed before the amendment took effect. According to the settled case law of this Court, actions for the imposition of an order on authorities to grant a residence permit must normally be examined on the basis of the date of the last hearing or decision of the court deciding as to the facts (see judgments of 16 June 2004 – BVerwG 1 C 20.03 – BVerwGE 121, 86 <88> with further authorities; of 7 April 2009 – BVerwG 1 C 17.08 – BVerwGE 133, 329, Headnote 3 and Marginal No. 37 et seq.; and of 1 December 2009 – BVerwG 1 C 32.08 – juris, Marginal No. 12).

- 11 1.2 It is not in dispute that Complainant 1 has no knowledge of German whatsoever, and therefore does not meet the requirements of Section 30 (1) Sentence 1 No. 2 of the Residence Act.
- 12 1.2.1 The requirement of being able to communicate in the German language, on a basic level at least, describes the language level required for an entitlement to subsequent immigration. The spouse must be able to communicate in German in 'at least a rudimentary manner' (BTDrucks 16/5065 p. 174). According to No. 30.1.2.1. of the General Implementing Regulations of the Federal Ministry of the Interior for the Residence Act of 26 October 2009 (GMBI p. 878) – the Implementing Regulations to the Residence Act – this requirement corresponds to the definition of the language skills at level A 1 of the Common European Framework of Reference for languages (CEFR). The parties likewise proceed from this assumption. That framework defines the following language abilities as the lowest level of language skills:

'Can understand and use familiar everyday expressions and very basic phrases aimed at the satisfaction of needs of a concrete type. Can introduce him/herself and others and can ask and answer questions about personal details such as where he/she lives, people he/she knows and things he/she has. Can interact in a simple way provided the other person talks slowly and clearly and is prepared to help.'

- 13 This description is suitable for determining in more detail the requirement under Section 30 (1) Sentence 1 No. 2 of the Residence Act for the ability to communicate in the German language at a basic level. In particular, it makes it clear that no exaggerated requirements may be set for language capability.
- 14 1.2.2 The ability to communicate in German at a basic level also includes a basic knowledge of the written German language. To that extent, to be sure, the wording of Section 30 (1) Sentence 1 No. 2 of the Residence Act is not unequivocal. This is because 'language' as a means of communication may also refer only to spoken and heard language (see judgment of 20 October 2005 – BVerwG 5 C 17.05 – Buchholz 130 Section 11 Citizenship Act No. 2). The same applies to the term 'communicate'. However, it is evident that a basic knowledge

of the written language is also required in cases of subsequent immigration of a spouse, if one compares this provision with other provisions of the Residence Act that require certain skills in the German language. From this comparison one can see that the legislators clearly express when (by exception) an oral knowledge is sufficient. For example, in order for a settlement permit to be granted, under Section 9 (2) Sentence 1 No. 7 of the Residence Act the foreigner must have an adequate knowledge of the German language. Only in certain circumstances (on a transitional basis under Section 104 (2) of the Residence Act or permanently under Section 9 (2) Sentence 5 of the Residence Act) is it sufficient if the foreigner can communicate verbally in German at a basic level. The provision for old cases in Section 104a of the Residence Act as well makes explicitly clear that the foreigner need only have a knowledge of the spoken language. It is evident that the legislative intent of Section 30 (1) Sentence 1 No. 2 of the Residence Act also embraced a basic knowledge of the written language from the fact that by inserting this provision, the legislators at the same time abandoned the former limitation to a speaking knowledge under Section 28 (2) of the Residence Act, and justified this change as a harmonisation with the requirements of a basic knowledge of German for the subsequent immigration of a spouse (BTDrucks 16/5065 p. 171 et seq.). The extension of the language requirement to a basic knowledge of written German is also consistent with the letter and intent of Section 30 (1) Sentence 1 No. 2 of the Residence Act. The requirement of being able to communicate in German on a basic level at least is intended to encourage the persons concerned to acquire a basic knowledge of German even before they enter the country, so as to facilitate their integration in German territory. Additionally, on the evidence of the statement of reasons for the bill, the provision is intended to combat forced marriages. These are – preventively – to be at least made more difficult. Furthermore – after the fact – the acquisition of the language is intended to enable victims to lead an independent social life in Germany (BTDrucks 16/5065 p. 173 et seq.). But a swift integration into the local environment presupposes that the foreigner must in any case be able to read and write simple sentences in German, since this form of communication is of great significance in many regards. A basic knowledge of the written language furthermore makes it easier for the

victims of forced marriages to avail themselves of offers of assistance and options for their own independent social development.

- 15 1.3 Complainant 1 does not meet the requirements under which an exception can be made to the language requirements by way of Section 30 (1) Sentence 2 and 3 of the Residence Act.
- 16 1.3.1 The Administrative Court properly assumed that in particular, Complainant 1 cannot invoke Section 30 (1) Sentence 3 No. 2 of the Residence Act. According to that provision, Section 30 (1) Sentence 1 No. 2 of the Residence Act is irrelevant if a spouse is unable to provide evidence of a basic knowledge of German on account of a physical, mental or psychological illness or disability. This provision is based on the idea that sick and disabled foreigners must still be eligible for subsequent immigration to join a spouse (BTDrucks 16/5065 p. 175). According to the Administrative Court's findings of fact, against which no procedural objections have been raised and which are therefore binding on this Court (Section 137 (2) Code of Administrative Court Procedure), there is no reason to believe that Complainant 1 cannot acquire a basic knowledge of the German language on account of illness or a disability. By the same token, nor is her illiteracy caused by an illness or disability. The difficulties generally associated with acquiring literacy as an adult are not sufficient for an exception under this provision.
- 17 1.3.2 Complainant 1 also does not meet the requirements of Section 30 (1) Sentence 3 No. 4 of the Residence Act. According to that provision, the language requirement does not apply if by virtue of his or her nationality, the foreigner may enter and stay in the Federal territory without requiring a visa for a period of residence which does not constitute a short stay. From the wording and system applied in Section 30 of the Residence Act we may deduce that the privileged visa status must be held not by the spouse who is subsequently immigrating, but by the spouse who lives in Germany and possesses the original entitlement. This requirement is not met here because the husband of Complainant 1, as a Turkish national, has no privileged visa status. According to Section 4 (1) Sentence 1 of the Residence Act in conjunction with Article 1 (1)

of Council Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, of 15 March 2001 (OJ L 81 p. 1), and its Annex I, Turkish nationals must normally have a visa in order to enter and stay in the Federal territory.

- 18 1.4 Nor does one find anything different from an examination of the standstill clauses for Turkish nationals under the laws of association. The language requirement does not violate either Article 41 (1) of the Additional Protocol to the Agreement of 12 September 1963 establishing an association between the European Economic Community and Turkey for the transitional phase of association (BGBl 1972 II p. 385) – the ‘Additional Protocol’ – or Article 13 of Decision No. 1/80 of the EEC/Turkey Council of Association on the development of the association, of 19 September 1980 (ANBA 1981 p. 4) – ‘Decision No. 1/80’. Nor can Complainant 1 avail herself of these provisions and her husband’s Turkish nationality to claim the exception under Section 30 (1) Sentence 3 No. 4 of the Residence Act.
- 19 1.4.1 Article 41 (1) of the Additional Protocol provides that the Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services. According to the case law of the European Court of Justice, this standstill clause has direct effect in the Member States, so that the rights which it confers on Turkish nationals to whom it applies may be relied on before the national courts to prevent the application of inconsistent rules of national law (see ECJ, judgment of 20 September 2007 – Case C-16/05, *Tum and Dari* – ECR 2007, I-07415, Marginal No. 46 with further authorities). But Article 41 (1) of the Additional Protocol only prohibits new restrictions on the freedom of establishment and the freedom to provide services. The standstill clause does not, however, endow a Turkish national with an independent right of residence, and does not encroach upon the Member States’ competence to regulate the entry of Turkish nationals into their territories (see ECJ, judgment of 11 May 2000 – Case C-37/98, *Savas* – ECR 2000, I-02927, Marginal No. 58). Thus Article 41 (1) of the Additional Protocol does not stand in opposition to the application of Section 30 (1) Sentence 1

No. 2 of the Residence Act to Turkish nationals, since in a subsequent immigration by dependents a permanent residence in the Federal territory is being sought that is not included under either freedom of establishment or freedom to provide services.

- 20 1.4.2 Under Article 13 of Decision No. 1/80, Member States may not introduce new restrictions on the conditions of access to employment applicable to Turkish workers and members of their families legally resident and employed in their respective territories. This standstill clause as well has direct effect (see ECJ, judgments of 17 September 2009 – Case C-242/06, *Sahin – NVwZ* 2009, 1551, Marginal No. 62, and 21 October 2003 – Case C-317/01 et al., *Abatay et al.* – ECR 2003, I-12301, Marginal No. 58 et seq.). It generally prohibits the introduction of new internal measures that have the purpose or effect of subjecting a Turkish national's exercise of the freedom of movement for workers within a Member State to more rigorous conditions than those that applied for such a worker in that state at the effective date of Decision No. 1/80 (see ECJ, judgment of 17 September 2009, *op. cit.*, Marginal No. 63). However, Decision No. 1/80 does not fundamentally alter the Member States' authority to adopt regulations regarding the immigration of Turkish nationals into their territory and the requirements for their initial employment (see ECJ, decision of 16 December 1992 – Case C-237/91, *Kus* – ECR 1992, I-06781, Marginal No. 25). Even if Article 13 of Decision No. 1/80 also prohibits the introduction of new restrictions on the freedom of movement for workers with reference to the initial reception of Turkish nationals in the host state's territory, this prohibition can refer only to those persons who wish to make use of such freedom of movement. But as Complainant 1 is seeking the visa not in order to access the labour market but for subsequent immigration as a dependent, she cannot rely on the standstill clause. To be sure, the person of her husband does meet the prerequisites for the application of this standstill clause, but the denial of permission for a subsequent immigration of dependents adds no new restriction to the conditions for his access to the labour market, or for his residence associated with that access. For the area of family reunification concerned here, there is no comparable prohibition on further restrictions (see ECJ, judgment of 30 September 1987 – Case 12/86, *Demirel* – ECR 1987, I-03719).

21 1.4.3 Complainant 1 also cannot avail herself of the standstill clauses for Turkish nationals under Section 30 (1) Sentence 3 No. 4 of the Residence Act. In its letter and intent, this exception pertains only to persons holding an original entitlement who receive preferential visa status under Section 41 of the Residence Regulation. As already explained above (see 1.3.2), this provision does not apply to Turkish nationals. Moreover, a general visa requirement for them was not introduced until the Eleventh Regulation Amending the Regulation Implementing the Aliens Act, of 1 July 1980 (BGBl I p. 782), which took effect on 5 October 1980. At the effective date of the Additional Protocol on 1 January 1973, under Section 5 of the Regulation Implementing the Aliens Act (the 'Aliens Act Implementing Regulation') of 10 September 1965 (BGBl I p. 1341), in the version of 13 September 1972 (BGBl I p. 1743) – the 'Aliens Act Implementing Regulation of 1965' – they needed to obtain a visa before entering the country only if they wished to engage in gainful activity in the Federal territory. This is further insufficient for an exception under Section 30 (1) Sentence 3 No. 4 of the Residence Act because according to the case law of the European Court of Justice, Article 41 (1) of the Additional Protocol has an effect only in procedural law, not substantive law, and it ordains with regard to time which provisions apply if a Turkish national wishes to exercise the freedom of establishment or freedom to provide services within a Member State (see ECJ, decision of 20 September 2007, *op. cit.*, Marginal No. 52 et seq.). The norm does not rule out adding other, more stringent restrictions to the provisions on immigration and residence. Moreover, Article 13 of Decision No. 1/80 also does not stand in opposition to the application of Section 30 (1) Sentence 3 No. 4 of the Residence Act, if only because this standstill clause did not become applicable until 1 December 1980 (Article 16 (1) Decision No. 1/80). But at that date, as already explained above, Turkish nationals were already subject to a general visa requirement.

22 1.5 The prerequisite for subsequent immigration under Section 30 (1) Sentence 1 No. 2 of the Residence Act, which according to Section 6 (4) Sentence 2 of the Residence Act must be met even before entering the country, is compatible under European law with Article 7 (2) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251

p. 12), known as the Family Reunification Directive. That Directive governs the requirements for family reunification with a third country national who is residing lawfully in the territory of a Member State (Article 1 of the Directive). It applies here, since the husband of Complainant 1 is a third country national (Article 2 (a) of the Directive) and, as a 'sponsor' (Article 2 (c) of the Directive), meets the residency-law requirements under Article 3 of the Directive. Under Article 4 of the Directive, the Member States are to authorise entry and residence of the family members it lists, subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16 of the Directive. This corresponds with a subjective right to family reunification. The group of favoured family members also includes the sponsor's spouse (Article 4 (1) (a) of the Directive). Article 7 (2) of the Directive, however, opens up the possibility for Member States – in deviation from the provisions of the Directive that are otherwise binding – to require that third country nationals must comply with immigration measures. If, as in the present case, for the subsequent immigration of a spouse the national legislators require an acquisition of a basic knowledge of German before entering the country, this is a permissible integration measure within the meaning of the Directive.

- 23 To the extent that under Article 7 (2) para. 2 of the Directive, integration measures do not apply to refugees and their family members until the persons concerned have been granted family reunification, it can be concluded by *argumentum e contrario* that in other cases of subsequent immigration, integration measures can also be required even before entry. If the person desiring subsequent immigration does not comply with such national requirements, the Member State can refuse entry for that person. This proceeds from the position under the provision of Chapter IV, which governs the requirements for exercising the right to family reunification. Article 7 (2) of the Directive also permits Member States to make entry contingent on the possession of a basic knowledge of the language.
- 24 It cannot be concluded from the wording of the provision permitting third country nationals to be required to comply with 'integration measures' (German: *Integrationsmaßnahmen*; French: *mesures d'intégration*) that this provision

stands in opposition to a national regulation that makes the subsequent immigration of a spouse to join a third country national contingent on that spouse's providing evidence, prior to entry, of a basic knowledge of the language spoken in the Member State. The wording merely indicates that the integration measures with which 'compliance' may be required must be subjective requirements for subsequent immigration, whose fulfilment lies within the control of the person concerned.

- 25 It is especially evident from the legislative history of the provision that Article 7 (2) of the Directive authorises Member States to make subsequent immigration contingent on a language requirement. The opening clause was not included in either the Commission's original Proposal for a Council Directive of December 1999 (COM <1999> 638 final) or the Amended Proposal of May 2002 (COM <2002> 225 final). It was added during the deliberations at the insistence of the Netherlands, Germany and Austria (see Council Document 14272/02 of 26 November 2002 p. 13 fn. 2). Here the negotiating partners plainly proceeded on the assumption that the clause covers the demand for an appropriate knowledge of the language (see Council Document 14272/02 p. 12 fn. 1). Moreover, the special provision for the subsequent immigration of dependents of recognized refugees in Article 7 (2) para. 2 of the Directive is also plainly attributable to the fact that at the time of the negotiations, the Netherlands already had specific plans for the introduction of language tests prior to entry (see Hauschild, ZAR 2003, 266 <271>; Breitzkreutz/Franssen-de la Cerda/Hübner, ZAR 2007, 381 <382>). Moreover, exercising this authorization, not only Germany but the Netherlands and France require a demonstration of knowledge of the language before entry. In the opinion of the Commission in its report to the European Parliament and to the Council of 8 October 2008 on the application of Council Directive 2003/86/EC on the right to family reunification, these national regulations are integration measures that are fundamentally permitted under Article 7 (2) of the Directive (COM <2008> 610 p. 8 et seq.).
- 26 Although some of the literature argues that the term 'integration measures' is based on a compromise, and – unlike the term 'integration requirements' – allows only certain efforts to be required, such as attending a language or integra-

tion course, but not a specific result (see Groenendijk, ZAR 2006, 191 <195>), the record of the negotiations on the Family Reunification Directive reveals no such thinking. Council Document No. 7393/1/03 of 14 March 2003, adduced as evidence in this connection, relates to Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16 p. 44) – the Long-Term Residence Directive. Article 5 (5) and Article 15 (3) of the final version of that document do distinguish integration requirements from integration measures. But the precise distinction between the two terms cannot be deduced even from the background materials for the Long-Term Residence Directive. Moreover, although the deliberations on the Long-Term Residence Directive and the Family Reunification Directive did proceed largely in parallel, this circumstance allows only limited conclusions as to the interpretation of the employed terms, since one cannot assume that the different directives on immigration were based on a generalised and sharply distinguished system of terms. For example, the same German term '*Integrationsmaßnahmen*' also appears in Article 33 of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 p. 12) – the 'Qualification Directive'. But it is clear that the term is to be understood differently there than in Article 7 (2) of the Family Reunification Directive, if only from the fact that different terms are used in both the English version ('access to integration facilities') and the French version ('*accès aux dispositifs d'intégration*').

- 27 While Article 7 (2) of the Family Reunification Directive authorizes Member States to require dependents desiring subsequent immigration to take steps for integration even before entering the country, the requirements they are expected to meet cannot be unreasonably high. This is evident in light of the Directive's overall goal of facilitating the integration of third country nationals into Member States by permitting them to have a family life through family reunification (see Recital 4), and its choice of rather lenient wording (integration measures instead of integration requirements). Moreover, this is a question of the proportionality of the specific integration steps required, not their fundamental permissibility under

Article 7 (2) of the Family Reunification Directive (as the Commission also noted in its report of 8 October 2008, *op. cit.*, p. 9).

- 28 Now that other Member States have also made use of the authorization under Article 7 (2) of the Family Reunification Directive to require, with an orientation to results, the existence of a certain language knowledge in cases of the subsequent immigration of dependents, and not merely participation in a language course, and since in the Commission's opinion as well this does not raise any reservations in principle, one may assume the existence of *acte clair* with regard to the fundamental permissibility, under Article 7 (2) of the Family Reunification Directive, of demonstrating language competence before entering the country, so that in this regard there is no need to refer the question to the European Court of Justice.
- 29 1.6 Requiring a basic knowledge of the language even before entering the country is fundamentally compatible with the special protection that marriage and the family enjoy under Article 6 of the Basic Law, Article 8 of the European Convention on Human Rights, and Article 7 of the Charter of Fundamental Rights, and thus regularly also complies with the further requirements of the Family Reunification Directive.
- 30 1.6.1 Marriage and the family are placed under the special protection of the system of government by Article 6 of the Basic Law. Making contingent the grant of a residence 'title' to a foreigner for subsequent immigration as a dependent upon the possession of a basic knowledge of the language falls under both Article 6 (1) and Article 6 (2) Sentence 1 of the Basic Law. According to the case law of the Federal Constitutional Court, these provisions contain not only this fundamental right as a defensive right in the classic sense, but also an institutional guarantee, as well as a statement of a fundamental valuational principle for the entire area of private and public law affecting marriage and the family.
- 31 However, the requirement of a basic knowledge of the language for the subsequent immigration of a spouse to join a foreigner residing in Germany does not represent an intervention in the rights of freedom under Article 6 of the Basic

Law. According to the case law of the Federal Constitutional Court, neither Article 6 (1) nor Article 6 (2) Sentence 1 of the Basic Law conveys a fundamental entitlement to entry and residence. This also applies to the subsequent immigration of a foreign spouse to join his or her foreign spouse already lawfully resident in Germany (see Federal Constitutional Court, decision of 12 May 1987 – 2 BvR 1226/83 et al. – BVerfGE 76, 1 <47 et seq.>). Nor is this provision per se capable of adversely affecting marriage and the family as constitutionally recognized institutions. To be sure, an impact on the institutional guarantee under Article 6 of the Basic Law is not limited to those cases where the provisions forming the core of marriage law and family law – specifically, those under civil law – are significantly revised or revoked. The guarantee may also be compromised if determinative characteristics of the concept of marriage and the family underlying the constitution are indirectly impaired. However, a provision does not call into question the distinguishing characteristics of the concept of marriage and the family that shapes Article 6 of the Basic Law if – as in this case – it bars a restricted group of persons, for a fundamentally limited length of time, from achieving their wish of living together as spouses or a family in a spatially quite specific regard, without preventing such a cohabitation outright or requiring the persons concerned to adopt an absolutely unreasonable way of bringing about the unity of marriage and the family (see Federal Constitutional Court, decision of 12 May 1987, *op. cit.*, <49>).

- 32 However, the language requirement for the subsequent immigration of a spouse must be measured against the statement of valuational principle under Article 6 of the Basic Law. According to that norm, the protective mission establishing an obligation to make allowances for marital and familial ties, and the imperative to encourage marriage and the family under Article 6 of the Basic Law, apply to the entire legal system regarding marriage and the family, and also set limits for the legislator. In issuing general rules for granting residence titles, legislators must allow for the existing marital and family ties to persons living in the Federal territory in a way that complies with the great importance that the Basic Law attaches to protecting marriage and the family. This corresponds with a constitutional entitlement to a fair and reasonable consideration of constitutionally protected interests in living together within the Federal territory. If a foreigner's re-

quest for subsequent immigration of dependents is opposed by public interests, his marital and family interests and the contrasting public interests must be weighed against one another, with the aim of arriving at a compassionate balance. In that process, the basis and the results of the weighing of the provisions of law must comply with the imperative that results from Article 6 (1) and (2) Sentence 1 of the Basic Law to make a fair allowance for the marital and family ties of foreigners seeking a residence title for their family members living in the Federal territory. The arrangements to be arrived at must in particular comply with the principles of proportionality and the prohibition on overreaching. However, in this regard the legislator has a broad margin of discretion in the area of immigration law; the priority of the legislative bodies' appraisal must also be taken into account with regard to future circumstances and developments (see Federal Constitutional Court, decision of 12 May 1987, *op. cit.*, <49 et seq.>).

- 33 1.6.2 Marriage and the family furthermore fall under the protection of Article 8 of the ECHR. The European Convention for the Protection of Human Rights and Fundamental Freedoms ranks as a federal law at the national level, by way of its transformation into German law. But at the level of constitutional law, the text of the Convention and the associated case law of the European Court of Human Rights also serve as an interpretive aid in deciding the content and scope of fundamental rights and the constitutional principles of the rule of law (see Federal Constitutional Court, decision of 18 December 2008 – 1 BvR 2604/06 – NJW 2009, 1133 with further authorities). At the level of the European Community, the fundamental rights guaranteed under the European Convention for the Protection of Human Rights and resulting from the common constitutional traditions of the Member States have become a part of European law as general principles. This is determined by the Lisbon Reform Treaty that took effect on 1 December 2009 (Article 6 (3) of the consolidated version of the Treaty on European Union – TEU – OJ 2010 C 83 p. 1). The change in law that occurred during the present appeal proceedings must be taken into account here, since the Administrative Court – if it were deciding in place of the Federal Administrative Court – would in its turn have to take that change into account (settled case law, see judgment of 1 November 2005 – BVerwG 1 C 21.04 – BVerwGE 124, 276 <279 et seq.>).

34 But according to the settled case law of the European Court of Human Rights, the Convention also does not guarantee a foreigner any right to enter a given country and reside there. However, measures regarding immigration may affect the right of respect for family life under Article 8 of the ECHR. That article guarantees everyone the right to respect for his private and family life. Interference is permitted only under the circumstances set forth in Article 8 (2) of the ECHR. This provision is primarily intended to protect the individual from arbitrary acts by the national authorities. But effective respect for family life can also give rise to positive obligations. In both cases, a balanced equilibrium must be sought between the contrasting interests of the individual and society; and in that regard, the state enjoys a certain margin of appreciation. The scope of the state's obligation to accept relatives of resident immigrants is based on the special circumstances of those involved, and the general interest. Article 8 of the ECHR does not obligate the Contracting States in general to respect a married couple's choice of their marital residence in the state or to consent to a family reunification within the state's territory. Nor does it guarantee a right to choose the place best suited for establishing a family life (see European Court of Human Rights, decision of 7 October 2004 – No. 33743/03, Dragan et al. – NVwZ 2005, 1043 and judgments of 21 December 2001 – No. 31465/96, Sen – InfAusIR 2002, 334; of 28 November 1996 – No. 73/1995/579/665, Ahmut – InfAusIR 1997, 141; of 19 February 1996 – No. 53/1995/559/645, Gül – InfAusIR 1996, 245; and of 28 May 1985 – No. 15/1983/71/107-109, Abdulaziz et al. – InfAusIR 1985, 298). The upshot is that Article 8 of the ECHR also requires one to find a balanced solution according to the principles of proportionality. In so doing, the special circumstances of those involved must be taken into account, on a case-by-case basis. In this connection, however, with regard to the question of whether subsequent immigration by dependents would be an adequate means of establishing a common family life, the court regularly attaches importance to the question of whether this is the only possibility for developing a family life, for example because there are impediments to establishing a residence in another country, or because there are special circumstances that make it impossible to expect such an establishment of residence (see European Court of Human Rights, judgments of 1 December 2005 – No. 60665/00, Tuquabo-Tekle – In-

fAusIR 2006, 105; of 21 December 2001, op. cit., Marginal No. 40; of 28 November 1996, op. cit., Marginal No. 70; of 19 February 1996, op. cit., Marginal No. 39; and of 28 May 1985, op. cit., Marginal No. 60).

- 35 1.6.3 At the Community level, in addition to Article 8 of the ECHR attention must also be paid to Article 7 of the Charter of Fundamental Rights. The Charter of Fundamental Rights (OJ 2007 No. C 303 p. 1) was incorporated as a binding part of primary law under the Treaty of Lisbon (Article 6 (1) TEU). According to Article 51 (1) of the Charter of Fundamental Rights, the Charter applies to the institutions and bodies of the European Union with due regard for the principle of subsidiarity, and to the Member States only when they are implementing Union law. Under Article 52 (3) of the Charter of Fundamental Rights, however, the right to respect for family life under Article 7 of the Charter of Fundamental Rights corresponds in meaning and scope to Article 8 of the ECHR.
- 36 1.6.4 Finally, at the European level, account must be taken of the Family Reunification Directive. That directive provides a better legal position in that it grants an independent right to family reunification, provided that the conditions established in the Directive are met. Substantively, the Family Reunification Directive must be interpreted and implemented by the Member States in conformity with Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights. Thus (also) under Community law, the Member States must exercise the margin of appreciation allowed to them under the Directive in line with the criteria developed by the European Court of Human Rights with regard to Article 8 of the ECHR (ECJ, judgment of 27 June 2006 – Case C-540/03 – European Parliament v. Council of the European Union, NVwZ 2006, 1033, Marginal No. 62). Moreover, they must comply with the principles laid down in Article 5 (5) and Article 17 of the Directive (ECJ, judgment of 27 June 2006, op. cit., Marginal No. 63 et seq.). Article 5 (5) of the Directive obligates the Member States to have due regard to the best interests of minor children. Under Article 17 of the Directive, if an application is rejected, the Member State must take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State, and of the existence of family, cultural and social ties with

his/her country of origin. These criteria correspond to those taken into consideration by the European Court of Human Rights when it reviews whether a state which has refused an application for family reunification has correctly weighed the competing interests against one another (ECJ, judgment of 27 June 2006, *op. cit.*, Marginal No. 64).

- 37 1.6.5 If neither Article 6 of the Basic Law nor Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights confers an entitlement for the subsequent immigration of a spouse, and if the Family Reunification Directive also allows the Member States a margin of appreciation – ultimately to be measured against Article 8 of the ECHR – with regard to the requirement for a knowledge of the language, the question whether protection of marriage and the family is compatible with the prerequisite for subsequent immigration under Section 30 (1) Sentence 1 No. 2 of the Residence Act, which in accordance with Section 6 (4) Sentence 2 of the Residence Act must be met even before entering the country, depends on whether that prerequisite complies with the principles of proportionality. With their requirement that even before entering the country, the spouse of a foreigner must be able to communicate in German on a basic level at least, the national legislators must take adequate account of the existing marital and family ties to foreigners lawfully living in the Federal territory, and must find a fair balance between the private interests of the concerned persons in living together in the Federal territory, and the contrasting public interests pursued with the regulation. This is fundamentally the case.
- 38 The language requirement serves to promote integration and prevent forced marriages (BTDrucks 16/5065 p. 173 et seq.). These are legitimate legislative objectives. Under normal conditions, it lies within the broad margin of appreciation of the legislators whether the instruments chosen to achieve those objectives are sufficiently promising. It is not evident that the requirement of a basic knowledge of German before entering the country is manifestly unsuitable for the purpose. The provision is based on the assumption that a spouse who even before entering the country can communicate in German in everyday situations, on a basic level at least, will become integrated faster into the living environment here. This is a reasonably arguable assessment of future events. A suffi-

cient knowledge of German makes a considerable contribution toward a successful integration. If the spouse has a basic knowledge even before entering the country, he or she can participate better in social life from the outset. Nor is there any objection to the legislators' assessment that the language requirement will in any case have an indirect effect in combating forced marriages, because a knowledge of the language makes it more difficult to exploit a situation of coercion in Germany.

- 39 The obligation to acquire a basic knowledge of the language even before entering the country is also necessary in order to achieve the legislative objectives. An obligation to acquire a knowledge of German only after entering the country would be a more lenient requirement for those concerned, to be sure, because it would not delay immigration, and the subsequently immigrating spouse could make use of a more extensive range of language courses in Germany. But a demonstration of language competence to be provided only after entering the country would be substantially less effective in achieving the objectives pursued by the legislators. This is because necessarily, a more or less extended time would pass until the person had acquired a basic knowledge of German. That would delay the success of integration. This consideration also applies for the possibility raised by the appellants of merely making the grant of a first settlement permit after entering the country contingent on the attainment of a basic knowledge of the language, and of tolerating the spouse until that time. Moreover, there would be uncertainties as to whether the effort to learn would succeed. By contrast, the provision chosen by the legislators ensures, with an orientation to results, that from the outset the spouse will have a basic knowledge of German – oral and written – on which he or she can build during the course of his or her further integration. It also appears plausible that the existence of a basic knowledge of the language is more likely to ensure that the spouse can turn to the appropriate authorities in the event of a situation of coercion, and can more easily escape dependence on the 'in-laws'.
- 40 In its specific statutory configuration, the language requirement for subsequent immigration of a spouse to join a foreigner results, as a rule, in a fair balance of interests.

- 41 The public interests pursued with the language requirement carry particular weight. The legislative objective of promoting integration is of great importance. A rapid inclusion of the subsequently immigrating spouse into the social and economic environment in Germany is not only a prerequisite for his or her continuing personal development, but also of great interest to society at large. The objectives pursued by the legislators are furthermore well-founded constitutionally: A rapid integration is desirable not just for reasons of a social federal state (Article 20 (1) Basic Law), it also facilitates the free development of the personality (Article 2 (1) Basic Law). The obstruction of forced marriages that the legislation pursues likewise serves to protect important legal rights. Forced marriages represent a form of domestic violence, and usually also sexual violence, and violate in a fundamental way the basic human rights of the woman concerned, especially the freedom to marry (Article 6 (1) Basic Law) and indirectly her sexual self-determination, personal freedom, and physical integrity (Article 2 (1) and (2) Basic Law). Under the scheme of values of the Basic Law, the state is obligated to protect these rights.
- 42 This is counterbalanced by the burdensome effects of the provision, which affect all voluntarily married couples as well. However, the language requirement is not an absolute hindrance to subsequent immigration, but rather one that is fundamentally surmountable. Yet it does entail a burden for the marriages and families concerned, to the extent that it regularly delays the establishment of domestic cohabitation in the Federal territory. It is not impossible that in individual cases, it may result in a permanent prevention of subsequent immigration into the Federal Republic of Germany. If cohabitation is established in another country, the foreign spouse living in Germany runs the risk of losing his or her right of residence (Section 51 Residence Act). Thus the persons concerned often have only the options of either tolerating a separation for a more or less extended time, or abandoning an existing right of residence.
- 43 Nevertheless, the provision of the law in the case of marriages between foreigners is in principle fair, because it regularly impedes living together in Germany only for a limited time. To avoid unreasonable burdens, the language re-

quirement under Section 30 (1) Sentence 3 No. 2 of the Residence Act does not apply if the spouse desiring subsequent immigration is unable to provide evidence of a knowledge of the language on account of a physical, mental or psychological illness or disability. Moreover, only a low level of requirements is set for the knowledge to be evidenced. It is sufficient if the spouse is able to communicate in German on a basic level. Irrespective of the educational, cultural, and mother-tongue background of the subsequently immigrating spouse, this regularly represents a relatively low hurdle whose requirements could hardly be set any lower. Furthermore, the spouse is free to choose how he or she will acquire a knowledge of the language. He or she can regularly make use of a vast variety of learning options. In numerous countries, the Goethe Institute and other language schools offer courses in German. According to the findings of the Administrative Court, which have not been opposed with procedural objections and are therefore binding, the courses offered by the Goethe Institute take substantially less than a year. This assessment is consistent with the findings discussed by this Court with the parties at the hearing. Accordingly, as a guideline, achieving CEFR level A 1 can be expected to take between 100 and 300 lessons lasting 45 minutes each. Such language courses have been offered in Turkey by the Goethe Institute since September 2007, at locations in Ankara, Istanbul and Izmir. For example, at the Goethe Institute in Ankara, a regular German course for beginners with no previous knowledge, leading to a CEFR level A 1 knowledge, takes 180 lessons lasting 45 minutes each – spread over three months – and costs approximately €700 (BTDrucks 16/7288 p. 5, 7 and 9). Furthermore, specifically in Turkey, there is a broad network of local providers of language courses (BTDrucks 16/7288 p. 8). In 2009 the passing rate for language examinations in Turkey was 68% (BTDrucks 17/1112 p. 10).

- 44 Even if there are no language schools available at his or her place of residence, a spouse desiring to subsequently immigrate can in principle reasonably be expected to go to some other place in his or her country of origin to take a language course. Moreover, there is a possibility of acquiring and expanding a basic knowledge of German with the assistance of audio and video language courses or other media (for example by way of Deutsche Welle or the Internet). The financial expense and other burdens associated with an acquisition of a

basic knowledge of German can likewise reasonably be expected regularly from the persons concerned when such a fundamental life decision as emigrating to join a spouse in another country is involved. Furthermore, the migrating spouse can as a general rule count on financial support from her life partner living in Germany.

- 45 The provision of the law is fundamentally also fair insofar as it applies, in the case of marriages between foreigners, to spouses desiring subsequent immigration who are impeded or even unable to acquire a language, not on account of illness or disability, but for other personal reasons that are not under their control. In these cases, to be sure, Section 30 (1) Sentence 1 No. 2 of the Residence Act does have the consequence that the couple may be unable to live together as a family in Germany for some time, or even permanently, because of a lack of knowledge of German. But here, with regard to proportionality, it must also be taken into account that the foreign spouse living in the Federal territory can in principle reasonably be expected to establish a family unit elsewhere. The mere circumstance that he has made use of an available opportunity to establish an economic and social existence here, and that the longer he stays here and the more he becomes involved in the living environment here, the more he will regularly be exposed to a corresponding alienation from the living environment in his country of origin, does not mean that he cannot in general reasonably be expected to leave Germany. Thus in the case of marriages between foreigners, the important public purposes pursued by the legislators in establishing the language requirement regularly outweigh the spouses' private interest in establishing cohabitation in Germany.
- 46 1.6.6 The provision of the law is also not unconstitutional for offending against Article 6 of the Basic Law in that it contains no general exception to avoid a disproportionate burden. If the spouse desiring subsequent immigration, for reasons that are beyond his or her control, is unable to acquire a basic knowledge of the language within a reasonable time, and at the same time the spouse living in Germany is objectively unable to establish a marital cohabitation outside Germany, for reasons of fact or law, or cannot reasonably be expected to do so because of special circumstances, under national constitutional law it is not

mandatory to grant a residence title for family reasons, but rather the constitutionally imperative balancing of interests can be achieved otherwise, by means of simple law, for example by granting a residence title for a temporary residence for purposes of acquiring the language (Section 16 (5) of the Residence Act). Thus with regard to the special protection of marriage and the family, the provision takes due account of the objective importance of the protective and promotional imperative of Article 6 of the Basic Law, in its configuration as a statement of valuational principle.

- 47 1.6.7 Even if the provision of law is compatible with Article 6 of the Basic Law at the national level, and complies in principle with the requirements of European law under the Family Reunification Directive and the right to respect for family life under Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights, the refusal of a visa must also conform to these standards in the specific individual case, and must in particular also be consistent with the case law of the European Court of Human Rights on the right to respect for family life under Article 8 of the ECHR. In this connection as well, this Court sees no questions of doubt to be referred to the European Court of Justice.
- 48 In the present case the refusal to grant a visa for the subsequent immigration of a spouse is not disproportionate in light of the cited case law of the European Court of Human Rights. It is not evident that Complainant 1 is unable to acquire the required basic knowledge of the language within a reasonable time for reasons beyond her control. Moreover, there are no objective impediments to establishing a marital cohabitation outside Germany, and the Complainant's husband can reasonably be expected to return to Turkey under the present circumstances.
- 49 The time that can reasonably be expected for learning a language in the case of subsequent immigration of a spouse depends not only on the objectives of the prerequisite for subsequent immigration, but also on the specific circumstances of the particular case. Here it must be borne in mind that acquiring the language is an integration step that not only is in the public interest, but also will personally benefit the person desiring subsequent immigration and his or her family

after entering the country. Consequently – including with regard to the waiting periods that are permissible under Article 8 of the Family Reunification Directive – a period of roughly two to three years is as a general rule within the realm of reasonable expectation, unless circumstances especially deserving of protection are present. There is no evident reason to think that one should proceed on the basis of a shorter time period here. Complainant 1 and her husband have already known one another for many years, and despite the children they had before they were married – their first child was born in 1994 – and despite the maintenance of family ties after the husband moved to Germany, they forwent the establishment or continuation of family cohabitation for years, by their own decision.

50 According to the findings of the Administrative Court, Complainant 1 might acquire the required knowledge of the language in Turkey, including a prior acquisition of literacy, in about a year, and thus within a reasonable time. This Court is bound by that finding of the judge of fact, which the Complainants have also not appealed with procedural objections. Irrespective of that factor, the assessment by the Administrative Court is also consistent with the findings discussed by this Court with the parties at the hearing. Accordingly, literacy in the Latin alphabet can be acquired in 200 to 300 lessons of 45 minutes each; in Turkey, the local adult education schools offer literacy courses (BTDrucks 16/11997 p. 8). Insofar as Complainant 1 claims she is unable either to acquire literacy or to attend a language course, she has not adequately substantiated this claim before the Administrative Court, nor has she furnished any documentation or evidence to that effect. Consequently the Administrative Court was not required to undertake to investigate the matter further. Moreover, from the time the Directive Transposition Act took effect in August 2007 and her visa application was denied by the German Embassy in Ankara in April 2008 until the hearing – which is definitive in matters of fact – before the Administrative Court in February 2009, Complainant 1 apparently made no effort of any kind in regard to acquiring a knowledge of German; at least, no mention has been made of such an effort.

- 51 Moreover, on the basis of the Administrative Court's binding findings of fact, it must be assumed that there are also no reasons standing in the way of establishing familial cohabitation outside the Federal territory. There are no evident special circumstances that would make it seem unreasonable to expect the Complainants' husband and father to return to Turkey. His application for asylum met with no success. The fact that even since moving to Germany he has regularly visited his family in Turkey shows that he himself fears no dangers in Turkey. At the time of the hearing before the Administrative Court, to be sure, he had been living in Germany for more than 10 years, and had a permanent employment here and an unlimited right of residence. On the other hand – as shown by his annual visits to Turkey even during his marriage to a German woman and the subsequent marriage to the mother of his children – he has never abandoned his ties to Turkey and his family living there.
- 52 The fact that the relationship produced five children – born before the marriage – likewise does not justify any other assessment. The family's focus of life was uninterruptedly in Turkey. All the children were born and raised there. Like their mother, they are rooted entirely in the cultural and linguistic environment there. Given this situation, under an assessment of the specific circumstances of the case, the husband and father living in Germany can reasonably be expected to return to Turkey, and such an expectation is compatible with Article 5 (5) and Article 17 of the Family Reunification Directive.
- 53 1.7 The language requirement does not result in an impermissible discrimination in the case of Complainant 1.
- 54 1.7.1 There is no violation here of the special provision of equality before the law under Article 3 (3) Sentence 1 of the Basic Law. That Article provides that no person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. This prohibition against discrimination presumes a causal connection between the favouring or disfavouring and the characteristics listed in Article 3 (3) Sentence 1 of the Basic Law; the favouring or disfavouring must therefore be precisely because of one of these characteristics (see Federal Constitutional Court, decision of 7 May 1953 – 1 BvL 104/52 –

BVerfGE 2, 266 <268>; Federal Administrative Court, judgment of 3 March 1998 – BVerwG 9 C 3.97 – BVerwGE 106, 191 <194 et seq.>).

- 55 a) If the requirements of Section 30 (1) Sentence 1 No. 2 of the Residence Act are not met, the refusal of a residence title is linked not to the fact that the foreigner speaks a specific language, but rather the fact that he does not have a basic knowledge of the German language. He is therefore not disfavoured 'because of his language'.
- 56 b) If spouses seeking subsequent immigration must meet the language requirement only after entering the country, because they entered the country without a visa, or if they are entirely exempted from the obligation to provide such evidence because they are married to an individual who does not need a visa under Section 30 (1) Sentence 3 No. 4 of the Residence Act, this is not founded on grounds of the homeland and origin of either spouse. The term 'homeland' refers only to their place of origin in terms of birth or residence; the term 'origin' moreover refers to their class and social background and roots (see Federal Constitutional Court, decision of 25 May 1956 – 1 BvR 83/56 – BVerfGE 5, 17 <22>). Neither Section 41 of the Residence Regulation nor Section 30 (1) Sentence 3 No. 4 of the Residence Act is tied to these two criteria. The deciding factor for the privileges is the privileged visa status of either the subsequently immigrating spouse or the spouse holding the original entitlement, on the basis of their nationality. These points of connection are not among the characteristics listed in Article 3 (3) of the Basic Law that are supposed to provide a minimum of assurance against discrimination (see Federal Constitutional Court, decisions of 20 March 1979 – 1 BvR 111/74 et al. – BVerfGE 51, 1 <30>; and of 9 February 1994 – 1 BvR 1687/92 – BVerfGE 90, 27 <37>).
- 57 1.7.2 Presenting evidence of language competence in cases of a spouse's subsequent immigration also does not violate the general principle of equality under Article 3 (1) of the Basic Law to the detriment of Complainant 1. That principle provides for equal treatment of all persons before the law. It applies to disfavours and favours equally. But legislators are not forbidden from making any differentiation. In this regard, virtually any reasonable consideration may be a possible reason for unequal treatment. To begin with, it is the legisla-

tor's duty to choose those matters to which the legal consequences in question are to be linked. But this selection must be objectively justifiable and not irrelevant. Article 3 (1) of the Basic Law does not require the legislator to choose the most just and most functional solution. But the general principle of equality leads to limits that depend on the matter to be regulated and the differentiating characteristics, and those limits may range from a simple prohibition of arbitrariness to a strict tie to requirements of proportionality (see Federal Constitutional Court, decision of 21 June 2006 – 2 BvL 2/99 – BVerfGE 116, 164). Here the limits become narrower the more seriously the unequal treatment may impair the exercise of constitutionally protected freedoms. In the case of an unequal treatment of groups of persons as well, the legislator is regularly subject to strict bounds. It is true that he may in principle decide at will which characteristics he will consider definitive for equal treatment or unequal treatment. But if a norm treats one group of persons differently from other persons it concerns, sufficient justification for unequal treatment is not yet established if the legislator has taken account of a distinguishing characteristic that is suitable by nature. Rather, in regard of the extent of the differentiation as well, there must be an inner connection between the existing differences and the differentiating provision, and that connection must be citable as an objectively justifiable distinguishing aspect of sufficient importance (see Federal Constitutional Court, Decision of 7 July 2009 – 1 BvR 1164/07 – DB 2009, 2441 with further authorities).

- 58 a) If citizens of the Union and their spouses can enter the country and remain here without a knowledge of the language, under the Act on General Freedom of Movement for Union Citizens (the EU Freedom of Movement Act), this privileging over other foreigners is justified because it is founded on requirements of European law. The question raised in the present proceedings as to whether the advantaging of the spouses of Union citizens over the spouses of German nationals to whom the language requirement applies by way of Section 28 (1) Sentence 5 of the Residence Act leads to an impermissible discrimination against German nationals, is immaterial to a decision here because the husband of Complainant 1 is not a German national.

- 59 b) Nor does a violation of Article 3 (1) of the Basic Law exist in that spouses who may enter the Federal territory without a visa, because of their nationality, even for a residence that is not a short residence, are also permitted to apply for a required residence title within three months after entering the country (see Section 41 (3) Residence Regulation). This advantages them over other spouses to the extent that they need not meet the language requirement until they first apply for a residence permit in Federal territory, rather than before entering the country. This unequal treatment has sufficient constitutional justification, since the Federal Republic has broad foreign policy discretion with regard to maintaining its relations with other countries. That includes privileging nationals of certain third countries under residence law.
- 60 c) Finally, there is also no impermissible unequal treatment of Complainant 1 with regard to the exception provided under Section 30 (1) Sentence 3 No. 4 of the Residence Act. This provision results in advantages over the spouses of third country nationals who – like the husband of Complainant 1 – cannot enter the country without a visa. This decision as well has sufficient constitutional justification. If the privileged visa status of certain third country nationals falls within the broad foreign policy discretion of the Federal Republic, this also includes the consequent facilitation of subsequent immigration of a spouse.
- 61 1.7.3 The unequal treatments discussed above also do not give rise to a violation of the prohibition on discrimination on grounds of nationality under Community law. That prohibition does not apply here to Complainant 1 and her husband, as third country nationals.
- 62 The general prohibition of discrimination on grounds of nationality has been an integral part of European Community law from the very start. Since the Treaty of Lisbon took effect, that prohibition has been contained in Article 18 of the consolidated version of the Treaty on the Functioning of the European Union (OJ 2008 C 115 p. 47) – the TFEU. According to that Article, within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited. Article 12 of the Treaty Establishing the European Union was thus incorporated almost word for word into Article 18 of the

TFEU. Only the scope of application was amended from 'Treaty' to 'Treaties' in the new versions, because of the plurality of sources in law.

- 63 Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, Article 21 (2) of the Charter of Fundamental Rights likewise prohibits all discrimination on grounds of nationality. The Charter of Fundamental Rights thus includes a general prohibition on discrimination that matches Article 18 of the TFEU. Article 21 (2) of the Charter of Fundamental Rights also formally raised to the rank of a fundamental right the prohibition on discrimination on the grounds of nationality that had already long been recognised as a fundamental right by the European Court of Justice. The conformity between Article 21 (2) of the Charter of Fundamental Rights and Article 18 of the TFEU, however, has the consequence under Article 52 (2) of the Charter of Fundamental Rights that this fundamental right must be exercised under the conditions and within the limits defined in Article 18 of the TFEU. This means that both the scope of the guarantee and the possibilities for impairments match. Thus, in the upshot, Article 21 (2) of the Charter of Fundamental Rights does not confer any more extensive protection than does Article 18 of the TFEU (see Frenz, *Handbuch Europarecht* [Handbook of European Law], Vol. 4, *Europäische Grundrechte* [European Fundamental Rights], 2009, Marginal No. 3226).
- 64 The personal scope of applicability of the prohibition on discrimination on grounds of nationality under European law neither is explicitly limited to citizens of the Union, nor mentions third country nationals. A certain limitation can at most be deduced from the wording 'within the scope of application'. However, one can see from the case law of the European Court of Justice that that court has hitherto declined to apply Article 18 of the TFEU, or its predecessor provision under Article 12 of the Treaty Establishing the European Union, to third country nationals. In a number of decisions, the ECJ has viewed discrimination against third country nationals as not conflicting with European law (see, for example, ECJ, judgment of 28 October 1982 – joined Cases 50-58/82, *Dorca Marina et al.* – ECR 1982, 3949, Marginal No. 11; judgment of 28 October 1982 – Case 52/81, *Faust* – ECR 1982, 3745, Marginal No. 25; judgment of 10 March 1998 – Case C-122/95, *Germany v. Council <Bananas>* – ECR 1998, I-

973, Marginal No. 56), but in this connection it also did not explicitly clarify that the prohibition on discrimination applies only for citizens of the Union, and cannot be applied in any case in favour of third country nationals.

65 However, it is evident from the meaning and purpose of the prohibition against discrimination on grounds of nationality that it does not apply in the present case. The general prohibition on discrimination on grounds of nationality represents a fundamental principle of the Community, without which the goal of a functioning internal market and an increasingly close integration of the Member States and their citizens cannot be achieved within the Union. This does not apply in the same way to third country nationals. Although the integration of third country nationals lawfully residing in the Union is likewise an important goal for social reasons, it is not a guiding precept of the European Idea. Accordingly, Community law regulates the status of third country nationals to a significantly lesser degree than that of nationals of the Member States. Furthermore, there are significant differences between integration of the internal market and the migration law of the European Union. In the area of migration, Union law does not restrict legislators' discretionary leeway with directly applicable basic freedoms; instead, it transfers to the political bodies the power of deciding the scope and orientation of Community legislation. A general application of the prohibition on discrimination to third country nationals would mean that a policy of differentiating against third countries, for example in the area of trade or in the use of economic zones, would become virtually impossible, since it is regularly associated with discriminating against those countries' nationals. It would furthermore contradict the objectives of the provisions on Union citizenship – which is linked to Member State nationality and reserves special rights for this group. Finally, there is also no necessity under Community law to compel Member States to generally pass on to third country nationals the rights that they regularly grant only subject to the condition of reciprocity. The result is that third country nationals generally cannot rely on the prohibition of discrimination on grounds of nationality.

66 The Treaty of Lisbon has changed nothing in this regard (see Hellmann, *Der Vertrag von Lissabon* [The Treaty of Lisbon], Springer 2009, p. 27). That treaty

has not altered the content of the prohibition on discrimination on grounds of nationality. Nor does anything else proceed from the fact that the former heading of Part Two of the Treaty Establishing the European Community ('Citizenship of the Union') was amended in Part Two of the Lisbon Treaty on the Functioning of the European Union to 'Non-Discrimination and Citizenship of the Union'. This change has no effect in law, but is in the nature of a political programme (Fischer, *Der Vertrag von Lissabon* [The Treaty of Lisbon], 1st ed., 2008, p. 195). A general inclusion of third country nationals in the group of those entitled to fundamental rights under Article 21 (2) of the Charter of Fundamental Rights would furthermore also result in a contradiction in values with Article 15 (3) of the Charter of Fundamental Rights, which limits itself to guaranteeing third party nationals a right to equivalent working conditions.

67 It is argued in the literature that by exception, third party nationals may invoke the prohibition on discrimination when they are covered by the scope of application of the Treaties. But, the argument goes, it is not sufficient for this that such persons should be in a situation governed by Community law; rather, there must be the added factor that they are in a legal position conferred by contract or by provisions of secondary law, such as would include protection by the general prohibition on discrimination on grounds of nationality (see Holoubek, in: Schwarze, *EU-Kommentar* [EU Commentary], 2nd ed., 2009, Article 12 Treaty Establishing the European Union, Marginal No. 27 et seq.; v. Bogdandy, in: Grabitz/Hilf, *Das Recht der Europäischen Union* [European Union Law], status June 2005, Article 12 Treaty Establishing the European Union, Marginal No. 30 et seq.; Wilms, in: Hailbronner/Wilms, *Recht der Europäischen Union* [European Union Law], status September 2007, Article 12 Treaty Establishing the European Union, Marginal No. 35). However, no such case is before us here. The right to family reunification under the Family Reunification Directive does not confer on third country nationals a legal position that includes protection under the general prohibition on discrimination on grounds of nationality. The Family Reunification Directive serves to protect the family and to preserve or establish family life (see Recital 7). Moreover, Recital 5 provides evidence that within the scope of application of the Family Reunification Directive, the prohibition on discrimination on grounds of nationality does not apply, as this recital

refers only to the prohibition on discrimination on the basis of the characteristics listed in Article 21 (1) of the Charter of Fundamental Rights (sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership in a national minority, fortune, birth, disabilities, age or sexual orientation), but not to the prohibition on discrimination on grounds of nationality contained in Article 18 of the TFEU and Article 21 (2) of the Charter of Fundamental Rights. Quite logically, in its report on the Family Reunification Directive of 8 October 2008, the Commission did not object to the exceptions that are linked in Germany to certain nationalities (*op. cit.*, p. 8). Given this situation, one also cannot assume that in this regard there is a question of doubt in Community law that is material to a decision and requires clarification by the European Court of Justice.

- 68 1.8 Finally, the statutory tightening of the requirements for an entitlement to subsequent immigration of a spouse also does not violate the constitutional prohibition on retroactive effect in old cases in which the application for a visa – as in this case – was filed before the Directive Transposition Act took effect.
- 69 The language requirement that was introduced without a statutory transitional provision has only an inauthentic retroactive effect, since the provision relates only to matters not yet concluded and future legal relationships. There are no apparent constitutional reservations regarding the principle of protection of legitimate expectation and the principle of proportionality. The spouse of a foreigner lawfully residing in the Federal territory was not in a position to assume that an entitlement to subsequent immigration that might possibly have existed under the previous status of the law would be immune to subsequent statutory restrictions. The legislators remedied any hardships primarily with the provisions for exceptions in Section 30 (1) Sentence 3 No. 2 of the Residence Act. Disproportionate results can furthermore be remedied by other means by way of simple law, as already explained above. Moreover, the constitutional protection of legitimate expectation does not provide protection against all disappointments; only an extension of confidence – i.e., an ‘investment of confidence’ that has led to a legal position or equivalent other dispositions – is deserving of constitutional protection (Federal Constitutional Court, decision in chambers of

12 September 2007 – 1 BvR 58/06 – juris, Marginal No. 20 with reference to judgment of 16 July 1985 – 1 BvL 5/80 et al. – BVerfGE 69, 272 <309> and decision of 5 May 1987 – 1 BvR 724/81 et al. – BVerfGE 75, 246 <280>). Nothing has been argued or is apparent here for any intervention in such a legally protected legal position.

- 70 2. If Complainant 1 has no entitlement to family reunification, the same also applies for Complainants 2 through 6. They do not meet the requirements of Section 32 (3) of the Residence Act for an entitlement to (isolated) subsequent immigration of dependents, since their father does not have sole custody (see judgment of this Division of 7 April 2009 – BVerwG 1 C 17.08 – BVerwGE 133, 329 = Buchholz 402.242 Section 32 Residence Act No. 4). Nor can they be granted a visa for subsequent immigration of dependents via discretionary channels – to Complainants 2 through 5, born before 1 January 2005, by way of Section 104 (3) of the Residence Act in conjunction with Section 20 (4) No. 2 of the Aliens Act of 1990, and for Complainant 6, born after 1 January 2005, by way of Section 32 (4) of the Residence Act. According to the Administrative Court's findings of fact, there is no reason to believe there is any special hardship that could justify a subsequent immigration of the children without their mother.
- 71 The disposition as to costs proceeds from Section 154 (2) and Section 159 Sentence 1 of the Code of Administrative Court Procedure in conjunction with Section 100 (1) of the Code of Civil Procedure. There is no cause to impose the out-of-court costs of the interested third party on either of the parties or the state for the sake of fairness (Section 162 (3) Code of Administrative Court Procedure).

Eckertz-Höfer

Prof. Dr. Dörig

Richter

Beck

Fricke

Order

The value of the matter at issue is set at €30,000 for these appeal proceedings (Section 47 (1) in conjunction with Section 52 (2) Court Costs Act).

Eckertz-Höfer

Prof. Dr. Dörig

Fricke

Field: BVerwGE: Yes

Immigration Law Professional press: Yes

Sources in Law:

Basic Law	Article 2, 3 (1), (3), Article 6 (1), (2), Article 20
Residence Act	Section 4 (1), Section 6 (4), Section 9 (2), Section 16 (5), Section 30 (1), Sections 32, 51, 104 (2) and (3), Section 104a
Residence Regulation	Section 41
Aliens Act 1990	Section 20 (4)
Aliens Act Implementing Regulations of 1965	Section 5
ECHR	Article 8
TEU	Article 6 (1) and (3)
TFEU	Article 18
Treaty Establishing the European Union	Article 12
Directive 2003/86/EC	Article 4, 5 (5), Article 7 (2), Articles 8, 16, 17
Directive 2003/109/EC	Article 5 (5), Article 15
Directive 2004/83/EC	Article 33
Regulation (EC) No. 539/2001	Article 1 (1)
Charter of Fundamental Rights	Article 7, 21, 51 (1)
Decision No. 1/80	Article 13, 16 (1)
Additional Protocol to the Agreement of 12 September 1963	Article 41 (1)

Headwords:

Visa; third country national; family reunification; subsequent immigration of spouse; marriages between foreigners; subsequent immigration of children; language acquisition; integration; forced marriage; communication on a basic level; language level; language framework; knowledge of written language; illiteracy; acquiring literacy; originally entitled person; privileged visa status; integration measure; integration requirement; marriage and family; family life; cohabitation; compassionate balance; proportionality; separation; possibility of return; unequal treatment; prohibition of discrimination; language; homeland; origin; nationality; standstill clause; prohibition on further restrictions; freedom of establishment; freedom to provide services; access to the labour market; effect in procedural law; inauthentic retroactivity; protection of legitimate expectation.

Headnotes:

1. The requirement introduced in August 2007 by the Directive Transposition Act that a spouse desiring to immigrate subsequently to join a foreigner living in Germany must be able to communicate in German at a basic level at least

(Section 30 (1) Sentence 1 No. 2 Residence Act) is compatible with Article 6 of the Basic Law, Article 8 of the ECHR and Article 7 (2) of Directive 2003/86/EC.

2. The absence of a general exception for hardships does not stand in opposition to the proportionality of the provision, since remedies can be found in other ways to avoid a disproportionate separation of a married couple in individual cases, for example by granting a residence title for purposes of acquiring the language under Section 16 (5) of the Residence Act.

3. The ability to communicate in German on a basic level as required under Section 30 (1) Sentence 1 No. 2 of the Residence Act requires that the spouse must have a basic oral and written knowledge of German at level A 1 of the Common European Frame of Reference for Languages (CEFR).

4. In cases of the subsequent immigration of dependents, third country nationals cannot avail themselves of the European-law prohibition on discrimination on grounds of nationality under Article 18 of the TFEU (formerly Article 12 Treaty Establishing the European Union) and Article 21 (2) of the Charter of Fundamental Rights.

Judgment of the First Division, 30 March 2010 – BVerwG 1 C 8.09

I. Berlin Administrative Court, 17.02.2009 – Case No.: VG 35 V 47.08 -