Field:	BVerwGE: yes
Immigration law	Professional press: yes

Sources in law:

Basic Law	Article 3(1), Article 6(1) and (2), Article 11
Residence Act	Section 1(2), Section 2(8), Section 4(1), Section 6(3), Section 16(5), Section 25(4); Section 28(1), Section 30(1)
Residence Regulation	Section 41
ECHR	Article 8
Treaty on the Functioning of the European Union	Article 20, 21, 267
Directive 2003/86/EC	Article 2, Article 3(3), Article 7(2)
Directive 2004/38/EC	Article 3(1)
Charter of Fundamental Rights	Articles 7, 51(1)
Association Council Decision 1/80	Article 7

Headwords:

Visa; third country national; Afghanistan; family reunification; subsequent immigration of spouse; German citizen; double citizenship; language requirement; integration; forced marriage; language level; written language knowledge; illiteracy; learning language after immigration; constitutional interpretation; equivalent application; privilege in visa law; integration measure; marriage and family; proportionality; separation; unequal treatment; Union citizen; freedom of movement; secure livelihood; reasonableness.

Headnotes:

1. The provision on the language requirement under Section 30(1) first sentence no. 2 of the Residence Act is applicable only mutatis mutandis to subsequent immigration of a spouse to join a German under Section 28(1) fifth sentence of the Residence Act. A constitutional interpretation of Section 28(1) fifth sentence of the Residence Act requires derogation from this requirement before entry if efforts to acquire the language in a given case are not possible, cannot reasonably be expected, or are not successful within one year. This does not relieve the person of the responsibility to make efforts to acquire the language after entering the country.

2. A German citizen can generally not be required to maintain his or her marriage outside the country. The fundamental right under Article 11 of the Basic Law confers on him or her – unlike a foreigner – the right to reside in Germany.

3. This applies likewise for subsequent immigration of a spouse to join a German citizen who also holds another citizenship.

Judgment of the 10th Division of 4 September 2012 – BVerwG 10 C 12.12

I. Berlin Administrative Court, 1 August 2011 – Case: VG 22 K 340.09 V -

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 10 C 12.12
VG 22 K 340.09 V

Released
on 4 September 2012
Ms Wahl
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.

When citing this decision, it is recommended to indicate the court, the date of the decision, the case number and the paragraph: BVerwG, Judgment of 4 September 2012 – BVerwG 10 C 12.12 – para …

The Tenth Division of the Federal Administrative Court
upon the hearing of 4 September 2012
by Presiding Federal Administrative Court Justice Prof. Dr Berlit and
Federal Administrative Court Justices Prof. Dr Dörig, Prof. Dr Kraft,
Fricke and Dr Maidowski

decides:

On appeal by the Complainant, the judgment of the Berlin Administrative Court of 1 August 2011 is set aside.

The matter is remanded to the Berlin Administrative Court for further hearing and a decision.

The disposition as to costs is reserved for the final decision.

Reasons :

I

1 The Complainant, an Afghan national born in 1983, seeks a visa for subsequent immigration of a spouse.

2 The Complainant's husband, born in 1982, entered Germany in 1999 as an Afghan national, and formally sought asylum here without success. In 2002 he was granted a residence authorisation, and in 2006 he was granted a settlement permit. The Complainant has been validly married to her husband since August 2007 or early 2008. In November 2009 her husband obtained German citizenship through naturalisation, in addition to his Afghan citizenship.

3 In May 2008, the Complainant sought a visa for subsequent immigration of a spouse. The German embassy in Kabul declined the application on 9 April 2009 on the grounds that the Complainant had not provided evidence of an adequate knowledge of the German language. It held that in the Complainant's case no exemption from the language requirement proceeded either from the fact that she is illiterate or from the fact that no courses in German were offered in Ghazni.

4 In December 2009 the Complainant brought an action to be granted the visa she seeks. In the alternative, she asked that the Respondent be ordered to grant her a one-year visa to learn German in Germany. The Administrative Court found against her in a judgment dated 1 August 2011. As grounds, it stated in substance: The Complainant is not entitled to a visa for subsequent immigration of dependents because she does not meet the language requirement, which under Section 28(1) first sentence no. 1 and fifth sentence of the Residence Act, in conjunction with Section 30(1) first sentence no. 2 of that Act, also applies for subsequent immigration to join a German spouse. The Complainant's inability to provide evidence of a basic knowledge of German was not on account of a physical, mental or psychological illness or disability (Section 30(1) third sentence no. 2 of the Residence Act). Rather, she herself assumes that in a context of suitable integration measures, she will be able to learn to read and write and furthermore to learn German. That, after all, was the object of her alternative application to the court.

5 The requirement that a foreigner must normally acquire a basic knowledge of German before subsequently immigrating to join a spouse residing in the Federal territory, the court said, is compatible with the protection of marriage under Article 6(1) of the Basic Law and Article 8 of the European Convention on Human Rights, as well as with Union law, particularly the Family Reunification Directive. In its Article 7(2), Directive 2003/86/EC grants Member States the right to require third country nationals to comply with integration measures, and these measures, the court held, also include the successful completion of a language course. Nor did the court see any indication that it would be impossible or unreasonable for the Complainant to acquire a basic knowledge of Ger-

man before moving to Germany. Such courses are offered in Kabul. The Complainant could be expected, the court found, to travel to Kabul to complete such a language course. She also has no entitlement to be granted a visa to acquire the language in Germany.

6 The Complainant's leapfrog appeal to this Court, filed by leave of the Administrative Court, is directed against that decision. She cites a violation of the principle of equality. She argues that there is no objective justification for the unequal treatment of third country national spouses of Germans in comparison to third country national spouses of citizens of the Union residing in Germany. The point of language requirements, she argues, is to promote the integration of arriving foreigners, to prevent forced marriages, and to prevent the development of 'parallel societies'. But in the case of the spouses of German nationals, one can regularly assume that there is less of a need for integration. The absence of justification for unequal treatment is also not cured, she argues, by the formal argument of subjection to Union law, which does not extend to nationals of the Member State itself. Furthermore, the provision unreasonably impedes the inception of marital cohabitation and therefore violates the protection of marriage under Article 6 of the Basic Law. Most of all, however, the provision is incompatible with Article 20 of the Treaty on the Functioning of the European Union. The Complainant's spouse's fundamental right to a united family, as a citizen of the Union, is being unfairly interfered with. If a residence permit is refused for lack of a knowledge of language, the Complainant and her husband would be unable to initiate marital cohabitation in Germany. This, she argues, is incompatible with the case law of the European Court of Justice.

7 The Respondent defends the appealed decision.

II

8 The Complainant's appeal meets with success. The appealed judgment is founded on a contravention of Federal law (Section 137(1)(1) of the Code of Administrative Court Procedure). The Administrative Court rejected a claim by the Complainant for the visa she sought for subsequent immigration of a spouse

on grounds that are incompatible with Federal law. It failed to recognise that the requirements for subsequent immigration of a spouse to join a German differ from the requirements for subsequent immigration to join a foreigner. For lack of sufficient findings of fact by the Administrative Court regarding the prerequisites for the claim, this Court cannot finally decide the matter. The matter is therefore to be remanded to the Administrative Court for further hearing and a decision (Section 144(3) first sentence no. 2 of the Code of Administrative Court Procedure).

9 1. The subject matter of these proceedings is the Complainant's application to be granted a national visa for subsequent immigration of a spouse, which she founds in part on her status as a family member of a citizen of the Union. In the present appeal the Complainant has not further pursued her alternative application, submitted at the first instance, to be granted a visa to learn German in Germany.

10 The assessment by this Court is to be based on the Residence Act in the version promulgated on 25 February 2008 (BGBl I p. 162), as last amended by Article 1 of the Act Implementing the EU Blue Card Directive of 1 June 2012 (BGBl I p. 1224). According to the settled case law of this Court, in actions seeking an administrative act granting or extending a residence title, the date of the last oral hearing or decision in the court trying the facts is normally determinative for the situation in fact and law (see judgment of 30 March 2010 – BVerwG 1 C 8.09 – BVerwGE 136, 231 para. 10). The changes in the law that take place in the course of an appeal proceeding before this Court must, however, be taken into account, because the Administrative Court would likewise have to take them into account if it were to decide in place of the Federal Administrative Court.

11 The application of the Residence Act is not precluded under Section 1(2)(1) of the Residence Act, because the Complainant's legal status, for lack of a right of residence under Union law, is not regulated by the Act on the General Freedom of Movement for EU Citizens. No such right proceeds from Directive 2004/38/EC – the EU Citizenship Directive – inasmuch as her husband resides

in Germany, the same Member State whose citizenship he holds (see Article 3(1) of the Directive). It also cannot be derived directly from her husband's status as a citizen of the Union. First of all, he has made no lasting use of his right to free movement and residence under EU law, so that even this prerequisite for the assumption of a so-called 'returnee' case is absent (see judgment of 22 June 2011 – BVerwG 1 C 11.10 – NVwZ 2012, 52 para. 9 with further authorities). Second, the denial of a right of residence to the Complainant does not deprive him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union under Articles 20 and 21 of the Treaty on the Functioning of the European Union (see ECJ, judgments of 8 March 2011 – case C-34/09, Zambrano – NVwZ 2011, 545 para. 42; of 5 May 2011 – case C-434/09, McCarthy – NVwZ 2011, 867 para. 56; and of 15 November 2011 – Case C-256/11, Dereci et al. – NVwZ 2012, 97 para. 74).

12 2. The Administrative Court correctly held that the Complainant, as an Afghan national, must have a national visa for the longer-term stay in Germany that she seeks (Section 6(3) of the Residence Act). The requirement of a residence title in order to enter and stay in the Federal territory proceeds from Section 4(1) first sentence of the Residence Act in conjunction with Article 1(1) of Council Regulation (EC) no. 539/2001 of 15 March 2001 (OJ EC no. L 81 p. 1) – the EC Visa Regulation – and its Annex I.

13 3. The Complainant seeks subsequent immigration to join her German husband. Under Section 6(3) in conjunction with Section 28(1) first sentence no. 1 of the Residence Act, a foreign spouse of a German must be granted a (national) visa if the German has his or her ordinary residence in the Federal territory. Here Section 30(1) first sentence nos. 1 and 2 and third sentence, and Section 30(2) first sentence of the Residence Act are to be applied mutatis mutandis (Section 28(1) fifth sentence of the Residence Act). Therefore, granting a visa for subsequent immigration of a spouse to join a German – as does granting a residence permit for subsequent immigration of a spouse to join a foreigner – presupposes (among other requirements) that the spouse desiring subsequent immigration must be able to communicate in the German language on a basic level at least (Section 30(1) first sentence no. 2 of the Residence

Act). According to the findings of the Administrative Court, the Complainant has no knowledge whatsoever of German, and therefore does not meet the requirements of Section 30(1) first sentence no. 2 of the Residence Act.

14 3.1 According to Section 2(8) of the Residence Act, a basic knowledge of the German language corresponds to Level A1 of the Common European Framework of Reference for Languages (CEFR). As the lowest language level, this comprises the following language abilities:

> ‘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.’

15 According to the definition of the language level, the ability to communicate in German at a basic level also comprises a basic knowledge of written German (see judgment of 30 March 2010, loc. cit., para. 14).

16 3.2 The Complainant does not meet the requirements under which a derogation from the language requirement is provided under Section 28(1) fifth sentence with the application, mutatis mutandis, of Section 30(1) third sentence of the Residence Act.

17 In particular, the Complainant cannot rely on Section 30(1) third sentence no. 2 of the Residence Act. According to that provision, Section 30(1) first sentence no. 2 of the Residence Act is to have no bearing if the spouse is unable to provide evidence of a basic knowledge of German on account of a physical, mental or psychological illness or disability. According to the findings of the Administrative Court, there is no reason to believe that the Complainant is unable to acquire a basic knowledge of the German language because of an illness or disability. Nor, according to those findings, is her illiteracy caused by an illness or disability. The difficulties generally associated with learning to read and write for

the first time as an adult do not suffice for a derogation under this provision (see judgment of 30 March 2010, loc. cit., para. 16).

18 Nor can the Complainant rely on Section 30(1) third sentence 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 including for a period of residence which does not constitute a short stay. This provision for an exception refers to principal entitled persons who, under Section 41 of the Residence Regulation, may enter the country without a visa also for extended stays, and may obtain a necessary residence title within the Federal territory (BTDrucks 16/5065 p. 175). No significance attaches to this exception by way of the reference in Section 28(1) fifth sentence of the Residence Act, for the case of a subsequent immigration of a spouse to join a German. A German needs no residence title to enter and stay in the Federal territory. The fact that he or she may enter the country and stay here without a visa, by virtue of his or her German nationality, does not derive from Section 41 of the Residence Regulation. If the provision for an exception were extended to German principal entitled persons, the language requirement for subsequent immigration to join a German would be entirely moot, which would be contrary to the legislative intent to require the subsequently immigrating spouse normally to provide evidence of a basic knowledge of German in these cases as well (see BTDrucks 16/5065 p. 171).

19 4. The requirement of a basic knowledge of the language for subsequent immigration of a spouse is fundamentally compatible with the special protection conferred on marriage and the family under Article 6 of the Basic Law and Article 8 of the European Convention on Human Rights, including where that requirement concerns subsequent immigration to join a German. Article 7 of the EU Charter of Fundamental Rights does not apply to a subsequent immigration to join a national principal entitled person who – as here – is not privileged under Union law, a case in which subsequent immigration to join a spouse is governed solely by national law (see Article 51(1) of the Charter of Fundamental Rights).

20 4.1 The requirement of a basic knowledge of the language for subsequent immigration to join a spouse does not represent an interference with the freedoms under Article 6 of the Basic Law. According to the case law of the Federal Constitutional Court, Article 6 of the Basic Law fundamentally confers no direct right to enter and stay in the country. This applies likewise for subsequent immigration of a foreigner to join a German spouse. However, the language requirement must be measured by the fundamental discriminating principle contained in Article 6 of the Basic Law (see Federal Constitutional Court, order of 12 May 1987 – 2 BvR 1226/83 et al. – BVerfGE 76, 1 <49>). Accordingly, the imperative of protection that mandatorily requires marital and family ties to be taken into account, together with the supportive imperative of Article 6 of the Basic Law, affects the entire legal system concerning marriage and the family, and also sets bounds for the legislator. When enacting general rules governing the granting of residence titles, legislation must take into consideration the existing marital and family ties to persons living in the Federal territory in a manner consistent with the great importance that the Basic Law attaches to the protection of marriage and the family. This corresponds to a fundamental entitlement to appropriate consideration of constitutionally protected interests in cohabitation in the Federal territory. If a foreigner's request for subsequent immigration of a dependent is contrary to public concerns, the person's marital and family concerns must be weighed against contrary public interests, with the aim of arriving at a compassionate balance. Here the basis and the results of the weighing of the statutory provision must be adequate to the imperative under Article 6(1) and (2) first sentence of the Basic Law to give due consideration to the marital and family ties that a foreigner seeking a residence title has with his or her family members living in the Federal territory. The arrangements to be reached must in particular comply with the principles of proportionality and the prohibition of excess. However, in this regard, legislators have a broad margin for action in the area of the immigration laws (see judgment of 30 March 2010, loc. cit., paras. 31 et seq. with further authorities).

21 Furthermore, marriage and the family fall under the protection of Article 8 of the European Convention on Human Rights. According to the settled case law of the European Court of Human Rights, however, even the Convention does not

guarantee any right of a foreigner to enter a given state and stay there. Measures in the area of immigration may, however, affect the right to respect for family life under Article 8 of the European Convention on Human Rights. According to that article, everyone has the right to respect for his or her private and family life; interference is permissible only subject to the provisions of Article 8(2) of the European Convention on Human Rights. In both cases, a balance is to be established between the contrary interests of the individual and of society. Ultimately, therefore, Article 8 of the European Convention on Human Rights also establishes an obligation to arrive at a well-balanced solution in accordance with the principles of proportionality (see judgment of 30 March 2010, loc. cit., paras. 33 et seq., with further authorities).

22 Concerning the language requirement for subsequent immigration of a spouse to join a foreigner, the First Division of the Federal Administrative Court held, in its judgment of 30 March 2010 (loc. cit., paras. 40 et seq.), that as a rule, the provision of the law leads to a well-balanced reconciliation of interests consistent with the fundamental principle of proportionality under Article 6 of the Basic Law and Article 8 of the European Convention on Human Rights. At the same time, the court pointed out that in individual cases, proportionality may also be established by granting a residence title to learn the language under Section 16(5) of the Residence Act (para. 46). The Tenth Division holds to that case law in interpreting national law.

23 The Federal Constitutional Court has confirmed the constitutional opinion of the Federal Administrative Court that the obligation for the spouse of a foreigner living in Germany, under Section 30(1) first sentence no. 2 of the Residence Act, to be able to communicate in the German language at least on a basic level in order to be granted a residence permit, does not violate Article 6(1) and (2) of the Basic Law (decision of 25 March 2011 – 2 BvR 1413/10 – NVwZ 2011, 870). Accordingly, by establishing an obligation to acquire a basic knowledge of the German language before entering the Federal territory, the legislature is pursuing a legitimate goal, namely to promote the integration of foreigners and to prevent forced marriages. The court found that it was not evident that the legislature’s opinion that the instrument chosen to achieve this goal promises

success might be manifestly inappropriate. The legislator's margin of appreciation is also not exceeded by the further assumption that the acquisition of a knowledge of German before entering the country is necessary because it leads more frequently and faster to integration into the living environment here than language acquisition only after entering the Federal territory. The same holds true, the court found, for the opinion that language knowledge already obtained at the time of entry impedes the exploitation of coercive situations; in particular, in the case of a situation of duress, a spouse can approach the competent authorities and more easily avoid dependence on 'in-laws'. The constitutional court also saw no constitutional objection to be made insofar as the Federal Administrative Court arrived at the conclusion that as a rule, in the case of subsequent immigration to join a foreign spouse, the required demonstration of a knowledge of German leads, in its specific statutory configuration, to a fair reconciliation of interests. The burden of a delay in domestic cohabitation in the Federal territory that is typically associated with acquiring some knowledge of the language can usually be overcome within a reasonable length of time, a conclusion that in particular is argued for by the fact that only low expectations are established for the language knowledge to be demonstrated. To this is added the fact it is normally reasonable to expect a foreign spouse living in the Federal territory to make an effort to maintain the family unit through visits, or if necessary, entirely outside this country (decision of 25 March 2011, loc. cit., paras. 5 et seq.).

24 The High Court for England and Wales, in its judgment of 16 December 2011 ([2011] EWHC 3370 (Admin) para. 115) also holds that the statutory provision introduced in the United Kingdom at the end of 2010, under which subsequent immigration of a spouse is made contingent on successfully completing a language test, limited to understanding and speaking, prior to immigration – albeit provided with a hardship clause ('exceptional compassionate circumstances') – is compatible with Article 8 of the European Convention on Human Rights.

25 4.2 However, the aspects arguing that the language requirement governed by Section 30(1) first sentence no. 2 of the Residence Act is compatible with Article 6(1) of the Basic Law, in cases of subsequent immigration by a spouse to join a foreigner, may be extended only with limitations to a subsequent immigration to

join a German. The Administrative Court did not take adequate account of these limitations in the decision appealed here. Insofar as the principle of proportionality imposes limitations in the case of a subsequent immigration to join a German spouse, this can be done justice by an interpretation, in keeping with the constitution, of Section 28(1) fifth sentence of the Residence Act, which provides that Section 30(1) first sentence no. 2 of the Residence Act is to apply only mutatis mutandis.

26 To be sure, it is a legitimate legislative goal as well, in the case of the subsequent immigration of a spouse to join a German, to facilitate the integration of a subsequently immigrating foreigner into German society, and to counteract the danger of forced marriages through an early demonstration of a knowledge of the language. For the same reasons, this Court has no doubt as to the suitability and necessity of the provision under Section 30(1) first sentence no. 2 of the Residence Act, as has already been explained in greater detail in the judgment of 30 March 2010 for the case of subsequent immigration of a spouse to join a foreigner (loc. cit., paras. 38 et seq.). In reconciling the contrary public and private interests, however, it must be taken into account that unlike a foreigner living in the Federal territory (see para. 45 of the aforementioned judgment), a German fundamentally cannot be required to maintain his marriage in some other country, or to forgo marital cohabitation (see judgment of 20 May 1980 – BVerwG 1 C 55.75 – BVerwGE 60, 126 <130>). The fundamental right under Article 11 of the Basic Law guarantees a German, in contrast to a foreigner, the right to stay in Germany (see Federal Constitutional Court, decision of 12 May 1987, loc. cit., <47>), and significantly increases the importance to be attached to private interests in the subsequent immigration of a spouse in order to maintain marital cohabitation in the Federal territory. Only in cases of public concerns of great importance may a German citizen be expected to be able to maintain a marriage for some period of time either not at all, or only in some other country. In any case it is inappropriate and unreasonable to expect that citizen to maintain a marriage lastingly outside this country.

27 It is true that the case law of the Federal Constitutional Court on Article 6(1) of the Basic Law does not result in an unrestricted obligation for the immigration

authority to allow the foreign spouse of a German to stay in the Federal territory. It can very well be read as saying that marriage with a German partner does not automatically protect a foreign national from termination of residence (see Federal Constitutional Court, decision of 18 July 1973 – 1 BvR 23/73 et al. – BVerfGE 35, 382 <408>). However, in a review of proportionality, the weight of competing interests shifts in favour of protecting marriage (see decision of 18 July 1979 – 1 BvR 650/77 – BVerfGE 51, 386 <398>). The same applies for the case law of the appellate courts, according to which it is fundamentally consistent with the constitutional protection of marriage and the family under Article 6 of the Basic Law to require the foreign spouse of a German to make up subsequently for a necessary visa procedure, and thereby to require a temporary separation (see Federal Constitutional Court, decision of 4 December 2007 – 2 BvR 2341/06 – InfAuslR 2008, 239 et seq.). Accordingly, impediments to subsequent immigration with a narrowly circumscribed duration are also not automatically unconstitutional even in the case of subsequent immigration of a spouse to join a German citizen.

28 However, if, in a specific case, the language requirement, as a prerequisite for subsequent immigration in visa proceedings, exceeds the reasonable extent of interference with the interests of the foreign and German spouses as given qualified protection under Article 6(1) of the Basic Law, it is necessary under Section 28(1) fifth sentence of the Residence Act to derogate from applying Section 30(1) first sentence no. 2 of the Residence Act before the foreign spouse enters the country. An unreasonable imposition may result, among other instances, from the fact that it may be impossible or unreasonable for the foreign spouse to learn German within a suitable time, for particular personal reasons or because of special circumstances in that person’s homeland. In such a case the fundamentally proportionate requirement for subsequent immigration becomes a disproportionate, lasting impediment to subsequent immigration. This Court has satisfied itself that the boundary between the general case and the exception should be drawn at a one-year delay in subsequent immigration. If reasonable efforts to acquire a knowledge of the language have remained without success for one year, the visa application of the spouse of a German can no longer be opposed by the language requirement. Equivalent

considerations apply if the foreign spouse cannot be expected from the outset to make efforts to learn the language, for example because no language courses are offered in the country concerned, or because attending them is associated with a high safety risk, and if, moreover, no other promising alternatives for learning the language are present; in that case, the one-year period need not be waited out. In assessing reasonableness, in particular, account must be taken of the availability of learning opportunities, their cost, their accessibility, and personal circumstances that may interfere with taking advantage of learning opportunities, such as illness or unavailability. The necessary effort to acquire the language may also find expression in that although the foreigner does not meet the writing requirements, he or she does meet the oral requirements.

29 If the review of proportionality in a given individual case comes to the conclusion that a derogation from a demonstration of meeting the language requirement under Section 30(1) first sentence no. 2 of the Residence Act before entering the country is called for, then if the other requirements are met the visa for subsequent immigration of a spouse is to be granted under Section 6(3) in conjunction with Section 28(1) first sentence no. 1 of the Residence Act. This does not, however, relieve the foreign spouse of the effort to acquire the language knowledge required by law after entering the country, in order to obtain a residence permit under Section 28(1) first sentence no. 1 of the Residence Act. The waiver of providing evidence of language acquisition prior to entering the country does not finally dispense with the public interest in a minimum language knowledge as a prerequisite for integration (see also the legal concept under Section 41(3) of the Residence Regulation). If the foreign spouse is unable to acquire the language, residence is in any case to be made possible in some other manner, for example by way of a residence permit under Section 25(4) of the Residence Act, so that the marriage can be maintained within the Federal territory.

30 4.3 The above considerations apply equally for subsequent immigration of a spouse to join a German who has an additional citizenship. The additional citizenship does not result in a restriction of the legal effects of German citizenship, particularly the right to reside in Germany under Article 11 of the Basic Law.

This Court points out that the double citizenship of a German principal entitled person – contrary to the Federal government's statement of reasons of 23 April 2007 regarding Section 28 of the Residence Act (BTDrucks 16/5065 p. 171) – also does not establish any particular circumstances, contrary to the rule under the law, for making subsequent immigration of a spouse contingent on ensuring a livelihood.

31 5. In its review of reasonableness, the Administrative Court held, in an error of law, that the prerequisites for subsequent immigration of a spouse to join a German are 'identical' with those for joining a foreign national (copy of the decision, p. 6) and as a general rule that a period of two to three years for acquiring the language may reasonably be expected (copy of the decision, p. 10). In the absence of sufficient findings of fact concerning the relevant criteria for reasonableness, the matter must be remanded to the Administrative Court. The Administrative Court will now in particular have to review whether the Complainant could reasonably be expected to attend a language course in Kabul in the period since the visa application was filed in May 2008. Here it will have to be taken into account that it may well not be reasonable to expect an Afghan woman, who has hitherto lived with her parents-in-law in a village environment, to move alone to the capital of Kabul, many hours away by car, in order to learn the German language there over a period of several weeks or months. Different considerations may apply if relatives or friends live in Kabul who can take in the Complainant for the duration while she learns the language. Findings by the Administrative Court on this point are absent. If in fact – as she avers – the Complainant is illiterate, the Administrative court would furthermore have to determine whether she could have learned to read and write and acquire a knowledge of German within one year, taking the circumstances of the specific case into account. If the Administrative Court arrives at the conclusion that the Complainant could not reasonably have been expected to acquire the language knowledge required by law, it must order the Respondent to grant the requested visa, if the other requirements of the law concerning the subsequent immigration of a spouse are satisfied. In this regard, consideration will have to be given to the fact that her husband's double citizenship – as has already been discussed – does not establish special circumstances for making subsequent

immigration contingent on a secure livelihood, contrary to the provision of the law under Section 28(1) third sentence of the Residence Act.

32 6. The appeal to this Court on the grounds of a violation of the principle of equality meets with no success. The evidence of language knowledge that is also required of the spouse of a German seeking subsequent immigration, under Section 30(1) first sentence no. 2 of the Residence Act in conjunction with Section 28(1) fifth sentence of the Residence Act, does not violate Article 3(1) of the Basic Law.

33 6.1 The appeal to this Court wrongly sees an unconstitutional violation of equality in the fact that a demonstration of language knowledge is required from the spouses of Germans, but not from the spouses of other citizens of the Union who reside in Germany. This difference proceeds from Union law, which confers beneficial provisions only on those citizens of the Union who are privileged under Union law (see ECJ, judgments of 5 May 2011, loc. cit., and of 15 November 2011, loc. cit.; Article 3(1) of Directive 2004/38/EC – the EU Citizenship Directive). According to the case law of the Federal Administrative Court, it does not represent a contravention of Article 3(1) of the Basic Law if the national legislature does not extend provisions of Union law to family members of national citizens of the Union in Germany who – like the Complainant's husband – are not privileged under Union law (see judgment of 16 November 2010 – BVerwG 1 C 17.09 – BVerwGE 138, 122 para. 15 with further authorities). Here we may set aside the question of whether, in light of the obligation to transpose requirements of Union law, and the resulting effects on different legal systems, the same or comparable situations of fact are present at all within the meaning of Article 3(1) of the Basic Law. This is because the unequal treatment resulting from the coexistence of (transposed) Union law and purely national law is in any case objectively justified. Although there is no imperative to extend the right of residence under Union law to family members of citizens of the Union in Germany who are not privileged under Union law, there are sufficiently weighty reasons to apply in these cases the provisions of national residence law that apply for all foreigners not privileged under Union law. Moreover, the provision of the law, as construed by this Court, takes account of the particular weight of

private interests in the subsequent immigration of a spouse to join a German, so that the language requirement applies to spouses of Germans only within limitations.

34 6.2 It is also no contravention of Article 3(1) of the Basic Law that spouses who, because of their nationality, may also enter the Federal territory without a visa for a stay that is not merely brief, may apply for a necessary residence title within three months after entering the country (see Section 41(3) of the Residence Regulation). This provision advantages them over other spouses to the extent that they need not meet the language requirement even before entering the country, but must meet it only when they apply for the first time for a residence permit within the Federal territory. This unequal treatment is adequately justified constitutionally. In maintaining its relations with other States, the Federal Republic is entitled to broad political discretion in foreign policy. This includes privileging nationals of certain third states under residence law (see judgment of 30 March 2010, loc. cit., para. 59). Furthermore, the provision is covered by the legislator's typifying authority to enact, for different groups of foreigners desiring to enter the country, differentiated provisions some of which, in an overall comparison among themselves, are advantageous and some of which are disadvantageous. Thus the provisions governing subsequent immigration afford spouses of Germans, for example, an advantage over spouses from states privileged in visa law, insofar as Section 28(1) third sentence of the Residence Act as a rule exempts them from the requirement of a secure livelihood.

35 7. There is no need for a referral to the European Court of Justice under Article 267 of the Treaty on the Functioning of the European Union to clarify whether the language requirement is a permissible integration measure within the meaning of Article 7(2) of Directive 2003/86/EC. It is unequivocally clear from the wording of the Directive that the Complainant is not covered by its provisions.

36 Under its Article 3(3), the Directive does not apply to members of the family of a citizen of the Union. But the Complainant's husband, as a German, is a citizen of the Union, even though he additionally holds another citizenship. According to Article 2(a) of the Directive, a 'third country national' is only someone who is

not – as the Complainant's husband is – a citizen of the Union within the meaning of Article 17(1) of the Treaty (now: Article 20(1) of the Treaty on the Functioning of the European Union). Furthermore, Union law offers no closed concept of provisions for subsequent immigration of dependents. Instead, a certain group of persons is exempted from the applicability of both the Family Reunification Directive, the EU Citizenship Directive, and other provisions of Union secondary law. This is particularly the case for members of the family of citizens of the Union in cases where the citizen of the Union has not exercised his right to freedom of movement.

37 Applicability of Directive 2003/86/EC to the Complainant also does not proceed from the fact that she had the legal status of a family member within the meaning of the Directive until her husband was naturalised in November 2009. It is true that the European Court of Justice decided, in its judgment of 29 March 2012 in the Kahveci and Inan case (cases C-7/10 and C-9/10 – InfAuslR 2012, 201) that the family members of a Turkish worker who is a duly registered member of labour force of a Member State are furthermore entitled to rely on their legal status under Article 7 of Decision 1/80 of the EEC/Turkey Association Council – Association Council Decision 1/80 – if that worker holds not only Turkish nationality but also nationality of the host Member State. However, that decision on Association law is not transferable to legal status under Directive 2003/86/EC, because within the purview of Directive 2003/86/EC, the acquisition of German citizenship confers the legal status of a citizen of the Union, and therefore the exclusionary circumstances under Article 3(3) are fulfilled, whereas Association Council Decision 1/80 does not offer any equivalent provision for the legal status under Association law.

38 8. The disposition as to costs is reserved for the final judgment.

Prof. Dr Berlit Prof. Dr Dörig Prof. Dr Kraft

Fricke Dr Maidowski