Field:	BVerwGE: yes
Immigration law	Professional press: yes

Sources in law:

Basic Law	Article 6
Residence Act	Section 6, 81(1)
Civil Code	Section 133
Code of Civil Procedure	Section 767
ECHR	Article 8
EU Charter of Fundamental Rights	Article 7
Regulation (EC) No. 810/2009	Articles 1, 2, 9, 18, 19, 21, 23, 24, 25, 32, 56, 58
Regulation (EC) No. 562/2006	Article 5(1)

Key words:

Schengen visa; visitor's visa; short-term stay; uniform visa; visa with limited territorial validity; visa application; desire to visit; interpretation; travel dates; action for administrative injunction; disposition; need for legal protection; action for revival; intent to return; illegal immigration; threat to public policy; family ties; family; close family members; parental right of contact; child's well-being.

Headnotes:

1. In the absence of indications to the contrary, an application for a Schengen visa for a short stay as a visitor must be construed as meaning that the applicant maintains his or her desire to visit even after the intended dates of stay indicated on the application are past.

2. Under the Visa Code, reasonable doubt as to the intent to return mandatorily opposes the issuing of a uniform visa valid for the entire territory of the Member States.

3. In these cases, under Article 25(1)(a)(i) of the Visa Code, the Member States retain the authority to exceptionally issue a visa with limited territorial validity for their own territory, for example to visit a close relative, if this is necessary in view of the special protection of family ties under Article 6 of the Basic Law, Article 8 of the ECHR and Article 7 of the EU Charter of Fundamental Rights (here: denied).

Judgment of the 1st Division of 11 January 2011 – BVerwG 1 C 1.10

I. Berlin Administrative Court, 10 December 2008 – Case No.: VG 7 V 16.08 –
II. Berlin-Brandenburg Higher Administrative Court, 18 December 2009 – Case No.: OVG 3 B 6.09 –

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

BVerwG 1 C 1.10
OVG 3 B 6.09

Released
on 11 January 2011
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.

the First Division of the Federal Administrative Court
upon the hearing of 11 January 2011
by Federal Administrative Court Chief Justice Eckertz-Höfer,
and Federal Administrative Court Justices Prof. Dr. Dörig, Richter,
Beck and Fricke

decides:

The Complainant's appeal against the judgment of the Berlin-Brandenburg Higher Administrative Court of 18 December 2009 is denied.

Costs of the appeal are adjudged against the Complainant.

Reasons:

I

1 The Complainant, a Moroccan national, seeks a Schengen visa to visit her two minor children living with their father in Germany.

2 The Complainant was married to a Moroccan national until June 2002. In the divorce she was awarded custody of their two children, born in 1998 and 2001. The Complainant's divorced husband has lived in Germany since July 2002. By a notarised instrument certified by a judge, in December 2004 the Complainant consented for both her children to join their father in Germany, where he was to care for them. The children have lived with their father since June 2005 and hold residence permits.

3 In December 2007 the Complainant applied to the German embassy in Rabat for a Schengen visa for a stay in Germany for 'tourist reasons', to begin on 25 January 2008. The embassy rejected this application because of doubts about the alleged purpose of the trip. The Complainant lodged a protest against the

rejection, and claimed she wanted to visit her two children. By a decision dated 15 February 2008, the embassy again rejected the application. It held that the Complainant had set forth no specific, credible prospect of return. For that reason, the requirements for issuing a visa under Article 5(1)(e) of the Schengen Borders Code and Section 6(1) of the German Residence Act had not been fulfilled. Moreover, the overall circumstances justified a negative exercise of discretionary powers. The embassy decided that the Complainant could maintain contact with her children by letter, telephone conversations, or visits by the children to Morocco.

4 In the complaint proceedings, the Administrative Court ordered the Respondent to issue a visitor's visa. It found that the request had not been disposed of, because it did not pertain to a specific visit period that had already passed, or to a specific occasion. The prerequisites for issuing a visa had been met, the court found. The doubts expressed by the Respondent regarding the Complainant's intent to return were not of such consequence that a permanent stay in German territory was significantly more probable than a return. The discretionary option opened under Section 6(1) of the Residence Act was narrowed to zero, the court found, particularly in light of the constitutional right of parental contact protected under Article 6 of the Basic Law.

5 In response to the Respondent's appeal, the Berlin-Brandenburg Higher Administrative Court rejected the complaint in a judgment of 18 December 2009, with regard to both the sought administrative injunction and the alternative request, lodged in the appeal proceedings, for a declaratory judgment that the refusal was unlawful, in the event that the court found that the matter had indeed been disposed of. In its reasoning, the court explained that the request for a visitor's visa had been disposed of through the passage of time. The application for a visa concerned the period from 25 January 2008 to 24 April 2008. The court ruled that expiry of a request for a visa referring to a specific or specifiable calendar period is not limited to the case in which the visit is to be made for an event linked to a specific time or that is non-recurring by its nature. Even if the foreigner maintains in principle the desire for a visit, the requisite application was lacking, the court found.

6 The court also found that the alternative claim for relief did not succeed. The refusal of the visa application had not been unlawful. The court ruled that a threat to public policy within the meaning of Section 6(1) sentence 1 No. 2 of the Residence Act in conjunction with Article 5(1)(e) of the Schengen Borders Code should be assumed if there was a lack of intent to return, and the intended use of the visa was for a purpose other than the indicated purpose of the stay. The court found that the prognosis for a return was negative where the probability of a permanent stay should be estimated as substantially greater than the probability of a return. Any remaining doubts short of that threshold should be taken into account within the scope of discretionary powers. In the Complainant's case, the prognosis of a return could only tell to her disadvantage. Even allowing for the weight accorded to her desire to visit under Article 6(1) of the Basic Law, in the requisite overall consideration it would have to be considered highly probable that she would make use of the visa to establish a basis for a permanent German residency from which she would otherwise be barred. Even if the requirements of attendant circumstances under the Schengen Borders Code were met, the court held, a refusal would not be unlawful, because in any case the discretionary decision made by the embassy as an alternative was not in error. The Complainant's wish to enter the country had been given great weight, with a view to Article 6(1) of the Basic Law. There could be no objection that in its weighing of interests, the embassy concluded that the Complainant could maintain contact with her children in other ways, especially since by her own account she has more than a sufficient income for Moroccan circumstances and has savings for travel for the children to visit.

7 In her appeal to this Court, the Complainant persists in her petition for an administrative injunction. She argues that her application has not expired. She claims she is also entitled to a visitor's visa because an overall consideration of all circumstances shows a clear willingness to return.

8 The Respondent defends the appealed judgment.

II

9 The Complainant's appeal fails. The court below correctly concluded that the action was to be rejected. The Complainant's action for an administrative injunction was procedurally permissible; in particular, there is no want of the required need for a protection of legal interests. Contrary to the opinion of the court below, the Complainant's request has not been disposed of through the passage of time. But the action fails because the Complainant has no entitlement to a Schengen visa to visit her children living in Germany, and the Respondent's refusal is not unlawful (Section 113(5) Code of Administrative Court Procedure). Therefore, albeit for a different reason, the decision of the court below was correct (Section 144(4) Code of Administrative Court Procedure).

10 1. In general, in actions for an injunction to issue a residence title, the situation in fact and law is to be assessed as at the date of the last hearing by the court deciding the facts (here: 18 December 2009). However, according to the present Court's case law, changes made to the law while proceedings are pending before this Court are to be taken into account if the court below would have had to take them into account if it were deciding in place of the Federal Administrative Court (settled case law, see judgment of 1 November 2005 – BVerwG 1 C 21.04 – BVerwGE 124, 276 <279 et seq.>).

11 The pertinent basis in law for issuing the visa in dispute is therefore now Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (OJ 15 September 2009, L 243 p. 1) – the 'Visa Code'. Since 5 April 2010 (Article 58(2) Visa Code), this Regulation has governed matters including the procedure and requirements for issuing visas for intended stays in the territory of the Member States not exceeding three months in any six-month period (Article 1(1) Visa Code). The Visa Code is binding in its entirety and directly applicable in every Member State (see the notice to this effect at the end of the Regulation). Because Community law takes priority in application, the Visa Code replaces the former national provision under Section 6(1) through (3) of the Residence Act (so too, the Berlin-

Brandenburg Higher Regional Court, judgment of 24 June 2010 – 2 B 16.09 – juris Marginal No. 22).

12 This change in the law, which was enacted while the present proceedings were pending, is of considerable import in the present case, because if the court below were to decide today in place of the Federal Administrative Court, it would have to take the Visa Code into account. This is not opposed by the fact that the visa application was rejected, and the action was lodged, before 5 April 2010. The Visa Code contains no express transitional provision for such a case. According to the case law of the European Court of Justice (ECJ), the effect *ratione temporis* of a provision of European Union law is to be determined in accordance with generally recognised principles of interpretation (ECJ, judgment of 12 November 1981 – Cases 212 to 217/80, Salumi – Col. 1981, 2735 Marginal No. 8). Here the ECJ distinguishes between procedural rules and substantive rules. Although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, substantive rules are usually to be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them. This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it. In general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication; this may be otherwise only exceptionally, where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (ECJ, judgments of 12 November 1981, loc. cit., Marginal No. 9 et seq. with further authorities, and of 10 February 1982 – Case 21/81, Bout – Col. 1982, 381 Marginal No. 13).

13 Thus even though the principle of non-retroactivity must generally be observed for substantive rules, in the present case the substantive rules of the Visa Code apply by exception. Issuing a visa does not constitute an intervention in an existing position, but rather the grant of an advantage looking to the future. Here the principles of legal certainty and protection of legitimate expectation have at

most a subordinate importance, because the person concerned must regularly expect changes in the law. This also applies for the reorganisation of the Schengen visa system under the Visa Code. With effect as from 5 April 2010, the Visa Code not only changed the procedures to be followed and the formal rules to be observed, but also the substantive requirements for issuing the visa, with new and independent effect above national law. Thus it is now the case that the Member States may issue a visa falling within the objective scope of the Visa Code only in compliance with the substantive rules of that Code. This also applies in cases where a visa – as here – was refused under the old law and the person concerned has appealed that refusal.

14 2. The appealed judgment is incompatible with federal law (Section 137(1)(1) Code of Administrative Court Procedure), in that the court below assumed that the Complainant's petition for an administrative injunction had been disposed of through the passage of time. Contrary to the opinion of the court below, the Complainant's visa application does not pertain, by consequence of the travel dates indicated on the application form, to a firmly defined calendar period that is now expired. Rather, in the absence of indications to the contrary, applications for a Schengen visa for a short visitor's stay must be interpreted as indicating that the applicant still desires to visit even after the intended period of the stay has passed. The contrary interpretation by the court below is inconsistent with Section 133 of the Civil Code.

15 Within an appeal on points of law, this Court is empowered to review the court below's interpretation of the visa application by the standard of this statutory rule of interpretation, which is to be applied *mutandis mutatis* in public law. The content of an application made to the authority does, to be sure, fall primarily within the sphere of findings of fact, which are generally reserved for the court deciding the facts and subject only to limited review in proceedings before the present Court (see Section 137(2) Code of Administrative Court Procedure). But according to unanimous opinion, the court of appeal on the law alone must review the assessment of the facts and evidence by the judges of fact – with no reservation of a right of objection – to the extent that it entails the application of the law, so as to determine whether that assessment is founded on an error in

law, does not comply with statutory rules of interpretation, or violates general principles of experience or laws of thought (see Eichberger, in: Schoch/Schmidt-Assmann/Pietzner, VwGO, version of May 2010, Section 137 Marginal No. 153 et seq. and 168 et seq., with further citations from the case law of the Federal Administrative Court). If the interpretation by the court below is defective in that sense, this Court is empowered to arrive at its own interpretation.

16 A visa is to be issued only upon filing an application (Section 81(1) Residence Act; Article 9 et seq. Visa Code). In applying for a Schengen visa for a short stay, under the present terms of law the applicant may indicate when, how often, and for how long he would like to enter the Schengen area. If he files an application, its contents will therefore be primarily in line with his concrete request. This request must be interpreted in accordance with Section 133 of the Civil Code, which states that when interpreting a declaration of intent, it is necessary to ascertain the true intention rather than adhering to the literal sense of the expression. This principle of interpretation also applies in interpreting applications submitted by a citizen to an authority (judgment of 10 July 1963 – BVerwG 6 C 91.60 – BVerwGE 16, 198 <203>). Here the deciding factor is how the authority was to understand the application in an objective assessment (‘objectivised recipient’s horizon’).

17 Neither the terms of the Residence Act that applied at the time when the application was filed, nor the Visa Code now to be taken into account, support the deduction that a Schengen visa may be applied for only for a specific calendar period. The restriction that it may be issued only for intended stays not exceeding three months in any six-month period (Article 1(1) Visa Code; Section 6(2) Residence Act) refers to the duration of the stay after the date of first entry into the country. It is also immaterial that applications may be lodged no more than three months before the start of the intended visit (Article 9(1) Visa Code) and that the period of validity of a visa cannot exceed five years (Article 24(1) Sentence 3 Visa Code; Section 6(2) Residence Act). From this requirement one can conclude only that a Schengen visa cannot be kept in reserve, but rather may be applied for only in a concrete temporal connection with an intended visit and

– particularly if multiple intended entries into the country are intended – may be issued only for a period of validity not exceeding five years.

18 Contrary to the opinion of the court below, the intended travel dates to be indicated on the application form also do not indicate that the applicant for a tourist trip is applying for a visa only for a specifically defined calendar period. To be sure, with this information the applicant does indicate the particulars of his intent to stay, in terms of time. This makes it easier for the diplomatic mission, if a visa is to be issued expeditiously, to decide as of when and for what period the visa is supposed to be valid. But if issuance is delayed, the mere expiry of the indicated travel dates does not entail that the foreigner's request for a visitor's visa has therefore been disposed of. If – as in the present case – there are no indications of an occasion for a visit linked to a specific date (such as a funeral, wedding, or birthday), an application for a Schengen visa for a short stay as a visitor must accordingly be interpreted as indicating that even after the stated travel dates are past, the applicant still adheres to his desire to visit, and to have that desire realised soon, and that he would like to have the beginning of the validity of the requested visa deferred until the date when the visa is issued.

19 Contrary to the opinion of the court below, this interpretation of the request under the application does not result in a visa without a time limit. The request remains directed to a visa for the duration of the stay stated in the application; only the desired inception date for validity changes. The assumption that the request survives in time beyond the travel period indicated on the application form also is not opposed by the fact that in visa applications for purposes of a visit, the declarations of commitment regularly submitted by close relatives do not remain legally binding indefinitely, and that the requisite traveller's health insurance as a rule is taken out to coincide in time with the intended visit abroad. If the issuing of a visa is delayed, the applicant may have to ensure that the information he has given and the documentation he must furnish are updated, since the diplomatic mission may issue a visa only if the requirements for issuance are met at the time of the mission's decision. The same applies in an administrative injunction action, which – as indicated above – must generally be

based on the status of the facts and law at the time of the last hearing before the court deciding the facts.

20 The practical problems adduced by the Respondent at the hearing also pose no obstacle to the procedural permissibility of an action for an administrative injunction. After a judgment that finds for a complainant becomes res judicata, the pertinent respondent must immediately issue a visa for the requested validity period. If the requirements for issuance have lapsed after the end of the hearing, that respondent has the option of an action seeking to abate enforcement under Section 167(1) of the Code of Administrative Court Procedure in conjunction with Section 767 of the Code of Civil Procedure. The Visa Code likewise does not bar the possibility of an action for an administrative injunction. As is evident from Article 32(3) of the Visa Code – although it applies only from 5 April 2011 onwards (Article 58(5) Visa Code) – Community law refers to the law of the Member State in regard to possibilities for appealing a refusal.

21 In this situation, it would run contrary to the courts' constitutional obligation to ensure effective protection under the law (Article 19(4) Basic Law) if the courts were to view a visa request as having been disposed of after its dates have passed, solely because an application is required and the travel date must be stated at the time of application. The individual concerned would thus be barred from pursuing the case through an action for an administrative injunction, and would instead have to rely on an action for revival (Section 113(1) sentence 4 Code of Administrative Court Procedure, applied accordingly), which affords weaker protection under the law, and furthermore presupposes a special interest in a revival judgment.

22 3. Nevertheless the action does not succeed, because at the critical time of the hearing before the court below, the Complainant had no entitlement to a Schengen visa, and the refusal was not unlawful. Here we may set aside the question of whether the diplomatic mission still has discretionary powers under the Visa Code – as formerly under Section 6(1) of the Residence Act – in terms of legal consequences, or whether, if the requirements of fact are satisfied, there is a limited entitlement to the issuance of a visa (on this point, see Berlin-

Brandenburg Higher Administrative Court, judgment of 24 June 2010, loc. cit., Marginal No. 23). The Complainant does not satisfy the requirements of fact for either a uniform visa valid for the entire territory of the Member States (Article 2(3) Visa Code) or a visa with limited territorial validity, valid for the territory only of the Federal Republic of Germany (Article 2(4) Visa Code).

23 a) Under Article 23(4) in conjunction with Articles 21 and 32 of the Visa Code, issuing a uniform visa – in addition to competence of the diplomatic mission (Article 18 Visa Code) and formal admissibility of the application (Article 19 Visa Code) – also presupposes that the applicant substantively fulfils the entry conditions and there is no reason for refusal (Articles 21, 32 Visa Code).

24 Under Article 21(1) of the Visa Code, in the examination of an application for a uniform visa, it must be ascertained whether the applicant fulfils the entry conditions set out in Article 5(1)(a), (c), (d) and (e) of Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (OJ L 105 p. 1) – the Schengen Borders Code. Accordingly, among other matters, a third country national must justify the purpose and conditions of the intended stay (Article 5(1)(c) Schengen Borders Code) and cannot represent a threat to public policy (Article 5(1)(e) Schengen Borders Code). Therefore, in examining an application for a uniform visa, the diplomatic mission must in particular assess whether the applicant presents a risk of illegal immigration or a threat to the security of the Member States, and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for (Article 21(1) clause 2 Visa Code). Under Article 32(1) of the Visa Code, the diplomatic mission must refuse a visa if the applicant is considered to be a threat to public policy (letter a(vi)) or there are reasonable doubts as to the applicant’s stated intention to leave the territory of the Member States before the expiry of the visa applied for (letter b).

25 Because of these substantive requirements, the Complainant cannot be issued a uniform visa. On the basis of the findings of fact by the court below, which have not been attacked on procedural grounds (Copy of the Decision, p. 14 et

seq.), and are binding upon this Court in accordance with Section 137(2) of the Code of Administrative Court Procedure, there are concrete indications that argue against the Complainant's alleged intention to return. Although she wishes to see her children, in the visa application procedure the Complainant initially stated that she wished to enter Germany for tourist purposes, and thereby concealed the true reason for her entry. It also argues against her intention to return that according to the findings of the court below, the neurotic disorders diagnosed in her children are attributable to their separation from their mother, and would not be improved by a short-term visit from the Complainant that was encumbered from the outset by the prospect of a new separation. Furthermore, statements by her divorced husband and one of her children consolidate the impression that she wishes to remain in Federal territory permanently. These are not countered by any comparably weighty ties in Morocco (joint ownership of the building where she lives, her own tailoring business, mother and both sisters live in Morocco). Furthermore, according to the findings of the court below, the Complainant already exceeded the validity period of her visa on a previous visit.

26 Under the circumstances here, it is immaterial that the findings of the court below regarding the Complainant's lack of intent to return appear in its reasoning regarding the lack of merit of her alternative request for a declaratory judgment, and therefore in terms of time relate primarily to the date of the last decision by the authorities (15 February 2008). This is because the court below took more recent information into account in its findings, as is evident from its discussion of the medical report of 16 October 2008 filed by the Complainant. Moreover, during the proceedings up to the date of the last hearing before the court below (18 December 2009), which is determinative here, the Complainant adduced no new reasons that might justify a different assessment of her intent to return. Therefore at the date of the hearing before the court below there were (still) reasonable doubts about the truthfulness of the Complainant's alleged intent to leave the territory of the Member States before the expiry of the visa applied for.

27 b) The Complainant also has no entitlement to a visa with limited territorial validity only for the territory of the Federal Republic of Germany, under Article 25 of

the Visa Code. Issuance of such a visa is included under the application for a Schengen visa, since it represents a geographically more limited privilege than the uniform visa, which is valid for the entire territory of the Member States. Accordingly, the Visa Code provides for only a single application form. Therefore, if the requirements for a uniform visa are not met, it must be examined whether issuing (at least) a visa with limited territorial validity should be considered.

28 Article 32 of the Visa Code does not oppose issuing a visa with limited territorial validity for the Federal territory alone. The reference in Article 32(1) of the Visa Code that the visa is to be refused in the cases under Article 32 of the Visa Code ‘without prejudice’ to Article 25(1) of the Visa Code shows that although Article 32 of the Visa Code mandatorily excludes issuing a uniform visa, nevertheless, even if a reason for refusal exists, it is still possible in certain exhaustively listed exceptional cases to issue a visa with limited territorial validity under Article 25(1) of the Visa Code.

29 Under Article 25(1)(a)(i) of the Visa Code, a visa with limited territorial validity is to be issued exceptionally when the Member State concerned considers it necessary, on humanitarian grounds, for reasons of natural interest or because of international obligations, to derogate from the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled. As has been explained, one of the requirements for entry under Article 5(1)(e) of the Schengen Borders Code is that the third country national must not present a threat to public policy. Under the terms of that provision, a threat to public policy must also be assumed if the third country national does not intend to leave the territory of the Member States before the expiry of the visa applied for. There is a significant interest of the Member States of the European Union in preventing illegal immigration.

30 However, even when there is a threat to public policy, the Member States still have the option of exceptionally issuing a visa restricted to their own territory, for the reasons listed in Article 25(1)(a) of the Visa Code. Here family ties of the applicant to family members lawfully living in the Federal territory may be taken into account, both on humanitarian grounds and because of international obliga-

tions. However, based on the public interest in preventing uncontrolled immigration, issuing a limited visa presupposes, in terms of conditions of fact, that in view of the special protection for family relationships under Article 6 of the Basic Law, Article 8 of the ECHR and Article 7 of the Charter of Fundamental Human Rights, the exceptional issuing of a visa for a visit is necessary in spite of the danger that the applicant presents to public policy.

31 According to the case law of the Federal Constitutional Court and the European Court of Human Rights (ECtHR), neither the constitutional protection of the family under Article 6 of Germany's Basic Law nor the right to respect for family life under Article 8 of the ECHR confers an immediate entitlement to enter a country and stay there. By way of Article 52(3) of the EU Charter of Fundamental Rights, this principle also applies to the right to respect for family life under Article 7 of the Charter of Fundamental Rights. However, under the decisive principle of Article 6(1) in conjunction with Article 6(2) of the Basic Law that the state must protect and promote the family, in deciding on a residence request the authorities must take account of the foreigner's family ties with persons who are lawfully residing in the Federal territory, and weigh these ties accordingly in their considerations; the holder of the fundamental right is entitled to such an appropriate consideration of his family ties (Federal Constitutional Court, decision of 12 May 1987 – 2 BvR 1226/83 *inter alia* – BVerfGE 76, 1 <47 et seq.>). This also applies in decisions about issuing a visa to a foreigner for the purpose of visiting his or her minor children living with the other parent in Germany. For this purpose, fundamentally the family concerns involved must be weighed on a case-by-case basis against the contrary public interests, taking due account of the principle of proportionality and the prohibition on disproportionate measures. The right to respect for family life under Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights ultimately compels such a consideration on the basis of principles of proportionality. Here too – on a case-by-case basis – the special circumstances of those involved must be considered (see judgment of 30 March 2010 – BVerwG 1 C 8.09 – Buchholz 402.242 Section 30 Residence Act Nr. 2 with further authorities).

32 In this weighing of interests, account must be taken of the fact that at both the Community and the national level, there is a significant public interest in preventing illegal immigration. If a third country national seeks permanent residence in the Federal territory for the purpose of reunifying the family he or she has established with another third country national, substantively the applicable requirements for entry under Directive 2003/86/EC (the Family Reunification Directive) and/or national law must be met. Furthermore, for entry and residence the third country national must have a national visa for a longer-term stay, which the Complainant did not apply for (see Section 6(4) in conjunction with Sections 27 et seq. Residence Act). If there are reasonable doubts about the foreigner's intention to return, therefore, a visitor's visa with limited validity also comes under consideration only in exceptional cases. An exceptional case cannot be assumed here, even in view of the Complainant's family ties with her minor children who are lawfully resident in the Federal territory.

33 The assessment of family ties does not hinge on family connections under formal law; rather, the crucial factor is the actual attachments among family members. Here it is immaterial whether there is a shared household or whether the living assistance provided by one family member might also be provided by other persons. If, as in this case, the question concerns a parent's personal contact with the child, it must be taken into account – even in cases where the parent does not have custody – that this is the expression and consequence of natural parental rights, and the associated parental responsibility. A parent's specific contribution toward a child's upbringing is not rendered dispensable by the fact that the child is being cared for by the other parent. The child's development is determined not just by the parents' quantifiable contributions toward his or her care, but also by mental and emotional involvement. The family community (within or without a single household) between a parent and a minor child is maintained by an actual participation in the child's life and upbringing (Federal Constitutional Court, decisions of 8 December 2005 – 2 BvR 1001/04 – InfAuslR 2006, 122 with further authorities, and of 9 January 2009 – 2 BvR 1064/08 – NVwZ 2009, 387 with further authorities). Under Section 1626(3) sentence 1 of the Civil Code, a child's well-being as a rule includes contact with both parents. Accordingly, under Section 1684(1) of the Civil Code, the child

has a right of contact with each parent, and each parent has not only a right of contact with the child, but also a duty of such contact in the child's best interests. This evolved insight into the significance of a child's right of contact with both parents must be taken into account in decisions on residency law that affect the actual exercise of the right of contact. In such cases, it must be examined whether in fact there is a personal involvement that the child must be able to rely on maintaining, in his or her best interests. On this point, full account must be taken of the parent's and the child's concerns. It must be assessed in what form parental responsibility is exercised, and what consequences a negative decision might have for the parent-child relationship as it is actually experienced, and for the child's well-being. It must also be taken into account that the child's personal contact with the parent living apart, and the associated establishment and continuity of emotional bonds with the father and the mother, serve as a general rule toward developing the child's personality, and that a child needs both parents (Federal Constitutional Court, decision of 8 December 2005 loc. cit.).

34 In application of these principles, the personal contact with her children that the Complainant seeks through her stay falls within the scope of protection of Article 6 of the Basic Law, Article 8 of the ECHR and Article 7 of the European Charter of Fundamental Rights. The children lived with the Complainant in Morocco until 2005, and were cared for by her. Given these circumstances, it must be assumed that in spite of the geographical separation brought about by the Complainant herself, a bond and family community persists (within or without a single household), characterised by mental and emotional involvement and supported by actual concern with the children's life and upbringing. Nevertheless, the rejection of the application for a visitor's visa is not disproportionate here. According to the findings of the court below, the Complainant herself brought about the geographical separation from her children in that, even though she received custody of the children in 2002 after the divorce, in 2005 she consented for the children to emigrate to Germany. If the children suffer from the resulting separation from their mother, the parents were and are free to reverse this decision in the children's best interests. Moreover, the Complainant and her two children – who were aged 11 and 8 years at the significant point in

time of the hearing before the court below – are not compelled to rely on a visit by the Complainant to the Federal territory in order to maintain family ties. The Complainant can maintain contact with her children from Morocco, both via the Internet and through letters and telephone calls. Furthermore, the children can visit their mother in Morocco during holidays. It is not unreasonable to expect the family to take these approaches, given the children's ages and the fact that according to the findings of the court below, the Complainant has an above-average income in Morocco, as well as savings that are not insubstantial.

35 The award of costs proceeds from Section 154(2) of the Code of Administrative Court Procedure.

Eckertz-Höfer Prof. Dr. Dörig Richter

Beck Fricke

D e c i s i o n

The value at issue for the proceedings before this Court is set at €5,000 (Section 47(1) in conjunction with Section 52(2) Court Costs Act).

Eckertz-Höfer Prof. Dr. Dörig Fricke