Field:	BVerwGE: yes
Immigration law	Professional press: yes

Sources in law:

Basic Law	Art. 6
Residence Act	Section 1(2)(1); Section 5(2); Section 6(4); Section 14(1)(2); Section 27(1); Section 28(1) sentence 1 No. 1; Section 99(1)(2)
Freedom of Movement Act/EU	Sections 1, 2(1); Section 11(2)
ECHR	Article 8
Residence Regulation	Section 31(1) sentence 1 No. 1; Section 39(3)
Treaty on the Functioning of the European Union	Article 20; 21(1)
Convention Implementing the Schengen Agreement	Article 18 sentence 1

Headwords:

Residence permit; subsequent immigration of spouse to join German; entry into country; marriage in Denmark; third party national spouse; Schengen visa; visitor's visa; national visa; required visa; visa requirement; legal entitlement to residence permit; subsequent compliance with visa application procedure; right of residence under Community law; right of free movement under Community law; citizenship of the Union; returnee cases; discrimination against citizens.

Headnotes:

1. According to the case law of the European Court of Justice in so-called 'returnee cases', a third country national spouse of a German national is entitled to a right of residence under Community law only if the German national has made a sustained exercise of his or her right of free movement under Community law. A brief stay for the purpose of marrying in another Member State (here: Denmark) does not suffice for this purpose (as in judgment of 16 November 2010 – BVerwG 1 C 17.09).

2. The visa that is to be viewed as the required visa within the meaning of Section 5(2) sentence 1 of the Residence Act is to be determined by the purpose of the stay pursued by the residence permit applied for within Federal territory (as in judgment of 16 November 2010 – BVerwG 1 C 17.09).

3. Entry into the country within the meaning of Section 39(3) of the Residence Regulation means the most recent entry into the Federal Republic of Germany.

4. In deciding when the prerequisites have been met for an entitlement to the issuance of a residence title within the meaning of Section 39(3) of the Residence Regulation, the focus must be on the date when the central feature characterising the purpose of residence is satisfied for the respective norm establishing the claim (here: marriage under Section 28(1) sentence 1 No. 1 of the Residence Act).

Judgment of the First Division of 11 January 2011 – BVerwG 1 C 23.09

I. Berlin Administrative Court, 5 November 2009 – Case No.: VG 15 A 335.08 –

FEDERAL ADMINISTRATIVE COURT

IN THE NAME OF THE PEOPLE

JUDGMENT

Federal Administrative Court 1 C 23.09
VG 15 A 335.08

Released
on 11 January 2011
Ms. Werner
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,
Prof. Dr. Kraft, and Fricke

decides:

The Complainant's appeal against the judgment of Berlin Administrative Court of 5 November 2009 is denied.

Costs of this appeal are adjudged against the Complainant.

R e a s o n s :

I

1 The Complainant, a Russian national, seeks a residence permit for subsequent immigration as a spouse.

2 The Complainant, born in 1968, by his own account remained for an extended time in Germany without a residence permit following an unsuccessful asylum proceeding. By his own account, in 2004 he became acquainted with Ms. G., a German national of Turkish background born in 1947, and has lived with her since September 2007. To be able to legalise his residence, he left the Federal territory in February 2008.

3 On 27 July 2008, the Complainant entered Germany on a Schengen visa issued by the Greek diplomatic mission in Moscow, with a validity from 27 July 2008 to 18 August 2008. On 1 August 2008 he married Ms. G. in Bornholm (Denmark), and he returned to Germany on that same day.

4 On 8 August 2008 the Complainant applied for a residence permit based on marriage. By a decision dated 25 September 2008 the Respondent denied the

application and threatened him with deportation. It held that the Complainant had entered Federal territory on 27 July 2008 without the national visa required to establish permanent residence. This visa could be issued only by a diplomatic mission of the Federal Republic of Germany. The visa requirement also could not be waived under the discretionary provision of Section 5(2) of the Residence Act, the decision said, because the visa application procedure had been circumvented with an obviously abusive intent. There were no evident extraordinary concerns of the Complainant and his wife deserving of protection.

5 The Administrative Court denied the complaint in a judgment of 5 November 2009. It founded its decision on the fact that the prerequisite for the issuance of a permit under Section 5(2) sentence 1 of the Residence Act had not been fulfilled, because at the time of his entry into the country the Complainant held only a Schengen visa valid for brief stays. The court held that this was not the visa required for purposes of the permanent residence now being sought. Irrespectively of that matter, according to the affidavit by the Complainant's wife, the intent to marry and obtain permanent residence existed even before the entry date, so that the Complainant omitted in his visa application to provide crucial information required for the issuance of a permit. The court found that he also did not have the option of applying for a residence permit from within Germany under Section 39(3) of the Residence Regulation. Although he held a valid Schengen visa at the time of his marriage, the claim arising from the marriage did not arise after his entry into the country, because the crucial consideration in this regard is the last entry into the Federal territory before the application was filed, not entry into the Schengen area. The court found that the Respondent exercised its discretionary power under Section 5(2) of the Residence Act without error. The authority correctly based its decision on the fact that the Complainant could reasonably be expected to leave the country and re-enter with the necessary visa. The court held that no special circumstances were either adduced or evident such as might cause a brief separation of the married couple to seem disproportionate.

6 In support of his appeal filed with this Court by leave of the Administrative Court, the Complainant asserts in substance that the Administrative Court's in-

terpretation would render the privileged status under Section 39(3) of the Residence Regulation irrelevant. In practice, he argues, it is impossible for a foreigner to enter into a marriage in Germany within three months. The regulatory agency should not have viewed the marriage in Denmark as an abuse, because it was obliged to recognise the marriage under Community law. Neither the systematic position of Section 39(3) of the Residence Regulation nor the background materials regarding the amendment of the rule, he says, provide any basis for the Administrative Court's opinion that the matter hinges on the last entry into Federal territory. The Administrative Court's interpretation, he argues, creates marriages of different kinds and quality, and impedes the subsequent immigration of a spouse so that *de facto* such an immigration can no longer take place.

7 The Respondent defends the lower court's decision. It argues that contrary to the Complainant's opinion, a marriage made in Germany subsequently to a dissembled prior decision is not privileged under Section 39(3) of the Residence Regulation, according to the intent and purpose of the rule. Furthermore, however, treating marriages entered into in Denmark and Germany differently in residence law is justified, because a German registrar is obliged to examine for the existence of a sham marriage, must initiate further inquiries if there are elements arousing suspicion, and may if applicable refuse to recognise the marriage.

8 This Court asked the Foreign Office to refer the record of the Complainant's visa application procedure. In response, the Foreign Office informed this Court that the visa documentation had already been destroyed by the Greek embassy in Moscow.

II

9 The Complainant's appeal to this Court is procedurally allowable, but fails on the merits. The Administrative Court rightly denied that the Complainant is entitled to a residence permit for subsequent immigration as a spouse without hav-

ing previously carried out a national visa application procedure, and it correctly affirmed the appealed rejection decision as lawful. It correctly held (1.) that the Complainant is subject to the terms of the Residence Act, (2.a) that he does not fulfil the general requirement for a visa under Section 5(2) sentence 1 of the Residence Act, and that (2.b) he neither is exempted from that requirement pursuant to Section 39 of the Residence Regulation nor (2.c) can he demand that the Respondent waive this requirement within its power of discretion under Section 5(2) sentence 2 of the Residence Act.

10 1. To begin with, the Administrative Court properly held that the Complainant's demand for relief should be assessed under the terms of the Residence Act. The exclusion of applicability of the Residence Act under Section 1(2)(1) of the Residence Act does not apply, because the Complainant's legal status is not covered by the Act on the General Freedom of Movement of European Union Citizens (the Freedom of Movement Act/EU). According to Section 1 of the Freedom of Movement Act/EU, that Act governs only the entry and residence of nationals of other Member States of the European Union and their family members, not the entry and residence of family members of German nationals.

11 However, according to the case law of the European Court of Justice (ECJ), family members of Germans do come under Community rules on subsequent immigration in exceptional cases, specifically in what are known as 'returnee cases' (ECJ, judgments of 7 July 1992 – Case C-370/90, Singh – InfAuslR 1992, 341, and of 11 December 2007 – Case C-291/05, Eind – InfAuslR 2008, 114). According to that case law, a Union citizen's spouse who is a third country national may also invoke a right of residence under Community law against the state of which the Union citizen is a national, if the Union citizen, exercising his or her right of free movement, settled in another Member State, and the spouse accompanied or joined him or her in that other Member State, and resided there with him or her. This ruling also applies when the marriage was entered into only in the other Member State, and it is not contingent on the date of entry or the lawful nature of the spouse's previous residence in the state of which the Union citizen is a national (ECJ, judgment of 11 December 2007, loc. cit., Marginal No. 27 et seq., 45) or in the other Member State (ECJ, judgment of 25 July

2008 – Case C-127/08, Metock – NVwZ 2008, 1097 Marginal No. 48 et seq.). According to ECJ case law, the practical validity of the right of free movement of the Union citizen entails that in these cases, the third country national spouse also has a well-founded right of residence in the Union citizen's country of origin if they return there together.

12 In general, the Member States cannot subject this right to any requirements other than furnishing evidence of identity and of the marriage. In particular, a 'residence visa for family reunification' cannot be demanded (ECJ, judgment of 14 April 2005 – Case C-157/03, Commission v. Spain – Col. 2005, I-2911 Marginal No. 28). Even entry without an allowably required entry visa in the form of a Schengen visa can at most result in the imposition of administrative sanctions, but not refusal of the right of residence and certainly not removal from the territory (ECJ, judgment of 25 July 2002 – Case C-459/99, MRAX – InfAuslR 2002, 417 Marginal No. 56 and 59). It need not be finally decided here whether, when such a right of residence of the third country national spouse of a German exists under Community law, the provisions of the Freedom of Movement Act/EU should be applied in an interpretation consistent with Community law (see Hailbronner, Auslandsrecht, Section 1 Freedom of Movement Act/EU Marginal No. 2 and 14; Darmstadt Administrative Court, decision of 6 October 2010 – 5 L 492/10.DA – p. 4 et seq.; presumably also Bremen Higher Regional Court, decision of 17 August 2010 – 1 B 166/10 – InfAuslR 2011, 1), or whether, on the other hand, treatment in conformity with Community law is to be secured through direct recourse to Community law (see Epe, in: GK-AufenthG, Section 1 Freedom of Movement Act/EU Marginal No. 26). In this Court's view, there are very good reasons for an analogous application of the terms of the Freedom of Movement Act/EU, with the consequence that in a so-called 'returnee case' the application of the Residence Act is also excluded under Section 1(2)(1) of the Residence Act. However, this would not mean that in all cases where third country nationals ask to subsequently immigrate and join their German spouse, it would always be necessary to find, in compliance with Section 11(2) of the Freedom of Movement Act/EU, that no right under Section 2(1) of the Freedom of Movement Act/EU exists, before bringing the Residence Act into play. After all, there is a presupposition that the persons indicated in Section 1 of the Free-

dom of Movement Act/EU have a right of free movement that family members of German nationals specifically do not have, and therefore in returnee cases an exception can be made from an according application of the terms of the Freedom of Movement Act/EU.

13 The question of law raised above does not call for final resolution here, because in the Complainant's instance the conditions for a so-called 'returnee case' within the meaning of ECJ case law do not exist. In making her brief trip to Denmark and marrying there, the Complainant's German wife did not exercise her freedom of movement in such a prolonged way that the practical efficacy of the laws on free movement would necessitate extending to the Complainant an entitlement to subsequent immigration under Community law. We may set aside the question of whether and to what extent the Complainant's wife, by making use of services during her short trip to Denmark, exercised her economic right of free movement in the form of freedom to obtain services. Under the case law of the ECJ, the application of the principles developed in so-called 'returnee cases' no longer necessarily presupposes that the citizen of the Union must have exercised economic fundamental freedoms (on the economic right of free movement through the providing of services, see ECJ, judgment of 11 July 2002 – Case C-60/00, Carpenter – Col. 2002, I-6279). Rather, exercising the general freedom of movement associated with citizenship of the Union under Article 21(1) of the Treaty on the Functioning of the European Union may also be sufficient to establish the applicability of Community rules for family reunification (see ECJ, judgment of 19 October 2004 – Case C-200/02, Zhu and Chen – InfAuslR 2004, 413 Marginal No. 34 et seq.). Nevertheless, as the cases decided by the ECJ show, not every exercise of the freedom of movement by citizens of the Union, however slight, is sufficient. Rather, in order for the status of having freedom of movement to be 'carried along' to the home country, with an associated favoured treatment of the third country national spouse, it is necessary for the citizen of the Union to exercise freedom of movement for a certain extended time (judgment of 16 November 2010 – Federal Administrative Court 1 C 17.09 – Marginal No. 9 et seq. – scheduled for publication in the BVerwGE collection; also, predominant case law from the administrative courts: Mannheim Higher Administrative Court, decision of 25 January 2010 – 11 p 2181/09 – InfAuslR

2010, 143; Munich Higher Administrative Court, decision of 29 September 2009 – 19 CS 09.1405 – juris Marginal No. 8; Darmstadt Administrative Court, decision of 23 October 2009 – 5 L 557/09.DA(2) – InfAuslR 2010, 67; on the same lines, Kassel Higher Administrative Court, decision of 22 January 2010 – 3 B 2948/09 – juris Marginal No. 16 et seq.). If any brief stay, never intended for a certain permanence, by a citizen of the Union in another Member State – for example for purposes of tourism – were sufficient for a third country national spouse traveling with the citizen of the Union to have a right of subsequent immigration under Community law when the citizen returned to his or her home country, the right of Member States to regulate entry and residence for the third country spouse or other family members of its own citizens would be largely hollow. But the ECJ has repeatedly and expressly recognised this right of the Member States in its decisions, and has emphasised that the treaty's terms on freedom of movement are not applicable to activities that are confined in all relevant respects within the boundaries of a single Member State (ECJ, judgments of 25 July 2008 loc. cit., Marginal No. 77 and of 1 April 2008 – Case C-212/06, Gouvernement de la Communauté française etc. – Col. 2008, I-1683 Marginal No. 39 with further authorities). To that extent, a kind of trivial exception can be derived from the case law of the ECJ about returnee cases, under which, in view of the substantial legal consequences of exercising freedom of movement in a returnee case, this exercise itself must also be of a certain substantiality or permanence. The Commission's considerations concerning an abusive claiming of Community rights in this connection trend in the same direction, deeming it necessary to establish a genuine and effective residence in the other Member State – in other words, in substance and as a rule, a relocation of the citizen of the Union (Communication from the Commission to the European Parliament and the Council of 2 July 2009, COM(2009) 313 final, p. 19 et seq.).

14 We need not decide here specifically where the line is to be drawn beyond which the exercise of the freedoms of movement and residence under Community law in another Member State is to be considered sufficiently long-lasting to justify a right of residence of the third country national spouse under Community law, and whether a generalisable specification to this extent is possible at all. In the present case, at least, the brief joint stay of only a few days by the Com-

plainant and his wife in Denmark undoubtedly has not reached that line. Therefore a referral of the case to the ECJ for a preliminary ruling is also superfluous.

15 Nor does any need for such a referral result from the concluding arguments by Advocate General Sharpston in the case C-34/09 – Zambrano – of 30 September 2010 referred to the Grand Chamber of the ECJ. Here the Advocate General fundamentally raised the question of whether a citizen of the Union can invoke his rights as a Union citizen – including the associated entitlement to family reunification under the rules of Community law – against the State of his or her nationality, even without having previously exercised the right of free movement. In the Advocate General's opinion, such discrimination against citizens is not permitted under Community law. However, her opinion is contradicted by the settled case law of the ECJ to date, under which Community law has no application to matters that fall entirely within the boundaries of a Member State, and decisions about any disadvantages to which nationals of a Member State are exposed under that State's laws are to be made solely within the bounds of that State's internal legal system (in addition to the judgments of 25 July 2008 and 1 April 2008 cited above, see also the judgment of 5 June 1997 – Case C-64/96 und C-65/96, Uecker and Jacquet – Col. 1997, I-3171 Marginal No. 23). The ECJ also expressly confirmed this position in response to a similar foray by Advocate General Sharpston in her concluding arguments of 28 June 2007, Marginal No. 121, in the case C-212/06, by its judgment of 1 April 2008, loc. cit., Marginal Nos. 37 through 39. In view of this unequivocal case law, this Court does not believe any doubts arise in this regard under Community law at present.

16 Nor does the application of the Residence Act to German citizens of the Union who have not exercised their right of free movement violate Article 3(1) of the Basic Law. We may set aside the question of whether, given the obligation to transpose requirements of Community law into national law and the resulting impact on different legal systems, the matters at hand are the same or comparable at all within the meaning of Article 3(1) of the Basic Law (see Federal Constitutional Court, decisions of 8 November 1989 – 1 BvR 986/89 – NJW 1990, 1033 and 13 June 2006 – 1 BvR 1160/03 – BVerfGE 116, 135 <159>).

This is because the unequal treatment resulting from the juxtaposition of Community law and national law is objectively justified anyway. Where Community law does not imperatively require a transfer of the right of residence under Community law to family members of German citizens of the Union who have not exercised their right of free movement, there are sufficiently weighty reasons for applying in these same cases the provisions of national residency law that apply to all foreigners not entitled to freedom of movement (see judgment of 4 September 2007 – Federal Administrative Court 1 C 43.06 – BVerwGE 129, 226 Marginal No. 40).

17 2. Therefore the legal assessment of the Complainant's claim here is governed by the terms of the Residence Act in the version of the Announcement of 25 February 2008 (Federal Law Gazette I p. 162) that applied at the time of the hearing before the Administrative Court. Those terms also remain unchanged at present, in so far as they are pertinent here.

18 Under Section 28(1) sentence 1 No. 1 in conjunction with Section 27(1) of the Residence Act, in addition to the other prerequisites stated there, an entitlement to a residence permit for subsequent immigration of a spouse to join a German national fundamentally also requires that the general prerequisite for issuance of a residence permit under Section 5(2) sentence 1 of the Residence Act must also be met, or in other words, that the foreigner must have entered the country with the necessary visa (No. 1) and must have already furnished the required key information in his or her visa application (No. 2). Differing terms apply only when the foreigner is entitled to obtain the residence permit after entering the country, under Section 39 of the Residence Regulation, or when a waiver of this requirement for a residence permit comes into consideration under Section 5(2) sentence 2 of the Residence Act.

19 a) The Administrative Court first correctly held that the Complainant does not meet the requirement for a residence permit under Section 5(2) sentence 1 of the Residence Act. He did not enter the country with a national visa granted for purposes of subsequent immigration of a spouse under Section 6(4) of the Residence Act, and according to the findings of the Administrative Court, he did

not furnish the information required for granting the permit in his visa application.

20 The Complainant entered Federal territory under a Schengen visa for a brief stay of not more than three months, within the meaning of Section 6(1) sentence 1 No. 2 of the Residence Act, and therefore not unlawfully within the meaning of Section 14(1)(2) of the Residence Act (on the interpretation of this provision see: BTDrucks 15/420 p. 73 and Federal Court of Justice, judgment of 27 April 2005 – 2 StR 457/04 – NJW 2005, 2095). But for a more extended stay, Section 6(4) sentence 1 of the Residence Act – with the exceptions indicated above – requires a visa for the Federal territory (national visa), which is issued before entry and is subject to the consent of the competent immigration authority (Section 31(1) sentence 1 No. 1 of the Residence Regulation). Which particular visa is to be considered the one required under Section 5(2) sentence 1 No. 1 of the Residence Act is determined by the purpose of the stay being pursued with the residence permit for Federal territory that is being requested (judgment of 16 November 2010 – Federal Administrative Court 1 C 17.09 – Marginal No. 19, as well as the strongly predominant case law of the Higher Administrative Courts: in addition to the appealed decision, for example, Kassel Higher Administrative Court, decision of 16 March 2005 – 12 TG 298/05 – NVwZ 2006, 111; Mannheim Higher Administrative Court, decision of 14 March 2006 – 11 S 1797/05 – juris Marginal No. 12 et seq.; Lüneburg Higher Administrative Court, decision of 28 August 2008 – 13 ME 131/08 – juris Marginal No. 3; Bremen Higher Administrative Court, decision of 26 June 2009 – 1 B 552/08 – juris Marginal No. 30; left open under the former status of the law in the judgment of 18 June 1996 – Federal Administrative Court 1 C 17.95 – BVerwGE 101, 265 <267>). This interpretation of the provision is also supported by the provision’s intent and purpose, as well as its systematic positioning among the general prerequisites for the issuing of residence titles. Unlike Section 14(1) No. 2 of the Residence Act, the provision does not serve primarily to prevent or sanction unlawful entry, but rather is intended to ensure compliance with the visa application procedure as an important instrument for controlling immigration (BTDrucks 15/420 p. 70). This purpose of the provision is best served by a broad interpretation that also allows for subsequent changes in the purpose of

residence. Moreover, only such an interpretation of the provision allows the exceptions provided for under Section 39(2), (3) and (6) of the Residence Regulation to attain independent significance. If it were not so, an application for a residence title in the Federal territory would already be permitted in the cases of later changes in the purpose of residence governed there, under Section 5(2) sentence 1 of the Residence Act.

21 Since the Complainant entered the country with ‘only’ a Schengen visa, not with the national visa required under Section 5(2) sentence 1 No. 1 of the Residence Act, and irrespective of the fact that he also did not provide in the visa application the information that was necessary for the issue of a residence permit for the purpose of entering into and maintaining a marriage, the requirement for granting a permit under Section 5(2) sentence 1 of the Residence Act has not been met.

22 b) Nor is the Complainant entitled by exception to obtain a residence title for the Federal territory, thereby exempting him from the visa requirement, under the rules of Sections 39 et seq. of the Residence Regulation, founded on Section 99(1)(2) of the Residence Act.

23 aa) The rule under Section 39(3) of the Residence Regulation, the only one that comes into consideration in the Complainant’s case, is applicable in the version of the Directive Transposal Act, which has been in effect since 28 August 2007 (see Article 7(4)(13) of the Act for the Transposal of European Union Directives on Residence and Asylum Law, of 19 August 2007, Federal Law Gazette I p. 1970). In the Complainant’s case there are no circumstances which would make it imperative, on grounds of protection of legitimate expectation, to work by exception on the basis of the previous status of the law, in derogation from the principle of the governing force of the current status of the law (see Münster Higher Administrative Court, decision of 21 December 2007 – 18 B 1535/07 – InfAuslR 2008, 129). His marriage, which controls the application of the rule, took place after the change in the law took effect, as did his application for the residence permit, so that if only for that reason, there could have been no legitimate expectation of the applicability of the old status of the law.

24 Under Section 39(3) of the Residence Regulation in the new version to be applied here, a foreigner may obtain a residence title in the Federal territory if he is a citizen of one of the states listed in Annex II to Regulation (EC) No. 539/2001 and is lawfully residing in the Federal territory or holds a valid Schengen visa for short stays (Section 6(1)(2) of the Residence Act), provided the prerequisites for an entitlement to a residence title arose after he entered the country. In the old version, the last phrase read: '…, if the requirements for an entitlement to issuance of a residence title are fulfilled'. The Complainant, for whom only the second alternative provided under the regulation comes into consideration, did hold a valid Schengen visa for short stays at the time when he filed the application for a residence permit for subsequent immigration of a spouse. However, the prerequisites for an entitlement to a residence permit did not arise after his last entry into Federal territory, but before.

25 bb) In examining Section 39(3) of the Residence Regulation, the Administrative Court correctly focused on the Complainant's last entry into Federal territory (concurring position, Munich Higher Administrative Court, decisions of 23 December 2008 – 19 CS 08.577 – juris Marginal No. 15 and 12 January 2010 – 10 CS 09.2705 – juris Marginal No. 9; Mannheim Higher Administrative Court, decisions of 8 July 2008 – 11 p 1041/08 – juris Marginal No. 17 and of 16 September 2009 – 13 S 1975/09 – juris Marginal No. 5; Kassel Higher Administrative Court, decision of 22 September 2008 – 1 B 1628/08 – juris Marginal No. 5; Lüneburg Higher Administrative Court, decision of 1 March 2010 – 13 ME 3/10 – juris Marginal No. 8; Münster Higher Administrative Court, decision of 2 November 2009 – 18 B 1516/08 – juris Marginal No. 10 et seq.; Greifswald Higher Administrative Court, decision of 22 July 2009 – 2 M 93/09 – juris Marginal No. 8). Even if the wording of the provision admits of a different reading, the positioning of the provision in the Fourth Part of the Residence Regulation, which deals only with exceptions to the visa requirement for the grant of national residence titles under Section 6(4) of the Residence Act, indicates that this set of circumstances refers not to an entry into the Schengen area, but to the (last) entry into Federal territory. The regulator is not subject to Community requirements in regulating exceptions to national visa obligations (see Article 18

sentence 1 of the Convention Implementing the Schengen Agreement of 14 June 1985, OJ 2000 L 239 p. 19 – Convention Implementing the Schengen Agreement). The mere link with matters touching on Community law does not justify the assumption that in Section 39(3) of the Residence Regulation the regulator intended to refer to an entry into the Schengen area (dissenting, Benassi, InfAuslR 2008, 127 <128 et seq.>). This is argued against primarily by the intent and purpose of Section 39(3) of the Residence Regulation. The regulation is intended to favour only those foreigners who have given correct information in the Schengen visa application procedure, and the purpose of whose stay has changed because of new circumstances that arose after entering the country. But it is not intended to honour the attempt to establish a permanent residence in Germany that was intended from the very start, by circumventing the national visa regulations. Otherwise, the intentional circumvention of the visa application procedure would be without consequences, and this important instrument for the control of immigration (as it is referred to in BTDrucks 15/420 p. 70) would be devalued. This regulatory purpose is clearly expressed in the reasons for the new version of the regulation in the Directive Transposal Act, with the example of entering into a marriage outside Germany (BTDrucks 16/5065 p. 240).

26 cc) In assessing when the prerequisites for an entitlement under Section 39(3) of the Residence Regulation have been met, one must focus on the date when the central feature characterising the purpose of residence was satisfied for the pertinent norm establishing the claim (here: entering into a marriage under Section 28(1) sentence 1 No. 1 of the Residence Act) (so too, Lüneburg Higher Administrative Court, decision of 1 March 2010, loc. cit., Marginal No. 9 et seq.; Munich Higher Administrative Court, decision of 29 September 2009 – 19 CS 09.1405 – juris Marginal No. 4; Bremen Higher Administrative Court, decision of 26 June 2009 – 1 B 552/08 – InfAuslR 2009, 380 <381 et seq.>; dissenting, Mannheim Higher Administrative Court, decision of 8 July 2008 – 11 p 1041/08 – InfAuslR 2008, 444 <449>). The Official Reasons for the new version link the origin of the entitlement and the purpose of the stay together, while the other prerequisites for an entitlement are not mentioned at this point (‘… the favoured position applies only when the entitlement arises after entering the country, and

it can therefore be excluded that a change of the alleged reason for the stay was intended from the beginning'. – BTDrucks 16/5065 loc. cit.). It follows that under Section 39(3) of the Residence Regulation, in determining whether the prerequisites for an entitlement to a residence title have been met, one should focus only on when the circumstances establishing the basis for the entitlement characterising the purpose of the stay arose. Moreover, the contrary interpretation, which focuses on the fulfilment of all prerequisites for an entitlement to a residence permit – except for the visa requirement under Section 5(2) sentence 1 of the Residence Act – leads to arbitrary results. Differentiating according to whether, for example, the necessary knowledge of the German language (Section 28(1) sentence 5 in conjunction with Section 30(1) sentence 1 No. 2 of the Residence Act) was acquired before or after entering Federal territory is incompatible with the legislative intent that the visa laws should no longer privilege permanent residencies that were intended from the outset.

27 dd) With the new version of Section 39(3) of the Residence Regulation, third country nationals who hold a valid Schengen visa, who have married a German citizen, and who intend to live in conjugal cohabitation with that citizen in the Federal Republic of Germany, are treated variably with regard to the visa requirement for their desired permanent residence in Federal territory: If the marriage was entered into in the Schengen area, the visa obligation under Section 6(4) sentence 1 of the Residence Act still applies. If the couple was married in Germany, Section 39(3) of the Residence Regulation makes it possible to obtain the residence permit within the Federal territory. However, this unequal treatment is founded on legitimate legislative considerations, and is justified under both the German constitution and Community law.

28 Measured by the standard of Article 3(1) of the Basic Law, the authority of legislators and regulators to distinguish types justifies differentiating the intervention of the visa requirement according to whether the marriage was entered into in Germany or elsewhere. In the case of a marriage entered into in Germany, national family law provides for specific control mechanisms to safeguard the prerequisites for a marriage and prevent sham or multiple marriages. For example, an affianced person who, under Article 13(1) of the Introductory Act to the Civil

Code, is subject to foreign law with regard to the requirements for entering into a marriage must generally obtain a certificate of eligibility for marriage from his or her home country, confirming that there is no impediment to marriage under that country's laws (Section 1309(1) BGB). Furthermore, the registrar must investigate any indications of a sham marriage, because the registrar must for example refuse cooperation if it is evident that both spouses are in agreement at the time of the marriage that they do not intend to establish conjugal cohabitation (Section 1310(1) sentence 2 in conjunction with Section 1314(2)(5) BGB). This duty of the registrar to examine and investigate is supported procedurally under Section 13(1) and (2) of the Marital Status Act by the power to question the parties jointly and separately, the power to order them to provide evidence, and the power to require an affidavit. Consequently the affianced couple's intent to establish conjugal cohabitation, which is also significant in residence law under Section 27(1) of the Residence Act, is already examined by the registrar at the time of a marriage within Germany, and any associated suspect points are investigated. This makes it easier for the immigration authority later to issue a residence permit for subsequent immigration of the spouse. This additional control mechanism is typically wanting for a marriage entered into in another country, as is shown precisely by the present case of a marriage entered into in Denmark. In the event of the suspicion of the existence of a sham marriage or marriage of convenience motivated by reasons of relevance under residence law, Section 22a of the Danish Marriage Act provides only that the examining or officiating authority must report the circumstance to the Danish immigration authorities (published in: Bergmann/Ferid/Henrich, *Internationales Ehe- und Kindschaftsrecht*, Volume IV, Denmark, status: 30 September 2007, 175th delivery). Therefore the unequal treatment is founded on sufficiently objective grounds.

29 Nor does Community law oppose the disadvantage imposed under Section 39(3) of the Residence Regulation on a German spouse who, as a citizen of the Union, exercises the right of free movement with a marriage in Denmark, and whose third country national spouse is required to go through the visa application procedure before taking up conjugal cohabitation in Germany. Under the case law of the European Court of Justice (ECJ), citizenship of the Union is intended to be the fundamental status of nationals of the Member States, which

enables those of them who are in the same situation to enjoy the same treatment in law within the objective scope of applicability of the Treaty, irrespective of their nationality and without prejudice to the exceptions explicitly provided in this regard (ECJ, judgments of 20 September 2001 – Case C-184/99, Grzelczyk – Col. 2001, I-6193 Marginal No. 31; of 11 July 2002 – Case C-224/98, D'Hoop – Col. 2002, I-6191 Marginal No. 28; and of 2 October 2003 – Case C-148/02, Avello – Col. 2003, I-11613 Marginal No. 22 et seq.). The situations that fall within the scope of applicability of Community law include those relating to the exercise of the fundamental freedoms guaranteed by the Treaty, and particularly also those concerned with the right conferred under Article 20 of the Treaty on the Functioning of the European Union, to move and reside freely within the territory of the Member States (ECJ, judgments of 20 September 2001, loc. cit., Marginal No. 33; of 11 July 2002, loc. cit., Marginal No. 29; and of 29 April 2004 – Case C-224/02, Pusa – Col. 2004, I-5763 Marginal No. 17). Since a citizen of the Union is entitled in all Member States to the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the facilitated freedom of movement (ECJ, judgments of 11 July 2002, loc. cit., Marginal No. 30, and of 29 April 2004, loc. cit., Marginal No. 18). In the ECJ's opinion, these facilitated rights cannot be fully effective if a national of a Member State may be prevented from exercising them by obstacles raised by national regulations that attach disadvantages to their exercise (ECJ, judgments of 7 July 1992 – Case C-370/90, Singh – Col. 1992, I-4265 Marginal No. 23; of 11 July 2002, loc. cit., Marginal No. 31; and of 29 April 2004, loc. cit., Marginal No. 19).

30 We may set aside the question of whether this case law – in which the European Court of Justice established a reference between the entitlement to equal treatment from all Member States inherent in the status of a citizen of the Union, and freedom of movement, and applied it against the citizen's own Member State – can be applied in the present case. This seems obvious, first because the Complainant's German wife spent only one day in Denmark, and therefore

made no sustained use of her freedom of movement (see above, Marginal No. 10 et seq.). Second, one may doubt whether Section 39(3) of the Residence Regulation constitutes a restriction of the rights deriving from Article 20(1) of the Treaty on the Functioning of the European Union (on this point, see ECJ, judgments of 18 July 2006 – Case C-406/04, De Cuyper – Col. 2006, I-6947 Marginal No. 39, and of 26 October 2006 – Case C-192/05, Tas-Hagen and Tas – Col. 2006, I-10451 Marginal No. 31). However, the rule does act to the disadvantage of German nationals, because they cannot immediately establish conjugal cohabitation with their third country national spouse within Federal territory. It also is linked to the fact that the Complainant's German wife, as a citizen of the Union, exercised her freedom to go to another Member State to enter into a marriage. There is no need to decide here whether in cases of a marriage, which is an official government act belonging to the core area of the exercise of public force, the link under Section 39(3) of the Residence Regulation should be viewed as a restriction of freedom of movement in the same way as in the cases decided hitherto by the European Court of Justice, and is subject to the same criteria.

31 This is because even if the above case law of the European Court of Justice were to be applied in the Complainant's favour, the unequal treatment in visa law triggered by Section 39(3) of the Residence Regulation would be justified, because it is founded on objective considerations independent of the nationality of the persons concerned, and is proportionate to the legitimate aim of the national provisions (on these criteria see: ECJ, judgments of 11 July 2002, loc. cit., Marginal No. 36; of 26 October 2006, loc. cit., Marginal No. 33; and of 11 September 2007 – Case C-76/05, Schwarz and Gootjes-Schwarz – Col. 2007, I-6849 Marginal No. 94). The visa obligation, in comparison to requests for subsequent immigration founded on marriages entered into within Germany, is founded on objective considerations independent of the nationality of the persons concerned. It serves the state's interest in preventively controlling prerequisites established by residence law, prior to the inception of residence. The Member State's interest in effective administrative control capabilities has already been acknowledged by the European Court of Justice in justifying unequal treatment relevant to freedom of movement in connection with drawing

social security benefits (ECJ, judgment of 18 July 2006, loc. cit., Marginal No. 40 et seq.). With regard to proportionality, it must be borne in mind that the visa application procedure results only in a delay, not a permanent prevention of conjugal cohabitation. This effect is proportionate to the legitimate aim of control.

32 In view of the settled case law of the European Court of Justice on the applicable criteria, the justification of a restriction of the rights proceeding from Article 20(1) of the Treaty on the Functioning of the European Union in the Complainant's regard seems to be acte clair. Therefore, there is also no need on this point to consult the European Court of Justice under Article 267 of the Treaty on the Functioning of the European Union.

33 c) The Administrative Court correctly held that the Respondent lawfully made the discretionary decision not to waive the prerequisite for a residence permit under Section 5(2) sentence 1 of the Residence Act, in accordance with sentence 2 of that provision.

34 Under Section 5(2) sentence 2 of the Residence Act, the requirement of a visa application procedure under sentence 1 may be waived if the prerequisites qualifying a foreigner for the granting of a residence title are met or if special circumstances relating to the individual case concerned render a subsequent visa application procedure unreasonable. The Complainant meets the requirements for the first alternative of the provision, but not the second one. According to the findings of the Administrative Court, there are no special circumstances that make it seem unreasonable for him to leave Federal territory temporarily in order to carry out a subsequent visa application procedure. The mere circumstance that the spouses may possibly have to undergo a temporary separation for the usual duration of the visa application procedure is also not sufficient for this purpose, even allowing for the protection of marriage under Article 6 of the Basic Law and Article 8 of the ECHR (see decision of 31 August 1984 – Federal Administrative Court 1 B 99.84 – BVerwGE 70, 54 <56 et seq.>; judgment of 9 December 1997 – Federal Administrative Court 1 C 20.97 – NVwZ 1998, 748 = Buchholz 402.240 Section 8 AuslG 1990 No. 14). Accordingly, the discretionary

latitude granted to the Respondent was not automatically narrowed. There is nothing to object to in the Respondent's choice in its decision not to honour through a discretionary waiver a deliberate evasion of the visa application procedure, committed by stating a different purpose for the stay. If the visa application procedure, as an important instrument for immigration control (BTDrucks 15/420 p. 70), is to perform its function effectively, general preventive aspects may also be included in the exercise of discretionary powers (judgment of 4 September 1986 – Federal Administrative Court 1 C 19.86 – BVerwGE 75, 20 <23 et seq.>).

35 In light of all the above, there is likewise nothing to object to in law in the threat of deportation in the appealed decision.

36 The disposition as to costs follows from Section 154(2) of the Code of Administrative Court Procedure.

Eckertz-Höfer Prof. Dr. Dörig Richter

Prof. Dr. Kraft Fricke

D e c i s i o n

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

Eckertz-Höfer Richter Prof. Dr. Kraft