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## **Austria: Federal Administrative Court (BVwG), 25. June 2018, W209 2184750-**

**Country of Decision:**

Austria

**Country of Applicant:**

Bangladesh

**Date of Decision:**

25-06-2018

**Citation:**

BVwG 2018/6/25 W209 2184750-1

**Court Name:**

Federal Administrative Court (BVwG)

**Keywords:**

Access to the labour market

Reception conditions

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**Relevant Legislative Provisions:**

European Union Law &gt; Treaty on the Functioning of the European Union 2010/C 83/01

European Union Law &gt; Treaty on the Functioning of the European Union 2010/C 83/01 &gt; Article 267 § 1 (b)

European Union Law > [EN - Reception Conditions Directive, Directive 2003/9/EC of 27 January 2003](#) [1]European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [2]European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [3] > [Article 29](#) [4]European Union Law > [EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013](#) [5] > [Article 15](#) [6]European Union Law > [EN - Recast Reception Conditions Directive, Directive 2013/33/EU of 26 June 2013](#) [5] > [Article 28](#) [7]

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**Headnote:**

In direct application of Art. 15 (2) of the Reception Conditions Directive, according to which asylum applicants must be given effective access to the labour market, the requirements of the Act Governing the Employment of Foreign Nationals (AuslBG) must be modified. The non-

existence of a unanimous approval by the Regional Council pursuant to Art. 4 (3) AuslBG does not preclude the granting of employment permits to asylum applicants.

### **Facts:**

The first complainant applied for an employment permit for the second complainant to work as a restaurant manager.

The second complainant is a Bangladeshi national who applied for international protection at the Federal Office for Immigration and Asylum (BFA). The second complainant had previously studied and lived in Great Britain for five years. Despite the express consent of Great Britain, the asylum procedure continued in Austria because the transfer period to Great Britain under the Dublin Regulation had expired. A decision by the BFA had not yet been issued at the time of the decision.

The first complainant runs two restaurants in Vienna and wishes to employ the second complainant, who holds a residence permit card pursuant to Sec. 51 Asylum Act 2005 (AsylG), as restaurant manager. The latter already had five years of professional experience in a restaurant and furthermore fulfilled all other necessary qualifications. In spite of the fact that the Labour Market Service for Enterprises (*Arbeitsmarktservice für Unternehmen*) has placed several vacancy notices for the first complainant, the vacant position of restaurant manager could not be filled since 2015.

After the first complainant had applied for an employment permit, the competent authority requested proof of a current residence permit and other documents of the second complainant. Furthermore, the authority stated that employment permits can only be granted if the situation and development of the labour market permit the employment, whereby it should be determined that no domestic or integrated foreign workers could be placed for the job (substitute employment procedure - *Ersatzkraftstellungsverfahren*).

The authority rejected the application on the basis that the second complainant was only in possession of a procedural card for the execution of the asylum procedure and therefore there was no right of residence within the meaning of Sec. 4(1) no. 1 AuslBG. The authority furthermore stated that, irrespective of the labour market situation pursuant to Sec. 4(1) AuslBG, the condition of the consent of the Regional Advisory Council (*Regionalbeirat*) pursuant to Sec. 4(3) AuslBG had to be fulfilled in order for an employment permit to be granted. The first complainant replied to the authority that in direct application of Art. 15(2) of Directive 2013/33/EC (Reception Conditions Directive) the lack of unanimous support by the Regional Advisory Council pursuant to Sec. 4(3) no.1 AuslBG should not preclude the granting of an employment permit.

The complainants brought the case before the Federal Administrative Court.

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### **Decision & Reasoning:**

The BVwG states first of all that the authority, in justifying its refusal, deviates from the opinion submitted by Austria to the European Commission, according to which the granting of employment permits for asylum applicants only requires that the requirements of Sec. 4(1) no. 1 and Sec. 4b AuslBG be fulfilled. Furthermore, such a restriction of the admission to the labour market would be contrary to Art. 15(2) Reception Conditions Directive, according to which asylum applicants must be given effective access to the labour market. Accordingly, the prerequisites of Sec. 4(3) AuslBG do not have to be fulfilled when granting an employment permit, as a result of the direct application of Art. 15(2) Reception Conditions Directive.

Moreover, contrary to the authority's assertion, the admission of the second complainant to the asylum procedure constitutes a necessary right of residence of the second applicant pursuant to Sec. 4 (1) no.1 AuslBG.

Furthermore, according to Sec. 4(1) in conjunction with Sec. 4b AuslBG, a labour market examination (substitute employment procedure) must be carried out before an employment permit is granted. By omitting a substitute employment procedure, the authority in the present case has only insufficiently established the facts that are essential to the decision and has thus not provided "useful investigation results" that are sufficient for a decision on the merits so that the BVwG referred the matter back to the authority for re-examination.

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**Outcome:**

The BVwG annuls the contested decision and refers the matter for reconsideration back to the authority.

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**Observations/Comments:**

This summary is written by Theresa Richter, LLM student of Queen Mary University, London.

**Attachment(s):**

[Federal Admin Court labour market and reception conditions.pdf](#)[8]

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**National / Other Legislative Provisions:**

[Austria - Act Governing the Employment of Foreign Nationals \(AuslBG\) - § 4](#) [9]

[Austria - Act Governing the Employment of Foreign Nationals \(AuslBG\) - § 5](#) [10]

[Austria - Act Governing the Employment of Foreign Nationals \(AuslBG\) - § 20g para.1](#) [11]

[Austria - Administrative Court Act \(VwGG\) - §25a para. 1](#) [12]

[Austria - Administrative Court Act \(VwGG\) - §17](#) [13]

[Austria - Administrative Court Act \(VwGG\)- § 28](#) [14]

[Austria - Administrative Court Act \(VwGG\) - §52](#) [15]

[Austria - Administrative Procedure Act \(AVG\)- §13 para.4](#) [16]

[Austria - Decree dated 11.05.2004](#) [17]

[GZ 435.006/6-II/7/2004](#) ( [18]

[Austria - Fachkräfte- Bundeshöchstzahlenüberziehungsverordnung \(BHZÜV\) - § 1](#) [19]

[Austria - Federal Constitutional Law \(B-GV\) - Art. 130 para.1](#) [20]

[Austria - Federal Constitutional Law \(B-GV\) - Art. 133 para. 4](#) [21]

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**Links:**

[1] <https://www.asylumlawdatabase.eu/node/353>

[2] <https://www.asylumlawdatabase.eu/node/4037>

[3] <https://www.asylumlawdatabase.eu/node/19>

[4] [https://www.asylumlawdatabase.eu/node/19#toc\\_262](https://www.asylumlawdatabase.eu/node/19#toc_262)

[5] <https://www.asylumlawdatabase.eu/node/4039>

[6] [https://www.asylumlawdatabase.eu/node/4039#toc\\_176](https://www.asylumlawdatabase.eu/node/4039#toc_176)

[7] [https://www.asylumlawdatabase.eu/node/4039#toc\\_295](https://www.asylumlawdatabase.eu/node/4039#toc_295)

[8]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Federal%20Admin%20Court%20labour%20>

[9] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-act-governing->

employment-foreign-nationals-auslbg-%C2%A7-4

[10] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-act-governing-employment-foreign-nationals-auslbg-%C2%A7-5>

[11] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-act-governing-employment-foreign-nationals-auslbg-%C2%A7-20g-para1>

[12] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-administrative-court-act-vwgg-%C2%A725a-para-1>

[13] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-administrative-court-act-vwgg-%C2%A717>

[14] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-administrative-court-act-vwgg-%C2%A7-28>

[15] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-administrative-court-act-vwgg-%C2%A752>

[16] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-administrative-procedure-act-avg-%C2%A713-para4>

[17] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-decree-dated-11052004>

[18] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/gz-4350066-ii72004>

[19] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-fachkr%C3%A4fte-bundesh%C3%B6chstzahlen%C3%BCberziehungsverordnung-bhz%C3%BCv-%C2%A7-1>

[20] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-federal-constitutional-law-b-gv-art-130-para1>

[21] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/austria-federal-constitutional-law-b-gv-art-133-para-4>