

Subject-matter concerned	<p>X 1) non-discrimination on grounds of nationality</p> <p>X 2) freedom of movement and residence</p> <p>- linked to which article of the Directive 2004/38</p> <p>linked to Article 24 (2) of the Directive 2004/38</p> <p><input type="checkbox"/> 3) voting rights</p> <p><input type="checkbox"/> 4) diplomatic protection</p> <p><input type="checkbox"/> 5) the right to petition</p>
Decision date	20 January 2016
Deciding body (in original language)	Bundessozialgericht (BSG)
Deciding body (in English)	Federal Social Court
Case number (also European Case Law Identifier (ECLI) where applicable)	B 14 AS 15/15 R
Parties	<p>Complainant (Spanish national)</p> <p>Berlin Jobcenter</p>
Web link to the decision (if available)	http://juris.bundessozialgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bsg&Art=en&sid=f4b9911622a3c4f64d6828232ddea063&nr=14304&pos=0&anz=3
Legal basis in national law of the rights under dispute	Section 7 (1), Sentence 2, No. 2 of the German Social Code, Book II (Sozialgesetzbuch, Zweiter Band, SGB II), www.gesetze-im-internet.de/sgb_2/ , for the old version of the code covering the period until 22 December 2016, see www.buzer.de/gesetz/2602/al57919-0.htm

	Sections 19 (1), 21, 27 (1) of the German Social Code, Book XII (<i>Sozialgesetzbuch, Zwölfter Band, SGB XII</i>), www.gesetze-im-internet.de/sbg_12/ , for the old version of the code covering the period until 22 December 2016, see www.buzer.de/gesetz/3415/al0-56208.htm
Key facts of the case (max. 500 chars)	<p>The complainant, a Spanish national, has lived in Germany since 2011, living on savings without being employed. His numerous job applications were without success. He applied for unemployment benefits according to the SGB II for the first time in 2013. His request was rejected by the local Jobcenter. The Berlin Social Court (<i>Sozialgericht, SG</i>) overruled the decision and ordered the Jobcenter to grant benefits according to the SGB II.</p> <p>The Higher Social Court (<i>Landessozialgericht, LSG</i>) overturned the ruling and decided that the complainant had no entitlement to unemployment benefits at all because Section 7 (1), Sentence 2, No.2 of the SGB II, which provides for a rule of exclusion of benefits for persons in search of work applied. The BSG stated in its decision of January 2016 that the complainant was excluded from benefits according to SGB II, that he was however entitled to receive social benefits according to Sections 19(1), 27 (1) SGB XII.</p>
Main reasoning / argumentation (max. 500 chars)	<p>According to Section 7 (1) of the SGB II a person is entitled to unemployment benefits if he or she is aged between 15 and the statutory standard pensionable age, if he or she is capable of work and eligible for benefits and if the person has his or her usual place of residence in Germany. According to Section 7 (1) Sentence 2, No.2 of the SGB II foreigners staying in Germany for the sole purpose of looking for work will not receive benefits. The complainant argues that the exclusion from benefits according to Section 7 (1), Sentence 2, No. 2 of the SGB II does not apply to him since the wording of the provision demanded him to be seeking work which was not the case since he had no reasonable chance of success. According to Rule 2.2.1a.2 of the administrative guidelines to the FreizügG/EU (<i>Allgemeine Verwaltungsvorschrift zum FreizügG/EU</i>, www.verwaltungsvorschriften-im-internet.de/bsvwvbund_03022016_MI12100972.htm) a person who has no reasonable chance of success in finding a job is not seeking work in the sense of Section 2 FreizügG/EU.</p> <p>The BSG's decision is in accordance with earlier decisions and with the Dano and Alimanovic rulings of the CJEU, as it stated that Section 7 (1), Sentence 2, No.2 of the SGB II was consistent with EU law, especially with Article 18 of the TFEU and Article 24 (2) of Directive 2004/38/EU. The BSG has not explicitly decided on the question of whether the claimant was to be qualified as job seeker or not. But it stated that Section 7 (1), Sentence 2, No.2 of the SGB II, beyond its wording, also applied to EU nationals that had no right to entry and residence under the FreizügG/EU or the AufenthG at all. The claimant did not have a right to residence according to Section 2 (2) of the FreizügG/EU since he was neither employed nor pursuing an independent economic activity. Unemployment benefits were therefore excluded. The complainant was however entitled to social benefits according to Sections 19 (1) and 27 (1) of the SGB XII. Even if these benefits, according to the wording of Section 21 of the SGB XII, seemed to be excluded for persons able to work, the notion of "ability to work" was not to be interpreted in a strict sense.</p>

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The BSG, after the Dano and the Alimanovic decisions of the CJEU, has developed settled case-law: Section 7 (1), Sentence 2, No.2 of the SGB II, in accordance with the jurisdiction of the CJEU, was consistent with EU law. On the other hand, social benefits had to be warranted because a complete exclusion from benefits was not in accordance with the German Basic Law (<i>Grundgesetz, GG</i>) (first established in the BSG decision of 3 December 2015, B 4 AS 44/15 R). In the present case, the BSG has followed this path. Additionally, it has clarified that this jurisdiction also applies to persons in search of work without reasonable chances of success who have not had a right to residence for other reason so far, a case group that has not been decided on by the CJEU until now.</p>
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The jurisdiction of the BSG has not led to a clear legal situation for jobseekers or social benefits claimants from EU countries. First of all, there are many minor courts dissenting with the BSG for different reasons. It has been argued that the SGB XII does not provide for social benefits for persons able to work (see, for instance, LSG Berlin-Brandenburg, decision of 15 January 2016, L 29 AS 20/16 B ER). It has also been argued that Section 7 (1), Sentence 2, No. 2 of the SGB II was not constitutional (see, for instance, LSG Hessen, decision of 7 April 2015, L 6 AS 63/15). Some courts have doubted both the constitutionality of Section 7 (1), Sentence 2, No. 2 of the SGB II and the accordance with EU law despite the decisions of the CJEU (see, for instance, SG Mainz, see below, Table 5). As a result, the legislator has, with the Act on the Settlement of Claims of Foreign Persons in the Field of Work and Social Benefits (<i>Gesetz zur Regelung von Ansprüchen von ausländischen Personen in der Grundsicherung für Arbeitssuchende und in der Sozialhilfe</i>) of 22 December 2016 modified Section 7 of the SGB II and Section 23 of the SGB XII and has explicitly provided for an exclusion of work <u>and</u> social benefits for persons without the right of residence, in search of work or with a residence permit with the aim of seeking work (see www.bgbl.de).</p>
Key quotations in original language and translated into English with reference details (max. 500 chars)	<p>„Der Kläger erfüllt zwar die Leistungsvoraussetzungen des § 7 Absatz 1 Satz 1 SGB II, unterliegt jedoch dem Leistungsausschluss nach § 7 Abs.1 Satz 2 Nr. 2 SGB II. Dem steht nicht das Recht der Europäischen Union (EU) oder das Grundgesetz (GG) entgegen. Für den Kläger kommen aber Leistungen der Sozialhilfe in Betracht“ (See BSG, decision of 20 January 2016, B 14 AS 15/15 R, Paragraph 11).</p> <p>The claimant is, in principle, subject to unemployment benefits according to Section 7 (1), Sentence 1 of the SGB II. Section 7 (1), Sentence 2, No.2 of the SGB II which excludes him from benefits, is however applicable. This is in accordance with EU law as well as with the German Basic law. The claimant is however entitled to social benefits.</p>
Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.	<p>No.</p>