

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>Articles 2, 3 (2)</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	30 November 2015
Deciding body (in original language)	Landessozialgericht für das Land Nordrhein-Westfalen (LSG NRW)
Deciding body (in English)	Higher Social Court of North Rhine-Westphalia
Case number (also European Case Law Identifier (ECLI) where applicable)	<p>L 19 AS 1713/15 B ER</p> <p>ECLI:DE:LSGNRW:2015:1130.L19AS1713.15B.ER.00</p>
Parties	<p>Bulgarian national</p> <p>Jobcenter</p>
Web link to the decision (if available)	www.justiz.nrw.de/nrwe/sgs/lsg_nrw/j2015/NRWE_L_19_AS_1713_15_B_ER.html
Legal basis in national law of the rights under dispute	<p>Section 7 (1), Sentence 2, No. 2 of the German Social Code, Book II (<i>Sozialgesetzbuch, Zweiter Band, SGB II</i>), 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, Section 3 of the German Act on the General Freedom of Movement for EU Citizens (<i>Freizügigkeitsgesetz/EU, FreizügG/EU</i>),</p>

	www.gesetze-im-internet.de/freiz_gg_eu_2004/ , www.gesetze-im-internet.de/englisch_freiz_gg_eu/index.html , Sections 11 and 28 of the German Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory Residence Act (<i>Aufenthaltsgesetz, AufenthG</i>), www.gesetze-im-internet.de/aufenthg_2004/ , www.gesetze-im-internet.de/englisch_aufenthg/index.html
Key facts of the case (max. 500 chars)	The claimant, a Bulgarian national, is the mother of two children. She was living together with her children and their father, who also is Bulgarian national. The children's father was working full-time. The family applied for complementary unemployment benefits according to SGB II. The Jobcenter granted the father and children benefits, but reasoned that the claimant was excluded from benefits according to Section 7 (1), Sentence 2, No. 2 of the German Social Code since she was in search of work. The Social Court Düsseldorf (<i>Sozialgericht, SG</i>) obliged the Jobcenter to grant benefits to the mother as well, reasoning that she was to be treated in the same way as a spouse according to Section 3 of the FreizügG/EU. The LSG did not share this view, but decided that the claimant was not to be excluded from benefits since she had a right of residence as the mother of the children according to Section 28 of the AufenthG.
Main reasoning / argumentation (max. 500 chars)	The claimant and the SG reasoned that exclusions from benefits according to Section 7 (1), Sentence 2, No. 2 of the SGB II in the present case did not apply. The exclusion clause does not apply if the applicant holds a residence permit other than one issued on the basis of searching for work. The SG reasoned that Section 3 (2), No. 1 of the FreizügG/EU provides the spouse of EU citizens who already have residence with a right of entry and residence. The LSG did not share this view and stated that the analogous application of Section 3 was not permissible since the legislator in Section 3 had expressly provided a definitive list of beneficiaries. The LSG further reasoned that the claimant did however have a different right to residence. The so-called most favoured clause applied. This clause is to be found in Section 11 (1) of the FreizügG/EU and is derived from the principle of non-discrimination in Article 18 of the TFEU which entitles EU citizens to a right of residence based on the AufenthG, if this is more favourable than the rights foreseen in the FreizügG/EU. The LSG has consequently assumed that the claimant had a right to residence according to Article 28 of the AufenthG, which entitles parents of minors, unmarried Germans or EU nationals with residence for the purpose of care and custody with a right to temporary residence. The LSG stated that, as a consequence, the exclusion clause in Section 7 (1), Sentence 2, No. 2 of the SGB II did not apply.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The LSG clarified that Section 3 (2), No. 1 of the FreizügG/EU only applies to the spouse or other persons explicitly mentioned in the provision, whereas an analogous application to the unmarried partner was not admissible. The LSG has not even mentioned the possibility of an interpretation in accordance with Article 3 of Directive 2004/38. The LSG has however pointed out the possibility of gaining residence via the most favoured clause and the AufenthG.
Results (e.g. sanctions) and key consequences or	The decision of the LSG is based on a decision of the Federal Social Court (<i>Bundessozialgericht, BSG</i>) of 30 January 2013, B 4 AS 54/12 R, https://sozialgerichtsbarkeit.de/sgeb/esgb/show.php?modul=esgb&id=161581 , which had already decided in a similar manner by stating

implications of the case (max. 500 chars)	<p>that Section 3 (2), No.1 of the FreizügG/EU only applies to the spouse or other persons explicitly mentioned in the provision. The decision of the LSG Baden Württemberg of 16 May 2012, L 3 AS 1477/11, https://openjur.de/u/556444.html, argues the same.</p> <p>It can therefore be stated that, so far, there is agreement, that Section 3 of the FreizügG/EU is not applicable to the unmarried partner. There is no (higher) jurisdiction to date that argues the opposite. Even if the unmarried partner may be entitled to other rights via the AufenthG, these rights may differ and be weaker. Section 3 of the FreizügG/EU consequently cannot be seen as being in full accordance with Directive 2004/38.</p>
Key quotations in original language and translated into English with reference details (max. 500 chars)	<p><i>„Zwar kann die Antragstellerin als Partnerin eines Arbeitnehmers kein Aufenthaltsrecht als Familienangehörige aus einer analogen Anwendung des § 3 FreizügG/EU ableiten, da der Familiennachzug in § 3 FreizügG/EU abschließend geregelt ist. Der Antragstellerin kann aber ein Aufenthaltsrecht aus § 11 Abs.1 Satz 11 FreizügG/EU i.V.m. § 28 Abs.1 S.1 Nr-3 AufenthG und Art. 18 AEUV zustehen“</i> (LSG NRW, decision of 30 November 2015, L 19 AS 1713/15 B ER, Paragraph 15).</p> <p>The claimant as the unmarried partner of an employee does not have a right to residence as a family member according to an analogous application of Paragraph 3 of the FreizügG/EU since residence via a family union is conclusively regulated in Section 3. The claimant may however be entitled to a right to residence according to Paragraph of the 11 FreizügG/EU in conjunction with Paragraph 28 of the AufenthG and Article 18 of the TFEU.</p>
Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.	<p>No.</p>