

Federal Social Court

Judgement of 29 March 2022 – B 4 AS 2/21 R

Basic benefits for job-seekers – Exclusion of benefits for foreign nationals staying for the purpose of seeking work – Union citizens – Other right of residence – Free movement of workers – Continuing effect of worker status in case of employment for longer than 1 year – No addition of periods of employment in case of interruption of several months

- 1. It is compatible with Germany's Basic Law (Grundgesetz) that foreign nationals who have no right of residence or only a right of residence for the purpose of seeking work and for whom it is possible and reasonable to leave the Federal Republic of Germany are excluded from benefits under the basic benefits scheme for job-seekers.**
- 2. A Union citizen's continuing right of residence as a worker cannot be based on periods of employment that precede a period of unemployment of more than six months.**

The plaintiff was born in the Federal Republic of Germany in 1992 and is a citizen of the Hellenic Republic. In 1997, he left for Greece. On 1 February 2016, the applicant re-entered the Federal Republic of Germany, where he has been registered since then. At least between 27.4.2016 and 31.12.2016, between 15.8.2017 and 30.9.2017 and between 1.4.2018 and 31.7.2018, the plaintiff was employed. He was then unemployed again. On 24 January 2019, the plaintiff concluded an employment contract for an indefinite period of time with a working time of ten hours per month and a monthly remuneration of EUR 100; he performed this work approximately every fortnight for five hours each.

The defendant Jobcenter refused to grant benefits in February 2019. The plaintiff was excluded from benefits under the Second Book of the German Social Code – Basic benefits for job-seekers (SGB II) because he had a right of residence solely for the purpose of seeking employment. In April 2019, the applicant applied for a review of the rejection decision. The defendant rejected this request. The Social Court dismissed the subsequent claim, which was limited to the period from March to December 2019. The Regional Social Court dismissed the appeal.

The Federal Social Court overturned the decision of the Regional Social Court and referred the case back to the Regional Social Court for a new hearing and decision. However, the Regional Social Court rightly decided that the plaintiff was excluded from benefits under SGB II because he had, at most, a right of residence for the purpose of seeking employment. In particular, the plaintiff did not have a right of residence as a worker under Section 2 (2) Number 1 of the Act on the General Freedom of Movement for Citizens of the Union (Freizügigkeitsgesetz/EU). The plaintiff only worked ten hours a month, spread over two days a month of five hours each. This activity thus presents itself as completely subordinate and insignificant, and does not establish employee status. Nor can the plaintiff invoke a continuing right of residence under Section 2 (3)

Sentence 1 Number 2 of the Freedom of Movement for Citizens of the Union/EU. A Union citizen's continuing right of residence as a worker in the event of involuntary unemployment after more than one year of employment cannot, in the event of interruptions, in any case be based on periods of employment that precede a period of unemployment lasting longer than six months. In the present case, this means that only activities of the plaintiff with a total duration of less than one year were to be taken into account.

It is also compatible with the basic right to guarantee a minimum subsistence level worthy of human life (Article 1 (1) in conjunction with Article 20 (1) of the Basic Law) that foreign nationals who have no right of residence or only a right of residence for the purpose of seeking work, and for whom it is possible and reasonable to leave the Federal Republic of Germany, are excluded from benefits under the basic benefits for job-seekers. The legislature has established a regulatory regime that is in conformity with the constitution with Section 7 (1) Sentence 2 Number 2 Letters a and b of Book II of the German Social Code and Section 23 (3), (3a) of Book Twelve of the German Social Code – Social Assistance (Book XII of the Social Code) in the version in force since 29 December 2016. In contrast to the persons covered by the Asylum Seekers' Benefits Act, there is, in principle, no reason to doubt the reasonableness of their departure in the case of EU citizens and thus also the plaintiff. If a departure is not possible or not reasonable due to special circumstances of the individual case, the hardship provision of Section 23 (3) Sentence 6 SGB XII applies.

However, the judgement of the Regional Social Court had to be set aside and the case had to be referred back to the Regional Social Court so that it could summon the locally competent social welfare agency and, if necessary, order it to pay benefits. In view of the case law of the Federal Social Court on Section 23 SGB XII, old version, there is the possibility that the social welfare agency is liable to pay benefits on the basis of Article 1 of the European Welfare Convention. Due to the lack of an invitation to attend and the right to be heard to be granted to the person to be invited, the Federal Social Court cannot decide at this point in time whether this case law is to be applied to Section 23 of the Social Code Book XII in the version relevant here. In addition, the Regional Social Court has so far left open whether the plaintiff has a right of residence for the purpose of seeking work and, therefore, falls within the personal scope of application of Article 1 of the European Welfare Convention. The obligation to be summoned is not precluded by the fact that the present case is a proceeding in favour of the court pursuant to Section 44 of the Tenth Book of the German Social Code – Social Administrative Procedure and Social Data Protection (SGB X). In such a constellation, too, the procedural-economic purpose of the so-called "non-genuine necessary supplementary summons" ("unechte notwendige Beiladung") must be taken into account.