

Federal Constitutional Court - Press office -

Press release no. 56/2012 of 18 July 2012

Judgment of 18 July 2012

[1 BvL 10/10](#)

[1 BvL 2/11](#)

Provisions governing basic cash benefits provided for in the Asylum Seekers Benefits Act held unconstitutional

Today, the Federal Constitutional Court pronounced its judgment on submissions of the Higher Social Court of the state of North Rhine-Westphalia (*Landessozialgericht Nordrhein-Westfalen*) on the question whether the cash benefits paid according to the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz - AsylbLG*) to secure the recipients' existence are constitutional.

Facts of the Case

The Asylum Seekers Benefits Act came into effect November 1, 1993. It established specific rules for the provision of minimum social benefits for certain foreign nationals, which set significantly lower benefits and primarily benefits in kind rather than cash, separate from the substantive law applicable to Germans and those legally defined to be similarly treated. The Asylum Seekers Benefits Act was passed in the context of efforts by the then Federal Government between 1990 and 1993 to limit relatively high number of refugees coming to Germany, to step up against abuse of the right to asylum, and to keep the cost of hosting and providing general care to refugees low as well as primarily via benefits in kind.

The personal scope of application of the Asylum Seekers Benefits Act has been expanded over the years. Today, the Act is applicable to people who live under widely different circumstances, legally and in fact. Those who are eligible under the Asylum Seekers Benefits Act are asylum seekers, war refugees and others in possession of a residence permit, those tolerated and those who are subject to an enforceable order to leave as well as their spouses, registered partners and children below age.

The Asylum Seekers Benefits Act is a separate rule for social benefits, apart from the Second and Twelfth Book of the Code of Social Law (SGB II and XII). It distinguishes between basic benefits (§ 3 AsylbLG), benefits for sickness, pregnancy and birth (§ 4 AsylbLG) and other benefits (§ 6 AsylbLG). Moreover, § 2 AsylbLG provides that people receive "analogous" regular and thus higher benefits based on the Twelfth Book of the Code of Social Law (SGB XII) after a period of receiving the low benefits for asylum seekers, the length of which the legislature repeatedly extended.

The questions posed to the Federal Constitutional Court address the basic benefits in the form of cash benefits. In § 3 AsylbLG, the legislature has provided for benefits in kind to take priority over cash benefits that may replace benefits in kind accord to § 3 sec. 2 AsylbLG. The amounts of these cash benefits have been set by law that remained unchanged since the introduction of the Asylum Seekers Benefits Act in 1993, although the now Federal Ministry of Labour and Social Affairs is obliged, by § 3 sec 3 AsylbLG, with the consent of the Bundesrat, to revise and eventually raise the amounts annually, to take effect January

1, if and to the extent necessitated in light of the actual cost of living to satisfy existential needs.

The questions posed by the lower court arose in the following court proceedings:

1 BvL 10/10

The plaintiff, born in 1977, arrived in Germany in 2003, applied for asylum without success, and has since been tolerated (§ 60a sec 2 sentence 1 Aufenthaltsgesetz - Residence Act). He has since been living in a communal shelter and received basic benefits based on § 3 AsylbLG, most recently an amount of € 224.97. This amount consisted of a cash amount based on § 3 sec 1 AsylbLG of € 40.90, and of benefits based on § 3 sec 2 AsylbLG of € 184.07, € 15.34 of which were set aside for electricity in the shelter. The plaintiff sued for higher benefits. The Social Court dismissed the claim.

Thereupon the plaintiff appealed to the Higher Social Court (*Landessozialgericht, LSG*). This Court suspended the proceedings and referred the case to the Federal Constitutional Court with the question whether § 3 sec 2 sentence 2 No. 1 and § 3 sec 2 sentence 3 in conjunction with sec 1 sentence 4 No. 2 AsylbLG are compatible with the Basic Law (*Grundgesetz, GG*). The Higher Social Court takes the view that those provisions violate the fundamental right to guarantee for a dignified minimum existence, based on Article 1 sec 1 GG in conjunction with Article 20 sec 1 GG. It argued that the basic benefits given to the plaintiff amount to a good 31% less than the benefits that are designed to ensure the existential minimum under SGB II and SGB XII, and were thus - in light of the decision of the Federal Constitutional Court of 9 February 2010 (BVerfGE 125, 175) - evidently insufficient. The special situation of asylum seekers could not justify this. Even if one would not consider the benefits as evidently insufficient, the benefits were not based on a constitutionally acceptable method to assess basic needs. The question of the constitutionality of these provisions is decisive for the judgment of the Higher Social Court.

1 BvL 2/11

The plaintiff, born in 2000 and at the time a foreign national, lives with her mother in a privately rented accommodation. In 2007, the plaintiff received basic benefits based on § 3 AsylbLG of € 132.93, later of an amount of € 178.95. After her initial complaint against the amount was rejected, she sued for higher benefits. The Social Court dismissed the claim.

Thereupon, the plaintiff brought an appeal to the Higher Social Court. This Court suspended the proceedings and referred the case to the Federal Constitutional Court with the question whether § 3 sec 2 sentence 2 No. 2 and No. 3 and § 3 sec 2 sentence 3 in conjunction with sec 1 sentence 4 No. 1 AsylbLG are compatible with the Basic Law. The Higher Social Court considers these to be unconstitutional, based on the reasons given in Case 1 BvL 10/10.

Decision of the Court:

The First Senate of the Federal Constitutional Court decided that the provisions governing basic cash benefits according to the Asylum Seekers Benefits Act are incompatible with the fundamental right to a minimum existence, protected as human dignity in Article 1 sec. 1 in conjunction with Article 20 sec. 1 of the Basic Law. The benefits are evidently insufficient because they have not been changed since 1993 despite considerable price increases in Germany. Furthermore, the amounts provided have not been comprehensibly calculated, nor is it apparent that a realistic, needs-oriented calculation has been made that serves

to presently secure the recipients' existence.

The legislature is obliged to immediately enact new provisions in the area of application of the Asylum Seekers Benefits Act which serve to secure a dignified minimum existence. Because of the importance of basic benefits to secure the recipients' lives, the Federal Constitutional Court has ordered a transitional arrangement that will apply until new provisions enter into force. Pursuant to this transitional arrangement, from 1 January 2011 onwards, basic benefits in the area of application of the Asylum Seekers Benefits Act shall be calculated based on the generally applicable provisions regarding the Second and Twelfth Book of the Code of Social Law (*Zweites und Zwölftes Buch des Sozialgesetzbuches*). This shall apply retroactively from 2011 onwards to benefits that have been set but are still disputed; furthermore, it shall apply until the legislature has complied with its obligation to enact new provisions.

In essence, the decision is based on the following considerations:

1. Article 1 sec. 1 GG in conjunction with the principle of the social welfare state in Article 20 sec. 1 GG establishes a fundamental right to the guarantee a dignified minimum existence. It is the legislature that must set the adequate amount of benefits. It may not be evidently insufficient and must be ascertained realistically. This has already been the starting point of the decision of the First Senate of the Federal Constitutional Court regarding unemployment benefits in February 2010 (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts - BVerfGE*) 125, 175).

a) Article 1 sec 1 GG establishes the right to the guarantee of a dignified minimum existence as a human right. German and foreign nationals alike who have their residence in the Federal Republic of Germany are entitled to it. Adequate benefits have to be ascertained in light of the circumstances in Germany, the country in which this existential minimum must be guaranteed. The Basic Law does not permit the necessities of a dignified life in Germany to be assessed at a lower level by referring to the existence level in the country of origin of the person in need or to the existence level in other countries. Nor does the constitution permit, in defining the details of existential benefits, to differentiate across-the board in light of the recipient's residence status; the legislature must always take as its guideline the concrete needs to secure a person's existence.

The fundamental right to a guarantee of a dignified minimum existence encompasses both the physical existence of an individual and the possibility to maintain interpersonal relationships and a minimum of participation in social, cultural and political life; these are needs to be secured comprehensively. Article 1 sec. 1 GG provides, as a basic guarantee, for a claim to benefits. The principle of the welfare state in Article 20 sec. 1 GG calls upon the legislature to ascertain concrete amounts according to the actual current and realistic needs of people. Furthermore, the legislature is also obliged by further standards resulting from European Union law and international law.

b) The benefits to secure a dignified minimum existence may not be evidently insufficient and, to specify the fundamental rights claim, it must be possible to calculate the amounts in a transparent and adequate way, according to the actual and current needs, i.e. realistically. These requirements do not refer to the legislative process but to its results. The Basic Law leaves room for negotiations and political compromise. It does not prescribe a specific method to ascertain

existential needs and to calculate benefits; this would restrict the legislature's margin of appreciation. However, if different methods are used for different groups of persons, this must be justifiable by facts. Apart from this, benefits to secure a person's existence must be continually reviewed and further developed.

Thus, whether and to what extent the need for existential of persons with a temporary right of residence in Germany can be set by law as different from the need of other persons in need depends solely on whether one can comprehensibly ascertain specific lower needs exactly because of a short period of staying in the country. If specific lower needs can indeed be ascertained in the case of short-term residence that is not intended to become permanent, and if the legislature wants to take this into account in setting the amount of benefits, the legislature must define the relevant group in such a way that it will indeed cover, with sufficient probability, only those who stay in Germany for a short time. A residence status may provide guidance, yet the actual life circumstances must always be considered. Furthermore, a restriction to lower benefits for a short stay is at any rate no longer justified if the actual stay lasts considerably longer.

c) The legislature's discretion assess the minimum existence corresponds to a restrained Federal Constitutional Court's review. Substantive review is limited to examine whether benefits are evidently insufficient; beyond this review of evident failure, the Federal Constitutional Court examines whether benefits are currently justifiable, based on reliable data and plausible methods of calculation.

2. According to these standards, the provisions submitted do not meet the requirements of the fundamental right to the guarantee a dignified minimum existence.

a) The cash benefits specified in § 3 AsylbLG are evidently insufficient. Their amount has not been changed since 1993 although the price level in Germany has increased by more than 30 % since then. At the time, the legislature had provided an adaptation mechanism in § 3 sec. 3 AsylbLG according to which the amount of benefits should have been adapted in regular intervals to the current cost of living. However, this has never happened. The evident insufficiency of the cash benefits today is also illustrated by a comparison between benefits paid to an adult head of a household according to the law in question with the amount of benefits paid according to general welfare law of the Second and the Twelfth Book of the Code of Social Law. The amount of the latter was redefined only recently for the very reason of securing a minimum existence. It is true that these benefits may not be directly compared, but even an adjusted calculation results in a difference of approximately one-third, and thus an evident deficit in securing a dignified existence.

b) In addition, the basic cash benefits are not assessed realistically and cannot be justified. The decision about the amount of benefits was not based on reliable data when it was introduced, and is not based on such data today. At the time, legislation was based on a mere estimate of costs; even today, no comprehensible calculation has been submitted or is anywhere in sight. This does not meet the requirements of the Basic Law on securing a minimum dignified existence.

There are no indications of an assessment of the amount of cash benefits to be inferred from the legislative history. It is neither apparent which needs do actually exist in the case of a short stay, nor has it been ascertained, for instance with regard to minors entitled to

benefits in the Asylum Seekers Benefits Act, whether there are child-specific and age-specific needs. The documents merely specify the amounts which, according to the Federal Government's bill, were deemed sufficient to cover an assumed need. The assumption on which the Asylum Seekers Benefit Act is obviously based, namely that a short stay justifies a lower amount of benefits, does not have a sufficiently reliable basis. It also lacks a plausible explanation, transparent in terms of its content, to demonstrate that typically, persons entitled to benefits by the Asylum Seekers Benefits Act do only stay in Germany for a short time. Since 1993, the scope of application of the Act has been extended several times. Today, it covers persons with widely diverse types of residence status, most of who have been staying in Germany for more than six years. However, a short duration or a short perspective of a stay in Germany does also not justify a reduction of the claim to the mere guarantee of a dignified minimum physical existence, for the Basic Law contains a comprehensive guarantee of benefits that encompass the socio-cultural existential minimum as well. In addition, a dignified existence must be ensured from the beginning of a stay in the Federal Republic of Germany.

Also, migration-policy considerations of keeping benefits paid to asylum seekers and refugees low to avoid incentives for migration, if benefits were high compared to international standards, may generally not justify any reduction of benefits below the physical and socio-cultural existential minimum. Human dignity may not be relativised by migration-policy considerations.

3. The transitional arrangement will result, for instance, in a considerably higher than before cash benefit for the head of a household, beyond the supply of benefits in kind which remain a priority. To secure a dignified minimum existence for a month, a cash benefit shall amount to 206 €, with an additional amount for personal needs of daily life of 130 €, to be provided instead of benefits in kind.