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**Federal Constitutional Court - Press office -**

**Press release no. 56/2012 of 18 July 2012**

Judgment of 18 July 2012

[1 BvL 10/10](http://www.bundesverfassungsgericht.de/entscheidungen/ls20120718_1bvl001010.html)

[1 BvL 2/11](http://www.bundesverfassungsgericht.de/entscheidungen/ls20120718_1bvl001010.html)

**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.

This press release is also available in the original [german version.](http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-056.html)