Headnotes

to the Judgment of the First Senate of 14 March 2000

– 1 BvR 284/96 –

– 1 BvR 1659/96 –

1. It is incompatible with the principle of equality before the law in Article 3.1 of the Basic Law (*Grundgesetz*) that the amount of the basic disability pension granted to war victims under § 31.1 sentence 1 of the Federal War Victims Relief Act (*Bundesversorgungsgesetz*) in the areas of the former Federal Republic of Germany and German Democratic Republic varies beyond 31 December 1998 where the disability is the same.

2. § 84a of the Federal War Victims Relief Act is therefore void from 1 January 1999.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 284/96, 1 BvR 1659/96 –

Pronounced
on 14 March 2000
Kehrwecker
Amtsinspektor
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. of Mr B…,

– authorised representative: Professor Dr. Ingwer Ebsen,
Alfred-Mumbächer-Straße 19, Mainz -

1. directly against

a) the Order of the Federal Social Court (*Bundessozialgericht*) of 12 December 1995 - 9 BV 113/95 -,

b) the Judgment of the Higher Social Court of Thuringia (*Thüringer Landessozialgericht*) of 28 June 1995 - L 1 V 167/94 -,

c) the Judgment of the Altenburg Social Court (*Sozialgericht Altenburg*) of 6 July 1994 - S 8 V 705/93 -,

2. indirectly against § 84a of the Federal War Victims Relief Act (*Bundesversorgungsgesetz*- BVG) in conjunction with Annex I chapter VIII subject area K part III number 1 letter a of the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (*Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, Einigungsvertrag*, Unification Treaty) of 31 August 1990 (Federal German Law Gazette, *Bundesgesetzblatt* II p. 889 <1067>)

- 1 BvR 284/96 -,

II. of Mr S…,

– authorised representative: Professor Dr. Ingwer Ebsen,
Alfred-Mumbächer-Straße 19, Mainz -

1. directly against

a) the Order of the Federal Social Court (*Bundessozialgericht*) of 19 June 1996 - 9 BV 176/95 -,

b) the Judgment of the Higher Social Court of Thuringia (*Thüringer Landessozialgericht*) of 27 September 1995 - L 1 V 43/94 -,

c) the Court Order of the Gotha Social Court (*Sozialgericht Gotha*) of 23 December 1993 - S 4 V 547/93 -,

2. indirectly against § 84a of the Federal War Victims Relief Act (*Bundesversorgungsgesetz*- BVG) in conjunction with Annex I chapter VIII subject area K part III number 1 letter a of the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (*Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, Einigungsvertrag*, Unification Treaty) of 31 August 1990 (Federal German Law Gazette, *Bundesgesetzblatt* II p. 889 <1067>)

- 1 BvR 1659/96 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Papier,

Grimm,

Kühling,

Jaeger,

Haas,

Hömig,

Steiner

Hohmann-Dennhardt

held on the basis of the oral hearing of 9 November 1999:

Judgment:

1. § 84a of the Federal War Victims Relief Act (*Bundesversorgungsgesetz*) in conjunction with Annex I chapter VIII subject area K part III number 1 letter a of the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (*Vertrag zwischen der Bundesr e publik Deutschland und der Deutschen Demokratischen Republik über die He r stellung der Einheit Deutschlands , Einigungsvertrag*, Unification Treaty) of 31 August 1990 (Federal German Law Gazette, *Bundesgesetzblatt* II p. 889 [at p. 1067]) is incompatible with Article 3.1 of the Basic Law and void insofar as the basic disability pension under § 31.1 sentence 1 of the Federal War Victims Relief Act continues to be computed differently even after 31 December 1998 in the area of the former German Democratic Republic than in the remainder of the Federal Republic of Germany.

2. The constitutional complaints are rejected as unfounded in other respects.

3. The Federal Republic of Germany is ordered to reimburse the complainants half of their necessary expenses.

R e a s o n s:

A.

The constitutional complaints, which are joined to be decided together, relate to the question of whether it is constitutionally admissible that persons disabled in the Second World War who were resident in the area of the former German Democratic Republic on 18 May 1990 receive a lower basic pension and a lower flat-rate amount for wear and tear of clothing and underwear until today than the disabled persons who were living in the area of the Federal Republic of Germany or in the West outside Germany at that time. 1

I.

The Act on the Pensions of the Military and their Surviving Dependants (*Gesetz über die Versorgung der Militärpersonen und ihrer Hinterbliebenen,* Reich Military Pensions Act) of 12 May 1920 (Reich Law Gazette, *Reichsgesetzblatt* p. 989) provided a claim to benefits relating to the health and financial consequences of an injury sustained while on duty. In addition to therapeutic treatment, social welfare and dependants' pensions, the Reich Military Pensions Act provided a pension, similar in design to today's basic pension, where there was a reduction of earning capacity of at least 15 per cent (§ 24 of the Reich Military Pensions Act). 2

In the area of the former Federal Republic of Germany, the Federal War Victims Relief Act (*Gesetz über die Versorgung der Opfer des Krieges, Bundesversorgungsgesetz*) of 20 December 1950 (Federal Law Gazette p. 791) replaced the Reich Military Pensions Act and the regulations of the occupation and *Land* (state) law that had been in force since the end of the war (cf. § 84.2 of the Federal War Victims Relief Act in the original version). 3

As part of the monetary benefits to which the disabled person is personally entitled, the Federal War Victims Relief Act provides earnings-related pension benefits such as occupational injury compensation (§ 30.3 of the Federal War Victims Relief Act) and benefits motivated by social welfare such as the equalisation pension (§ 32 of the Federal War Victims Relief Act) and what is known as the basic pension under § 31.1 sentence 1 of the Federal War Victims Relief Act, the amount of which is determined solely according to the extent by which earning capacity is reduced as a result of the disability. The pension is paid independently of the disabled person's income and property. It gives compensation for impairment of physical integrity and is intended to reimburse extra expenses that the disabled person still has, despite the numerous individual forms of assistance under §§ 11 to 15 of the Federal War Victims Relief Act. The basic pension is not intended to pay living expenses and is therefore to be left out of account when other state benefits are assessed (cf. *Bundestag* [the lower house of the German parliament] document, *Bundestagsdrucksache* 3/1239, p. 21 under A. 1). 4

The flat-rate amount to compensate for wear and tear of clothing and underwear under § 15 Federal War Victims Relief Act is also independent of income. It is intended to reimburse the extra expenses that the disabled person incurs as the result of the extraordinary wear and tear of clothing resulting from disability. The flat-rate amount is calculated with regard to the nature of the consequences of the disability. […]. 5

Unlike the Federal Republic of Germany, the German Democratic Republic had no separate law on war victims' pensions. War-disabled persons were given benefits under the social security scheme. […] At the end, the pension amount was uniformly 340 East German marks (plus, if applicable, a married couple's benefit in the amount of 100 East German marks and a children's benefit in the amount of 45 East German marks). Half of this sum counted towards a higher old-age pension. Only a few war 6

victims received benefits. The number of those entitled in spring 1990, including surviving dependants, is estimated at approximately 5,000 persons […]. In the Federal Republic of Germany at this date, 618,433 war victims received a basic disability pension. There are now more than 60,000 persons in the area of the former German Democratic Republic who receive a basic disability pension.

II.

1. On 1 January 1991, the benefits under the Federal War Victims Relief Act were extended to the area of the former German Democratic Republic. Whereas non-cash benefits in the form of therapeutic and medical treatment (§§ 10 *et seq.* of the Federal War Victims Relief Act) and welfare for war victims (§§ 25 *et seq.* of the Federal War Victims Relief Act) were granted to those entitled in the area of the former German Democratic Republic to the same extent as in the area of the former Federal Republic of Germany, the legislature created a special arrangement for pensions and other money benefits; this was added to the Federal War Victims Relief Act as § 84 by Annex I chapter VIII subject area K part II of the Reunification Treaty. It reads as follows: 7

Since the date when they changed their residence or habitual abode, and at the earliest from 1 January 1991, persons entitled who in 18 May 1990 had their residence or habitual abode in the area named in Article 3 of the Unification Treaty have received benefits under the Federal War Victims Relief Act on the conditions applying in this area under the Unification Treaty, even if they move their domicile or habitual residence to the area in which this Act was in force even before the accession. Sentence 1 applies *mutatis mutandis* to Germans and to those of German ethnic origin from the states named in § 1 of the Foreign Territory Relief Ordinance (*Auslandsversorgungsverordnung*) who established their residence or habitual abode in the area named in Article 3 of the Unification Treaty after 18 May 1990. 8

Annex I chapter VIII subject area K part III number 1 letters and f of the Unification Treaty further provide as follows: 9

Federal German law shall enter into force in the area named in Article 3 of the Treaty subject to the following provisions: 10

1. Federal War Victims Relief Act as promulgated on 22 January 1982 (Federal Law Gazette I p. 21), last amended by Article 1 of the Act of 26 June 1990 (Federal Law Gazette I p. 1211) with the following provisos: 11

a) The Deutsche Mark amounts named in §§ 14, 15, 26c.6, § 31.1 and 31.5, § 32.2, § 33a.1, § 35.1, § 36.1 and 36.3, §§ 40, 40b.3, § 41.2, §§ 46, 47.1, § 51.1 to 51.3 and § 53 as amended shall be multiplied by the percentage that is obtained from the applicable ratio of the disposable standard pension (§ 68.3 of the Sixth Book of the Code of Social Law (*Sozialgesetzbuch*) in the area named in Article 3 of the Treaty to the disposable standard pension in the area in which the Federal War Victims Relief Act applied even before accession […]. The factor defined in § 15 sen- 12

tence 2 shall also be multiplied by the percentage named in sentence 1...

The Federal Minister of Labour and Social Affairs will announce the relevant percentage and the date of the alteration from time to time in the Federal Bulletin (*Bundesanzeiger*). 13

f) § 56 shall apply from the date on which the governing ratio under letter a sentence 1 above reaches 100 per cent. 14

The provision has the effect that the varying incomes of the persons with old-age pensions insurance in the areas of the former Federal Republic of Germany and the former German Democratic Republic are included in the assessment of the basic pensions for war victims. This happens because the current standard pensions are calculated on the basis of the current pension values in the areas of the former Federal Republic of Germany and the former German Democratic Republic, which differ from each other at any given time; these pension values are determined by the current average wages of the present population subject to social insurance (for the area of the former Federal Republic of Germany, § 68.1 and 68.3 of the Code of Social Law VI; for the area of the former German Democratic Republic, § 255a of the Code of Social Law VI). The calculation of the basic pension is therefore not based on the actual average pension amount in the area of the former Federal Republic of Germany and the former German Democratic Republic, but on a fictitious quantity, known as the standard pension, which is payable after 45 years of employment subject to insurance with constant average wages. If the current pension value (east) rises faster than the current pension value (west), the value of the quotient of the disposable standard pensions approaches the figure one. The precondition for this is that the net wages in the east rise faster than in the west. The process of adjustment comes to an end when the two current pension values are equal. For 1 July 1999, the current pension value (west) was calculated at 48.29 Deutsche Mark, and the current pension value (east) at 42.01 Deutsche Mark. 15

As a result of this calculation system, the basic pensions (east) in 1991 were 54 per cent lower than the basic pensions (west); in 1994 the difference was only 25 per cent. After this, the process of adjustment became slower. In each case, the benefits in 1995-96 rose towards mid-year to approximately 78 per cent and then to 82 per cent; after this, they stagnated at approximately 85 per cent, and only on 1 July 1999 did they reach 86.71 per cent. 16

[…]. 17-18

III.

The original proceedings were based on the following facts: 19

1. The first complainant, who was born on 5 August 1923, was injured by shell splinters on the German eastern front on 7 March 1943. As a result, his left leg was amputated at the thigh. On 18 May 1990, the relevant key date, the complainant was living 20

in the area of the former German Democratic Republic. From 1 January 1991, he received disability benefit based on a reduction of earning capacity of 70 per cent. The amount calculated under § 84a of the Federal War Victims Relief Act included the basic pension with increase for age and the flat-rate amount as compensation for wear and tear of clothing and underwear.

In his application made in 1991, the complainant claimed payment of compensation in the amount of the "level in the west". In essence he submitted that the differing amounts paid for war victims' pensions in east and west Germany, which were based on the place of residence on 18 May 1990, violated Article 3.1 of the Basic Law. The only standard for the amount of the benefit had to be the physical disability resulting from the war. […]. 21

The War Pension Office (*Versorgungsamt*) refused the application. The objection, complaint and appeal on points of fact were unsuccessful. The Federal Social Court (*Bundessozialgericht*) rejected the complaint against the non-admission of the appeal on points of law, affirming its previous interpretation of the law (cf. judgment of 10 August 1993, BGSE, *Entscheidungen des Bundessozialgerichts*, Decisions of the Federal Social Court 73, p. 41) as unfounded. […] The court held that at least the legislature was permitted to provide a different amount of compensation payments for a transitional period if the aim of adjustment, achieving uniform standards of living, was pursued persistently and effectively. These principles also applied to the basic pension. 22

2. The second complainant, born on 11 April 1923, also suffered an injury from shell splinters in January 1945 as a soldier in the German Armed Forces. His right arm had to be amputated above the elbow joint. 23

The War Pension Office assessed the reduction of earning capacity at 80 per cent and granted the complainant from 1 January 1991 a disability benefit consisting of basic pension, increase for age and flat-rate payment for wear and tear of clothing assessed on the basis of § 84 of the Federal War Victims Relief Act. His application to be granted benefits on the same level as in the former Federal Republic of Germany was unsuccessful in the administrative procedure and in the proceedings before the social courts. […]. 24

3. In their constitutional complaints, the complainants challenge the court decision and indirectly challenge the provision in § 84a of the Federal War Victims Relief Act in conjunction with Annex I chapter VIII subject area K part III number 1 letter a of the Unification Treaty. They submit above all that their fundamental rights under Article 3.3 and Article 3.1 of the Basic Law have been violated. 25

The reduction of the benefits of the basic pension and the payment for wear and tear of clothing to the detriment of the war victims in the east, they submit, is unconstitutional. It is based on a provision that was void *ab initio*. The use of residence in the former Federal Republic of Germany or the former German Democratic Republic on a 26

particular key date (18 May 1990) as a nexus differentiates between persons according to their homelands (*Heimat*) under Article 3.3 sentence 1 of the Basic Law. The disabled persons who remained in the German Democratic Republic after the war are discriminated against. The law grants these war victims in their capacity as east Germans, determined by the key date, lower benefits, although it is irrelevant where they currently live or are staying while they are drawing benefits. At all events, according to the complainants, the unfavourable treatment of the war victims in the east is incompatible with the principle of equality before the law in Article 3.1 of the Basic Law. There is no adequate factual reason for this treatment.

[…]. 27-38

B.

The constitutional complaints are admissible and in part well-founded. § 84a of the Federal War Victims Relief Act in conjunction with Annex I chapter VIII subject area K part III number 1 letter a of the Unification Treaty violates Article 3.1 of the Basic Law insofar as the basic disability pension (§ 31.1 sentence 1 of the Federal War Victims Relief Act) is calculated differently in the area of the former German Democratic Republic than in the rest of the area of the Federal Republic of Germany even after 31 December 1998 (II 4). But the constitutional complaints are dismissed insofar as they directly challenge the decisions of the social courts, because these complaints relate to a period of time in which the pension notices granting a basic pension for war-disabled persons on which the court proceedings were based were calculated on principles that were constitutional (II 3). Insofar as the amount of the flat-rate payment for the wear and tear of clothing payable under § 15 of the Federal War Victims Relief Act is the subject of the Constitutional Court proceedings, the constitutional complaints are unfounded if only because § 84a of the Federal War Victims Relief Act now as then is a constitutional legal basis for its calculation (III). 39

I.

The review standard is Article 3.1 of the Basic Law. However, a review of § 84a of the Federal War Victims Relief Act, on which the court decisions challenged are based, against the constitutional prohibition of unfavourable treatment of the complainants by reason of their homelands (Article 3.3 sentence 1 of the Basic Law) is out of the question. § 84 a of the Federal War Victims Relief Act uses as a point of reference the residence or habitual abode of the complainants on 18 May 1990, not their homelands. The term “homeland” (*Heimat*) refers to the local origin of a person by birth or residence in the sense of the emotional relation to a geographically restricted area that helps to shape the individual (place, landscape). The homeland of a person is not determined by residence or abode in one of the two parts of Germany that existed before the reunification (cf. BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*, Decisions of the Federal Constitutional Court 92, p. 26 [at p. 50] with further references). It is therefore no longer of any significance whether the complainants are 40

barred from relying on this fundamental right in the present proceedings, because they neglected to assert its violation in the legal protection proceedings before the non-constitutional courts (cf. BVerfGE 68, p. 384 [at pp. 389-90]).

II.

1. Article 3.1 of the Basic Law requires that all people are treated equally before the law. However, this does not prohibit the legislature from all differentiation. But the legislature violates the fundamental right if in provisions that relate to groups of people it treats one group of persons addressed differently from other persons addressed although there are no differences between the two groups of such a nature and weight that they could justify the unequal treatment (cf. BVerfGE 100, p. 59 [at p. 90]; established case-law). 41

2. The indirectly reviewed provision in § 84a of the Federal War Victims Relief Act grants persons entitled whose residence or habitual abode on 18 May 1990 was in the area of the former German Democratic Republic benefits under the Federal War Victims Relief Act under the conditions applying in this area under the Unification Treaty. In comparison to the persons in the remainder of the Federal Republic of Germany who are entitled to benefits, they are treated less favourably, because they receive smaller basic pensions and a lower flat-rate amount for the wear and tear of clothing. The standard pension, to which reference is made in the calculation of the war victims' pension, varies in amount in the east and the west because of the difference in the net earnings. 42

3. At the date when the Federal War Victims Relief Act came into force in the area of the former German Democratic Republic and in the following years, there were sufficiently weighty grounds for the unequal treatment effected by § 84a of the Federal War Victims Relief Act. This also applies to the basic disability pension under § 31.1 sentence 1 of the Federal War Victims Relief Act, which is shaped in part by the idea of non-material compensation for victims (cf. 4b below). 43

a) The legislature extended the benefits under the Federal War Victims Relief Act to the area of the former German Democratic Republic on 1 January 1991, but specific money benefits, under § 84a of the Federal War Victims Relief Act, were not immediately granted to the persons entitled in the area of the former German Democratic Republic at the same rate as in the rest of the Federal Republic of Germany. Article 3.1 of the Basic Law did not oblige the legislature to do this. In assessing the money benefits, it had a wide scope for drafting, for the public budgets were confronted with large financial burdens in the course of reunification. The constitutional requirements were satisfied if the legislature created suitable provisions and ensured that the unequal treatment of the war victims in east and west effected by § 84a of the Federal War Victims Relief Act was not of a permanent nature and in the light of the differences at the time in the standards of living it was compatible with an approach based on the idea of justice. At first, this was done. As the benefits continued to be paid, it was intended that the linking in this provision of the amount of the basic pension and 44

the flat-rate payment for wear and tear of clothing with the development of the standard pensions in east and west should ensure that there was a rapid adjustment (cf. *Bundestag* document 11/7817, p. 154). The chosen way was not unsuitable from the outset to lead to equal benefits in gradual stages and over a limited period of time.

b) The concept of adjustment itself is also constitutionally unobjectionable. It is not the task of the Federal Constitutional Court to decide whether in this connection the legislature chose the most expedient or most appropriate criterion for the adjustment. It is in the first instance for the legislature to determine the standards for this (cf. BVerfGE 89, p. 132 [at pp. 141-142]; 81, p. 156 [at p. 206]). At all events, from the point of view of Article 3.1 of the Basic Law, it was not inappropriate to link the amount of the money payments to war-disabled persons under the Federal War Victims Relief Act to the development of the standard pensions and thus, by way of the adjustment of the old-age pensions in the statutory old-age pensions scheme, to link them to the development of wages. In this way, a certain social symmetry of income from employment, pensions paid to the insured and tax-financed state benefits was ensured. 45

aa) In the course of reunification, the legislature, with regard to social-law provisions that directly or indirectly relate to the income (earned income or income substituted for earned income, *Erwerbsersatzeinkommen*) and the cost of living of those entitled to benefits, laid down values for the area of the former German Democratic Republic that were in general lower, because of the financial differences between west and east. This applies to the income limits for compulsory insurance and for the assessment of contributions, the current pension value in the pensions insurance scheme, the annual wages and salaries limit in personal accident insurance, the reference figures for the wage compensation payments in employment promotion law, the limits in the calculation of requirements and income set-offs in relation to child benefits, rent subsidy and state industrial training assistance, the special provisions for additional contributions to health insurance, the use of one's own income in connection with supplementary welfare benefits and survivors' pensions, limits to additional income in pensions insurance and the reference figures for demand management in the Healthcare Reform Act (*Gesundheitsreformgesetz*) and in the Healthcare Structure Act (*Gesundheitsstrukturgesetz*; cf.. Bieback, Das Sozialrecht im vereinigten Deutschland - Strukturprobleme, verfassungsrechtliche Fragen und Perspektiven, Neue Zeitschrift für Sozialrecht 1994, p. 193 [at p. 194]). It is not inappropriate from the outset to use this as a basis for calculating the benefits for war victims too. 46

bb) In adapting the pensions for war victims to the development of the benefits under the state pensions insurance scheme and thus to wages and salaries, the legislature in essence chose no other measure than those that were used in the West German law of war victims' benefits at the date of reunification. 47

Until 31 December 1969, the adjustment of benefits in the old Federal Republic of Germany was carried out after a periodical review taking into account the development of economic performance and the real growth of the economy independent of 48

social security (cf. *Bundestag document* 5/1012, p. 48; on *Bundestag* document 5/1216, p. 9; § 56 of the Third Act on the Amendment and Supplementation of the Law on War Victims [*Drittes Gesetz zur Änderung und Ergänzung des Kriegsopferrechts, Drittes Neuordnungsgesetz,* Third Reorganisation Act] of 28 December 1966, Federal Law Gazette I p. 750). From 1 January 1970, the legislature index-linked the current benefits for war victims' pensions to those of the statutory pensions insurance, with the result that they were adapted annually to the average earnings of all wage-earners and salary-earners (cf. Act on the Adaptation of the Benefits of the Federal War Victims Relief Act (*Gesetz über die Anpassung der Leistungen des Bundesversorgungsgesetzes,* [*Erstes Anpassungsgesetz*, First Adaptation Act] of 26 January 1970, Federal Law Gazette I p. 121). Since 1 July 1977, the factor determining the adaptation is no longer the alteration of this basis of assessment, but the current development of pensions in statutory workers' pension insurance (cf. § 56 of the Ninth Act on the Adaptation of the Benefits of the Federal War Victims Relief Act, *Neuntes Gesetz über die Anpassung der Leistungen des Bundesversorgungsgesetzes* [*Neuntes Anpassungsgesetz*, Ninth Adaptation Act] of 27 June 1977, Federal Law Gazette I p. 1037).

As a result of this adaptation based on a group of rates, the pension benefits for war victims and in particular the basic pension rise to the same degree as the pensions under the social security scheme. Thus the war victims share the real income growth of persons gainfully employed. In the provision in § 84a of the Federal War Victims Relief Act, the legislature admittedly split the group of rates on which the adaptation was based in such a way that the differing standards and developments of the reference pension in the area of the former Federal Republic of Germany and in the area of the former German Democratic Republic in each case are taken into account separately. However, the development of pensions has not thereby been abandoned as a standard, but merely used as an instrument in the way set out above, which continuously raises the pensions in the area of the former German Democratic Republic towards the level of the pensions in the area of the former Federal Republic of Germany. Admittedly, in doing this the legislature failed to take into account the fact that because the insurance periods in the German Democratic Republic are without exception longer, the actual pension level in the area of the former German Democratic Republic in relation to that in the area of the former Federal Republic of Germany is higher than the relation between the standard pensions indicates. In the case of disabled persons, all of whom without exception are in the pensioner generation, this means that there is a relatively greater discrepancy between the benefits under the Federal War Victims Relief Act and those from pensions insurance. This too was something that the legislature had a duty to take into account; at the date when the provision was passed, the legislature assumed, in view of the higher rates of wage increase to be expected in the east and an increase of the pensions corresponding to this increase in wages, that a rapid adaptation to the level in the west would be guaranteed in this way. 49

4. § 84a Federal War Victims Relief Act in conjunction with Annex I chapter VIII subject area K part III number 1 letter a of the Unification Treaty, however, violates Article 3.1 of the Basic Law to the extent that the basic disability pension in the area of the former German Democratic Republic is lower than in the remainder of the Federal Republic of Germany even after 31 December 1998. The concept of adaptation, which at first was constitutional, became unconstitutional from 1 January 1999 on. 50

a) At the latest since 1998 it has been recognisable to the legislature that the benefits for war victims in the east that come within the scope of § 84 a of the Federal War Victims Relief Act will not in a foreseeable period of time reach the level of the benefits in the west. 51

Since 1 January 1991, the ratio of the disposable standard pension (east) to the standard pension (west) as the basis for the benefits for war victims has risen from 46.37 per cent to 86.71 per cent on 1 July 1999. However, the process of adaptation has appreciably slowed down since 1997 (cf. 1999 Annual Report of the Federal Government on the Status of German Unity, *Jahresbericht 1999 der Bundesregierung zum Stand der Deutschen Einheit*, *document* 14/1825, p. 13). From 1994 to 1997 the benefits still rose, by at least 3 percentage points per annum; thereafter the increase was only an average of approximately 0.5 percentage points per annum. This means that equal treatment of war victims in the area of the former Federal Republic of Germany and the former German Democratic Republic cannot be predicted for the time being. 52

The reason for this lies in the economic development of the area of the former German Democratic Republic. According to the calculations of the Federal Statistics Office, the income gap has even opened up again in the last few years. The average monthly earnings in the producing sector in 1999 were 3,853 Deutsche Mark in the area of the former German Democratic Republic and 5,256 Deutsche Mark in the remainder of the Federal Republic (cf. Annual Report of the Federal Government on the Status of German Unity, document 14/1825, pp. 6, 13). It corresponds to this development that in the area of the former German Democratic Republic the income limit for the assessment of contributions to the statutory pension insurance scheme and the annual wage or salary limit of the statutory health insurance for the year 2000 sank (cf. Ordinance on Authoritative Operands in Social Security for 2000 (*Verordnung über maßgebende Rechengrößen der Sozialversicherung für 2000* ,[*Sozialversicherungs-Rechengrößenverordnung 2000* Social Security Operands Ordinance 2000]) of 29 November 1999 [Federal Law Gazette I p. 2375]). 53

b) It must therefore be expected, by reason of the age of the war victims in the area of the former German Democratic Republic, that they will not receive pensions in the same amount as those in the west. Thus, for them, the unequal treatment only for a limited period of time aimed at under § 84a of the Federal War Victims Relief Act will become permanent unequal treatment. With regard to the basic pension under § 31.1 sentence 1 of the Federal War Victims Relief Act, by reason of its special legal 54

features, this cannot be justified under Article 3.1 of the Basic Law.

aa) Unlike the other benefits granted under the Federal War Victims Relief Act, the basic pension for disabled persons under § 31.1 sentence 1 of the Federal War Victims Relief Act has both a material and a special non-material component. It is therefore a benefit *sui generis*. It represents compensation for impairment of physical integrity and is intended to reimburse the extra expenses incurred by the war victim as a result of the disablement in contrast to a healthy person (cf. *Bundestag* document 1/1333, pp. 43, 45; *Bundestag* document 3/1239, p. 21). The basic pension is described as an integrative component of rehabilitation and an expression of the legal claims of war victims to appropriate and dignified compensation (Member of the *Bundestag* Dr. Probst as rapporteur, German *Bundestag*, 4th legislative period, records of the 107th session of 22 January 1964, p. 4980). Accordingly, the provision in § 30.1 sentence 1 of the Federal War Victims Relief Act was expanded by the Fifth Act on the Amendment and Supplementation of the Federal War Victims Relief Act of 6 June 1956 (Federal Law Gazette I p. 463) in such a way that when the reduction of earning capacity is established, the emotional effects and pain are to be taken into account. 55

In 1969 the federal government took the view that the persons entitled regarded the basic pension as both a reimbursement of extra expenses caused by disability and also a benefit paid by the general public in view of the sacrifice made by the war victims. ... In the present proceedings too, the federal government proceeds on the assumption that the basic pension has a non-material function that cannot be separated from its material component. 56

It is consistent with this that case law and literature overwhelmingly regard the basic pension for the war victims as partly shaped by its non-material content (cf. Decision of the Federal Court of Justice in Civil Matters, *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, BGHZ 30, p. 162 [at p. 171]; BSGE 30, p. 21 [at p. 25]; 50, p. 243 [at p. 245]; 73, p. 41 [at p. 45]; Wilke, Soziales Entschädigungsrecht, Kommentar, 7th edition 1992, Federal War Victims Relief Act, § 31, marginal number 4; Gelhausen, Soziales Entschädigungsrecht, 2nd edition 1998, marginalnumber 320; Schulin, *loc. cit.*, p. 1345, marginal number 95; *contra*: BGHZ 20, 61 [at p. 69]). The case-law of the Federal Constitutional Court does not contradict this assessment. The determinations in the judgment of 24 July 1963 on the legal nature of the basic pension relate to provision for dependents, not to provision for the war-disabled themselves (cf. BVerfGE 17, p. 38 [at p. 47]). 57

[...]. 58

bb) The element of legal redress contained in the basic disability pension can also be seen in the details of its drafting as a law. The pension is paid regardless of the personal circumstances of the individual disabled person, his or her income and assets. Unlike the income-dependent benefits, it is in principle not taken into account when assessing other state benefits (cf. *Bundestag* document 4/1831, p. 13), for ex- 59

ample in the case of unemployment benefit (§ 194.3 number 6 of the Code of Social Law III) and in welfare law (§ 76.1 Federal Social Security Act, *Bundessozialhilfegesetz*). In maintenance law, under § 1610a of the German Civil Code, the basic pension of the disabled person cannot normally be imputed to the total income of the person liable for maintenance. It is a benefit that is protected against set-off and levy of execution (§§ 51.1, 54.3 number 3 of the Social Security Code I).

c) If, in view of this, the basic disability pension under § 31.1 sentence 1 of the Federal War Victims Relief Act is essentially shaped by the idea of non-material compensation for a special health sacrifice made by the individual in military service for the state community, and if this non-material component cannot be separated from the material one, then with regard to the constitutional principle of equality before the law (Article 3.1 of the Basic Law) there can be no justification if it is granted to a war-disabled person from the area of the former German Democratic Republic permanently at a lower rate, although that person's sacrifice was made for the same state in the same war. Differing compensation for the same sacrifice can therefore, for a transitional period, find its objective justification in the extraordinary need for state finance that accompanied German unification. But it loses its justification when it becomes clear that the legislative goal of a rapid and gradual adjustment of the level of compensation in the whole area of the Federal Republic of Germany cannot be achieved with the legal machinery used in a period of time that the persons entitled will live to see. This was apparent at the latest at the end of 1998. It is therefore required by Article 3.1 of the Basic Law that the basic pension is calculated as a uniform whole for all those entitled from 1 January 1999. 60

Since then, predominant financial and economic concerns can no longer justify the previous unequal treatment of recipients of the basic pension in the east in comparison to those in the west. According to the figures presented by the federal government, in the year 1999 (from January to October), if the war victims in the east had been treated equally, the financing of the basic disability pensions would have required an extra payment of approximately 35 million Deutsche Mark with a number of 60,417 beneficiaries. If this sum is compared with the development of the federal government expenditure for all benefits in connection with war victims' pensions without welfare for war victims in 1998 (9,025 million Deutsche Mark) and in 1999 (8,369 m. Deutsche Mark), this gives extra expenditure for the basic disability pensions of less than 1 per cent. Such a burden can no longer justify upholding the unequal treatment. 61

[…]. 62

C.

I.

The unconstitutionality of § 84a of the Federal War Victims Relief Act in conjunction with Annex I chapter VIII subject area K part III number 1 letter a of the Unification 63

Treaty results in the provision being void to the extent determined by the wording (§ 95.3 sentence 1 of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz*). Insofar as the constitutional complaints challenge the judgments of the non-constitutional courts, they are rejected as unfounded on the above grounds.

II.

64 The permanent administrative acts relating to the basic disability pensions in the east under § 31.1 sentence 1 of the Federal War Victims Relief Act are to be amended on application from 1 January 1999 on the grounds that the provision challenged is void under this judgment (cf. § 44 of the Code of Social Law X).

65

III.

The constitutional complaints are successful in part, insofar as they challenge § 84a of the Federal War Victims Relief Act. Consequently, half of the necessary expenses of the complainants are to be reimbursed (§ 34a.2 of the Federal Constitutional Court Act).

Papier Grimm Kühling

Jaeger Haas Hömig

Steiner Hohmann-Dennhardt

Dissenting opinion

Justices Kühling, Jaeger and Hohmann-Dennhardt

on the judgment of the First Senate of 14 March 2000

- 1 BvR 284/96, 1 BvR 1659/96 -

We agree with the result of the judgment and largely also with the grounds of the judgment. However, unlike the majority of the Senate, we regard Article 3.3 sentence 1 of the Basic Law as relevant. The complainants are treated unfavourably by the provision challenged by reason of their homelands. 66

The point of reference for the unfavourable treatment provided in § 84a of the Federal War Victims Relief Act is the residence or habitual abode on 18 May 1990. The majority opinion of the Senate is correct when it states that residence or habitual abode in itself does not fulfil the definition of the concept of homeland, but is a fundamentally admissible criterion for differentiating provisions. However, this applies only insofar as the statute refers to the current residence or abode. Previously the Federal Constitutional Court has concerned itself only with such provisions (cf. BVerfGE 5, p. 17 [at p. 22]; 13, p. 31 [at pp. 32, 39]; 23, p. 258 [at p. 262]; 48, p. 281 [at pp. 282, 287]; 92, p. 26 [at pp. 28, 50]). 67

In the present case, the issue is different. The reference to residence or habitual abode in a particular area at a particular date allocates the persons affected once and for all to this area. The provision with an unfavourable effect applies to them quite independently of where they establish their residence or have their habitual abode during the validity of the provision. What is decisive is not where they are, but where they come from. It is precisely this that Article 3.3 sentence 1 of the Basic Law is intended to prevent. 68

If the prohibition of discrimination in Article 3.3 sentence 1 of the Basic Law is the answer to threats and destruction of human dignity that are part of history, to which the legislature creating the constitution reacted (Scholz, in: Maunz/Dürig, Grundgesetz, 32nd part, October 1996, Article 3.3 marginal number 1), because that legislature clearly assumed that the general conviction that such discrimination is inadmissible was not established enough to be effectively excluded by the general clause in Article 3.1 of the Basic Law alone (BVerfGE 3, p. 225 [at p. 240]), then it must be concluded that the legislature creating the constitution regarded the elements contained in Article 3.3 sentence 1 of the Basic Law as of approximately equal weight. All these elements have in common that by historical experience they have repeatedly, in particular circumstances, been the starting point and nexus for discrimination. For the elements of race, faith, political opinions and status (origin) this is just as plain as the current danger of discrimination by reason of language and homeland at the date when the constitution was promulgated, in view of the fact that there were over seven million refugees. Such a context prohibits the definition of homeland in terms of folklore. 69

The term "homeland" ("*Heimat*") was introduced into the Basic Law precisely in order to prevent discrimination against refugees and expellees (cf. shorthand record of the 26th session of the Guiding Principles Committee of the Parliamentary Council of 30 November 1948, pp. 61-62, reproduced in part in: von Doemming/Füsslein/Matz, Entstehungsgeschichte der Artikel des Grundgesetzes, Jahrbuch des öffentlichen Rechts der Gegenwart, new series 1, 1951, p. 1 [at p. 69]; Heun, in: H. Dreier [ed.], Grundgesetz Kommentar, vol.1, 1996, Article 3, marginal number 116; Stein, in: Alternativ-Kommentar zum Grundgesetz, 2nd ed. 1989, Article 3, marginal number 90; Starck, in: von Mangoldt/ Klein/Starck, Grundgesetz, vol. 1, 4th ed. 1999, Article 3, marginal number 365; Gubelt, in: von Münch/Kunig, Grundgesetz-Kommentar, vol. 1, 4th ed. 1992, Article 3, marginal number 99). The concept of homeland in the language usage of the time was very closely associated with the concept of expulsion (Maunz/Dürig, *loc. cit.*, marginal numbers 70 and 78 on the prohibition of discrimination by language, which was also associated with the German-speaking population driven out of their homelands). 70

Incorporating a specific residence at a specific date into a statute with the consequence of continuing rights or unfavourable treatment is a quite usual method of drafting technique to link to the elements of homeland. This is made clear by the post-war provisions in the Act on the Affairs of Expellees and Refugees (*Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge, Bundesvertriebenengesetz,* Federal Expellees Act) and the Equalisation of War Burdens Acts (*Lastenausgleichsgesetze*), which refer back to the one definition. 71

The Germans driven out of their homelands are a special category of expellees (cf. § 2 of the Federal Expellees Act of 19 May 1953 [Federal Law Gazette I p. 201]; as is recognised as early as in § 31 of the Emergency Relief Act (*Soforthilfegesetz*) of 8 August 1949 [Law Gazette of the Bi-Zonal Economic Administration, *Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebietes* p. 205; Tax and Customs Duty Gazette for Berlin, *Steuer- und Zollblatt für Berlin* p. 239]). A person driven out of a homeland was defined as someone who on 31 December 1937 or before had had a residence in a uniform territory from which persons were expelled that was part of the totality of the territories that on 1 January 1914 belonged to the German Reich or to the Austro-Hungarian monarchy or at a later date to Poland, Estonia, Latvia or Lithuania. Emotional ties or being rooted in the territory from which persons were expelled were not relevant. The enforced change of residence and the disadvantages suffered as a result of this were not to be followed by new disadvantages in the territory of the Federal Republic of Germany. The category of persons was given favourable treatment in public contract awards, with the intention of making compensation (§ 74 Federal Expellees Act), and was given equal treatment in quotas for the finding of employment (§ 77 Federal Expellees Act). Preferential treatment of "persons native to the *Land"* was prohibited (§ 81 Federal Expellees Act). 72

Less favourable treatment, for example of Germans who lived in the area of application of the Basic Law but had their residence or habitual abode on the other side of 73

the Oder-Neisse Line on 31 December 1937 would therefore after the war automatically have been regarded as covered by the prohibition of discrimination of Article 3.3 sentence 1 of the Basic Law. As far as can be discerned, no legislature conceived such provisions.

The Senate majority opinion refuses to recognise this when it described the term "homeland" as an emotional connection to a specific area that helps shape the individual (for a similar opinion see also Osterloh, in: Sachs, Grundgesetz-Kommentar, 2nd edition 1999, Article 3 marginal number 295; Jarass, in: Jarass/Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 4th edition 1997, Article 3 marginal number 71). This definition does indeed correspond to the general usage of the term today. However, it is unsuitable for the interpretation of Article 3.3 sentence 1 of the Basic Law; for a provision that refers to such a definition, even by way of creating categories, is scarcely conceivable. The prohibition of discrimination would be of virtually no effect. In addition, such a definition of a term, as stated, misjudges the intention of the legislature creating the constitution. Instead, favourable or unfavourable treatment on account of a "homeland" exists whenever a provision relates to geographical origin in the sense of birth or residence (BVerfGE 5, p. 17 [at p. 22]; 23, p. 258 [at p. 262]; 48, p. 281 [at pp. 287-88]). 74

The war victims who were living in the area of the former German Democratic Republic on the key date are permanently bound to such a geographical origin in pensions law. This is not the laying down in law of a place of abode at a particular date, with the help of which provisions are linked to factually different fact situations or different legal systems, as for example in the case of marital property regimes (cf. BGHZ 40, p. 32 [at p. 38]) or in the question of the age of majority (cf. BVerfGE 5, p. 17 [at p. 22]). Instead, it is a question of claims that arose even before the German Democratic Republic came into existence and that are to be satisfied by the Federal Republic of Germany as war-induced burdens. The sacrifice was made in the same war for the same state. If in such circumstances a distinction is nevertheless made according to the residence on 18 May 1990 in the area of the German Democratic Republic, then the war-disabled persons in the area of the former German Democratic Republic are treated differently solely by reason of their origin from an area in which until shortly before the key date they were kept by the state power of the German Democratic Republic and to which they are now again bound in their compensation claims by the location-based key date provision. This represents unfavourable treatment on account of geographical origin, that is, residence in the German Democratic Republic and thus on account of a homeland. 75

In its result, however, the decision is correct. Until 31 December 1992, the provision challenged is covered by Article 143.1 of the Basic Law. For the years afterwards until 31 December 1998, the grounds of justification set out in the judgment still stand up to Article 3.3 sentence 1 of the Basic Law. Not every case of unequal treatment that violates Article 3.3 sentence 1 of the Basic Law is unconstitutional. Indeed, discriminating provisions may be admissible, insofar as they are mandatorily necessary to 76

solve problems that are contained in the distinguishing element itself (cf. BVerfGE 85, p. 191 [at p. 207]; to the same effect, even earlier, BVerfGE 2, p. 266 [at p. 286]; 43, p. 213 [at pp. 226 *et seq*.]). This is the situation in the present case. The transfer, occasioned by reunification, of all war victims' pension rights of the persons previously living in the German Democratic Republic to the Federal Republic of Germany was manageable only step by step if a stable budget and internal social harmony were to be preserved. The judgment sets this out in detail.

Kühling	Jaeger	Hohmann-Dennhardt

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