Headnotes

to the Order of the First Senate of 7 February 2012

– 1 BvL 14/07 –

1. **The legislature is not absolutely prohibited from differentiating on the basis of citizenship. However, the general guarantee of the right to equality requires that using citizenship as an element for differentiating must be justified by a sufficient factual reason.**

2. **The exclusion of persons by reason of citizenship from the *Land* child-raising allowance under the Bavarian *Land* Child-Raising Allowance Act violates Article 3(1) of the Basic Law.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvL 14/07 –

IN THE NAME OF THE PEOPLE

**In the proceedings
for constitutional review**

as to whether Article 1(1) first sentence no. 5 of the Act to Grant a *Land* Child-Raising Allowance and to Implement the Federal Child-Raising Allowance Act (*Gesetz zur Gewährung eines Landeserziehungsgeldes und zur Ausführung des Bundeserziehungsgeldgesetzes, Bayerisches Landeserziehungsgeldgesetz* – BayLErzGG) as promulgated on 16 November 1995 (Law and Ordinance Gazette, *Gesetz- und Verordnungsblatt* – GVBl p. 818) violates Articles 3(1) and 6(1) of the Basic Law and is void

– suspension of proceedings and order of referral from the Munich Social Court (*Sozialgericht*)
of 10 December 2007 (S 29 EG 59/07) –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 7 February 2012:

1. **Article 1(1) first sentence no. 5 of the Act to Grant a *Land* Child-Raising Allowance and to Implement the Federal Child-Raising Allowance Act (*Gesetz zur Gewährung eines Landeserziehungsgeldes und zur Ausführung des Bundeserziehungsgeldgesetzes, Bayerisches Landeserziehungsgeldgesetz* – BayLErzGG) as promulgated on 16 November 1995 (Law and Ordinance Gazette, *Gesetz- und Verordnungsblatt* – GVBl p. 818), Article 1(1) first sentence no. 5 of the Bavarian Act to Pay a *Land* Child-Raising Allowance and to Implement the Federal Child-Raising Allowance Act (*Bayerisches Gesetz zur Zahlung eines Landeserziehungsgeldes und zur Ausführung des Bundeserziehungsgeldgesetzes* – BayLErzGG) of 26 March 2001 (GVBl p. 76), Article 1(1) first sentence no. 5 of the Bavarian Act to Pay a *Land* Child-Raising Allowance and to Implement the Federal Child-Raising Allowance Act (*Bayerisches Gesetz zur Zahlung eines Landeserziehungsgeldes und zur Ausführung des Bundeserziehungsgeldgesetzes* – BayLErzGG) as promulgated on 13 April 2004 (GVBl p. 133) and Article 1(1) first sentence no. 6 of the Act for the Reform of the Bavarian *Land* Child-Raising Allowance (*Gesetz zur Neuordnung des Bayerischen Landeserziehungsgeldes*) of 9 July 2007 (GVBl p. 442) are incompatible with Article 3(1) of the Basic Law.**

2. **If the legislature does not replace the unconstitutional legislation with revised provisions by 31 August 2012 at the latest, the challenged provisions will become void.**

R e a s o n s:

A.

The referred case relates to the question of whether it is compatible with Articles 3(1) and 6(1) of the Basic Law (*Grundgesetz* – GG) that Article 1(1) first sentence no. 5 of the Act to Grant a *Land* Child-Raising Allowance and to Implement the Federal Child-Raising Allowance Act (*Land* Child-Raising Allowance Act – *Bayerisches Landeserziehungsgeldgesetz* – BayLErzGG) as promulgated on 16 November 1995 (GVBl p. 818) restricts the granting of the *Land* child-raising allowance to Germans and other citizens of a Member State of the European Union or of another contracting party to the Agreement on the European Economic Area. 1

I.

In 1989, the Free State of Bavaria enacted a *Land* (federal state) Child-Raising Allowance Act. It was the intention of the legislature that benefits under this Act should begin being paid immediately following the end of benefits under the Federal Act to Grant a Child-Raising Allowance and Parental Leave (*Gesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub* – BErzGG) and in this way make it possible for parents to take parental leave for a longer period of time and to care for their 2

children themselves. Under the 1995 version of Article 3(1) BayLErzGG, the child-raising allowance was paid out for a further twelve months of the child's life from the time the federal child-raising allowance payments ended, until the child reached the age of three at most. Under Article 5(1) first sentence BayLErzGG, the amount of the *Land* child-raising allowance was 500 Deutsche Mark per month. Entitlement to the allowance was governed by Article 1(1) BayLErzGG. Under Article 1(1) first sentence no. 5 BayLErzGG – the only provision submitted for review in the present case –, the only persons entitled were those who held the citizenship of a Member State of the European Union or of another contracting party to the Agreement on the European Economic Area.

Article 1(1) BayLErzGG as promulgated on 16 November 1995 had the following wording: 3

(1) [1] Persons are entitled to the *Land* child-raising allowance if they 4

1. have their main or habitual residence in Bavaria since the birth of the child, but for fifteen months at the least, 5

2. live together in the same household with a child born after 30 June 1989 and are responsible for the care of the person of the child, 6

3. care for and raise this child themselves, 7

4. are not gainfully employed or not gainfully employed full-time and 8

5. are citizens of a Member State of the European Union or of another contracting party to the Agreement on the European Economic Area. 9

[2] The entitlement to the *Land* child-raising allowance does not require the entitled person to have received the child-raising allowance under the Federal Child-Raising Allowance Act beforehand. 10

II.

With respect to the implementation of the *Land* child-raising allowance, the statement in support of the draft bill of 11 April 1989 explains that in recent years the results of research and practice have led to the general belief that the quality of the parent-child relationship in the first three years of a child's life constitutes the basis for the development of a stable personality that combines security and resilience with the ability to form emotional attachments, a sense of responsibility and a marked sense for community. Early social conditioning by the family is therefore of particular importance for society and the state. The implementation at the federal level, from 1 January 1986 on, of the child-raising allowance and parental leave for the first twelve months of a child's life by means of the Federal Child-Raising Allowance Act put this knowledge into political practice. The *Land* legislature states that it is deeply convinced of the rightness of the concept of a child-raising allowance. In view of a pend- 11

ing extension of the period in which the federal child-raising allowance is granted, the Government of the Free State of Bavaria has decided to reform the law on *Land* family support benefits and to introduce a *Land* child-raising allowance. The *Land* child-raising allowance is understood as recognition of the intensive efforts mothers and fathers invest in child-raising and is at the same time intended to improve the financial situation of young families (Bavarian *Landtag* document, *Drucksache des Bayerischen Landtags* – BayLTDrucks 11/11033, p. 4).

In order to avoid a “bandwagon effect”, applicants must have had their main or habitual residence in Bavaria since the birth [of the child], but for 15 months at the least. This is to guarantee selective support of “people of the *Land* (*Landeskinder*)” (BayLTDrucks 11/11033, p. 5). 12

III.

1. The plaintiff in the original proceedings is a Polish citizen and petitions for the *Land* child-raising allowance in order to care for her child, who was born in February 2000 and thus prior to Poland’s accession to the European Union on 1 May 2004. She has lived in M. since 1984 and has a permanent residence permit. She has worked in several jobs since 1988. For example, she worked as a photo laboratory technician for a long period and in a textile warehouse for a short period. From 2002 on, she worked in the food service industry for approximately seven hours a week. For the first and second years of her child’s life she had received the federal child-raising allowance in the full amount. Her application for the *Land* child-raising allowance was rejected on the basis that by reason of her Polish citizenship she was not entitled to the *Land* child-raising allowance. She filed an objection to the rejection; after this failed, she filed an action before the Munich Social Court (*Sozialgericht*) requesting that the *Land* child-raising allowance be granted and the rejection as formulated in the ruling on the objection be reversed. The Munich Social Court suspended the proceedings and in a first step referred to the Bavarian Constitutional Court (*Bayerischer Verfassungsgerichtshof* – BayVerfGH) the question as to whether Article 1(1) first sentence no. 5 BayLErzGG violates the general guarantee of the right to equality of the Constitution of the Free State of Bavaria. The Bavarian Constitutional Court held that the submitted provision of the Bavarian *Land* Child-Raising Allowance Act was compatible with the Bavarian Constitution (BayVerfGH, Decision of 19 July 2007 – Vf. 6-V-06 –, juris). 13

2. The Munich Social Court then suspended the proceedings pursuant to Article 100(1) GG and § 13 no. 11, § 80(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) and referred to the Federal Constitutional Court the question whether Article 1(1) first sentence no. 5 BayLErzGG violates Articles 3(1) and 6(1) GG and is void. 14

The referring court holds the provision submitted for review to be unconstitutional. It states that Article 3(1) GG requires supervision to be stricter, the stronger the potential negative effect of the unequal treatment on constitutionally protected freedoms. 15

The protection of marriage and the family, which must be taken into account here, is guaranteed not only for German citizens. Under Article 1(1) first sentence no. 5 BayLErzGG, parents with certain citizenships, irrespective of the family child-raising situation and the stability of their residence in Bavaria, receive no *Land* child-raising allowance. There are no reasons that might justify the nature and weight of this unequal treatment.

The factual differentiation, it states, must be based on the aims of the Child-Raising Allowance Act in light of the protection of marriage and the family. In this respect, priority attaches to enabling parents to care for their children themselves by forgoing or limiting gainful employment. The legislature would be acting in compliance with Article 3(1) GG if it excluded those applicants who are unable to engage in gainful employment for legal reasons. These persons would be unable to achieve the main objective of carrying out childcare while forgoing or limiting gainful employment. However, differentiation on the basis of citizenship does not serve this objective; on the contrary, it has no objective correlation to it. 16

It would also be constitutionally legitimate, it states, if the legislature were only to permit the child-raising allowance to be paid to those who can be expected to remain permanently in Bavaria. In the case of successive benefits like the child-raising allowance, the achievement of the objective is substantially promoted by the continuity of a recipient's residence. But this requirement is already satisfied with regard to all benefit recipients – not only foreign citizens – by the condition of a prior period of residence in Article 1(1) first sentence no. 1 BayLErzGG. 17

The chosen differentiation, it states, only serves fiscal interests. However, the prevention of additional fiscal burdens cannot justify the differentiation made. It is true that the legislature may, without violating the Basic Law, refrain from granting "voluntary family-policy-related supplementary benefits" that do not contribute to compensating for family burdens or to the subsistence minimum required for children. If the legislature were to generally dispense with the granting of the *Land* child-raising allowance, this would also put an end to the problematic differentiations between different groups of persons. However, if it decides to grant such an allowance, then, despite the fact that the granting of the allowance is voluntary, the differentiation rules of Article 3(1) GG may not be completely left unconsidered. The Free State of Bavaria could also take account of fiscal interests by way of reducing benefits, without excluding foreign citizens from the receipt of benefits. 18

Citizenship, it states, is out of the question as a criterion of differentiation. While in principle it cannot be excluded as a criterion of differentiation, its suitability as a criterion of differentiation must be determined in the specific context of the legislative subject-matter. If differentiation on the basis of citizenship adversely affected a fundamental right, a justification oriented towards the gravity of the impairment would be required. No such justification is apparent. Citizenship may by no means degenerate into an isolated criterion of differentiation. Yet this is the direction taken in the Bavarian 19

Constitutional Court's decision, which boosts the "motive of a targeted advancement of the people of the *Land*" in this direction.

IV.

Statements on the referral were submitted by the Government of the Free State of Bavaria, the Tenth Senate of the Federal Social Court, the German Association of Administrative Districts (*Landkreistag*), the German Family Court Association and the German Women Lawyers Association (*Deutscher Juristinnenbund*). 20

1. The Government of the Free State of Bavaria regards the legislation in question as constitutional. It states that the general guarantee of the right to equality does not require schematic equal treatment, but instead permits differentiations that are justified on the basis of objective considerations. In the case of a provision granting rights, it argues, the legislature has a particularly broad drafting freedom when delimiting the categories of persons who benefit. Drafting discretion in the field of benefits administration only ends where the unequal treatment of cases provided for is no longer compatible with an approach guided by the notion of justice and, in the absence of convincing reasons, must be regarded as arbitrary. 21

The legislature, it states, did not cross this boundary. The legislation distinguishes by citizenship and not – unlike the provision on the granting of the federal child-raising allowance which the Federal Constitutional Court held incompatible with the Constitution in its Order of 6 July 2004 (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 111, 176) – by residential status. The criterion of citizenship is specifically not based on the expectation that the foreign citizen will remain in Bavaria in the long-term. This objective is covered by the requirement of prior residence in Article 1(1) first sentence no. 1 BayLErzGG and applies to applicants of all countries of origin. The Act is also not intended to promote the integration of foreigners. The legislature has no obligation to undertake such promoting. 22

Instead, it submits, mere fiscal policy considerations could already constitute objective reasons justifying the legislation in question. This applies in any event to benefits which do not have to be granted. Admittedly, the legislature must properly define the group of persons involved. However, the legislature's discretion was not restricted by the considerations of the Federal Constitutional Court in the Order of 6 July 2004 (BVerfGE 111, 160) on the granting of the child benefit. Those arguments are closely related to the nature of the child benefit as a component of the dual system of the equalisation of family burdens. It is intended to relieve in part the financial burden on parents, and it therefore serves to comply with the minimum requirements, set out in Articles 6(1) and 20(1) GG, to keep the subsistence minimum of children free from taxation. In contrast, the state is not obliged to pay a child-raising allowance. The *Land* child-raising allowance could be withdrawn without replacement. 23

In addition, it states that differentiation on the basis of citizenship is also justified 24

from a reciprocity perspective. The guarantee of reciprocity is a manifestation of the international law principle of reciprocity, which serves to safeguard a state's own concerns against other states and to improve the legal position of German citizens abroad. When granting benefits, preferential treatment of Germans over foreign citizens in whose home countries Germans are refused comparable benefits is justified. If this were not the case, there would be no incentive for other countries to enter into reciprocal agreements. The orientation along the lines of the principle of reciprocity is also demonstrated by the fact that not only German citizens, but also citizens of European Union Member States and contracting parties to the Agreement on the European Economic Area, are privileged. For with regard to these states, there are international law prohibitions on discrimination.

2. The Tenth Senate of the Federal Social Court submits that it has not yet applied the provision. It states that the Munich Social Court submitted significant constitutional arguments. Admittedly, the Basic Law does not absolutely prohibit unequal treatment by reason of citizenship. Nor is this one of the differentiation criteria prohibited by Article 3(3) GG. The sole standard of review is therefore the general guarantee of the right to equality of Article 3(1) GG. In its case-law, the Federal Constitutional Court has always emphasised that Article 3(1) GG does not prohibit the legislature from all differentiation and that it has broad legislative discretion in particular with regard to delimitating the categories of persons who benefit in the area of state activities involving the granting of benefits. However, the general guarantee of the right to equality imposes limits upon the legislature that are all the more narrow the stronger the potential adverse effects of the unequal treatment on the exercise of constitutionally protected freedoms. The protection of marriage and the family under Article 6(1) GG, which must be taken into account in the present case, is not limited to Germans. Since the differentiation criterion of citizenship is a personal characteristic, a strict review of proportionality would be necessary. 25

According to the case-law of the Tenth Senate of the Federal Social Court, there are no differences in weight between the Federal Child-Raising Allowance Act and the Bavarian *Land* Child-Raising Allowance Act with regard to their requirements and purpose. The question therefore arises above all as to whether citizenship is a suitable criterion for achieving the objective intended by the federal child-raising allowance and the subsequent *Land* child-raising allowance of enabling parents to care for their children themselves by forgoing or limiting gainful employment. This point was the primary focus of the constitutional reservations of the referring court. 26

3. The German Association of Administrative Districts regards the arguments of the Munich Social Court as convincing. It states that fiscal objectives could not justify the unequal treatment. 27

4. The German Family Court Association also shares the reservations of the referring court. It states that the legislature must indeed be granted broad legislative discretion in state activities involving the granting of benefits. However, state actions are 28

subject to limits that are narrower, the stronger the potential adverse effects of the unequal treatment on the exercise of constitutionally protected freedoms. The protection of marriage and the family guaranteed by Article 6 GG is independent of citizenship.

Differentiating on the basis of citizenship, it argues, violates the principle of equality. The criterion does not serve to pursue the objective of the Bavarian *Land* Child-Raising Allowance Act of enabling parents, after they have received support under the Federal Child-Raising Allowance Act, to care for their children themselves for a further year without having to take up employment. The legitimate interest in permanent residence is ensured by the condition of a prior period of residence. There is no factual reason for differentiating on the basis of citizenship. This element is therefore exclusionary and discriminatory. 29

In the case of voluntary benefits such as a child-raising allowance, fiscal interests may be taken into account, it states. Nevertheless, entitled persons may not be excluded from the benefit based on irrelevant motives. If the legislature can only deploy limited funds, the legislature is at liberty to stop granting the benefit, to reduce the amount or to introduce non-discriminatory criteria. 30

Citizenship, it argues, is an exclusionary criterion that is hostile to the family and treats children unequally. Indeed, the purpose of the provision, to guarantee care for small children within the family, which is protected by Article 6(1) GG, or to create the economic basis for choosing care in the family, is actually thwarted by the requirement of a privileged citizenship. Parents with a non-privileged citizenship would have to engage in gainful employment, and in contrast to other parents they would not be able to dedicate themselves to family care, although their families are also protected by Article 6 GG. The children of parents with and without privileged citizenship would also be treated unequally under the Bavarian *Land* Child-Raising Allowance Act, contrary to Article 3 GG. 31

5. In its opinion, the German Women Lawyers Association supports the opinion of the referring court. It states that the Bavarian *Land* Child-Raising Allowance Act is a benefit supporting families. In this connection, the legislature has a broad scope of discretion. In defining the persons entitled to benefits, however, there may be no arbitrary differentiation. This must be assessed according to the general guarantee of the right to equality of Article 3(1) GG. The standard of review for benefits supporting the family is not the prohibition of arbitrariness, but the principle of proportionality. It must be assessed whether there are reasons whose nature and weight might justify the unequal treatment. 32

The German Women Lawyers Association states that from the perspective of families' freedom to arrange their lives and the promotion of equality, the *Land* child-raising allowance is a benefit questionable in overall constitutional and legal-policy terms. However, the legislature did remain within the bounds of what is constitutionally permissible. But the Free State of Bavaria overstepped this mark by differentiating 33

on the basis of citizenship. Differentiation on the basis of citizenship is not always impermissible. However, in respect of compliance with the principle of equality before the law when granting a child-raising allowance, it is necessary to take account of the Order of the Federal Constitutional Court of 6 July 2004 (BVerfGE 111, 176). The Court formulated principles with regard to the Federal Child-Raising Allowance Act based on the family-policy objectives of the child-raising allowance, which suggest that a differentiation on the basis of citizenship is also arbitrary in the context of the *Land* child-raising allowance. Support for the decision to have children, the mitigation of financial disadvantages and the recognition of the value of caring for children affects parents irrespective of their citizenship. The Federal Constitutional Court has already held that the objectives of a child-raising allowance are no less relevant in the case of foreigners with a residence permit or a right of residence than in the case of Germans or foreigners with other rights of residence. If the Federal Constitutional Court already held that the exclusion of persons with particular residence rights was impermissible, then a differentiation on the basis of citizenship should be all the more impermissible. The entitlement of foreign parents to the allowance is advisable and is helpful for integration. Fiscal arguments are unconvincing.

B.

Article 1(1) first sentence no. 5 BayLErzGG does not violate Article 6 GG; however, it is incompatible with the general guarantee of the right to equality (Article 3(1) GG) because it excludes all persons who do not hold the citizenship of a Member State of the European Union or of a contracting party to the Agreement on the European Economic Area from the entitlement to the *Land* child-raising allowance. 34

I.

Article 1(1) first sentence no. 5 BayLErzGG does not violate Article 6 GG. 35

Article 1(1) first sentence no. 5 BayLErzGG lays down a statutory condition for entitlement to the *Land* child-raising allowance. In doing so, the provision governs requirements for granting state benefits in the area of family support, but it does not interfere with the guarantees of protection against the state contained in the fundamental right to family, in particular with the parental right specifically protected by Article 6(2) first sentence GG (cf. BVerfGE 24, 119 <135>; 31, 194 <204>). 36

It is not necessary to decide here whether the right of parents, as guaranteed by Article 6(1) and 6(2) GG, to plan and realise their family life according to their own wishes and in particular to decide under their responsibility for child-raising whether and at what stage of its development the child is to be cared for mainly by one parent alone, by both parents mutually complementing each other or by another person (cf. BVerfGE 99, 216 <231>), is adversely affected by the fact that financial support is provided only when a parent cares for the child but not when other forms of childcare are chosen by the parents. The restriction of the entitlement to the *Land* child-raising allowance to those who care for and raise their children themselves follows from Article 37

1(1) first sentence no. 3 BayLErzGG and not from the requirement of citizenship of Article 1(1) first sentence no. 5 BayLErzGG, which is the only provision submitted for review here.

The provision does not violate any duty of the state to protect and support the family derived from Article 6(1) and (2) GG. A violation of duties to protect and to support pursuant to Article 6(1) and (2) GG can only be considered if the Free State of Bavaria had a constitutional duty to support families by granting a child-raising allowance. It is true that the particular guarantee contained in the express duty of protection of Article 6(1) GG does contain a duty of the state to promote and protect the family that goes beyond the general constitutional duty to protect fundamental rights (see also BVerfGE 43, 108 <121>; 110, 412 <436>; 111, 160 <172>; Burgi in Friauf/Höfling, Berliner Kommentar zum Grundgesetz <in the version of November 2011>, Art. 6 para. 51). The elements of protection and support particular to the general provision on the protection of the family in Article 6(1) GG, and which are not restricted to Germans (cf. BVerfGE 111, 176 <184>), extend to the narrower parental right of child-raising (Article 6(2) first sentence GG). This duty to protect and support results in the task of the state to protect and support, by means of suitable financial measures, parental childcare and child-raising (cf. Jestaedt in Bonner Kommentar zum Grundgesetz <in the version of December 2011>, Art. 6(2) and (3) para. 21). But substantive claims to specific state benefits cannot be derived from the general constitutional requirement to support parental childcare and child-raising (cf. BVerfGE 82, 60 <81 and 82>; 87, 1 <36>; 107, 205 <213>; 110, 412 <445>). In particular, the *Land* legislature has no constitutional duty to grant a benefit supporting families in the form of a child-raising allowance. 38

II.

Article 1(1) first sentence no. 5 BayLErzGG violates Article 3(1) GG. 39

1. a) The general guarantee of the right to equality of Article 3(1) GG requires that the legislature treat what is essentially equal equally and treat what is essentially unequal unequally (cf. BVerfGE 98, 365 <385>). It applies both to unequal burdens and to unequal benefits (cf. BVerfGE 79, 1 <17>; 126, 400 <416> with further references; 129, 49 <68>). Yet in doing so, Article 3(1) GG does not prohibit every differentiation by the legislature. However, the differentiation must always be justified by factual reasons that are appropriate with regard to the objective of the differentiation and the extent of the unequal treatment (cf. BVerfGE 124, 199 <220>; 129, 49 <68 and 69>). The general guarantee of the right to equality is violated if one group of persons to whom a legal rule applies or who are affected by it is treated differently in comparison to another group although there are no differences between the two of such a nature and weight that they may justify the differing treatment (cf. BVerfGE 55, 72 <88>; 88, 87 <97>; 93, 386 <397>; 99, 367 <389>; 105, 73 <110>; 107, 27 <46>; 110, 412 <432>; 129, 49 <68 and 69>). 40

These general principles also apply in case of the constitutional assessment of legislation that treats foreigners differently in comparison to Germans. The right to equality guarantees equal treatment for “all persons”, and it thus also applies to foreigners (BVerfGE 30, 409 <412>). The same applies to the protection of the family, which must be taken into account in the present case by reason of the family-policy nature of the Bavarian *Land* Child-Raising Allowance Act (cf. BVerfGE 111, 160 <169>; 111, 176 <184> with further references). Article 3(1) GG, however, does not prohibit every form of unequal treatment of Germans and foreigners on the part of the legislature. There is no general prohibition on differentiating on the basis of citizenship (cf. BVerfGE 116, 243 <259>). However, the right to equality requires that taking citizenship as a basis for differentiation must be justified by a sufficient factual reason. The fact that citizenship is not generally an impermissible basis for differentiation does not conversely mean that the unequal treatment of foreigners and Germans without cause would stand up to scrutiny under Article 3(1) GG (cf. Gundel in Isensee/Kirchhof, Handbuch des Staatsrechts vol. IX, 3rd ed. 2011, § 198, para. 86; Rüfner in Bonner Kommentar zum GG, vol. I <in the version of December 2011>, Art. 3(1), para. 136; see also European Court of Human Rights (ECtHR), Gaygusuz v. Austria, Judgment of 16 September 1996, no. 17371/90, para. 42; Poirrez v. France, Judgment of 30 September 2003,no. 40892/98, para. 46). The decision of the constitutional legislature to design the general guarantee of the right to equality as a human right not restricted to Germans would otherwise come to nothing and thus become meaningless. 41

With regard to the constitutional requirements for the factual reason justifying unequal treatment, depending on the subject being regulated and the basis for differentiation being used, the right to equality imposes varying limits on the legislature, which may range from relaxed conditions merely limited to the prohibition of arbitrariness to strict requirements of proportionality (cf. BVerfGE 117, 1 <30>; 122, 1 <23>; 126, 400 <416> with further references; 129, 49 <68 and 69>). In the area of state activities involving the granting of benefits, the legislature generally has broad legislative discretion in delimiting the categories of persons who benefit (cf. BVerfGE 99, 165 <178>; 106, 166 <175 and 176>; 111, 176 <184>). However, the legislature may be more strictly bound, depending on the respective freedoms that are affected (cf. BVerfGE 88, 87 <96>; 111, 176 <184>; 129, 49 < 69>). In addition, the constitutional requirements will be stricter, the less the basis of the statutory differentiation is at the disposal of the individual (cf. BVerfGE 88, 87 <96>; 129, 49 < 69>), or the more they approach the elements of Article 3(3) GG (cf. BVerfGE 88, 87 <96>; 124, 199 <220>; 129, 49 <69>). 42

b) Applying these principles, the constitutional requirements applicable to the referred provision are stricter than a mere prohibition of arbitrariness. 43

aa) The constitutional requirements in the present case are stricter than a mere prohibition of arbitrariness already because the denial of the child-raising allowance impinges on the parental right which is protected under Article 6(2) GG and not restricted to Germans (cf. BVerfGE 111, 160 <169>; 111, 176 <184>). Even if Article 6 GG is 44

not violated in and of itself (see B. I. above), the elements of protection and support of the constitutional parental right are affected. The *Land* child-raising allowance encourages a particular form of the exercise of the parental right by financially supporting childcare undertaken personally by parents who reduce their gainful employment. The refusal to grant the *Land* child-raising allowance denies those persons concerned this element of state support for the parental right. This must be taken into account in the constitutional assessment of the unequal treatment (cf. BVerfGE 111, 160 <169>; 111, 176 <184>), even if, in view of the voluntary nature of the state benefit, this still does not result in any particularly strict constitutional requirements for the justification of unequal treatment (cf. BVerfGK, 19, 186 <189>).

bb) The constitutional requirements are also stricter than the mere prohibition of arbitrariness due to the fact that Article 1(1) first sentence no. 5 BayLErzGG, by using citizenship, relies on a basis for differentiation that is hardly at the disposal of the applicants [for the allowance]. A person's citizenship generally depends on the citizenship of the person's parents or the person's place of birth, and thus on circumstances beyond the person's control. A change of citizenship is possible only under conditions that again are not entirely set at the discretion of those affected (cf. BVerfGE 111, 160 <169 and 170>). 45

cc) Article 3(3) first sentence GG does not list citizenship as an impermissible basis for differentiation, despite its similarity to and overlap with the bases set out there. A differentiation on the basis of citizenship is therefore not subject to the strict prohibition of differentiation of Article 3(3) first sentence GG (cf. BVerfGE 90, 27 <37>). This does not rule out that in certain situations the unequal treatment of foreign citizens will disadvantage the persons affected in a manner similar to a differentiation under the bases set out in Article 3(3) first sentence GG, thereby triggering strict constitutional requirements for the justification of the unequal treatment (cf. Osterloh in Sachs, GG, 6th ed. 2011, Art. 3, para. 297; Jarass in Jarass/Pieroth, GG, 11th ed. 2011, Art. 3, para. 127; Gundel loc. cit. para. 86; König/Peters in Grote/Marauhn, EMRK/GG, 2006, chap. 21 para. 138; see also ECtHR, loc. cit.). It is not necessary to decide the extent of this, since the referred provision already fails to satisfy less strict constitutional requirements. 46

2. The unequal treatment, resulting from Article 1(1) first sentence no. 5 BayLErzGG, of persons who do not have any citizenship referred to there is incompatible, according to the above principles, with the general guarantee of the right to equality because, even taking into account the legislature's leeway to design, the provision lacks a legitimate purpose that would justify the disadvantaging of foreign citizens and that the differentiation in Article 1(1) first sentence no. 5 BayLErzGG would serve. 47

a) The exclusion of persons who do not have any citizenship referred to in Article 1(1) first sentence no. 5 BayLErzGG is not justified by the purposes of the Bavarian *Land* Child-Raising Allowance Act. 48

The granting of the child-raising allowance is aimed above all at enabling parents to care for their children themselves by forgoing or limiting gainful employment and in this way encouraging early childhood development (BayLTDrucks 11/11033, p. 4). While financial support of parents caring for and raising a child is a legitimate legislative purpose (see B.I. above), in view of the constitutional requirement of protection and support (Article 6(2) GG), this purpose does not justify the exclusion from benefits laid down in the referred provision. The legislature's intention to enable parents to care for their children themselves and thereby encourage early childhood development bears upon foreigners and their children in the same way as it does upon Germans. The constitutional protection of the family (Article 6 GG) is not restricted to Germans. 49

The differentiation provided for in Article 1(1) first sentence no. 5 BayLErzGG also does not indirectly serve to realise the legislative purpose. In view of the legislative purpose, it would be constitutionally permissible for the drawing of benefits to be restricted to persons who may lawfully work in Germany. The legislature would be acting in compliance with Article 3(1) GG if it excluded from the receipt of the child-raising allowance those foreigners who for legal reasons would in any case not be allowed to engage in gainful employment. The granting of a state benefit that is intended to give parents an incentive to forgo gainful employment misses its aim if such gainful employment is not legally permitted for the parent who is prepared to care for the child (cf. BVerfGE 111, 176 <185 and 186>). However, the referred provision is not capable of achieving this objective. Even more than the required link to a residence permit, which was criticised by the Federal Constitutional Court in the Orders of 6 July 2004 (BVerfGE 111, 160 <174 and 175>; 111, 176 <185 et seq.>), differentiation on the basis of citizenship allows no inference to be drawn with regard to the existence of a work permit or not. The plaintiff in the original proceedings was lawfully engaged in gainful employment in Bavaria, so that the *Land* child-raising allowance could have constituted an incentive for her to restrict her gainful employment in favour of childcare. 50

b) The exclusion of persons who neither have the citizenship of a Member State of the European Union nor of a contracting party to the Agreement on the European Economic Area cannot be justified by the purpose of restricting support to persons who will live in Bavaria permanently. In certain cases, the foreseeable duration of the residence of foreign citizens in Germany might justify unequal treatment (cf. BVerfGE 111, 160 <174>; 111, 176 <184>), yet the absence of permanent residence cannot automatically justify every differentiation with regard to the granting of state benefits (cf. BVerfGE 116, 229 <239 and 240>). In this case, however, the criterion of citizenship is neither directed at nor capable of covering the category of persons who will foreseeably permanently reside in Bavaria. Citizenship does not provide reliable information as to whether a person will permanently reside in Bavaria, and it does so even less than does the type of residence permit, which the Federal Constitutional Court has also already held not to be suitable in this respect (cf. BVerfGE 111, 160 51

<174>; 111, 176 <185>).

c) The exclusion of persons who neither have the citizenship of a Member State of the European Union nor of a contracting party to the Agreement on the European Economic Area cannot be justified by the purpose of giving preferential treatment to what are known as “people of the *Land*” (cf. BayVerfGH, loc. cit., para. 33). It is not necessary to discuss here to what extent the preferential treatment of “people of the *Land*” is permissible under the Basic Law, since the referred provision does not differentiate on the basis of origin from other *Laender*, but rather on the basis of citizenship, and thus, from the outset, cannot be justified on the basis of supporting “people of the *Land*”. This might apply differently for the provision on the prior period of residence in Bavaria laid down in Article 1(1) first sentence no. 1 BayLErzGG (cf. BayLT-Drucks 11/11033, p. 5), but this is not the subject of the present proceedings. 52

d) Insofar as the *Land* legislature intended to prevent “bandwagon effects” which might result from persons taking up residence temporarily in Bavaria in order to obtain the Bavarian child-raising allowance, this goal is also achieved by the provision on the prior period of residence (Article 1(1) first sentence no. 1 BayLErzGG; cf. BayLTDrucks 11/11033, p. 5). Apart from this, citizenship would not be a suitable means of achieving this goal, since, as shown, it provides no reliable information either on the period of residence before the child’s birth or on the future period of residence in Bavaria. 53

e) Fiscal interests cannot justify the disadvantaging brought about by Article 1(1) first sentence no. 5 BayLErzGG. Insofar as the legislature grants a benefit voluntarily, it may of course take into account the financial means it can deploy in view of the other state obligations (cf. BVerfGE 102, 254 <303>). Fiscal policy concerns, however, may only play a role to the effect that entitled persons who satisfy the requirements for drawing benefits to the same extent as others are not excluded from the benefit by reason of a differentiation on the basis of irrelevant motives. If the only intention is to reduce the amount of benefits for the purpose of reducing state expenditure, this is not in itself sufficient to justify differing treatment of different categories of persons (cf. BVerfGE 87, 1 <46> with further references and BVerfGE 19, 76 <84 and 85>; 76, 256 <311>; 93, 386 <402>; 107, 218 <253>; 122, 210 <233>). The requirement of equal treatment would otherwise fail its purpose in the area of state financial benefits, since the legislature could always justify unequal treatment on the basis that it intended to reduce state expenditure through partial savings (cf. BVerfGE 121, 241 <258>). Avoiding state expenditure is a legitimate purpose, but it cannot justify the unequal treatment of categories of persons. If there is no factual reason to differentiate beyond this, the legislature must take account of fiscal policy concerns by restricting the amount or duration of the benefit for all those entitled. 54

f) Finally, differentiation on the basis of citizenship cannot be justified by the international law principle of reciprocity. According to this principle, foreign citizens in a state must only be granted certain advantages if the citizens of the host state can claim the 55

same advantages in the home state in question. Withholding from foreign citizens those benefits that are granted to a state's own citizens may, for example, serve the purpose of influencing other states to enter into international treaties or reciprocal agreements that grant a higher degree of protection to Germans abroad. The deliberate disadvantaging of citizens from states with which there is no reciprocity may, under certain circumstances, be constitutionally acceptable (cf. BVerfGE 51, 1 <24>; 81, 208 <224>). However, given the fact that the Federal Government is competent for foreign relations under Article 32(1) GG, the question whether a *Land* legislature may claim to rely on the reciprocity in relation with other states would have to be examined more closely.

However, the referred provision can already not be justified on the basis of the principle of reciprocity because Article 1(1) first sentence no. 5 BayLErzGG does not differentiate on the basis of the reciprocal guarantee of similar benefits (cf. BayVerfGH, loc. cit. para. 36). The referred provision is not geared toward specific reciprocity, but rather requires the citizenship of a Member State of the European Union or of a contracting party to the Agreement on the European Economic Area. No account is taken of those agreements with other countries that might exist, nor of the granting of corresponding benefits by other states irrespective of an agreement. A review of the specific reciprocity requirements in any case of benefits is therefore impossible. Even if a reciprocal agreement did exist between the Federal Republic of Germany and the Republic of Poland before the latter acceded to the European Union, or, even without this, if Poland had granted corresponding benefits to Germany, this could not have been taken into account in the granting of the *Land* child-raising allowance. However, when a provision leaves no scope for reviewing the specific reciprocity requirements, this rules out, from the outset, the possibility that the argument of reciprocity in international law might stand up to scrutiny under Article 3(1) GG (cf. BVerfGE 51, 1 <25>; 81, 208 <224>). 56

g) No other purposes that could justify the differentiation in Article 1(1) first sentence no. 5 BayLErzGG are apparent. 57

C.

I.

As a general rule, the unconstitutionality of a statutory provision renders it void (§ 82(1) in conjunction with § 78 first sentence BVerfGG). But since in the present case the legislature has several possibilities for remedying the unconstitutionality, the declaration of incompatibility is the only sanction that comes into question (cf. BVerfGE 84, 168 <186 and 187>; 92, 158 <186>). Thus, for example, the legislature could remove the requirement of citizenship without replacement. However, it could also draft a provision based on the permission to engage in gainful employment (cf. BVerfGE 111, 176 <189>). The legislature could also decide that in future it will grant either no *Land* child-raising allowance at all or grant it at a lower rate for everyone. This option 58

is, however, not available in respect of those proceedings filed in court before any amendment comes into force, since those parents who satisfy the requirements of Article 1(1) first sentence no. 5 BayLErzGG have already received or will receive the child-raising allowance on the basis of proceedings which are ongoing or already finally and absolutely completed, and they cannot retroactively be deprived of this. The effect of a retrospective repeal of the *Land* child-raising allowance would thus again, in a manner violating the right to equality, disadvantage those persons who do not satisfy the requirements – incompatible with Article 3(1) GG - of Article 1(1) first sentence no. 5 BayLErzGG.

II.

Pursuant to § 78 second sentence BVerfGG, in the interest of legal clarity, the follow-up provisions in Article 1(1) first sentence no. 5 of the Bavarian Act to Pay a *Land* Child-Raising Allowance and to Implement the Federal Child-Raising Allowance Act of 26 March 2001 (GVBl p. 76), in Article 1(1) first sentence no. 5 of the Bavarian Act to Pay a *Land* Child-Raising Allowance and to Implement the Federal Child-Raising Allowance Act as promulgated on 13 April 2004 (GVBl p. 133) and in Article 1(1) first sentence no. 6 of the Act for the Reform of the Bavarian *Land* Child-Raising Allowance of 9 July 2007 (GVBl p. 442), the contents of which do not differ from Article 1(1) first sentence no. 5 BayLErzGG 1995, are declared incompatible with Article 3(1) GG (cf. BVerfGE 92, 53 <73>; 94, 241 <265 and 266>, in each case with further references). 59

III.

Notices that have already become final at the date of the pronouncement of this decision are unaffected by it. This conforms to the basic principle of § 79(2) first sentence BVerfGG, which also applies in cases where the Federal Constitutional Court declares a provision incompatible with the Basic Law (cf. BVerfGE 81, 363 <384>). The legislature is at liberty to pass a different provision in connection with the subject of the present decision (cf. BVerfGE 94, 241 <266 and 267>; 111, 115 <146>). 60

IV.

The legislature has until 31 August 2012 to enact new legislation. If no new legislation that is in conformity with the Basic Law is passed by this date, the challenged provisions will be void (cf. BVerfGE 111, 115 <146>). 61

V.

Court and administrative proceedings which are not final and can still be appealed, and in which the only obstacle to the granting of the *Land* child-raising allowance is the applicants' citizenship, shall be or shall remain suspended (cf. BVerfGE 111, 115 <146>; 116, 96 <135>) until the legislature has replaced the unconstitutional provision by a new provision (cf. BVerfGE 28, 324 <363>; 111, 160 <176>), or the provision becomes void as set out in C. IV. (cf. BVerfGE 111, 115 <146>). 62

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