Headnotes

to the Order of the First Senate of 10 July 2012

- 1 BvL 2/10 -

- 1 BvL 3/10 -

- 1 BvL 4/10 -

- 1 BvL 3/11 -

1. **The law that excludes foreign nationals who have been granted residency under international law or on political or humanitarian grounds but who do not fulfil any of the criteria for integration in the labour market as defined in § 1(6) no. 3 letter b of the 2006 Federal Child-Raising Allowance Act (*Bundeserziehungsgeldgesetz* – BErzGG) and § 1(7) no. 3 letter b of the Federal Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz* – BEEG) from receiving the federal child-raising allowance or the federal parental allowance violates Article 3(1) and Article 3(3) first sentence of the Basic Law.**

2. **A provision that is neither gender-specific nor based on criteria which from the outset only relate to women or only relate to men, but which nonetheless disadvantages women in comparison to men on legal or practical grounds related to maternity, is subject to strict standards of justification pursuant to Article 3(3) first sentence of the Basic Law.**

FEDERAL CONSTITUTIONAL COURT

– 1 BvL 2/10 –

– 1 BvL 3/10 –

– 1 BvL 4/10 –

– 1 BvL 3/11 –

IN THE NAME OF THE PEOPLE

In the proceedings
on the judicial review

I. of whether § 1(6) no. 2 letter c in conjunction with § 1(6) no. 3 letter b of the Federal Child-Raising Allowance Act (*Bundeserziehungsgeldgesetz* – BErzGG) in the version of the Act on the Entitlement of Foreigners in respect of the Child Benefit, the Child-Raising Allowance and Child Maintenance Advances (*Gesetz zur Anspruchsberechtigung von Ausländern wegen Kindergeld, Erziehungsgeld und Unterhaltsvorschuss*) of 13 December 2006 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 2915) is compatible with Article 3(1) of the Basic Law insofar as, in accordance therewith, foreigners to whom a residence permit was issued pursuant to § 23(1) of the Residence Act (*Aufenthaltsgesetz*) by reason of war in their home country or pursuant to §§ 23a, 24 and 25(3) to (5) of the Residence Act, are entitled to the federal child-raising allowance only if they are entitled to engage in gainful employment in Germany and actually do so, or draw recurrent cash benefits pursuant to the Third Book of the Code of Social Law (*Drittes Buch Sozialgesetzbuch* – SGB III) or are on parental leave

–order of suspension and referral from the Federal Social Court (*Bundessozialgericht*)of 3 December 2009 (B 10 EG 7/08 R) –

– 1 BvL 2/10 –,

–order of suspension and referral from the Federal Social Court
of 3 December 2009 (B 10 EG 5/08 R) -

– 1 BvL 3/10 –,

–order of suspension and referral from the Federal Social Court
of 3 December 2009 (B 10 EG 6/08 R) –

– 1 BvL 4/10 –,

II. of whether § 1(7) no. 2 letter c in conjunction with § 1(7) no. 3 letter b of the Federal Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz* – BEEG) in the version of Article 1 of the Act Introducing the Parental Allowance (*Gesetz zur Einführung des Elterngeldes*) of 5 December 2006 (BGBl I p. 2748) is compatible with Article 3(1) of the Basic Law insofar as, in accordance therewith, foreigners to whom a residence permit was issued pursuant to § 23(1) of the Residence Act by reason of war in their home country or pursuant to §§ 23a, 24 and 25(3) to (5) of the Residence Act are entitled to the child-raising allowance only if they are entitled to engage in gainful employment in Germany and do so, draw recurrent cash benefits pursuant to the Third Book of the Code of Social Law or are on parental leave

-order of suspension and referral from the Federal Social Court
of 30 September 2010 (B 10 EG 9/09 R) -

– 1 BvL 3/11 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

held on 10 July 2012:

§ 1(6) number 3 letter b of the Act to Grant the Child-Raising Allowance and Child-Raising Leave (*Gesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub – Bundeserziehungsgeldgesetz*, Federal Child-Raising Allowance Act – BErzGG), in the version of the Act on the Entitlement of Foreigners in respect of the Child Benefit, the Child-Raising Allowance and Child Maintenance Advances of 13 December 2006 (BGBl I p. 2915), and § 1(7) number 3 letter b of the Federal Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz* – BEEG) in the version of Article 1 of the Act Introducing the Parental Allowance (*Gesetz zur Einführung des Elterngeldes*) of 5 December 2006 (BGBl I p. 2748) are in violation of Article 3(1) and Article 3(3) first sentence of the Basic Law and are void.

Reasons:

A.

The referrals relate to the question of whether it is compatible with the Basic Law that certain foreign nationals who have been granted residency under international law or on humanitarian or political grounds are entitled to the child-raising allowance or the parental allowance only if, during the period of entitlement, they satisfy one of the labour market integration criteria listed in the provisions referred. 1

I.

The Federal Child-Raising Allowance Act (*Bundeserziehungsgeldgesetz* – BErzGG) was in force in various versions from 1 January 1986 until the version relevant here (2006 BErzGG) was replaced by the Federal Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz* – BEEG) on 1 January 2007. The Federal Child-Raising Allowance Act most recently provided for a standard child-raising allowance of 300 € per month until the child reached the age of 24 months, the entitlement being reduced as income increased. By contrast, the parental allowance under § 2(1) BEEG is paid at 67% of the average monthly income earned from gainful employment in the twelve calendar months prior to the month of the child's birth, up to a maximum of 1,800 € per month. At the same time, a minimum parental allowance of 300 € is provided for, which is also paid if no income from gainful employment was earned in the relevant period prior to the birth (§ 2(5) BEEG). The parental allowance can only be drawn during the first 14 months of the child's life. The duration of the allowance payments for both parents taken together is in principle twelve months. Both the Federal Child-Raising Benefit Allowance Act and the Federal Parental Allowance and Parental Leave Act grant benefits only as long as no employment, or no full-time gainful employment, is exercised (§ 1(1) no. 4 BErzGG 2006 and § 1(1) no. 4 BEEG). According to § 2 BErzGG 2006 and § 1(6) BEEG, a person does not engage in full-time gainful employment *inter alia* if their weekly working hours do not exceed 30 hours per week averaged over a month. 2

With the introduction of the federal child-raising allowance, the legislature wished to enable mothers and fathers to primarily devote themselves to raising their child by forgoing or restricting gainful employment (*Bundestag* document, *Bundestagsdrucksache* – BTDrucks 10/3792, p. 15). Because the child-raising allowance was found to no longer be sufficiently effective even after the Federal Child-Raising Allowance Act (BErzGG) was recast in 2006, it was replaced as of 2007 by the parental allowance, pursuant to the Federal Parental Allowance and Parental Leave Act (BEEG). The purpose of the parental allowance is to make it easier to establish a family and to lastingly contribute towards providing financial security for families by offering compensation for the income lost as a result of childcare (BTDrucks 16/1889, p. 1). It aims to create a protective financial space for young families and to help ensure that parents can care for their child themselves during this period (BTDrucks 16/1889, p. 2). With the Act, the legislature also sought to react to the low birth-rate (BTDrucks 16/1889, pp. 1 and 15). 3

II.

The referred provisions, which are virtually identical, are both part of a rule on eligibility contained in § 1 of both Acts. 4

§ 1(6) BErzGG 2006 reads as follows: 5

> (6) A foreigner not entitled to freedom of movement shall only be eligible if he/she 6
>
> 1. holds a settlement permit,
>
> 2. holds a residence permit that entitles or entitled the holder to engage in gainful employment, unless the residence permit was
>
> a) issued pursuant to § 16 or § 17 of the Residence Act,
>
> b) issued pursuant to § 18(2) of the Residence Act and the approval of the Federal Employment Agency may, pursuant to the Employment Ordinance (*Beschäftigungsverordnung*), only be issued for a specific maximum period,
>
> c) issued pursuant to § 23(1) of the Residence Act by reason of war in the holder's home country or pursuant to §§ 23a, 24, 25(3) to (5) of the Residence Act, or
>
> 3. holds a residence permit listed in no. 2 letter c, and
>
> a) has been in Germany for at least three years either lawfully, with authorisation or under a temporary suspension of deportation, and
>
> b) is entitled to be employed in Germany, draws recurrent cash benefits according to the Third Book of the Code of Social Law or is on parental leave.

§ 1(7) BEEG has the following wording in the referred version of 5 December 2006: 7

> (7) A foreigner not entitled to freedom of movement shall only be eligible if this person 8
>
> 1. holds a settlement permit,
>
> 2. holds a residence permit that entitles or entitled the holder to engage in gainful employment, unless the residence permit was
>
> a) issued pursuant to § 16 or § 17 of the Residence Act,
>
> b) issued pursuant to § 18(2) of the Residence Act and the approval of the Federal Employment Agency may, pursuant to the Employment Ordinance (*Beschäftigungsverordnung*), only be issued for a specific maximum period,
>
> c) issued pursuant to § 23(1) of the Residence Act by reason of war in the holder's home country or pursuant to §§ 23a, 24, 25(3) to (5) of the Residence Act, or
>
> 3. holds a residence permit listed in no. 2 letter c, and
>
> a) has been in Germany for at least three years either lawfully, with authorisation or under a temporary suspension, and
>
> b) is entitled to be employed in Germany, draws recurrent cash benefits pursuant to the Third Book of the Code of Social Law or is on parental leave.

§ 1(6) BErzGG 2006 and § 1(7) BEEG make the granting of the child-raising allowance or the parental allowance to foreign nationals dependent on the type of residence title they hold within the meaning of the Residence Act (Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet* – AufenthG, Residence Act). The settlement permit, which according to § 9(1) first sentence AufenthG provides an entitlement to permanent residence, always leads to eligibility pursuant to § 1(6) no. 1 BErzGG 2006 and § 1(7) no. 1 BEEG. By contrast, a holder of a residence permit (*Aufenthaltserlaubnis*), which according to § 7 AufenthG is a temporary title, is, pursuant to § 1(6) no. 2 first alternative BErzGG 2006 and § 1(7) no. 2 first alternative BEEG, in principle only eligible if the residence permit – be it by virtue of law, be it on the basis of a work permit issued in an individual case – entitles or entitled the holder to engage in gainful employment. Furthermore, the residence permit may not be one of the residence titles listed in § 1(6) no. 2 letters a to c BErzGG 2006 and § 1(7) no. 2 letters a to c BEEG, as the holders of these are, in principle, not eligible to claim benefits. However, holders of a residence permit pursuant to § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG, who are in principle not eligible to draw the child-raising allowance or the parental allowance, are nevertheless entitled to the child-raising allowance or the parental al- 9

lowance if the additional prerequisites of the exception to the exception pursuant to § 1(6) no. 3 BErzGG 2006 and § 1(7) no. 3 BEEG are satisfied.

In a decision dated 6 July 2004, the Federal Constitutional Court declared a precursor rule in the 1993 Federal Child-Raising Allowance Act, which also differentiated on the basis of residence titles, to be incompatible with Article 3(1) of the Basic Law because determining eligibility according to the formal type of residence title is not justified (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 111, 176 <185 et seq.>). According to the 1993 Federal Child-Raising Allowance Act, all foreigners with a “residence title for exceptional purposes” (*Aufenthaltsbefugnis*) pursuant to the Aliens Act applicable at the time (*Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet*, Act Concerning the Entry and Residence of Aliens in the Territory of the Federal Republic of 9 July 1990, BGBl I pp. 1354 and 1356), were excluded from entitlement without any exception to the exception existing, such as the one that can now be found in § 1(6) no. 3 BErzGG 2006 and § 1(7) no. 3 BEEG. The residence title for exceptional purposes pursuant to the Aliens Act was primarily issued for the same reasons as the residence permits issued on humanitarian grounds under Part 5 of the Residence Act applicable today, which are referred to in § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG. 10

The legislature reacted to this ruling of the Federal Constitutional Court with the new provisions on the benefit-entitlement of holders of humanitarian residence permits, which are now the subject of this referral. In comparison to the precursor provision, the group of beneficiaries was, on the one hand, further restricted by the child-raising allowance or parental allowance only being granted to those individuals who hold a residence permit that constitutes an entitlement to engage in gainful employment (§ 1(6) no. 2 first alternative BErzGG 2006 and § 1(7) no. 2 first alternative BEEG). On the other hand, the group of beneficiaries was expanded vis-à-vis the provision objected to by the Federal Constitutional Court because § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG initially exclude holders of residence permits issued on humanitarian grounds from eligibility, yet these individuals are nevertheless eligible to draw benefits on the basis of the exception to the exception in § 1(6) no. 3 BErzGG 2006 and § 1(7) no. 3 BEEG if they have been in Germany for at least three years lawfully, they have been authorised to enter or their deportation has been temporarily suspended (§ 1(6) no. 3 letter a BErzGG 2006 and § 1(7) no. 3 letter a BEEG) and if they satisfy one of the characteristics of labour market integration listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG. § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG are conditional on those concerned being gainfully employed during the benefit-payment period, receiving cash benefits according to the Third Book of the Code of Social Law (unemployment benefit I) or taking parental leave. 11

The explanatory memorandum to the Federal Government’s draft of the Federal Child-Raising Allowance Act of 2006 stated that the Federal Constitutional Court had 12

not objected to the stated legislative objective of providing family benefits only to foreign nationals who were likely to remain in Germany permanently. It had, however, considered the provision that had been declared unconstitutional unsuitable for achieving this goal. Retaining the legislative objective, to which the Federal Constitutional Court had not objected, new criteria were thus established relating to when permanent residence could be presumed. Since, according to the Residence Act, each residence permit was in principle amenable to becoming permanent, a further element would have to be present in order to be able to presume foreseeably permanent residence. According to the Federal Government, this would, particularly, be gainful employment or the fact that gainful employment was or could be permitted. Employment or integration in the labour market is to be understood as an indication of permanently remaining in Germany. Securing a livelihood from one's own employment is generally seen as necessary for extending a residence permit (see BTDrucks 16/1368, p. 8).

III.

1. Referrals 1 BvL 2 to 4/10 are based on proceedings in which child-raising allowance claims are asserted under the Federal Child-Raising Allowance Act of 2006. In the original proceedings on which referral 1 BvL 3/11 was based, the plaintiff is requesting a parental allowance according to the Federal Parental Allowance and Parental Leave Act. All the plaintiffs had residence titles which are listed in § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG; they were entitled to engage in gainful employment; and they had been in Germany for more than three years lawfully, had been authorised to enter or their deportation had been temporarily suspended; but they were neither in gainful employment during the period at issue, nor did they draw unemployment benefit I or take parental leave. 13

2. The Federal Social Court has suspended the sets of proceedings and referred to the Federal Constitutional Court for a ruling on whether § 1(6) no. 2 letter c in conjunction with no. 3 letter b BErzGG 2006 and § 1(7) no. 2 letter c in conjunction with no. 3 letter b BEEG are compatible with Article 3(1) of the Basic Law insofar as, pursuant thereto, foreigners to whom a residence permit has been issued according to § 23(1) AufenthG because of a war in their home country or according to §§ 23a, 24 and 25(3) to (5) AufenthG have a right to federal child-raising allowance or federal parental allowance only if they engage in gainful employment in Germany and are entitled to do so, draw recurrent cash benefits according to the Third Book of the Code of Social Law or are taking parental leave. The referring court considers the provisions submitted for review to be unconstitutional. It states that the provisions are not compatible with Article 3(1) of the Basic Law. While the Federal Constitutional Court had considered it to be permissible to grant the federal child-raising allowance only to those foreigners who may engage in gainful employment in Germany and of whom one may expect that they remain in Germany permanently, § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG, however, impose requirements which go beyond the permission to engage in gainful employment and which at best might 14

be justified as a prognosis of permanent residence. It stated that the delimitation criteria used, however, were unsuitable for this since these did not properly determine the group of those who were likely to remain in Germany permanently.

It stated that the imposition by the legislature of more far-reaching conditions than the mere entitlement to take up gainful employment was not objectionable in principle with regard to the granting of support benefits to persons holding residence titles which by their nature were not intended for permanent residence. One could also presume that the residence titles listed in § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG in principle only had a temporary character. Thus, it is not to be considered fundamentally objectionable if the legislature, pursuant to the provision contained in § 1(6) no. 3 letter a BErzGG 2006 and § 1(7) no. 3 letter a BEEG, required holders of such titles to also have at least three years of either lawful residence, authorisation to enter the country or suspended deportation. 15

The further criteria in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG were however not considered by the referring court to be suitable for distinguishing between individuals with a favourable residence prognosis and those without such a prognosis. While these characteristics chosen by the legislature do indeed include individuals for whom a favourable residence prognosis could certainly be affirmed, other individuals to whom such a residence prognosis also should apply are excluded. Furthermore, the referring court states that the provision runs counter to the objectives of the Federal Child-Raising Allowance Act and the Federal Parental Allowance and Parental Leave Act because it makes parents unable to bring to fruition the incentive to take on the care of their children themselves, because they must take up employment. 16

3. In their written observations, Caritas Germany (*Caritasverband*), the Social Service Agency of the Evangelical Church in Germany (*Diakonisches Werk der Evangelischen Kirche in Deutschland*), the German Women Lawyers Association (*Deutscher Juristinnenbund*), the German Family Court Association (*Deutscher Familiengerichtstag e.V.*), the German Social Court Association (*Deutscher Sozialgerichtstag e.V.*), the German Red Cross and the United Nations High Commissioner for Refugees (UNHCR) took the view that the provisions that had been submitted were unconstitutional. By contrast, the German Association of Rural Districts (*Deutscher Landkreistag*) and the German Association for Public and Private Welfare (*Deutscher Verein für öffentliche und private Fürsorge*) considered the provisions to be constitutional. No observations were submitted by the *Bundestag*, the *Bundesrat*, the Federal Government or the Federal Government Commissioner for Migration, Refugees and Integration (*Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration*) or the Governments of the *Laender*. 17

B.

The referrals are admissible. The questions referred by the Federal Social Court are worded in such a way as to be understood that the referring court considers only 18

§ 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG to be unconstitutional, but not § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG, which, in conjunction with § 1(6) no. 3 letter a BErzGG 2006 and § 1(7) no. 3 letter a BEEG, develop a meaning of their own without the referring court casting doubt as to constitutionality in this respect.

C.

§ 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG violate Article 3(1) of the Basic Law (I.) and Article 3(3) first sentence of the Basic Law (II.). 19

I.

The distinction effected in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG places the foreign parents concerned at a disadvantage in an unconstitutional manner (Art. 3(1) of the Basic Law). 20

1. The general principle of equality requires the legislator to apply equal treatment to what is essentially alike and unequal treatment to what is essentially different (see BVerfGE 98, 365 <385>; established case-law). It applies both to unequal burdens and to unequal advantages (see BVerfGE 79, 1 <17>; 126, 400 <416>; 129, 49 <68> with further references). Depending on the subject-matter of the provision and elements upon which the differentiation is based, the general principle of equality may give rise to different boundaries for the legislature which may range from loose requirements merely prohibiting arbitrariness to stringent requirements as to proportionality. The principle of equality is violated if a group of addressees of the provision or persons concerned by the provision is treated differently in comparison to another group although no differences of such a nature and weight exist between the two groups such that they justify the differing treatment (see BVerfGE 129, 49 <68 and 69>). 21

2. The provisions that have been submitted lead to unequal treatment. According to § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG, persons with the residence titles listed in § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG are only entitled to the child-raising allowance or the parental allowance if, in the benefit-payment period, they engage in gainful employment and are entitled to do so; draw recurrent cash benefits according to the Third Book of the Code of Social Law; or take parental leave. If those concerned do not satisfy any of the three prerequisites, they do not receive the child-raising allowance or the parental allowance, and are, in this respect in particular, placed on worse footing than persons with an identical residence title who are able to show one of the three connections with the labour market listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG. 22

3. This unequal treatment is not justified. 23

a) The prerequisites listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG serve an objective that is legitimate in principle. 24

aa) However, the differentiation does not coincide with the objective generally pursued by the two Acts which is to enable parents to care for their child themselves while forgoing gainful employment or restricting it. This fundamentally legitimate objective may well justify restricting the drawing of benefits to those individuals who can in fact lawfully engage in gainful employment (see BVerfGE 111, 176 <185 and 186>; BVerfGE 130, 240 <256 and 257>). The legislature, however, has already taken this into account in § 1(6) no. 2 first alternative BErzGG 2006 and § 1(7) no. 2 first alternative BEEG, which have not been submitted here for review and according to which only those individuals who are or were entitled to engage in gainful employment receive the child-raising allowance or the parental allowance. With the individual provisions that have been submitted, the legislature, however, is not pursuing the objective of enabling parents to forgo or restrict employment. Rather, the eligibility of the foreign nationals concerned here pursuant to § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG (first and second alternatives) is conditional on their active integration in the labour market even while they are drawing benefits (see b) bb) (4) (c) (aa) and (bb) below). 25

bb) It was, however, the legislature's intention that the prerequisites listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG serve to grant the child-raising allowance or the parental allowance only to those foreign nationals who are likely to reside in Germany permanently (BTDrucks 16/1368, p. 8). In principle, a difference in the duration of residence in Germany may justify unequal treatment (see BVerfGE 111, 160 <174>; 111, 176 <185>), without, however, the lack of permanent residence automatically constituting a legitimation of every possible differentiation with regard to granting social benefits (see BVerfGE 116, 229 <239-240>; BVerfGE 130, 240 <256 and 257>). Granting the child-raising allowance and the parental allowance exclusively to parents who are likely to remain in Germany permanently does indeed pursue a legitimate purpose insofar as the legislature intends, with these benefits, to promote sustainable demographic development in Germany because this goal would not be achieved if benefits were granted to individuals who are soon to leave Germany. 26

b) The differentiation criteria chosen by the legislature, however, do not determine the group of beneficiaries in a manner that is suitable because the criteria used do not predict the duration of residence of those concerned. Neither the employment-related prerequisites under § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG as such, nor these taken together with the fact that the persons concerned all derive their right of residence from a humanitarian residence permit (§ 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG) constitute an adequate basis for predicting the duration of residence in Germany, and are thus not suitable as delimitation criteria for drawing the benefits in question here. 27

aa) The holding of a residence permit listed in § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG as required by § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG is itself not an adequate indication of the lack of a perma- 28

nent residence perspective. These residence permits are regulated in Part 5 of the Residence Act, and are granted to persons seeking protection under international law or on humanitarian or political grounds. With regard to residence titles under the previously applicable Aliens Act – which are similar to the humanitarian residence permits – the Federal Constitutional Court has already held that the formal nature of the residence title by itself is not a suitable basis for predicting the duration of residence in Germany (see BVerfGE 111, 176 <185>; see also BVerfGE 111, 160 <174 and 175>). The European Court of Human Rights explicitly concurred with this in a ruling on German law relating to the child benefit (European Court of Human Rights (ECtHR) Okpisz v. Germany, Judgment of 25 October 2005, no. 59140/00, *Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2006, p. 917 <918>). There is no reason to derogate from this assessment.

29 In particular the statutory possibilities of extending residence permits or making them permanent run counter to the conclusion that holding a residence permit within the meaning of § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG indicates a lack of a perspective to remain. It is true that they are only granted for a limited time, and may not be extended if the obstacle to leaving the country or other reasons staying a termination of residence have ceased to apply (§ 26(1) and § 26(2) AufenthG). However, if the humanitarian, political or international law grounds for granting residence continue to apply, almost all of the residence titles involved may be extended (§ 26(1) AufenthG). Extensions may be renewed without limit. Moreover, a settlement permit may be granted after seven years, so that the right of residence becomes permanently established (§ 26(4) AufenthG). Hence, in principle each of the residence permits listed in § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG – apart from the residence permit pursuant to § 24 AufenthG, which has never been granted so far (see Dienelt in Renner, Ausländerrecht, 9th ed., 2011, § 24, para. 10) – is amenable to becoming permanent. In the constellations covered by § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG, the likelihood that a permit will be made permanent is also not small in the sense that, given the previous residence duration of three years, upon which § 1(6) no. 3 letter a BErzGG 2006 and § 1(7) no. 3 letter a BEEG are conditional, a not inconsiderable part of the minimum seven-year period under § 26(4) AufenthG has already passed.

30 bb) The prerequisites listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG also do not constitute a sufficient basis for predicting the anticipated duration of residence. There is no legally relevant connection between the conditions listed and the duration of residence.

31 (1) The three criteria listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG do convey some informational content on the integration in the labour market of those persons concerned at the time around the birth of their child. According to the first of the alternatives listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG, only persons gainfully employed in the period in which the benefit is drawn may draw the allowance. By contrast, it is not sufficient that a person was

gainfully employed. The benefit-payment period under the Federal Child-Raising Allowance Act was in principle the first 24 months of the child's life (§ 4(1) first sentence BErzGG 2006). The benefit-payment period under the Federal Parental Allowance and Parental Leave Act is in principle the first 14 months of the child's life (§ 4(1) BEEG). According to the second alternative, those who receive the unemployment benefit I (*Arbeitslosengeld I*) during the benefit-payment period are also entitled to draw the allowance. The unemployment benefit I is received by anyone who was, among other things, employed subject to mandatory insurance for at least twelve months within a period of two years (qualifying period, § 142 Book III of the Code of Social Law (*Drittes Buch Sozialgesetzbuch* – SGB III)) and who is at the disposal of the placement efforts of the Employment Agency (§ 138(1) no. 3, (5) SGB III). According to the third alternative, persons who take parental leave are eligible to draw the allowance. This leave necessarily implies an existing employment relationship while drawing the allowance (§ 15(1) BEEG).

In all three cases, the claim is contingent on an employment relationship existing during the benefit-payment period or having existed relatively shortly before the benefit-payment period. The legislature evaluates this as an indication of permanent prospects to remain. This presumption may be correct. Yet the converse conclusion, which is material for the provision, is that those who fail to satisfy these prerequisites do not have permanent prospects to remain. This is incorrect. There is no recognisable link between failing to satisfy the elements listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG and the lack of permanent prospects to remain. 32

(2) Rather, holders of the residence permits in question here frequently do not return to their countries of origin as long as the reasons applying to the granting of their residence permit continue to apply, regardless of how they are integrated in the labour market. The grounds for residence that are relevant according to § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG are largely such that a return is ruled out in legal or practical terms as long as the situation upon which the residence permit is based continues. This applies regardless of whether or not the residence permit is extended in the specific case. 33

For instance, a residence permit can only be granted under § 25(3) AufenthG if a ban on deportation pursuant to § 60(2), (3), (5) or (7) AufenthG applies. This is the case when a foreigner is specifically at risk of being subjected to torture or inhumane or humiliating treatment or punishment, when there is a risk of the death penalty being imposed or carried out, when it emerges from the application of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (BGBl 1952 II p. 685) that the deportation is not permissible, or when a significant specific danger to life, limb or freedom is present. A residence permit under § 25(4) AufenthG presupposes that the person is not obligated to leave the country pursuant to an enforceable order and that urgent humanitarian or personal reasons or considerable public interests require the person's further temporary presence in Germany; to this extent, too, an enforced return is not possible. A residence permit is granted 34

under § 25(5) AufenthG to a foreigner who is obligated to leave the country pursuant to an enforceable order, but who cannot do so for legal or factual reasons; the legal impossibility may emerge for instance from the protection of marriage and the family under constitutional law (Article 6 of the Basic Law) or under international law (Article 8 of the European Convention on Human Rights). Here too, a return is impossible as long as reasons for its impossibility continue to exist. A residence permit issued pursuant to Article 23(1) AufenthG by reason of war can in particular be granted when the highest *Land* authority orders, on the basis of international law or on humanitarian grounds or in order to defend the political interests of the Federal Republic of Germany, that the deportation of foreigners from certain states, or groups of foreigners specified by other means is generally suspended, or suspended only in regard to specific states, for a period of more than six months (§ 60a(1) second sentence AufenthG). Here too, the suspension of the deportation precludes a return against the will of the person concerned.

In respect of the possibility and enforceability of the return, it is irrelevant in all these situations whether or when the persons concerned are integrated into the labour market. 35

(3) Those not satisfying the prerequisites of § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG are also not without permanent prospects for remaining since, for instance, those concerned might in fact be prevented from returning (see (2) above), but frequently do not satisfy the statutory conditions for extending a residence permit (but see BTDrucks 16/1368, p. 8). No decision needs to be made here as to whether it is compatible with the Basic Law to require, in order to predict the duration of residence for the purposes of the child-raising allowance and the parental allowance, both the lack of a possibility to return, and the holding of a residence permit – the latter necessarily preceding the permanent establishment of the residence right according to § 26(4) AufenthG. 36

For the extension of the residence permits listed in § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 letter c BEEG, non-compliance with the criteria listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG is certainly not so significant that one might derive from it a negative prognosis to remain. It is true that according to § 5(1) no. 1 AufenthG securing one's livelihood within the meaning of § 2(3) AufenthG, for which gainful employment may play a role, is also in principle necessary for the granting and extension of any residence title. Yet, apart from the fact that satisfying or not satisfying the criteria of labour market integration listed in the referred provisions only permits a selective statement to be made on the gainful employment of those concerned (see (4) (b) below), the securing of one's livelihood and thus also gainful employment are at most only slightly significant in statutory law particularly with regard to the extension of the residence permits in question here. According to § 5(3) second sentence AufenthG, the condition of securing one's livelihood may be waived when issuing a residence permit according to Part 5 of the Residence Act. In the cases of residence permits under §§ 24 and 25(3) to (4b) AufenthG, 37

it is even mandatory that this condition be waived (§ 5(3) first sentence AufenthG). The Residence Act thus makes the extension of residence in Germany on humanitarian grounds not (or at least not absolutely) dependent on the securing of one's own livelihood. Whether or not those concerned secure their livelihood – be it through their own employment or otherwise – is irrelevant in this respect.

(4) The prospect of remaining permanently is also not lacking in the case of persons failing to satisfy the prerequisites of § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG in the benefit-payment period and who thus are unlikely to be granted a settlement permit (§ 26(4) AufenthG) and the associated unlimited right of residence. It is not necessary to clarify here whether, under constitutional law, in relation to child-raising allowance and parental-allowance law, the issuing of a settlement permit may be linked to the finding of the prospect to remain permanently. In any case, the prerequisites listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG are not sufficiently conclusive on the prospect of the issuing of a settlement permit. The fact that the prerequisites listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG are not satisfied during the potential benefit-payment period of the child-raising allowance and parental allowance does not indicate that a settlement permit will not be issued. 38

(a) The prospect of remaining permanently as it is relevant for entitlement to the child-raising allowance and the parental allowance does not require that the conditions for granting a settlement permit, in particular the securing of one's livelihood as required under § 26(4) first sentence in conjunction with § 9(2) no. 2 AufenthG, already be met at the time of application for the child-raising allowance or the parental allowance. The entitlement to the child-raising allowance and the parental allowance pursuant to § 1(6) no. 2 BErzGG 2006 and § 1(7) no. 2 BEEG is not restricted to holders of a settlement permit. Merely because the prerequisites listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG at the time of application are not satisfied, does not mean that the conditions required for the issuing of a settlement permit will not subsequently be fulfilled. Furthermore, in statutory law, the assessment pursuant to § 9(2) first sentence no. 2 AufenthG of whether someone can secure their livelihood is not carried out on the basis of one specific point in time, but on the basis of a prognosis that takes a retrospective view of whether the person concerned, without the occurrence of any unforeseen events, is able to maintain their livelihood in the future without requiring public funds (see Higher Administrative Court for the *Land* North Rhine-Westphalia, *Oberverwaltungsgericht für das Land Nordrhein-Westfalen* – OVG NRW, Order of 4 December 2007 – 17 E 47/07 –, juris, para. 6). The criteria in the referred provisions are not suitable for making such a prognosis since they only take into account a short period of time (b) in which the birth of the child may particularly cause parent-specific disturbances to labour market integration (c). 39

(b) The referred provisions require that those concerned be gainfully employed while drawing the child-raising allowance or the parental allowance (first alternative) 40

or that they were gainfully employed during a specific period prior to the birth and are, de facto, at the disposal of the labour market during the benefit-payment period (second alternative) or are in an employment relationship during the benefit-payment period which they suspend in order to take parental leave (third alternative). All three alternatives take into account a relatively short period – mainly the benefit-payment period – and disregard labour market integration during other periods.

(aa) The prerequisites under § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG may fail to cover many years of minor employment or self-employment. A person who is only in minor employment does not acquire any entitlement to the unemployment benefit I. If their employment relationship ends, they do not, for lack of a right under the Third Book of the Code of Social Law, have any entitlement to the child-raising allowance or the parental allowance pursuant to § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG, regardless of the length of their previous employment. Also no such rights are acquired by self-employed persons if they have not voluntarily established a mandatory insurance relationship pursuant to § 28a of Book III of the Code of Social Law. Even foreigners who have been in minor employment or self-employed for years, and were thus integrated in the German labour market, and who will possibly re-enter it again soon after a career break devoted to childcare, are not entitled to draw the child-raising allowance or the parental allowance pursuant to these provisions. Whether temporary minor employment is extended or not frequently depends on circumstances beyond the influence of those concerned. Women in temporary minor employment relationships in particular are, should they become pregnant, frequently in a situation in which their job expires during the pregnancy and is not renewed. Merely failing to meet the criteria listed in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG thus hardly provides any conclusive information with regard to previous and subsequent labour market integration. 41

(bb) Long-term gainful employment that is subject to obligatory social insurance may also potentially not be taken into account. It is true that those concerned may, in the event that they lose their employment prior to the birth of the child, be entitled to cash benefits pursuant to the Third Book of the Code of Social Law, such that the second alternative of § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG is satisfied. Once the unemployment benefit I is no longer being drawn, however, the entitlement to the child-raising allowance or the parental allowance typically ends before the care phase following the birth is completed and new gainful employment is more easily possible in practical terms. Those concerned are thus ascribed negative prospects to remain even though, in view of their previous gainful employment that is subject to obligatory social insurance, there is much to suggest they would be successful in integrating in the labour market once again following the childcare period. 42

(c) The criteria provided in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG also do not allow for a sufficiently conclusive prognosis of the longer-term labour market integration of those concerned because they focus on a period during 43

which gainful employment (first alternative), as well as actually being at the disposal of the labour market as required for entitlement to benefits under the Third Book of the Code of Social Law (second alternative), and the taking up of an employment relationship and its suspension within the framework of parental leave (third alternative) all meet with specific obstacles resulting from parenthood without it being possible to draw plausible conclusions from this as to longer-term labour market integration and the concomitant securing of one's livelihood.

§ 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG for the most part require labour market integration during the period in which the benefits will potentially be drawn. According to the Federal Child-Raising Allowance Act, this was the first 24 months of the child's life, and according to the Federal Parental Allowance and Parental Leave Act this is, in principle, the first 14 months. In this phase especially, there are many legal and factual reasons for the lack of labour market integration ((aa) to (cc)), without it being possible to conclude from this that those concerned would remain without gainful employment in the long-term. 44

(aa) Fulfilling the first alternative under § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG (actual gainful employment) is particularly difficult for mothers. It is even impossible for legal reasons in certain cases. While the Federal Child-Raising Allowance Act and the Federal Parental Allowance and Parental Leave Act do allow gainful employment to be exercised parallel to the drawing of the parental allowance since fewer than 30 weekly working hours do not preclude the drawing of the benefit (§ 1(1) no. 4 in conjunction with § 2 BErzGG 2006, § 1(1) no. 4 and (6) BEEG), during the eight weeks of maternity leave, however, mothers are subject to the prohibition of employment under maternity-leave law (§ 6 of the Act on the Protection of Working Mothers, *Mutterschutzgesetz* – MuSchG). For mothers who breast-feed, gainful employment even after the eight-week maternity leave period is practically more difficult. 45

For mothers and fathers, a frequent obstacle to taking up (part-time) gainful employment is the fact that childcare is not guaranteed by means of a legal right to childcare placement (see (bb) below), the actual availability of childcare is not sufficient to cover all parents and making use of the existing childcare possibilities also requires a financial contribution to be made by the parents which those concerned may frequently be unable to afford. 46

(bb) Also the prerequisites of the second alternative (drawing recurrent cash benefits pursuant to the Third Book of the Code of Social Law) are particularly difficult to satisfy in the time after the birth of a child. According to § 138(1) no. 3 of Book III of the Code of Social Law, the unemployment benefit I may only be received by those who are at the disposal of the labour market. For this, unemployed persons must be able and allowed to carry out reasonable employment that is subject to obligatory insurance for at least 15 hours per week under the customary conditions of the labour market in question (§ 138(5) no. 1 of Book III of the Code of Social Law). Unemployed persons are not at the disposal of the labour market according to the established 47

case-law of the regular courts if in respect of the gainful employment there is no childcare alternative available with regard to children in need of care (see Federal Social Court, *Bundessozialgericht* – BSG, Judgment of 25 April 1991 – 11 RAr 9/90 –, Zeitschrift für das gesamte Familienrecht – FamRZ 1992, p. 813 <814>; Regional Social Court, *Landessozialgericht* – LSG Schleswig-Holstein, Judgment of 28 September 2001 – L 3 AL 53/00 –, juris, para. 24, and Judgment of 27 August 2004 – L 3 AL 85/03 –, juris, para. 42; LSG Baden-Württemberg, Judgment of 11 December 2003 – L 12 AL 2723/03 –, juris, paras. 31 and 32; LSG North Rhine-Westphalia, Order of 26 April 2010 – L 19 B 45/09 AL –, juris, paras. 16 and 17). Children for whom the child-raising allowance or the parental allowance can be granted (until they reach the age of 24 months pursuant to § 4(1) first sentence BErzGG 2006, until they reach the age of 14 months pursuant to § 4(1) first sentence BEEG) require constant care. The availability of a childcare placement for children under three is currently not legally guaranteed. A new version of § 24 of Book Eight of the Code of Social Law (SGB VIII) is to come into force on 1 August 2013 under which there will be a right to support upon the reaching of the age of one. For children under one, according to § 24(1) of Book Eight of the Code of Social Law, an offer meeting demand is to exist without establishing an individual right in this respect (cf. the Act Promoting Children under Three in Daycare Centres and in Child Daycare, *Gesetz zur Förderung von Kindern unter drei Jahren in Tageseinrichtungen und in Kindertagespflege* of 10 December 2008, BGBl I p. 2403 <2404, 2409>; BTDrucks 16/9299, p. 10). Accordingly, in future too, childcare in the first twelve months of a child's life in particular – a time in which the parents might draw the parental allowance pursuant to § 4(1) BEEG – will not be guaranteed as a subjective right.

(cc) The third alternative (taking parental leave) is almost impossible to fulfil in the period following the birth of a child unless an employment relationship had already been established prior to the birth and it is on-going during the benefit-payment period. In practice, during the benefit-payment period those concerned will hardly be able to establish an employment relationship only to suspend it again in favour of parental leave. It should also be considered that the dismissal protection applicable to parental leave applies at the earliest eight weeks prior to the taking of parental leave (§ 18(1) first sentence BEEG), and that parental leave does not prevent the expiry of a temporary employment relationship. All this makes it highly probable that the persons concerned will not be in an employment relationship during the benefit-payment period which is suspended because of parental leave, without this making it possible to draw conclusions with regard to gainful employment following an early childcare phase. 48

(dd) The legislature itself recognised that, following a birth, active labour market integration is made more difficult by circumstances solely related to the birth of the child, without these constituting a permanent obstacle to gainful employment. The child-raising allowance and the parental allowance are, not least, granted in recognition of the interruption to gainful employment associated with the birth of a child, in order to improve the thus hampered financial situation of young families (cf. BTDrucks 49

16/1889, p. 1).

Moreover, requiring a parent to be gainfully employed (§ 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG, first alternative) or at the disposal of the labour market (§ 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG, second alternative) during the first months of a child's life is contrary to the objective pursued by the legislature, both in the Federal Child-Raising Allowance Act and in the Federal Parental Allowance and Parental Leave Act, which is to enable parents to personally devote themselves to the care of their children in the first months of their lives without any financial difficulties (see BTDrucks 10/3792, pp. 1, 13; BTDrucks 11/4509, p. 5; BTDrucks 16/1889, p. 2). 50

(5) No other points that could plausibly justify linking the failure to satisfy the criteria listed in the referred provisions with prospects for residence can be derived from the documents on the legislative history of the referred provisions in the Federal Child-Raising Allowance Act of 2006 either. Rather, these seem to indicate that the three criteria used are not the result of detailed considerations with regard to their suitability as indicators of the duration of residence. The committee report and minutes of plenary proceedings show that there were certain unclear or incorrect assumptions on what the prerequisites to drawing benefits set down in the referred provisions were. The statements of members of the parliamentary groups supporting the Act reveal that they assumed that, beyond the mere requirement of a work permit (§ 1(6) no. 2 first alternative BErzGG 2006) and the three-year residence requirement in § 1(6) no. 3 letter a BErzGG 2006, there were no further prerequisites to be fulfilled in order to be entitled to the child-raising allowance, and especially not the prerequisites of § 1(6) no. 3 letter b BErzGG 2006 submitted here for review (see BTDrucks 16/2940, p. 11; Minutes of Plenary Proceedings 16/57 of 19 October 2006, pp. 5591 and 5592). 51

The fact that during the course of the legislative procedure no precise ideas existed as to the degree to which the distinctions effected by the differentiated drafting of the entitlements in the provisions that were submitted are factually related to the materially relevant aspect of the duration of residence, does not of itself give rise to a violation of the Constitution. Conversely, however, the considerations laid out in the legislative procedure also do not provide any angle which might justify the distinctions drawn in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG between those who are eligible and those who are not. 52

II.

§ 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG violate the prohibition of disadvantaging on grounds of gender (Article 3(3) first sentence of the Basic Law). 53

1. The referred provisions disadvantage women in comparison to men because for the group of individuals covered by § 1(6) no. 2 letter c BErzGG 2006 and § 1(7) no. 2 54

letter c BEEG, the right to claim the child-raising allowance or the parental allowance is dependent on prerequisites which are more difficult for women to satisfy than for men.

The referred provisions disadvantage women because provisions of the law on maternity leave prohibit them – unlike men – from taking up gainful employment following the birth of a child, and in this respect they are objectively unable, on legal grounds, to satisfy the prerequisites of § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG (first and second alternatives), in contrast to men. During the maternity leave period, the continuation or taking up of employment that falls under the scope of § 1 MuSchG is ruled out (§ 6(1) MuSchG). Regardless of whether a mother, from a purely physical perspective, is able to engage in employment in the first weeks following the birth, legally she does not have the possibility to engage in gainful employment or to be at the disposal of the labour market and thus draw the child-raising allowance or parental allowance pursuant to the first or second alternatives of § 1(6) no. 3 letter b BErzGG 2006 and of § 1(7) no. 3 letter b BEEG. The granting of the maternity benefit pursuant to § 13 MuSchG only partially compensates for this because not all persons concerned receive the maternity benefit, and because the amount of the maternity benefit does not necessarily correspond to the child-raising allowance or the parental allowance lost. 55

Beyond the eight-week maternity-leave period, § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG have the effect of treating women and men unequally, since breast-feeding mothers can, in practice, only engage in gainful employment under more difficult conditions. As a matter of principle, mothers must not be subjected to the argument that they voluntarily breast-feed their child and would have the same possibilities of engaging in gainful employment as men (following the maternity-leave period), should they forgo breast-feeding. This is underscored by Article 6(4) of the Basic Law, which recognises a particular entitlement to the protection and care of the community for breast-feeding mothers in particular, in times when there are motherhood-related limitations to gainful employment. 56

2. This unequal treatment is to be measured by the standard of Article 3(3) first sentence of the Basic Law. The provisions submitted for review are worded in a gender-neutral manner. They neither link explicitly to gender, nor do they refer directly to criteria that can affect only women or only men. Rather, the granting of a benefit in the first and second alternatives is made contingent on actually engaging in gainful employment or actually being at the disposal of the labour market. However, the resulting disadvantaging of women in respect of their entitlement under the Federal Child-Raising Allowance Act and the Federal Parental Allowance and Parental Leave Act is very closely connected with the legal and biological circumstances of motherhood, and thus comes particularly close to constituting direct disadvantaging on the grounds of gender. Whether under different circumstances a gender-neutral provision that ultimately affects mainly members of one gender is also to be measured by the standard of Article 3(3) first sentence of the Basic Law (see BVerfGE 97, 35 <43>; 57

104, 373 <393>; 121, 241 <254 and 255>), or whether Article 3(2) of the Basic Law will then be applied (see BVerfGE 113, 1 <15>; 126, 29 <53>), does not need to be decided here.

According to Article 3(3) first sentence of the Basic Law, a disadvantaging on the grounds of gender is only permissible to the extent that it is essential for solving problems which by their very nature can only occur with regard to men or only to women (see BVerfGE 85, 191 <207>; 92, 91 <109>; 114, 357 <367>). A provision that is neither gender-specific nor based on criteria which from the outset can only relate to women or to men but which, as here, nonetheless disadvantages women in comparison to men due to legal and biological circumstances related to maternity, is also subject to stringent requirements of justification, pursuant to Article 3(3) first sentence of the Basic Law. In exceptional cases, other factual reasons might even justify such a provision before Article 3(3) first sentence of the Basic Law; however, these would have to be of considerable weight. 58

3. The disadvantaging of women cannot be justified here, already on the grounds that the characteristics used to differentiate are not a suitable basis of prognosis, and thus do not make it possible to achieve the legislature's objective of identifying cases of prospective long-term residence (see I. above). 59

D.

I.

Pursuant to § 82(1) in conjunction with § 78 first sentence of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG are void. When the unconstitutionality of a provision – as here – is grounded in a violation of the principle of equality, the Federal Constitutional Court frequently goes no farther than finding the provision to be incompatible with the Basic Law in cases where the legislature has a variety of possibilities for remedying the unconstitutionality (see BVerfGE 84, 168 <186 and 187>; 92, 158 <186>; 117, 1 <69>; 122, 210 <245>; 126, 400 <431>). Here, however, there is no reason for limiting this to a declaration of incompatibility. The declaration of nullity does not disproportionately restrict the latitude of the legislature. The prerequisites for entitlement to benefits which require a work permit (§ 1(6) no. 2 first alternative BErzGG 2006 and § 1(7) no. 2 first alternative BEEG) and at least three years of residence (§ 1(6) no. 3 letter a BErzGG 2006 and § 1(7) no. 3 letter a BEEG), and which were the focus of the parliamentary deliberations, are not affected by the declaration of voidness. The characteristics in § 1(6) no. 3 letter b BErzGG 2006 and § 1(7) no. 3 letter b BEEG which have been declared void are not suitable for achieving the objective pursued by the legislature in these provisions. The declaration of nullity limited solely to these prerequisites thus does not impose upon the legislature a provision that it fundamentally did not want. 60

II.

Notices that have already become final at the time of the pronouncement of this decision shall remain unaffected by the declaration of nullity. This corresponds to the basic rationale of § 79(2) first sentence BVerfGG. The legislature remains free to make other legislative arrangements (see BVerfGE 94, 241 <266 and 267>; 111, 115 <146>). 61

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