H e a d n o t e s

to the judgment of the First Senate of 18 July 2012

- 1 BvL 10/10 -
- 1 BvL 2/11 -

1. **The amount of cash benefits paid according to § 3 of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*) is evidently insufficient because it has not been changed since 1993.**

2. **Article 1.1 of the Basic Law (*Grundgesetz* – GG) in conjunction with the principle of the social welfare state in Article 20.1 of the Basic Law ensures a fundamental right to the guarantee of a dignified minimum existence (see Decisions of the Federal Constitutional *Court* (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 125,175). Article 1.1 of the Basic Law establishes this right as a human right. It encompasses both the physical existence of a human being as well as the possibility to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life. German and foreign nationals who reside in the Federal Republic of Germany are both entitled to this fundamental right.**

3. **If the legislature wishes to consider the particular characteristics of specific groups of individuals when determining the dignified minimum existence, it may not, in defining the details of existential benefits, differentiate across the board in light of the recipients' residence status. Such differentiation is only possible if their need for existential benefits significantly deviates from that of other persons in need, and if this may be substantiated consistently based on the real and actual need of this group specifically, in a procedure that is transparent in terms of its content.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvL 10/10 -

- 1 BvL 2/11 -

Pronounced

on 18 July 2012

Kehrwecker

Amtsinspektor
as Registrar

of the Court Registry

IN THE NAME OF THE PEOPLE

**In the proceedings
on the constitutional review**

of whether § 3.2 sentence 2 no. 1 and § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 no. 2 of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz* – AsylbLG) in the version promulgated on 5 August 1997 (Federal Law Gazette (*Bundesgesetzblatt* – BGBl) I p. 2022) are compatible with the Basic Law (*Grundgesetz* – GG)

- suspension of proceedings and submission order of the Higher Social Court of North Rhine-Westphalia (Landessozialgericht Nordrhein-Westfalen) of 26 July 2010 - L 20 AY 13/09 -

- 1 BvL 10/10 -,

of whether § 3.2 sentence 2 no. 2 and no. 3 and § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 no. 1 of the Asylum Seekers Benefits Act in the version promulgated on 5 August 1997 (Federal Law Gazette I p. 2022) are compatible with the Basic Law

- suspension of proceedings and submission order of the Higher Social Court of North Rhine-Westphalia of 22 November 2010 - L 20 AY 1/09 -

- 1 BvL 2/11 -

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer, and

Britz

based on the oral hearing held on 20 June 2012, by

Judgment

hereby declares:

1. **§ 3.2 sentence 2 no. 1 and § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 no. 2 of the Asylum Seekers Benefits Act and § 3.2 sentence 2 no. 2 and no. 3 and § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 no. 1 of the Asylum Seekers Benefits Act, in the version promulgated on 5 August 1997, are incompatible with the fundamental right to the guarantee of a dignified minimum existence contained in Article 1.1 of the Basic Law in conjunction with the principle of the social welfare state contained in Article 20.1 of the Basic Law. The provisions remain applicable to benefit periods up to 31 December 2010.**

2. **In the scope of application of the Asylum Seekers Benefits Act, the legislature is obliged to enact new provisions without undue delay that ensure the guarantee of a dignified minimum existence.**

3. **The following is herewith ordered until new provisions enter into force:**

a. **The parameters of § 3.2 sentence 2 no. 1, no. 2 and no. 3 of the Asylum Seekers Benefits Act shall be calculated from 1 January 2011 onwards based on the consumption expenditure relevant to standard needs for categories 1 (food, alcohol-free beverages), 3 (clothes and shoes), 4 (housing, energy and housing maintenance) and 6 (healthcare) as defined in §§ 5 to 7 of the Act on the Calculation of the Standard Needs, according to § 28 of the Twelfth Book of the Code of Social Law (*Gesetz zur Ermittlung der Regelbedarfe nach § 28 Sozialgesetzbuch Zwölftes Buch*), for single and family households. The consumption expenditure relevant to standard needs for category 5 (interior fittings, household appliances and utensils) will not be considered.**

b. **From 1 January 2011 onwards, the amounts of money according to § 3.1 sentence 4 no. 1 and no. 2 of the Asylum Seekers Benefits Act (where appropriate in conjunction with § 3.2 sentence 3 of the Asylum Seekers Benefits Act) shall be calculated in accordance with the consumption expenditure relevant to standard needs for categories 7 (transport), 8 (communication), 9 (leisure, entertainment, culture), 10 (education), 11 (accommodation and gastronomy) and 12 (other goods and services), defined in §§ 5 to 7 of the Act on the Calculation of the Standard Needs, according to § 28 of the Twelfth Book of the Code of Social Law, for single and family households.**

c. **The standard need categories 1 to 6, according to § 8 of the Act on the Calculation of the Standard Needs based on § 28 of the Twelfth Book of the Code of Social Law, shall be applied, to distinguish standard needs, to beneficiaries according to the Asylum Seekers Benefits Act for benefits according to § 3.2 sentence 2 and § 3.1 sentence 4 of this Act. Individuals in standard need category 2 or 3, the order made as a and b shall apply to persons in standard need category 2 with 90 per cent and for persons in standard need category 3 with 80 per cent of the set parameters and amounts of money.**

d. **As long as there is no new calculation of the standard needs according to § 28 of the Twelfth Book of the Code of Social Law, the parameters and amounts of money in § 3.2 sentence 2 and § 3.1 sentence 4 of the Asylum Seekers Benefits Act shall be extrapolated in line with the rate of change of the mixed index according to § 138 and § 28a of the Twelfth Book of the Code of Social Law.**

e. **The provision on the rescission of an unlawful yet non-beneficial administrative act as defined in § 9.3 of the Asylum Seekers Benefits Act, in conjunction with § 44 of the Tenth Book of the Code of Social Law, and the provision on the rescission of an beneficial administrative act with lasting effect in case of changes of the law as defined in § 9.3 of the Asylum Seekers Benefits Act in conjunction with § 48.1 sentence 2 no. 1 of the Tenth Book of the Code of Social Law shall not apply to benefit periods until the end of July 2012.**

Reasons:

A.

The proceedings on the constitutionality of a specific statute raise the question whether the amount of the cash benefit provided for in the Asylum Seekers Benefits Act to secure one´s existence is compatible with the Basic Law. 1

I.

1. With the Asylum Seekers Benefits Act, a law was created to define, starting 1 November 1993, minimum maintenance for asylum seekers and certain other foreign nationals, apart from the substantive law applicable to Germans and those foreign nationals defined as equals, to provide for considerably lower benefits, and primarily for benefits in kind rather than cash benefits (see Article 1 of the Act to Reform Benefits for Asylum Seekers (*Gesetz zur Neuregelung der Leistungen an Asylbewerber*) of 30 June 1993 – Asylum Seekers Benefits Act –). 2

Regarding social benefits for asylum seekers, the legislature had been pursuing the goal to restrict the benefits altogether and to issue benefits in kind rather than cash benefits from the 1980s onwards, starting in 1981 with the Second Act to Improve the Budget Structure. From 1990 to 1993, the Federal Government primarily sought to limit the number of asylum seekers coming to Germany and to keep the cost of hosting and providing general care to them low (see *Bundestagsdrucksache* (*Bundestag* document – BTDrucks) 12/4451, pp. 1 and 5). These considerations also inform the provisions on benefits in the Asylum Seekers Benefits Act. The German *Bundestag* adopted the Act to Reform Benefits for Asylum Seekers of June 30, 1993 as special legislation, separated from the Federal Social Assistance Act (*Bundessozialhilfegesetz* – BSHG), to define benefits for necessary maintenance of asylum seekers and similarly treated foreign nationals. … The Asylum Seekers Benefits Act … defines the beneficiaries (§ 1), the basic benefits as to the recognised needs and the amount (§ 3) and further special benefits (§ 4 and § 6), as well as an option to receive benefits as in general social welfare law (§ 2). The concern of the submitting court is directed at the provisions on the amount of benefits in § 3 of the Asylum Seekers Benefits Act. 3

2. Today, after several amendments and contrary to its designation, the Asylum Seekers Benefits Act as special legislation separate from general social assistance law, does not only apply to asylum seekers but also to large numbers of groups of other individuals. 4

a) The scope of the Act was originally limited to a small number of groups of individuals whose residence in Germany was expected to be brief. […] 5

In 1997 […], eligible persons in principle included all foreigners who typically stayed in Germany temporarily, that is without an established status under immigration law (see identical *Bundestag* bills of the CDU/CSU and F.D.P. […] 1995, and of the Federal Government […] 1996). 6

The group of beneficiaries […] was subsequently expanded several times more. […] All in all, the beneficiaries of the Asylum Seekers Benefits Act were hence persons who did not have a permanent right of residence, but who otherwise have highly diverse residence status, and whose residence in Germany is based on varying circumstances. 7

b) Today, the receipt of benefits of the Asylum Seekers Benefits Act also depends 8

on the “duration of prior receipt” […]. In 1993, this was set at twelve months’ residence in Germany. Since 28 August 2007, the actual stay became irrelevant and, according to a new § 2 of the Asylum Seekers Benefits Act it became decisive whether asylum seekers benefits had been claimed for a duration of 48 months […].

[…] 9-10

c) In 2009, the Asylum Seekers Benefits Act applied to a total of almost 150,000 people […]. The data from 2009 indicates that among beneficiaries of asylum seekers benefits, the actual duration of residence in Germany varies considerably. More than two-thirds of them had been in Germany for more than six years. […] 11

d) If beneficiaries of the Asylum Seekers Benefits Act do not have any assets of their own, they rely on existential benefits. As a rule, gainful employment is prohibited in the first year of residence, and in most cases is only to be permitted with lower priority in the ensuing period, i.e. if no Germans or similarly treated foreign nationals can be found to fill the post […]. 12

3. As far as it is applicable, the Asylum Seekers Benefits Act provides for benefits to secure a person’s existence. 13

a) The legislature has subdivided these benefits into several types. § 3 of the Asylum Seekers Benefits Act is meant, as an enforceable claim, to cover the necessary needs for food, housing, heating, clothing, healthcare and body care and household durables and consumables, as well as to cover the personal needs of daily life. In addition, § 4 of the Asylum Seekers Benefits Act provides for a right to benefits in cases of sickness, pregnancy and giving birth. Furthermore, the legislature incorporated a discretionary provision, in § 6 of the Asylum Seekers Benefits Act, to provide additional benefits in individual cases that reach beyond the basic needs. The provisions, in the version of 1997 submitted to the Court, read as follows: 14

§ 3 15

Basic benefits

(1) The required need of food, housing, heating, health and body care, clothing and household durables and consumables shall be covered by benefits in kind. If clothing cannot be provided, it may be granted in the shape of vouchers or other comparable non-cash allowances. Household durables may be provided on a lending basis. Beneficiaries shall receive, in addition,

1. until they reach the age of 14, 40 Deutsche Mark,

2. above age 14, 80 Deutsche Mark

per month, as an amount of money to cover personal everyday needs. The amount of money for beneficiaries who have been taken into detention pending deportation shall be 70 per cent of the

amount of money set in sentence 4.

(2) Should housing be provided outside reception facilities within the meaning of § 44 of the Asylum Procedure Act, benefits may, if necessary under the circumstances, be provided as vouchers, similar non-cash allowances or payments of equal value, instead of benefits in kind which are to be granted as a matter of priority, according to § 3.1 sentence 1. The value shall be

1.for the head of the household, 360 Deutsche Mark,

2.for members of the household until age 7, 220 Deutsche Mark,

3.for members of the household above age 7, 310 Deutsche Mark

per month, plus the necessary costs for housing, heating and household items. § 3.1 sentences 3 and 4 shall apply.

(...)

§ 4 16

Benefits

in cases of illness, pregnancy and giving birth

(1) In order to treat acute illnesses and pain, the necessary medical and dental treatment shall be granted, including medication or bandages, as well as other services necessary to heal, improve or alleviate illnesses or the consequences of illness. Dental prostheses shall only be provided if this cannot be delayed in the individual case for medical reasons.

(2) Pregnant women and women in childbed shall be granted medical and nursing care, the assistance of a midwife, as well as medication, bandages and remedies.

(3) The competent authority shall ensure medical and dental care, including the officially recommended protective inoculations and medically necessary check-ups. Where the services are provided by physicians or dentists in private practice, remuneration shall be based on the contracts locally applicable at the doctor’s or dentist´s practice, according to § 72.2 of the Fifth Book of the Code of Social Law (*Fünftes Buch Sozialgesetzbuch*). The competent authority shall determine which contract is applied.

§ 6 17

Other benefits

Other benefits can particularly be granted if they are indispensable

in the individual case to ensure livelihood or health, or if necessary to cover special needs of children or to meet a legal obligation to co-operate. The benefits are to be granted as benefits in kind, and as cash benefits only where under special circumstances.

b) Different from general social welfare law, the Asylum Seekers Benefits Act gives priority to benefits in kind over other forms of benefit; however, benefits in kind are in fact mostly replaced by cash benefits, the amount of which is stipulated in § 3.2 sentence 2 and § 3.1 sentence 4 of the Asylum Seekers Benefits Act. 18

aa) The basic benefits […] are to be provided as a matter of priority through benefits in kind. […]. 19

[…] 20

bb) Today, the majority of the *Länder* (German states) and of the districts provide cash benefits. […] 21

cc) § 3.2 sentence 2 of the Asylum Seekers Benefits Act, which was submitted to the Court for review, stipulates the amount of the cash benefits to be paid instead of benefits in kind. It specifies the amount […] in for the head of the household at 360 Deutsche Mark, for household members until age 7 at 220 Deutsche Mark and above age 7 at 310 Deutsche Mark, plus the necessary costs for housing, heating and household effects. According to § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 of the Act, until age 14, 40 Deutsche Mark and after that 80 Deutsche Mark are to be paid to cover personal needs of everyday life. There was no formalised conversion to amounts in Euros. According to the official conversion rate, the amounts today in § 3.2 sentence 2 are 184.07 €, 112.48 € or 158.50 €, and of § 3.1 sentence 4 are 20.45 € or 40.90 €. 22

4. Regarding the recognised needs, the Asylum Seekers Benefits Act differs in many ways […] from the general social welfare law. 23

a) The Act does not recognise all the additional needs that are recognised in the Second and Twelfth Books of the Code of Social Law. Also, the Act limits the needs in case of illness, compared to the general social welfare law; it provides only for benefits in kind; a health insurance certificate is needed which the funding administrations must issue separately in each individual case and for which the beneficiaries have to apply themselves in situ which frequently incurs travel costs. Also, beneficiaries of the Asylum Seekers Benefits Act are eligible for the “educational package” (*Bildungspaket [assistance for children´s educational needs]*) in some *Länder*, yet they do not yet have a right to these benefits according to §§ 28-29 of the Second Book of the Code of Social Law and §§ 34-35 of the Twelfth Book of the Code of Social Law (versions […] from 2011). 24

b) Finally, general welfare law provides for a right to basic benefits for atypical needs according to § 21.6 sentence 1 of the Second Book of the Code of Social Law. There 25

is no comparable claim in the Asylum Seekers Benefits Act. […]

5. In 1993, the legislature already vested the power to adjust the benefits in the Asylum Seekers Benefits Act to developments of the actual cost of living, by ordinances, which is still applicable today yet has never been used despite the considerable increase in consumer prices which has taken place since then.[…] 26

[…] 27-28

6. Regarding the basic needs comparable to the standard needs in general welfare law, benefits of the Asylum Seekers Benefits Act are generally considerably lower than those in the Second and Twelfth Books of the Code of Social Law. 29

[…] 30

Differences amount to the following: 31

32

Age group	Amount according to Asylum Seekers Benefits Act	Amount according to special evaluation, § 28 of the Twelfth Book of the Code of Social Law	Share of Asylum Seekers Benefits of the amount set in the Code of Social Law
until 6	20.45 €	75.07 €	27 %
7-14	20.45 €	82.66 €	25 %
15-17	40.90 €	75.77 €	54 %
above 18	40.90 €	129.75 €	32 %

7. The burden on the public federal and state budgets caused by benefits of the Asylum Seekers Benefits Act has decreased considerably since the law was introduced in 1993. In 2009, 121.918 persons drew such benefits. […] By contrast, there were almost 500,000 beneficiaries in the early years of the Asylum Seekers Benefits Act. Accordingly, expenditure in this field has dropped from 5.6 billion Deutsche Mark to 0.77 billion Euros. […] 33

II.

1. a) The plaintiff of the original proceedings on which submission 1 BvL 10/10 was based, born in 1977, is an Iraqi national of Kurdish descent. He arrived in the Federal Republic of Germany in 2003 and applied for asylum without success. His residence has been tolerated since then, according to § 60a.2 sentence 1 of the Residence Act (*Aufenthaltsgesetz* – AufenthG). […] 34

b) The plaintiff claimed, before the Social Court, a right to (higher) benefits for January 2009. The Social Court rejected the action. 35

In response to the plaintiff's appeal on points of fact and law, the Higher Social Court 36

suspended the proceedings and submitted to the Federal Constitutional Court the question for a ruling as to whether § 3.2 sentence 2 no. 1 and § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 no. 2 of the Asylum Seekers Benefits Act in the version promulgated on 5 August 1997 (Federal Law Gazette I p. 2022) are compatible with the Basic Law.

[…] 37-39

2. a) The mother of the plaintiff of the original proceedings on which submission 1 BvL 2/11 was based, born in 2000, had come from Liberia to Germany. The plaintiff had a residence permit from birth, and a permit based on § 25.5 of the Residence Act in the period which was contentious before the ordinary courts. She has been a German national since March 2010. […] The plaintiff asserted a right to higher benefits, before the Social Court, for January until November 2007. 40

b) The Social Court rejected the action and admitted the appeal on points of fact and law. The Higher Social Court suspended the proceedings and submitted to the Federal Constitutional Court the question for a ruling on whether § 3.2 sentence 2 no. 2 and no. 3 of the Asylum Seekers Benefits Act, as well as § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 no. 1 of the Asylum Seekers Benefits Act in the version promulgated on 5 August 1997 (Federal Law Gazette I p. 2022), are compatible with the Basic Law. 41

[…] 42-44

III.

The Federal Government, the Senate of Berlin, the President of the Federal Social Court (*Bundessozialgericht*), the United Nations High Commissioner for Refugees (UNHCR), PRO ASYL – National Working Group for Refugees (*Bundesweite Arbeitsgemeinschaft für Flüchtlinge e.V.*), Amnesty International (ai section of the Federal Republic of Germany – Countries and Asylum department), the Berlin Refugee Council (*Flüchtlingsrat Berlin e.V.*), the Authorised Representative of the Council of the Evangelical Church in Germany (EKD) to the Federal Republic of Germany and the European Union, the Liaison Office of the German Bishops, the Federal Association of Non-Statutory Welfare Services (*Bundesarbeitsgemeinschaft der Freien Wohlfahrtspflege e.V.*), the German Social Court Association (*Deutscher Sozialgerichtstag e.V.*), the German Institute for Human Rights, as well as the respective plaintiffs of the original proceedings, submitted their views on the submissions. 45

1. The Federal Ministry of Labour and Social Affairs stated, in the name of the Federal Government, that the amount of the basic benefits […] had been determined, in 1993, on the basis of cost estimates. […] Since they allegedly did not meet the requirements in the judgment of the Federal Constitutional Court of 9 February 2010 (BVerfGE 125, 175) regarding the standard benefits according to the Second Book of the Code of Social Law, the benefit rates in the Asylum Seekers Benefits Act would be reviewed by the Federal Government according to the requirements of the Federal 46

Constitutional Court. […]

2. The Eighth Senate of the Federal Social Court, which has jurisdiction for disputes related to the Asylum Seekers Benefits Act, is of the opinion that the difference between benefits according to the Federal Social Assistance Act (*Bundessozialhilfegesetz*)/the Twelfth Book of the Code of Social Law and § 3 of the Asylum Seekers Benefits Act do not justify the presumption that the Federal legislature did not ensure the constitutionally required minimum existence. It is the discretion of the legislature in terms of its social policy to develop for foreigners with insecure residence status its own concept to secure their livelihood. […] 47

3. In the view of the United Nations High Commissioner for Refugees (UNHCR), the failure to adjust the amount of benefits despite a cost of living which has increased markedly since 1993, and the gap of more than 30 % to the level of benefits for Germans, is indicative of the fact that the minimum of social assistance to be granted under international law is not met. In addition, the amount of the benefits contradicts the requirements of the International Covenant on Economic, Social and Cultural Rights (ICESCR); in particular, complete exclusion from cultural life may hardly be compatible with Article 15.1.a of the ICESCR, the right to take part in cultural life. 48

4. The German Institute for Human Rights presumes that the fundamental right to the guarantee of a minimum existence has been violated because of the lack of transparent, comprehensible ascertainment of needs and of a regular review of the basic benefits according to § 3 of the Asylum Seekers Benefits Act. Additionally, Article 9 of the ICESCR and various provisions of the United Nations Convention on the Rights of the Child (CRC), in particular Article 22.1 of the CRC, had been violated. 49

5. The *Land* Government of Berlin, PRO ASYL – National Working Group for Refugees, Amnesty International, the Berlin Refugee Council, the Authorised Representative of the Council of the Evangelical Church in Germany, the Liaison Office of the German Bishops, the Federal Association of Non-Statutory Welfare Services, the German Social Court Association, as well as the respective plaintiffs of the original proceedings, presume that the provisions contained in § 3 of the Asylum Seekers Benefits Act are not compatible with the fundamental right to the guarantee of a dignified minimum existence. Apart from the German Social Court Association, all consider the basic benefits to be evidently insufficient. The benefit rates also did not comply with the methodological principles for the calculation of benefits laid down by the Federal Constitutional Court in the judgment of 9 February 2010 (BVerfGE 125, 175). 50

[…] 51-56

IV.

In the oral hearing, the expert third parties who were heard took the view that the basic benefits were evidently insufficient with regard to the actual needs of those concerned in the light of the Basic Law and also of international obligations; the circumstances of people to whom the Asylum Seekers Benefits Act applied were very 57

divergent, and a dignified human existence was frequently not guaranteed even by benefits in kind and non-cash benefits. The Federal Government announced that it would enact new legislation on the benefits in question according to the ruling of the Federal Constitutional Court of 9 February 2010; it however stated, as did the Rhineland-Palatinate *Land* Government, that it could not be forecast when one might anticipate a draft Bill. The *Land* Rhineland-Palatinate stated that a budget risk had already been included in the state budgets for 2010, 2011 and 2012, calculated in light of general welfare law benefits according to the Twelfth Book of the Code of Social Law.

B.

The submissions are admissible. Their subject-matter is limited to § 3.2 sentence 2 and sentence 3 in conjunction with § 3.1 sentence 4 of the Asylum Seekers Benefits Act, in each case in the version promulgated on 5 August 1997 (Federal Law Gazette I p. 2022). The rulings of the submitting court depend but on these provisions. The question is directed at the amount of cash benefits according to the Asylum Seekers Benefits Act insofar as these are to cover personal needs and to, where appropriate, are to cover basic needs instead of benefits in kind. 58

[…] 59-60

C.

§ 3.2 sentence 2 no. 1 and § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 no. 2 of the Asylum Seekers Benefits Act, as well as § 3.2 sentence 2 no. 2 and no. 3 and § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 no. 1 of the Asylum Seekers Benefits Act, in each case in the version promulgated on 5 August 1997 (Federal Law Gazette I p. 2022), are incompatible with the fundamental right to the guarantee of a dignified minimum existence of Article 1.1 of the Basic Law in conjunction with the principle of the social welfare state of Article 20.1 of the Basic Law. 61

I.

1. The fundamental right to the guarantee of a dignified minimum existence emerges from Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law. Article 1.1 of the Basic Law establishes this right as a human right. The principle of the social welfare state contained in Article 20.1 of the Basic Law mandates the legislature to guarantee a dignified minimum existence. In light of the unavoidable value judgments needed to determine the amount of what guarantees the physical and social existence of a human being, the legislature enjoys a margin of appreciation. This fundamental right is in essence not disposable and must be honoured as an enforceable claim to benefits, yet it needs to be shaped in detail and regularly updated by the legislature which has to orient the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life regarding the concrete needs of those concerned. In doing so, the legislature has room to 62

shape the issue (see BVerfGE 125, 175 <222> with further references).

a) Article 1.1 of the Basic Law declares human dignity to be inviolable and obliges all state power to respect and protect it. If people do not have the material means necessary to guarantee a dignified existence because they are unable to acquire means from gainful employment, from their own assets or from payments by third parties, the state is obliged, within its mandate to protect human dignity and to maintain the social welfare state, to ensure that material means are available to those in need (see BVerfGE 125, 175 <222>). Because it is a human right, both German and foreign nationals who reside in the Federal Republic of Germany are entitled to this fundamental right. This objective obligation derived from Article 1.1 of the Basic Law corresponds with an individual claim to benefits, because the fundamental right protects the dignity of each individual human being (see BVerfGE 87, 209 <228>) and may, in such situations of need, only be ensured by material support (see BVerfGE 125, 175 <222-223>). 63

b) The direct constitutional benefit claim to the guarantee of a dignified minimum existence does only cover those means that are absolutely necessary to maintain a dignified life. It guarantees the entire minimum existence as a comprehensive fundamental rights guarantee, that encompasses both humans' physical existence, that is food, clothing, household items, housing, heating, hygiene and health, and guarantees the possibility to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life, since a human as a person necessarily exists in social context (see BVerfGE 125, 175 <223> with further references). 64

c) The guarantee of a dignified minimum existence must be ensured by a statutory enforceable right. This derives already directly from the scope of protection provided for by Article 1.1 of the Basic Law. A person in need may not be referred to voluntary benefits from the state or third parties the provision of which is not guaranteed by a subjective right of this person. The statutory benefit claim must be designed so that it always covers the entire existential need of each individual carrier of this fundamental right. If the legislature does not sufficiently comply with its constitutional obligation to determine the minimum existence, the law is unconstitutional to the degree that its design is deficient (see BVerfGE 125, 175 <223-224>). 65

d) The very existence of a claim to benefits derived from Article 1.1 of the Basic Law is stipulated by the Constitution itself. Its scope may however not be derived directly from the Constitution. The scope depends on the views present in society on what is necessary for a dignified existence, on the specific living conditions of the persons in need, and on the respective economic and technical circumstances, and must thus be specified accordingly by the legislature (see BVerfGE125, 175 <224>). 66

The principle of the social welfare state contained in Article 20.1 of the Basic Law obliges the legislature to adequately assess the actual social reality regarding the guarantee of a dignified minimum existence. The necessary value judgments are for parliament as the legislature to take. It is obliged to concretise the claim to a benefit in 67

terms of conditions and legal consequences. Whether it guarantees the minimum existence through benefits in cash, kind or services, is in principle subject to the legislature´s discretion. In addition, it enjoys a margin of appreciation to determine the amount of the benefits to secure a minimum existence. This margin of appreciation in determining the amount of benefits comprises the evaluation of actual living conditions as well as the evaluative assessment of necessary needs, and it moreover varies in scope: It is narrower insofar as the legislature concretises what is necessary to secure a human´s physical existence, and it is broader when it comes to the nature and extent of the possibility to participate in social life (see BVerfGE 125, 175 <224-225>). The decisive point is that the legislature focuses its decision on the actual needs of those who receive assistance. The standard to define this minimum existence may only be taken from the circumstances in Germany, the country in which the minimum existence must be guaranteed. Hence, the Constitution does not permit to define the necessities of a dignified life in Germany at a lower level than the one prescribed by the living conditions in Germany, by referring to the existence level in a country of origin of the people in need, or by referring to the existence level in other countries.

e) In doing so, the legislature is also obliged by further requirements emerging from the law of the European Union and from international obligations. These include Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers in the Member States. Article 10.2 stipulates that children are to be granted access to schooling at the latest after three months and to enrolment in the general school system after twelve months. The rules applicable in Germany to ensure the minimum existence also include the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (ICESCR, which came into force on 3 January 1976 […], which the German *Bundestag* approved in […] 1973). Article 9 of the Covenant stipulates a right to social security, and Article 15.1.a provides for the human right to take part in cultural life. Additionally, the United Nations Convention on the Rights of the Child of 20 November 1989 (CRC […], which came into force […] in 1990, for the Federal Republic of Germany on 5 April 1992, […] without reservations since 15 July 2010). Article 3 of the CRC contains the obligation that the best interests of the child shall be a primary consideration in all legislation, whilst Article 22.1 of the CRC determines that particularly children who seek refugee status in accordance with applicable domestic or international asylum law may not be disadvantaged in exercising their rights, while, finally, Article 28 of the CRC states a human right of children to education. 68

f) It must be possible to substantiate benefits to guarantee a dignified existence, to specify the claim that is based on the Constitution itself, consistently in a proper procedure that is transparent in terms of its content, and based on real and actual needs, thus measured realistically (see BVerfGE 125, 175 <225> with further references). 69

aa) The requirements emerging from the Constitution as to the methodologically proper determination of benefits guaranteed by fundamental rights do not refer to the 70

legislative process but to its results. Articles 76 et seq. of the Basic Law sets requirements for the legislative process that also ensure the transparency of decisions taken by the legislature. The Basic Law however does not prescribe what, how and precisely when such reasoning and calculations are to be carried out in the legislative process. It allows for negotiations and for political compromise. It is decisive that the results do not miss the requirement of the Basic Law to actually guarantee a dignified existence. The fundamental right to the guarantee of a dignified minimum existence derived from Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law does not entail specific obligations regarding the legislative process; the decisive point is whether the legal claim to existential benefits can be substantiated in a rationally differentiated way by realistic, plausible calculations.

bb) The Basic Law thus does also not prescribe any specific method which would restrict the margin of appreciation to which the legislature is entitled. Rather, the legislature may itself select the method to ascertain needs and to calculate benefits to guarantee a dignified existence, in light of viability and appropriateness (see BVerfGE 125, 175 <225>). If different methods are applied to different specific groups of individuals, this must however be justifiable by facts (see BVerfGE 125, 175 <225>). The decision for or against a specific method to ascertain needs and to determine amounts of benefits does not change the fundamental rights standards; these are equally binding in each case. Hence, no method may be selected to specify existential benefits that excludes a recognition of needs from the start if these have otherwise been recognised as existential. 71

cc) The result of a proper procedure to determine blanket claims guaranteed by fundamental rights is to be continually reviewed and refined (see BVerfGE 125, 175 <225>). The elementary vital needs of a person may, as a matter of principle, only be, and indeed must be, satisfied at the time when they arise. Hence, legislation must react in good time to changes of economic conditions such as price increases or the increase in sales taxes, in order to ensure that the current need is being met (see BVerfGE 125, 175 <225>). 72

dd) If the legislature wishes to consider the particular characteristics of specific groups of individuals when determining the dignified minimum existence (see BVerfGE 116, 229 <239>), it may not, in specifying the details of existential benefits, differentiate across the board in light of the recipients' residence status. Such differentiation is only possible if their need for existential benefits significantly deviates from that of other persons in need, and if this can be substantiated consistently based on the actual needs of this specific group, in a procedure that is transparent in terms of its content (on these obligations see once more BVerfGE 125, 175 <225>). 73

(1) Whether and to what extent the need for existential benefits of persons with a temporary right of residence in Germany can be defined by law to differ from the need of other persons with a permanent right of residence depends solely on whether one can comprehensibly ascertain and calculate specifically lower needs precisely be- 74

cause of a short time of staying in the country. It must also be considered whether, as a result of a short-term nature of residence, lower needs are compensated for by greater needs which typically arise particularly when residence is only temporary. Again, the legislature enjoys a margin of appreciation that encompasses the assessment of the actual circumstances of a group of individuals, as well as the evaluative assessment of their required needs (see BVerfGE 125, 175 <225>), but that does not release the legislature from determining, in a rational and realistic manner, the minimum existence as to the specific needs.

(2) If specific lower needs can indeed be ascertained in the case of short-term residence that is not meant to become permanent, and if the legislature therefore wishes to separately determine the existential benefits for this group of individuals, the legislature must ensure that the legal definition of this group indeed and in a sufficiently reliable way covers only those who generally stay in Germany for a short time only. When people initially take residence, this can only be done by way of prognosis. This prognosis is determined not solely, but among other factors by the respective residence status. It must always be considered how a status is embedded in actual living conditions. 75

(3) A restriction of the existential minimum because of possibly lower needs for short periods of residence is, irrespective of residence status and without taking into consideration an earlier prognosis to the contrary, certainly no longer justified if the actual residence has clearly exceeded the timeframe of a short residence. For such cases, the legislature must provide for a rapid transition from the existential benefits for short residence to the regular cases, which is based on the reasons for different needs. 76

2. The legislature's discretion in assessing the minimum existence corresponds to restrained review by the Federal Constitutional Court. 77

a) Since the Basic Law itself does not prescribe an exact quantification of the right to existential benefits, substantive review of the amount of social benefits to guarantee a dignified existence is limited to examining whether benefits are evidently insufficient (BVerfGE 125, 175 <225-226>). 78

b) Beyond this review of evident failure, the Federal Constitutional Court examines whether benefits are currently justifiable, based on reliable data and plausible methods of calculation (see BVerfGE 125, 175 <226>). It must be possible to explain the nature and the amount of benefits with a method by which the necessary facts are essentially completely and correctly determined and according to which all calculation is carried out, with comprehensible figures, within this procedure, and where the structural principles of the procedure are within the framework of what is justifiable. Furthermore, the obligation to update amounts of benefits must be complied with if and insofar as this has become necessary, in light of the actual costs of living, to cover the existential need (see BVerfGE 125, 175 <225>). If it is not possible to calculate benefits to guarantee the minimum existence in a comprehensible and rationally differentiated manner in line with needs, such provisions on benefits no longer comply with Ar- 79

ticle 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law.

II.

According to these standards, the provisions which have been submitted to the Court do not satisfy the requirements of Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law. The provisions submitted to the Court are at any rate evidently insufficient to guarantee a dignified minimum existence. In addition, the amount of benefits has been neither comprehensibly calculated nor is there a realistic calculation focused on needs that secures current the existential minimum. 80

1. The cash benefits which are the subject-matter of these proceedings according to § 3.2 sentence 2 and sentence 3 in conjunction with § 3.1 sentence 4 of the Asylum Seekers Benefits Act are evidently insufficient. 81

a) The amount of the cash benefits in the Asylum Seekers Benefits Act has not been changed since 1993 despite considerable price increases. 82

aa) The price level in Germany has risen by more than 30 % since then. […] 83

bb) It is obvious that the cash benefits according to the Asylum Seekers Benefits Act, which guaranteed minimum existence in 1993, were no longer able to meet the existential need of even a short residence as early as in 2007. […] The history of the Asylum Seekers Benefits Act permits no serious doubt as to the fact that the legislature sought to then already stretch to the limit of what was necessary to guarantee a dignified existence, and took but a short period of residence into account (see *Bundestag* document 12/4451 […]). 84

b) The legislature had itself provided for an adjustment mechanism in 1993, which was […] however never implemented. […] 85

c) The evident insufficiency of the amount of cash benefits is illustrated, for instance, by comparing the benefits paid to an adult head of a household with the amount of benefits currently paid according to the general social welfare law contained in the Second and the Twelfth Books of the Code of Social Law. […] 86

aa) The basic benefit as a cash benefit according to the Asylum Seekers Benefits Act for heads of the household is 224.97 € per month, whilst single adult beneficiaries entitled according to the Second and Twelfth Books of the Code of Social Law have drawn monthly benefits of 346.59 € in this respect since January 2012; this is a difference of 35 % for January 2012. […] 87

bb) A considerable gap between the amounts of money according to § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 of the Asylum Seekers Benefits Act and the benefits for the sociocultural need in the general social welfare law is particularly apparent […] where the gap with children and juveniles amounts to between 27 and 54 %. […] 88

d) The evidently insufficient amount of cash benefits according to § 3 of the Asylum 89

Seekers Benefits Act may not be compensated for by applying § 6 of the Act. The provision is conceived as an exceptional provision for atypical needs, and hence is not suited from the outset to compensate for structural benefit shortfalls in the area governed by § 3 of the Asylum Seekers Benefits Act. […]

2. The basic benefits according to § 3.2 sentence 2 and § 3.2 sentence 3 in conjunction with § 3.1 sentence 4 of the Asylum Seekers Benefits Act are furthermore not assessed realistically and may not be substantiated. They are not measured in a proper procedure that is transparent in terms of its content according to actual needs; the decision about the amount of cash benefits was not based on reliable data when it was introduced, and it is not based on such data today. The legislature used a mere estimate of costs at the time. This does not comply with the requirements of the Basic Law to guarantee a dignified existence (see BVerfGE 125, 175 <226>). 90

a) The legislative materials (*Bundestag* document 12/4451 and 12/5008) on the Act to Reform Benefits for Asylum Seekers of 30 June 1993 (Federal Law Gazette I p. 1074) do not reveal any indications of an assessment procedure to determine the cash benefits. […] 91

b) The presumption on which the Act is evidently based, namely that a short period of residence justifies the limited amount of benefits, also has no adequately reliable basis. Neither the Asylum Seekers Benefits Act nor the legislative materials or the statements in the proceedings at hand reveal any indications that the period of residence has a concrete impact on existential needs, or as to the degree to which this might determine the amount of cash benefits stipulated by the Act. There is also no plausible proof that the beneficiaries covered by the Asylum Seekers Benefits Act typically only stay in Germany for a short period of time. 92

aa) The scope of the Asylum Seekers Benefits Act has been extended several times since 1993, and today encompasses people with a highly divergent residence status (A I 2 above). The legislative concept presumes that there is a short-term, temporary residence (see *Bundestag* documents […]). This however fails to do justice to the actual situation. The vast majority of those individuals who receive benefits according to the Asylum Seekers Benefits Act has already been in Germany for more than six years (see *Bundestag* document 17/642). […] 93

bb) Furthermore, even a short period of residence or only short-term prospects for residence in Germany would not justify a restriction of the claim to a guarantee of a dignified minimum existence to physical needs alone. Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law demands that the minimum existence must be guaranteed in each case and at all times (see BVerfGE 125, 175 <253>). Article 1.1 of the Basic Law guarantees a dignified minimum existence secured by benefits which are to be designed by the social welfare state described in Article 20.1 of the Basic Law as a comprehensive fundamental right that encompasses the physical and sociocultural minimum. Foreign nationals do not lose the right to be considered as social individuals by virtue of the fact that they leave their homes and temporarily 94

reside in the Federal Republic of Germany only temporarily (see Rothkegel, *Zeitschrift für Ausländerrecht und Ausländerpolitik* – ZAR 2010, pp. 373 <374>). Dignified existence, which is to be understood comprehensively, must hence be realised in the Federal Republic of Germany starting at the moment at which residence is taken.

c) Migration-policy considerations to keep benefits for asylum seekers and refugees low in order to avoid incentives for migration, which may be set by relatively high benefits compared to international standards, may generally not justify any reduction of benefits below the physical and sociocultural minimum existence (see the recommendation for a resolution and report of the *Bundestag* Committee on Family Affairs and Senior Citizens of 24 May 1993 […]). Human dignity, guaranteed in Article 1.1 of the Basic Law, may not be modified in light of migration-policy considerations. 95

3. The Asylum Seekers Benefits Act does also not contain a provision corresponding to § 28.1 sentence 1 of the Second Book of the Code of Social Law and § 34.1 sentence 1 of the Twelfth Book of the Code of Social Law according to which the need for education and participation in social and cultural life in the community of children and juveniles are secured as a right. Legislation that secures existence is only constitutional if needs are secured by enforceable claims (see BVerfGE 125, 175 <228-229>). 96

D.

I.

The provisions of the Asylum Seekers Benefits Act submitted to the Court that set the amount of basic benefits … are to be declared incompatible with the Basic Law (see § 82.1 in conjunction with § 79.1 and § 31.2 sentence 2 of the Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz* – BVerfGG). A declaration of nullity (see § 82.1 in conjunction with § 78 of the Federal Constitutional Court Act) or a waiver of a transitional provision would lead to a situation in which there is no statutory basis and thus no constitutionally stipulated law, which is necessary according to Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law, to grant benefits that ensure a dignified minimum existence, and in which those to who the Asylum Seekers Benefits Act applies could thus not receive any benefits (see BVerfGE 125, 175 <256>). This would create a situation which would be even further away from a constitutional order than the previous one (see BVerfGE 99, 216 <244>; 119, 331 <382-383> with further references). 97

II.

Regarding the amount of cash benefits defined in the Act but evidently insufficient, there is a need for a transitional rule by the Federal Constitutional Court. 98

1. It is not acceptable to further apply the unconstitutional provisions, because of the existential significance of basic benefits. The fundamental vital needs of the benefi- 99

ciaries are to be met at the time when they arise. It is, according to the Federal Government's statement in Court, and also according to the statement of the Government of Rhineland-Palatinate, not foreseeable when new legislation will be enacted. The Federal Government announced to review the provisions in 2010, but there is no draft bill to the present day. But there is an inevitable need for a uniform, abstract, and general provision (see also BVerfGE 39, 1; 48, 127; 84, 9; 88, 203; 99, 341; 101, 106 <132>; 103, 111; 109, 256), since the minimum existence guaranteed by fundamental rights is otherwise not ensured.

2. The Federal Constitutional Court has the option, to ensure existential needs, to resort to the Standard Needs Calculation Act (*Regelbedarfs-Ermittlungsgesetz* – RBEG, 2011) to design a proper transitional provision. The amounts set in 1993 that were mere estimates in relation to the price index of the Federal Statistical Office (C II 1a aa above) would not be properly focused on the needs of those concerned. According to the statement of the Federal Government in the proceedings at hand, the provisions of the Standard Needs Calculation Act are the only determination of amounts of benefits to guarantee a dignified minimum existence available that were carried out by the legislature and basses on an assessment within its margin of appreciation. It is not certain that this realistically portrays the possibly deviating needs of those to whom the Asylum Seekers Benefits Act applies. It is also not possible to say anything about whether benefits calculated on this basis for beneficiaries in other welfare systems would pass constitutional muster. Since there is however currently no other viable data on the matter, the Senate can only presume that the essential fundamental needs can be provisionally covered by benefits of the amount set by the Standard Needs Calculation Act. 100

3. This transitional arrangement does not replace the decision of the legislature. The latter has a constitutional duty to take a decision of its own, consistent with the requirements of the Basic Law as to how and by which amount the minimum existence of the group of individuals affected by the provisions declared unconstitutional may be guaranteed in the future. 101

4. The transitional rule is oriented towards §§ 5 to 8 of the Standard Needs Calculation Act with respect to the structure of the law which the legislature has chosen. […] 102

a) […] As a result, this increases basic benefits in every case. […] 103

[…] 104-108

b) The decision of the legislature in § 3.2 sentence 1 of the Asylum Seekers Benefits Act to provide for benefits in kind to primarily cover vital needs is not affected by this transitional rule. Insofar as, and presuming that, benefits in kind currently actually do ensure a dignified minimum existence, the transitional rule does not encroach on the structure of the Asylum Seekers Benefits Act as to the type of benefit. […] 109

5. The transitional rule applies until new legislation comes into force. As long as no recalculation takes place according to § 28 of the Twelfth Book of the Code of Social 110

Law, the parameters and amounts of money according to § 7 of the Standard Needs Calculation Act are to be extrapolated according to the change rate of the mixed index as defined in § 138 in conjunction with § 28a of the Twelfth Book of the Code of Social Law.

III.

Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law does not oblige the legislature to retroactively reset benefits. 111

However, it is appropriate to retroactively apply the transitional rule by 1 January 2011, because the legislature had to anticipate the need for new legislation with regard to the Asylum Seekers Benefits Act at the latest with the decision of the Federal Constitutional Court of 9 February 2010 (BVerfGE 125, 175). 112

[…] 113-114

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