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Federal Constitutional Court - Press office -

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Judgment of 9 February 2010

Standard benefits paid according to the Second Book of the Code of Social Law ("Hartz IV legislation") not constitutional

I. Facts of the case

1. With effect from 1 January 2005, the Fourth Act for Modern Services on the Labour Market (*Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt*) of 24 December 2003 (the so-called „Hartz IV legislation“) merged the (long-term) unemployment ass istance (*Arbeitslosenhilfe*) and the social assistance benefits existing to date in the newly created Second Book of the Code of Social Law (*Sozialgesetzbuch Zweites Buch – SGB II*) in the shape of a uniform, means-tested basic provision for employable persons and the persons living with them in a joint household (community of need). Accordingly, employable needy persons receive unemployment benefit II, and the non-employable dependants living with them in a joint household, in particular children before completing the age of 15, receive social allowance. These benefits are essentially made up of: (1) the standard benefit paid to secure one’s livelihood, which is determined in §§ 20 and 28 SGB II; and (2) benefits for accommodation and heating. The benefits are only granted where no sufficient means of one’s own, especially income or property, exist. Upon its entry into force, the SGB II fixed the standard benefit for singles living in the old West German states including East Berlin at €345. It determines the standard benefit for the other members of the joint household as percentages of this amount. This resulted as from 1 January 2005 in a rounded amount of €311 (90 per cent) for spouses, civil partners and live-in partners, in a rounded amount of €207 (60 per cent) for children before completing the age of 14 and in an amount of €276 (80 per cent) for children from the beginning of their 15th year of age.

In contrast to the provisions under the former Federal Social Assistance Act (*Bundessozialhilfegesetz* – BSHG) the standard benefit according to

SGB II is largely paid as a lump sum; an increase for everyday need is ruled out. Non-recurring assistance is only paid in exceptional cases for a special need. To meet a need that recurs irregularly, the standard benefit has been increased so that benefit recipients can save the corresponding amount.

2. a) When fixing the standard benefit, the legislature took the social assistance law, which has been regulated since 1 January 2005 in the Twelfth Book of the Code of Social Law (*Sozialgesetzbuch Zwölftes Buch* – SGB XII) as an orientation. Pursuant to the SGB XII and the Standard Rate Ordinance (*Regelsatzverordnung*) issued by the competent Federal Ministry, the assessment of the standard rates under social assistance law is carried out according to a statistical model which had been developed in a similar fashion when the BSHG was in force. The basis of the assessment of the standard rates is a special evaluation of the sample survey on income and expenditure which is conducted every five years by the Federal Statistical Office. What is relevant for the determination of the basic standard rate, which also applies to singles, is the expenditure, compiled in the different divisions of the sample survey, of the lowest 20 per cent of the single-person households stratified according to their net income (lowest quintile) after leaving out the recipients of social assistance. When assessing the basic standard rate, this expenditure, however, is not fully considered; only certain percentages of it are taken up as expenditure that is relevant to the standard rate.

The Standard Rate Ordinance which has been in force since 1 January 2005 is based on the 1998 sample survey on income and expenditure. When determining the expenditure that is relevant to the standard rate in § 2.2 of the Standard Rate Ordinance, division 10 of the sample survey on income and expenditure (Education) has not been taken into account. Further reductions were made for instance in division 03 (Clothing and shoes) e.g. for furs and tailor-made clothes, in division 04 (Housing etc.) with the expenditure item „Electricity“, in division 07 (Transport) due to the costs of motor vehicles and in division 09 (Leisure, entertainment and culture) e.g. for gliders. The amount calculated for 1998 was projected to 1 January 2005 according to the provisions that apply to the annual adaptation of the standard benefit pursuant to the SGB II and of the standard rates pursuant to the SGB XII, according to the development of the current pension value in the statutory pensions insurance scheme (see § 68 SGB VI).

b) When fixing the standard benefit for children, the legislature deviated from the percentages that were in force under the BSHG by creating only two age groups (0 to 14 years and 14 to 18 years). At first, the expenditure behaviour of married couples with one child was not studied, as had been done under the BSHG.

3. The special evaluation of the sample survey on income and expenditure from 2003 resulted in changes concerning the expenditure that is relevant to the standard rate pursuant to § 2.2 of the Basic Rate Ordinance as from 1 January 2007 but not in an increase of the basic standard rate and the standard benefit for singles. A new special evaluation conducted regarding the expenditure behaviour of married couples with one child resulted in the legislature’s introducing a third age group of children from the age of 6 until they complete the age of

14 living in the same household. As from 1 July 2009, they receive, pursuant to § 74 SGB II, 70 per cent of the standard benefit of a single person. Pursuant to § 24a SGB II, school-age children have received since 1 August 2009, apart from this, additional benefits for school to the amount of €100 per school year.

4. On 20 October 2009, the First Senate of the Federal Constitutional Court conducted an oral hearing about a case submitted by the Higher Social Court of Hesse (*Hessisches Landessozialgericht*) (1 BvL 3/09) and about two cases submitted by the Federal Social Court (*Bundessozialgericht*) (1 BvL 3/09 and 1 BvL 4/09) on the question of whether the amount of the standard benefit for securing the livelihood of adults and children until completing the age of 14 in the period between 1 January 2005 and 30 June 2005 according to § 20.1 to 20.3 and according to § 28.1 sentence 3 no. 1 alternative 1 SGB II is compatible with the Basic Law. Detailed information about the original proceedings on which the submissions are based is contained in the German press release on the oral hearing (no. 96/2009 of 19 August 2009).

II. The Federal Constitutional Court's decision

The First Senate of the Federal Constitutional Court has decided that the provisions of the SGB II which concern the standard benefit for adults and children do not comply with the constitutional requirement following from Article 1.1 of the Basic Law (*Grundgesetz* – GG) in conjunction with Article 20.1 GG to guarantee a subsistence minimum that is in line with human dignity. The provisions remain applicable until the legislature enacts new provisions, which it is ordered to do until 31 December 2010. The legislature is also ordered to make provision, when enacting the new provisions, for securing an irrefutable current special need which is not non-recurring for those entitled to receive benefits according to § 7 of the Second Book of the Code of Social Law, a need which has not yet been covered by the benefits pursuant to §§ 20 et seq. of the Second Book of the Code of Social Law but must mandatorily be covered to guarantee a subsistence minimum that is in line with human dignity. It is ordered that until the legislature enacts new provisions, this claim can be asserted directly, taking into account the grounds of the decision, on the basis of Article 1.1 GG in conjunction with Article 20.1 GG, with the costs being borne by the Federation.

In essence, the decision is based on the following considerations:

1. a) The fundamental right to guarantee a subsistence minimum that is in line with human dignity, which follows from Article 1.1 GG in conjunction with the principle of the social state under Article 20.1 GG, ensures every needy person the material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural and political life. Beside the right from Article 1.1 GG to respect the dignity of every individual, which has an absolute effect, this fundamental right from Article 1.1 GG has, in its connection with Article 20.1 GG, an autonomous significance as a guarantee right. This right is not subject to the legislature's disposal and must be honoured; it must, however be lent concrete shape, and be regularly updated, by the legislature. The legislature has to orient the benefits to be paid towards the respective stage of development of the

polity and towards the existing conditions of life. As regards the types of need and the means that are necessary to meet such need, the extent of the constitutional claim to benefits cannot be directly inferred from the constitution. It is for the legislature to lend it concrete shape; it has latitude for doing so.

In order to lend the claim concrete shape, the legislature has to assess all expenditure that is necessary for one's existence consistently in a transparent and appropriate procedure according to the actual need, i.e. in line with reality.

b) The legislature's latitude for assessing the subsistence minimum corresponds to a cautious review of the provisions in non-constitutional law by the Federal Constitutional Court. As the Basic Law itself does not admit of exactly quantifying the claim, substantive review is restricted, as regards the result, to ascertaining whether the benefits are evidently insufficient. Within the material range which is left by the review of evident faultiness, the fundamental right to guaranteeing a subsistence minimum that is in line with human dignity cannot provide any quantifiable guidelines. It requires, however, an examination of the bases and of the assessment method of the benefits to ascertain whether they do justice to the objective of the fundamental right. In order to ensure a traceability of the extent of the statutory assistance benefits that is commensurate with the significance of the fundamental right and to ensure the review of the benefits by the courts, the assessment of the benefits must be viably justifiable on the basis of reliable figures and plausible methods of calculation.

The Federal Constitutional Court therefore examines: (1) whether the legislature has taken up and described the objective of ensuring an existence that is in line with human dignity in a manner that does justice to Article 1.1 GG in conjunction with Article 20.1 GG; (2) whether it has, within the boundaries of its latitude, chosen a fundamentally suitable method of calculation for assessing the subsistence minimum; (3) whether in essence, it has completely and correctly ascertained the necessary facts; and finally (4) whether it has kept within the boundaries of what is justifiable within the chosen method and its structural principles in all stages of calculation, and with plausible figures. To make this review by the Federal Constitutional Court possible, the legislature is obliged to plausibly disclose the methods and stages of calculation employed in the legislative procedure. If the legislature does not sufficiently meet this obligation, the ascertainment of the subsistence minimum is no longer in harmony with Article 1.1 GG already due to these shortcomings.

2. The standard benefits of €345, 311 and 207 cannot be regarded as evidently insufficient to secure a subsistence minimum that is in line with human dignity. With regard to the amount of the standard benefit of €345, it cannot be established that it is evidently below the subsistence minimum because it is at least sufficient to secure the physical aspect of the subsistence minimum and because the legislature's latitude is especially broad as regards the social aspect of the subsistence minimum.

This also applies to the amount of €311 for adult partners in a joint household. The legislature was allowed to assume that living in a joint

household reduces expenditure and that therefore, two partners living together have a financial minimum need that is lower than twice the need of a person living alone.

It also cannot be established that the amount of €207 which uniformly applies to children before completing the age of 14 is evidently insufficient to secure a subsistence minimum that is in line with human dignity. In particular, it is not apparent that this amount is not sufficient to cover the physical subsistence minimum, especially the need for food, of children between 7 and 14 years of age.

3. The statistical model which applies to the assessment of the standard rates under social assistance law and which according to the will of the legislature is also the basis for the assessment of the standard benefit is a justifiable, and hence constitutionally permissible, method for realistically assessing the subsistence minimum for a single person. Moreover, it is based on suitable empirical data. The sample survey on income and expenditure reflects the expenditure behaviour of the population in a statistically reliable manner. The choice of the lowest 20 per cent of the single-person households stratified according to their net income after leaving out the recipients of social assistance as the reference group for ascertaining the standard benefit for a single is constitutionally unobjectionable. The legislature could also justifiably assume that the reference group on which the evaluation of the 1998 sample survey on income and expenditure was based was situated above the social assistance threshold in a statistically reliable manner.

It is also constitutionally unobjectionable that the expenditure of the lowest quintile ascertained in the different divisions of the sample survey on income and expenditure is not fully considered but that only a certain percentage of it is considered, as expenditure that is relevant to the standard benefit, for assessing the standard benefit. The legislature, however, has to take the decision as to which expenditure is part of the subsistence minimum in an appropriate and justifiable manner. The reduction of expenditure items in the divisions of the sample survey on income and expenditure require an empirical basis for their justification. The legislature may only regard expenditure which the reference group incurs as not relevant if it is certain that it can be covered otherwise or if it is not necessary to secure the subsistence minimum. To ascertain the amount of the reductions, an estimate is not ruled out if it is performed on a sound empirical basis; estimates conducted “at random” are, however, not a realistic way of ascertaining the amount.

4. The standard benefit of €345 has not been ascertained in a constitutional manner because the structural principles of the statistical model have been abandoned without a factual justification.

a) The expenditure that fixed in § 2.2 of the Standard Rate Ordinance 2005, which is relevant to the standard rate and thus at the same time to the standard benefit, is not based on a viable evaluation of the sample survey on income and expenditure 1998. For with regard to some expenditure items, percentage reductions for goods and services which are not relevant to the standard benefit (e.g. furs, tailor-made clothes and gliders) were made without it being certain whether the reference

group (lowest quintile) has incurred such expenditure at all. With regard to other expenditure items, reductions were made which are justifiable on the merits, but which were not empirically substantiated as regards their amount (e.g. a 15 per cent reduction for the item “Electricity”). Other expenditure items, e.g. division 10 (Education), were completely left out of account, without any reasoning for this being provided.

b) Apart from this, the projection of the amounts ascertained for 1998 to the year 2005 on the basis of the development of the current pension value constitutes an inappropriate change of standard. While the statistical method of ascertainment focuses on net income, consumer behaviour and cost of living, the projection according to the current pension value is based on the development of gross wages and salaries, on the contribution rate to the general pensions insurance and a demographic factor. These factors, however, show no relation to the subsistence minimum.

5. The ascertainment of the standard benefit to the amount of €311 for partners living together in a joint household does not meet the constitutional requirements because the shortcomings which have become apparent with regard to the ascertainment of the standard benefit for singles are continued for the standard benefit for partners was ascertained on the basis of the standard benefit or singles. However, the assumption that an amount of 180 per cent of the corresponding need of a single is sufficient to secure the subsistence minimum of two partners has indeed a sufficient empirical basis.

6. The social allowance of €207 for children before completing the age of 14 does not meet the constitutional requirements because it is derived from the standard benefit to the amount of €345 which has already been objected to. Furthermore, its determination is not based on any justifiable method of determining the subsistence minimum of a child before completing the age of 14. The legislature has not ascertained the specific need of a child in any way, which, in contrast to that of an adult, has to take a child’s stages of development and a development of personality that is appropriate for children into account. Its reduction of 40 per cent from the standard benefit of a single is set freely without an empirical and methodical foundation. In particular, the necessary expenses for schoolbooks, exercise books, calculators etc., which are part of the existential need of a child, are left out of account. For without these costs being covered, children in need of assistance are under the threat of being excluded from chances in life. What is missing as well is a differentiated survey of the need of younger and older children.

7. These infringements of the constitution have neither been eliminated by the evaluation of the sample survey on income and expenditure 2003 and the new determination of the expenditure that is relevant to the standard rate as from 1 January 2007 nor by § 74 and § 24a SGB II, which came into force in the middle of 2009.

a) The amendment of the Standard Rate Ordinance, which has entered into force as from 1 January 2007, has not eliminated essential shortcomings such as for instance the fact that the expenditure recorded in division 10 (Education) was not taken into account, or the projection of the

amounts ascertained for 2003 according to the development of the current pension value.

b) The social allowance paid to children from the beginning of their 7th year of age until they complete the age of 14 to the amount of 70 per cent of the standard benefit of a single, which was introduced by § 74 SGB II, does not comply the constitutional requirements already because it is derived from this standard benefit, which had been incorrectly ascertained. It is true that by introducing a third age group and by using the determination that is based on § 74 SGB II, the legislature will probably have come closer to realistically ascertaining the necessary benefits for school-age children. In spite of this, it has, however, not complied with the requirements placed on ascertaining the child-specific need because the statutory provision continues to be based on the expenditure of an adult single.

c) The provision of § 24a SGB II, which provides for a non-recurring payment of € 100.00, does not fit into the need system of the SGB II from a methodological perspective. Furthermore, the legislature did not empirically ascertain the school-related need of a child when enacting § 24a SGB II. Obviously, the amount of €100 per school year was based on a free estimate.

8. Furthermore, it is incompatible with Article 1.1 GG in conjunction with Article 20.1 GG that the SGB II lacks a provision which provides for a claim to receive benefits for securing a current special need which is not non-recurring and which is irrefutably necessary to cover the subsistence minimum that is in line with human dignity. Such a claim is necessary for the need which is not covered by §§ 20 et seq. SGB II for the sole reason that the sample survey on income and expenditure on which the standard benefit is based only reflects the average need in usual situations of need but not a special need arising due to atypical need situations that goes beyond it.

It is in principle permissible to grant a standard benefit as a fixed rate. If the statistical model is used in accordance with the constitutional requirements and if in particular the lump sum has been determined in such a way that it is possible to balance out the different need items, the person in need of assistance will, as a general rule, be able to organise his or her individual expenditure behaviour in such a way as to manage with the fixed rate; in case of special need, he or she will, above all, have to resort to the potential for saving up that is contained in the standard benefit.

As, due to its concept, a lump-sum standard benefit amount can only cover the average need, a need arising in special cases is not convincingly reflected by the statistics. Article 1.1 GG in conjunction with Article 20.1 GG requires, however, to cover also this irrefutable current special need which is not non-recurring if this is necessary in an individual case for a subsistence minimum that is in line with human dignity This need has not as yet been covered without exception in the SGB II. Due to this gap in the coverage of the vital subsistence minimum, the legislature is to provide for a hardship arrangement in the shape of a claim to assistance benefits to cover this special need for those entitled to receive benefits pursuant to § 7 SGB II. However, this claim only arises if the need is so considerable that the total amount

of the benefits granted to the person in need of assistance – including benefits paid by third parties and taking into account the possibilities of saving of the person in need of assistance – no longer ensures the subsistence minimum that is in line with human dignity. In view of the narrow and strict requirements placed on this constituent element, this claim will probably be considered only in rare cases.

9. The unconstitutional provisions remain applicable until the legislature enacts new provisions, which it is ordered to do until 31 December 2010. Due to the legislature's scope for action, the Federal Constitutional Court is not competent to determine a certain amount of benefits on its own on the basis of its own assessments and evaluation. As it cannot be established that the standard benefit amounts which are fixed by statute are evidently insufficient, the legislature is not directly obliged under the constitution to fix higher benefits. Instead, it must, according to the instructions given, conduct a procedure to ascertain the benefits necessary for securing a subsistence minimum that is in line with human dignity which is realistic and takes account of the actual need, and it has to anchor the result of such procedure in the law as a claim to benefits.

Article 1.1 GG in conjunction with Article 20.1 GG does not oblige the legislature to retroactively fixing the benefits anew. Should the legislature, however, not have complied with its obligation to enact a new provision until 31 December 2010, a law enacted, contrary to this obligation, at a later date, would have to be declared applicable by 1 January 2011.

Apart from this, the legislature is obliged to create a provision in the SGB II until 31 December 2010 at the latest which ensures that an irrefutable current special need which is not non-recurring is covered. Those entitled to receive benefits according to § 7 SGB II which have such a need must however receive the necessary benefits in kind and cash even before the new provision is enacted. To avoid the danger of a violation of Article 1.1 GG in conjunction with Article 20.1 GG in the transitional period until a corresponding hardship arrangement is introduced, the unconstitutional gap must be closed for the time from the pronouncement of the judgment onwards by an order of the Federal Constitutional Court to this effect.