

# AUT-2018-1-001

a) Austria / b) [Constitutional Court](#) / c) / d) 07-03-2018 / e) G 136/2017 / f) / g) / h) CODICES ([German](#)).

## Keywords of the systematic thesaurus:

[05.02](#) Fundamental Rights - **Equality**.

[05.04.18](#) Fundamental Rights - Economic, social and cultural rights - **Right to a sufficient standard of living**.

## Keywords of the alphabetical index:

Refugee, rights, social benefits.

## Headnotes:

The main objective of social assistance is to ensure a decent existence for all who lack sufficient resources. The legislator is free to restrict eligibility for social assistance to persons with indefinite leave to stay but entitlement to social benefits must not be made dependent on a waiting period. Nor can a rigid ceiling of social assistance applying to all persons living in a residential community be justified by objective reasons; within a household livelihood needs rise with every additional person living in that community.

## Summary:

I. The Social Assistance Act of the *Land* of Lower Austria allows for those in need to be granted social assistance covering their domestic and livelihood requirements. This Act applies to Austrian citizens, refugees entitled to asylum and other aliens who have been granted indefinite leave to remain in Austria. The total amount of social assistance for a single person is equal to the minimum pension which was – 844 in 2017.

In 2016, the Social Assistance Act was amended so that if somebody in need has been residing in Austria for less than five years throughout the last six years the total amount of social assistance is cut by 30 %, unless it can be proved that he or she left Austria for professional or training purposes only. In addition, social assistance granted to persons living together in the same household or residential community must not exceed the sum of – 1.500.

The Regional Administrative Court of Lower Austria asked the Constitutional Court to rule on the constitutionality of the new provisions.

II. The Constitutional Court began by pointing out that the legislator usually enjoys a wide margin of appreciation in terms of general measures of economic or social strategy. In particular, the legislator is not obliged to grant social assistance to an extent that would have effects which are not desirable from a political perspective. However, where the legislator

has created a system of social assistance meant to guarantee a dignified life, it must refrain from any measures which would jeopardise attainment of the goals of that system.

The Government of Lower Austria submitted that the measure of a waiting period was necessary to ensure sound public finances and to encourage people in need to resume employment quickly.

The Court noted that the legislator may respond to an increasing demand for social benefits by tightening eligibility for such public services. However, any such restriction must be based on objective grounds. In the case of social benefits, the residence status of a person in need may be taken into account as well as the fact that assistance is granted by others. In particular, entitlement to social benefits may be limited to residents of Austria.

By contrast, the Constitutional Court held that the length of stay in Austria cannot be considered to be an appropriate means to assess the needs of a person. It also rejected the argument that citizens who had recently arrived in, or returned to, Austria needed any specific «incentives» to take up employment. It held that the waiting period amounted to a discriminatory difference in treatment with regard to Austrian citizens in need.

The Constitutional Court also found the waiting period to be discriminatory with regard to refugees.

The Court agreed with the Government that limiting access to social assistance may be justified by the need to prevent «benefits tourism». However, as distinct from immigrants, refugees have not left their home country of their own free will, but through well-founded fears of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The Court therefore held that if entitlement of refugees to the full amount of social assistance depends on a minimum length of stay in Austria, this is not objectively justified. In this connection, the Court referred to the Convention Relating to the Status of Refugees of 1951 under Article 23 of which Contracting States must accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Irrespective of whether full or reduced social assistance applies, the total amount of social assistance granted to persons living together in the same household must not exceed – 1.500.

The Government of Lower Austria argued that the rationale behind specifying a maximum amount of social assistance, which reflected the median income in Austria, was to prevent families with many children from obtaining a monthly income that is in excess of an average employment income. This measure therefore appeared to be necessary to create an incentive for people in need to take up employment.

The Constitutional Court pointed out that in a household, most livelihood needs, for instance food, increase with every additional person living in that residential community. A rigid

ceiling, such as a maximum that cannot be exceeded even in cases of particular hardship, runs counter to the objectives of social assistance.

Accordingly, the Constitutional Court held that the provisions at issue violated the principle of objectivity resulting from the constitutional principle of equality.

**Cross-references:**

European Court of Human Rights:

- *Fawsie v. Greece*, no. 40080/07, 28.10.2010;
- *Bah v. United Kingdom*, no. 56328/07, 27.09.2011, *Reports of Judgments and Decisions* 2011.

**Languages:**

German.