CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

# COUR EUROPÉENNE DES DROITS DE L'HOMME
# EUROPEAN COURT OF HUMAN RIGHTS

## FOURTH SECTION

## DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 59140/00
by Zbigniew and Halina OKPISZ
against Germany

The European Court of Human Rights (Fourth Section), sitting on 17 June 2003 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mr G. RESS,
Mrs E. PALM,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI, *judges*
and Mr M. O'Boyle, *Section Registrar*,

Having regard to the above application introduced on 15 February 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

# THE FACTS

The applicants, Zbigniew and Halina Okpisz, are Polish nationals, born in 1946 and 1947, respectively and living in Dortmund. The respondent Government are represented by Mr K. Stoltenberg, *Ministerialdirigent*, of the Federal Ministry of Justice.

## A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

In 1985, the applicants, a married couple, immigrated to Germany with their daughter, born in 1979. Their son, born in 1970, joined them in 1986.

In 1987 their request to be recognised as immigrants of German origin (*Vertriebene*) was rejected. The applicants' request to reopen the proceedings was rejected on 5 November 1992 by the Münster Administrative Court of Appeal. The same day the applicants were issued with residence titles for exceptional purposes (*Aufenthaltsbefugnis*) which have been regularly renewed.

On 27 December 1993, the Dortmund Labour Office informed the first applicant, who had received child benefits (*Kindergeld*) since 1986, that as from 1 January 1994 the child benefits would no longer be paid following a change in legislation. The office noted that according to Section 1(3) of the Federal Child Benefits Act (*Bundeskindergeldgesetz*), as amended and in force as from 1 January 1994, a foreigner was only entitled to child benefits if in possession of a residence permit (*Aufenthaltsberechtigung*) or a provisional residence permit (*Aufenthaltserlaubnis*). The office noted that this condition was not met in the applicant's case.

On 25 March 1994 the Federal Labour Office rejected the first applicant's objection.

The first applicant, assisted by counsel, lodged an action with the Dortmund Social Court, claiming that he and his family had been residing in Germany since 1985 and had been paying tax and social contributions. He should, therefore, continue to be entitled to the child benefits.

On 27 March 1995, the Social Court dismissed the first applicant's action. It confirmed that only aliens with an unlimited or a provisional residence permit were entitled to the payment of child benefits. The new legislation had only intended to grant child benefits to aliens living in Germany on a permanent basis, whereas aliens with only a limited residence title for exceptional purposes were not likely to stay. The court further

pointed out that this distinction did not violate the German Basic Law as had been stated by the Federal Social Court in several judgments since 1992. As to the special protection of the family provided under Article 6 of the German Basic Law, the court held that this did not prevent the State from subjecting the payment of child benefits to the type of the residence title.

On 14 June 1995 the first applicant, assisted by counsel, lodged an appeal with the North Rhine-Westphalia Social Appeals Court.

On 28 July 1995 the judge at the Social Appeals Court acting as rapporteur informed the first applicant's counsel that it did not appear possible to change the first instance decision. Having regard to Federal Social Court's jurisprudence to which the Appeals Court adhered, the Social Court had correctly considered that Section 1(3) of the Child Benefit Act could not be objected to from a constitutional point of view. Referring to the possibility to reject the appeal unanimously, counsel was asked whether it was intended to withdraw the appeal in writing.

The first applicant continued the proceedings.

On 30 January 1997 the Social Appeals Court informed the first applicant that it had referred a case concerning a similar issue to the Federal Constitutional Court for review of the constitutionality of Section 1(3) of the Child Benefits Act. On 2 May 1997 the Social Appeals Court informed the first applicant that it had referred five pilot cases to the Federal Constitutional Court for review of Section 1(3), and asked him whether he would agree to a suspension of his appeal proceedings until a decision had been rendered by the Constitutional Court on the pilot cases. On 20 May 1997 the Social Appeals Court, having obtained the parties' agreement, ordered the suspension of the proceedings.

Since August 1998 the first applicant has repeatedly inquired with the Federal Constitutional Court about the state of the proceedings. By letter of 2 September 1999, the Federal Constitutional Court informed the first applicant that it intended to render a decision towards the end of 1998. On 22 January, 11 February, 28 June and 14 September 1999 as well as on 3 January 2000, the Federal Constitutional Court told the applicants that no decision had been taken so far and that it was not able to tell them when it would render a decision.

On 10 April 2001, following a query by the Social Appeals Court of 2 April, the Federal Constitutional Court indicated that the judge rapporteur in the referred pilot cases had again changed and that no decision could be expected before 2002.

The Federal Constitutional Court has not yet rendered a decision in the pilot cases.

### B. Relevant domestic law

Section 1 of the 1994 Federal Child Benefits Act (*Bundeskindergeldgesetz,* Federal Gazette - *Bundesgesetzblatt 1994-I, S. 168*), as in force until 31 December 1995, provided for the payment of child benefits which are financed by the Federation.

Section 1, as far as relevant, provided as follows:

> "(1) Under the provisions of the present Act, anybody is entitled to child benefits for his or her children ...,
>
> 1. who has a place of residence (*Wohnsitz*) or regular residence (*gewöhnlicher Aufenthalt)* within the scope of the present Act,
>
> ...
>
> 3. An alien is entitled to a benefit under the present Act, if he has a residence permit or a provisional residence permit. ..."

Following a reform of the law on child benefits with effect from 1 January 1996, an equivalent provision on child benefits is to be found in Section 62(2) of the Income Tax Act (*Einkommenssteuergesetz*).

## COMPLAINTS

The applicants complained that the refusal of the child benefits from January 1994 and onwards amounted to discrimination under Article 14 of the Convention.

## THE LAW

1. The applicants complained that the German authorities' refusal of child benefits as from January 1994 amounted to discrimination.

The Court has examined this complaint under Article 14, taken together with Article 8, of the Convention. Articles 8 and 14, as far as relevant, provide as follows:

> "**Article 8**
>
> 1. Everyone has the right to respect for his private and family life, ...

**Article 14**

The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

a) The Government maintained that the application was inadmissible for non-exhaustion of domestic remedies.

With regard to the second applicant, they submit that she had not been a party to the domestic proceedings and that it had been only the first applicant who had pursued the claims for child benefits. The court proceedings instituted by the first applicant, however, had not yet finished. As the appeal proceedings pending before the Social Appeals Court, he could have required that they be resumed and, if necessary, lodge a constitutional complaint with the Federal Constitutional Court about any refusal to resume the proceedings, or about the length of the proceedings.

The Court observes that the interests sought to be protected by the second applicant under the Convention appear identical to those pursued by the first applicant on behalf of his family and there is nothing to suggest that the second applicant might have obtained a different outcome had she brought proceedings before the domestic courts together with the first applicant (see *mutatis mutandis*, *Federation of Offshore Workers' Trade Unions and Others v. Norway* (dec.), no. 38190/97, 27 June 2002, unpublished). Against this background, the Court does not find that her omission to do so can be viewed as a failure to exhaust domestic remedies.

Furthermore, the Court considers that there are special circumstances in this case which absolve the applicants from exhausting the domestic remedies at their disposal. The excessive length of domestic proceedings may constitute such a special circumstance (see *X. v. Germany,* No. 6699/74, Commission decision of 15 December 1977, *Decisions and Reports* 11, p. 16).

In the present case, the Court observes that, in the beginning of 1997, the North-Rhine Westphalia Social Appeals Court referred selected pilot cases to the Federal Constitutional Court for a review of the constitutionality of Section 1(3) of the Child Benefits Act and suggested to that the proceedings in the instant case be suspended. The proceedings have meanwhile been pending before the Federal Constitutional Court for more than six years and it is not yet possible to predict when they will come to an end. In this respect, the Court notes that the Federal Constitutional Court had initially

planned a decision before the end of 1998, whereas in 2001, it stated that a decision could not be expected before 2002. It is true that the first applicant himself has given his consent that the proceedings before the Social Appeals Court be suspended. However, the initiative for suspending his appeal proceedings had been taken by the Social Appeals Court itself which had, at the early stage of the appeal proceedings, still adhered to the jurisprudence that there were no doubts as to the constitutionality of the underlying legislation. The reasons for suspending the proceedings, the relevance of the Constitutional Court proceedings for the instant case, remained pertinent (see, *e contrario*, *H.T. v. Germany* , no. 38073/97, § 36, 11 October 2001, unreported).

In the Court's opinion, the delays in the proceedings before the Federal Constitutional Court which are prejudicial to the proceedings pending before the Social Appeals Court reflect difficulties which cannot be resolved by requesting that the latter proceedings be resumed or by lodging a complaint with the Federal Constitutional Court.

In these circumstances, the applicants cannot be expected to continue to exhaust the remedies available to them under German law. The Government's claim must therefore be rejected.

b) the Government maintained that the applicant's complaint was manifestly ill-founded. According to them, the statutory provision of Section 1(3) of the Child Benefits Act and its application in the present case did not discriminate against the applicant in the exercise of his right to respect for his family life.

First, child benefits did not fall within the ambit of Article 8, as the State's general obligation to enhance family life did not give rise to concrete rights to specific payments. The applicant had a right to social assistance in the event of his means not being sufficient.

Second, the difference in treatment under the Child Benefits Act was justified. The German legislator did not transgress the margin of appreciation when distinguishing according to the residential status of foreigners.

Foreigners who were likely to stay in Germany on a long-term or possibly permanent basis had, as a rule, established certain ties with the German State, which in turn justified their entitlement to social benefits. Foreigners with a residence title for exceptional purposes were mainly de-facto refugees staying in Germany as long as the exceptional reasons continued to exist.

No other conclusions were to be drawn as far as the position of foreigners following the "*Ostblockbeschlüsse*" were concerned. They did not involve a prohibition on expulsion, but only a temporary - though regularly prolonged - suspension of the expulsion of the foreigners concerned.

Moreover, considering the German legislation on social assistance and the personal tax allowance in respect of dependent children, the difference in treatment concerning child benefits was not disproportionate. The applicant had not challenged his income tax assessments and the instant case did not relate to tax matters.

The Government added that under the laws of the European Communities only recognised refugees were entitled to equal treatment as German nationals.

The applicants objected to the Government's view. They argued in particular that the withdrawal of child benefits on the ground of the type of residence title amounted to discrimination. According to them, it was decisive that they had lawfully established a stable residence in Germany, that they had work permits and had paid tax.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

*Declares* the application admissible, without prejudicing the merits of the case.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President