CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF OKPISZ v. GERMANY

(Application no. 59140/00)

JUDGMENT

STRASBOURG

25 October 2005

FINAL

15/02/2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Okpisz v. Germany,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ,
Ms R. JAEGER, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 4 October 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 59140/00) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Polish nationals, Mr Zbigniew and Ms Halina Okpisz ("the applicants"), on 15 February 2000.

2. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent,* and, subsequently, Mrs A. Wittling-Vogel, *Ministerialrätin*, of the Federal Ministry of Justice.

3. The applicants alleged that the refusal of child benefits from January 1994 onwards amounted to discrimination.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 17 June 2003 the Court declared the application admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1946 and 1947 respectively and live in Dortmund in Germany.

9. 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.

10. 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 (*Oberverwaltungsgericht*). The same day the applicants were issued with residence titles for exceptional purposes (*Aufenthaltsbefugnis*) which have been regularly renewed.

11. On 27 December 1993 the Dortmund Labour Office (*Arbeitsamt*) 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,* see relevant domestic law below), 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 applicants' case.

12. On 25 March 1994 the Federal Labour Office (*Bundesanstalt für Arbeit*) rejected the first applicant's objection.

13. The first applicant, assisted by counsel, lodged an action with the Dortmund Social Court (*Sozialgericht*) with the aim to be granted child benefits from January 1994 onwards. He claimed 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.

14. 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.

15. On 14 June 1995 the first applicant, assisted by counsel, lodged an appeal with the North Rhine-Westphalia Social Court of Appeal (*Landessozialgericht*).

16. On 2 May 1997 the Social Court of Appeal informed the first applicant that it had referred five pilot cases to the Federal Constitutional Court (*Bundesverfassungsgericht*) for review of Section 1 § 3 of the Child Benefits Acts, and asked him whether he would agree to a suspension of his appeal proceedings until a decision had been given by the Constitutional Court. On 20 May 1997 the Social Court of Appeal, having obtained the parties' agreement, ordered the suspension of the proceedings.

17. By decision of 6 July 2004 in the pilot cases (1 BvL 4/97, 1 BvL 5/97, 1 BvL 6/97), the Federal Constitutional Court ruled that section 1 § 3 of the Child Benefits Act as effective from January 1994 until December 1995 was incompatible with the right to equal treatment under Article 3 § 1 of the Basic Law. Accordingly, the legislator was ordered to amend the law by 1 January 2006.

18. The Federal Constitutional Court found, in particular, that the different treatment of parents who were and who were not in possession of a stable residence permit lacked sufficient justification. As the granting of child benefits related to the protection of family life under Article 6 § 1 of the Basic Law, very weighty reasons would have to be put forward to justify unequal treatment. Such reasons were not apparent. In so far as the provision was aimed at limiting the granting of child benefits to those aliens who where likely to stay permanently in Germany, the criteria applied were inappropriate to reach that aim. The fact that a person was in possession of a limited residence title did not form a sufficient basis to predict the duration of his or her stay in Germany. The Constitutional Court did not discern any other reasons justifying the unequal treatment.

19. On 27 December 2004, following the first applicant's request, the Social Court of Appeal resumed the proceedings. On 9 March 2005 the Social Court of Appeal, with the parties' consent, once again suspended proceedings pending the amendment of the applicable legislation.

20. In 2000 the first applicant lodged a motion with the Munster Tax Court (*Finanzgericht*) with the aim to be granted child benefits from January 1996 onwards according to the provisions of the Income Tax Act (*Einkommensteuergesetz*, see relevant domestic law below). On 6 May 2004 the Tax Court rejected the motion. The first applicant did not lodge an appeal.

II. RELEVANT DOMESTIC LAW

21. Section 1 of the 1994 Federal Child Benefits Act (*Bundeskindergeld-gesetz,* Federal Gazette - *Bundesgesetzblatt 1994-I, S. 168*), as in force from 1 January 1994 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. ..."

22. 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*).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

23. The Government invited the Court to strike this application out of the Court's list of cases pursuant to Article 37 § 1 (c) of the Convention. They pointed out that the proceedings, which form the subject matter of this application, were still pending before the Social Court of Appeal and had been suspended until the legislator amended the applicable legislation. The Social Court of Appeal, when giving its decision, would take into account the reasoning of the Federal Constitutional Court in the pilot cases.

24. The Court notes that, subsequent to its decision on the admissibility of the present complaint, the Federal Constitutional Court – in separate proceedings – ruled that section 1 § 3 of the Child Benefits Act violated the right to equal treatment as guaranteed by Article 3 § 1 of the Basic Law and ordered the legislator to amend the impugned provision by 1 January 2006 (see paragraph 17 above). The proceedings concerning the applicants' claims are suspended pending the amendment of the applicable legislation.

25. The Court reiterates that it has found in its admissibility decision that the applicants were absolved from exhausting domestic remedies in the present case. The Court further notes that the proceedings before the

Constitutional Court do not directly affect the applicants' case and that the prospective new legislation – which might improve the applicants' legal position with respect to their claims for child benefits – has not yet been passed. Accordingly, the subject matter of the application has not yet been resolved (see Article 37 § 1 (b) of the Convention). Nor does the Court find any other reason which could justify to discontinue the examination of the application pursuant to Article 37 § 1 (c) and thus proceeds to the examination of its merits.

II. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

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

27. The Court has examined this part of the application under Article 14, taken together with Article 8, of the Convention, which, 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."

28. The Government maintained that child benefits did not fall within the ambit of Article 8 of the Convention, as the State's general obligation to promote family life did not give rise to concrete rights to specific payments. The statutory provision of Section 1 § 3 of the Child Benefits Act and its application in the present case did not discriminate against the applicants in the exercise of their right to respect for their family life.

29. The applicants contested these submissions.

30. The Court reiterates that, according to its established case-law, Article 14 is only applicable if the facts at issue fall within the ambit of one ore more of the substantive provisions of the Convention and its Protocols (see, among many other authorities, *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, § 22; *Willis v. United Kingdom*, no. 36042/97, § 29, ECHR 2002-IV).

31. As the Court has held on many occasions, Article 14 comes into play whenever "the subject-matter of the disadvantage...constitutes one of the modalities of the exercise of a right guaranteed", or the measures complained of are "linked to the exercise of a right guaranteed"

(see *Petrovic*, cited above, § 28; *National Union of Belgian Police v. Belgium*, judgment of 27 October 1975, Series A no. 19, § 45; *Schmidt and Dahlström v. Sweden*, judgment of 6 February 1976, Series A no. 21, § 39).

32. By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision (see, *mutatis mutandis*, *Petrovic*, cited above, § 30). It follows that Article 14 – taken together with Article 8 – is applicable in the present case.

33. According to the Court's case-law, a difference of treatment is discriminatory for the purposes of Article 14 of the Convention if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see, among other authorities, *Willis*, cited above, § 39).

34. The Court is not called upon to decide generally to what extent it is justified to make distinctions, in the field of social benefits, between holders of different categories of residence permits. Rather it has to limit itself to the question whether the German law on child benefits as applied in the present case violated the applicants' rights under the Convention. Like the Federal Constitutional Court in the pilot cases (see paragraph 18 above), the Court does not discern sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

36. The applicants, by way of just satisfaction, claimed payment of child benefits for their son from 1 April 1994 until 31 March 1997 and for their daughter from 1 January 1994 until 31 December 2000. They maintained

that the subject matter of their complaint should not be divided between claims under the Child Benefits Act and those under the Income Tax Act, as both regulations violated their rights under the Convention.

37. The Government did, at first, not express an opinion on the matter. In their further observations of 12 July 2005, they pointed out that the present application only related to the child benefits for the period of time between 1 January 1994 and 31 December 1995, which amounted to a total of EUR 2,455 for both children.

38. The Court notes that the current proceedings are limited to the application of the Child Benefits Act as in force from 1 January 1994 until 31 December 1995. The proceedings before the Tax Courts with respect to the applicants' claims to child benefits from January 1996 onwards (see paragraph 20 above) do not fall within the scope of the present application as delimited by the decision on admissibility. Having regard to these circumstances, the Court awards the applicants EUR 2,500 as compensation for the loss of child benefits for the applicants' two children during the period of time from January 1994 to December 1995.

39. The applicants have not made any claim in respect of non-pecuniary damage. In these circumstances, the Court is not called upon to make an award under this head.

B. Costs and expenses

40. The applicant did not claim costs. Accordingly, the Court makes no award of this nature.

C. Default interest

41. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 14 in conjunction with Article 8 of the Convention;

2. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five

hundred euros) in respect of pecuniary damage, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 October 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Josep CASADEVALL
President