JV 2006/1
Europees Hof voor de Rechten van de Mens
25 oktober 2005, 58453/00.
(Mr. Casadevall
Mr. Bonello
Mr. Pellonpää
Mr. Traja
Mr. Borrego Borrego
Mr. Mijovic
Mr. Jaeger)

Niedzwiecki,
tegen
Duitsland.
(...; red.)

Gezinsleven, Kinderbijslag, Discriminatie, Duitsland

[EVRM - 8; 14]

» Samenvatting

Niedzwiecki van Poolse nationaliteit emigreerde in 1987 naar Duitsland. Daar verkreeg hij in 1989 een voorlopige verblijfsvergunning (Aufenthaltserlaubnis). Vervolgens werd hem in 1991 een beperkte verblijfstitel wegens bijzondere omstandigheden verleend (Aufenthaltsbefugnis). In 1997 verkreeg hij een permanente verblijfsvergunning (Aufenthaltsberechtiging). Voor zijn in 1995 geboren dochter vroeg Niedzwiecki kinderbijslag aan welke hem werd geweigerd omdat hij op dat moment in het bezit was van een voorlopige verblijfsvergunning. Het Bundesverfassungsgericht weigerde de zaak in behandeling te nemen.

Het Hof overweegt dat door kinderbijslag toe te kennen, staten hun respect voor gezinsleven in de zin van art. 8 EVRM kunnen bewijzen. Een verschillende behandeling zonder redelijke rechtvaardiging is in strijd met art. 14 EVRM. Het Hof wordt in het algemeen niet gevraagd te beslissen in hoeverre het gerechtvaardigd is om onderscheid te maken op het gebied van sociale voorzieningen tussen houders van verschillende categorieën verblijfsvergunningen. Zij beperkt zich tot de vraag of het Duitse recht op kinderbijslag zoals toegepast in deze casus inbreuk maakt op klagers rechten onder het Verdrag. Het Hof verwijst naar een beslissing van het Bundesverfassungsgericht uit 2004 in eenzelfde kwestie nadat de procedure van klager al was afgerond. Gelijk het Bundesverfassungsgericht ziet het Hof geen voldoende redenen die een verschillende behandeling rechtvaardigen ten aanzien van toekenning van kinderbijslag aan vreemdelingen welke in het bezit zijn van een stabiele verblijfsvergunning aan de ene kant en vreemdelingen die deze niet hebben aan de andere kant. Schending van art. 14 jo art. 8 EVRM.

» Uitspraak

(...; red.)

Procedure

1. The case originated in an application (no. 58453/00) 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 a Polish national, Mr Jaroslaw Niedzwiecki (‘‘the applicant’’), on 27 October 1999.

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 applicant alleged, in particular, that the refusal of child benefits between July and December 1995 amounted to discrimination in the exercise of his right to respect for family life.

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

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

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

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

The facts

I. The circumstances of the case

8. The applicant was born in 1961. At the time the application was lodged he lived in Erlenbach in Germany. He currently resides in Swidnica in Poland.

1. The applicant's situation in Germany

9. The applicant immigrated to Germany in February 1987. His request for asylum was rejected. His expulsion was, however, suspended under the agreement of the Home Secretaries of the Länder not to expel Polish nationals (''*Ostblockbeschlüsse*'' *der Innenminister der Länder*). In November 1989 the applicant obtained a provisional residence permit (*Aufenthaltserlaubnis*). In January 1991, following an amendment of the Aliens Act, he was issued with a limited residence title for exceptional purposes (*Aufenthaltsbefugnis*). This residence title was renewed every two years, the last time in January 1995 until January 1997. In April 1997 the applicant obtained an unlimited residence permit (*Aufenthaltsberechtigung*).

10. In July 1995 the applicant's daughter was born.

2. The child benefit proceedings before the Labour Office

11. On 28 July 1995 the applicant applied to the Aschaffenburg Labour Office (Arbeitsamt) for child benefits according to Section 1 of the Federal Child Benefits Act (Bundeskindergeldgesetz, see relevant domestic law below).

12. On 18 August 1995 the Labour Office dismissed the applicant's request under Section 1 par. 3 of the Child Benefits Act. It noted that the applicant only had a limited residence title for exceptional purposes, and no unlimited residence permit or provisional residence permit, as required under Section 1 par. 3.

13. On 12 October 1995 the Federal Labour Office (*Bundesanstalt für Arbeit*) rejected his objection.

3. The proceedings before the Social Court

14. The applicant lodged an action with the Würzburg Social Court (*Sozialgericht*), claiming that he had been residing in Germany since 1987 and that he should, therefore, have the right to child benefits.

15. On 21 April 1997 the Social Court dismissed the applicant's action regarding child benefits between July 1995 and April 1997. It confirmed that only aliens with an unlimited residence permit or with a provisional residence permit were entitled to the payment of child benefits under Section 1 par. 3 of the Child Benefits Act,

as in force until 31 December 1995. According to the Social Court, the legislature had only intended to grant child benefits to aliens who were likely to stay in Germany on a permanent basis. Aliens with only a limited residence title for exceptional purposes were, however, not likely to stay. The court further pointed out that this distinction did not violate the German Basic Law. In the present case, the legislature had remained within its wide margin of appreciation in social law matters.

4. The appeal proceedings

16. On 23 April 1998 the Bavarian Social Court of Appeal (*Landessozialgericht*) dismissed the applicant's appeal to the extent that his claims under the Child Benefits Act until 31 December 1995 were concerned. The Court of Appeal confirmed the lower court's reasoning, noting that the applicant did not have a stable residence permit in 1995, as his limited residence title for exceptional purposes had had to be renewed every two years. Likewise, referring to the wide margin of appreciation of the legislature, it took the view that Section 1 par. 3 of the Federal Child Benefits Act was compatible with the Basic Law. In this respect, it considered that until December 1995 families had benefited from child benefits and tax deductions (*Kinderfreibetrag*) as a system of compensation (dualer Familienlastenausgleich). The applicant and his wife had paid taxes in 1995 but had not obtained child benefits. In the court's view, this taxation, not the refusal of child benefits, might have violated the Basic Law; however, it was not for the social courts to decide on that matter.

17. On 18 March 1999 the Federal Social Court (*Bundessozialgericht*) dismissed the applicant's appeal on points of law.

18. The applicant lodged a constitutional complaint combined with a request for an interim measure. He claimed that the relevant provision of the Federal Child Benefits Act was discriminatory and racist, and violated his right to respect for his family life. In addition, he alleged that the refusal of his request for child benefits infringed the principle of social justice (*Sozialstaatsprinzip*) laid down in Article 20 par. 4 of the Basic Law.

19. On 21 October 1999 the Federal Constitutional Court (*Bundesverfassungsgericht*) refused to entertain his complaint and rejected his request for an interim measure.

5. The proceedings concerning claims after 1 January 1996

20. On 3 July 2001 the Würzburg Social Court decided that it was not competent to deal with the applicant's claims regarding child benefits for the period after 1 January 1996 and transferred the proceedings to the Nuremberg Tax Court (*Finanzgericht*). The proceedings before the Tax Court are still pending.

II. Relevant domestic law and practice

21. 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. ...''

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 par. 2 of the Income Tax Act (*Einkommenssteuergesetz*).

23. By decision of 6 July 2004 (1 BvL 4/97, 1 BvL 5/97, 1 BvL 6/07), the Federal Constitutional Court ruled that section 1 par. 3 of the Child Benefits Act in the above cited version was incompatible with the right to equal treatment under Article 3 of the Basic Law. Accordingly, the legislator was ordered to amend the law by 1 January 2006.

24. 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 par. 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.

The law

I. Alleged violation of Article 14 in conjunction with Article 8 of the Convention

25. The applicant complained that the German authorities' refusal of child benefits for the period of time between July and December 1995 amounted to discrimination, racism and inhuman treatment.

26. The Court has examined this complaint 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.''

27. 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 par. 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.

28. The applicant contested these submissions.

29. 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, par. 22; *Willis v. United Kingdom*, no. 36042/97, par. 29, *ECHR* 2002-IV).

30. 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, par. 28; *National Union of Belgian Police v. Belgium*, judgment of 27 October 1975, Series A no. 19, par. 45; *Schmidt and Dahlström v. Sweden*, judgment of 6 February 1976, Series A no. 21, par. 39).

31. 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, par. 30). It follows that Article 14 – taken together with Article 8 – is applicable.

32. 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, par. 39).

33. 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 applicant’s rights under the Convention. In this respect the Court notes the decision of the Federal Constitutional Court concerning the same issue which was given after the proceedings which form the subject matter of the present application had been terminated (see paragraph 24 above). Like the Federal Constitutional Court, 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.

II. Further alleged violations

34. In his further observations on the merits of 1 June 2005, the applicant complained under Article 6 par. 2 of the Convention about the length of the proceedings before the Tax Courts and about the Federal Constitutional Court’s refusal to issue an interim order in his favour.

35. The Court notes that these complaints fall outside the scope delimited by the Chamber’s decision on admissibility. It follows that the Court has no jurisdiction to examine the merits of these complaints (see, among other authorities, *Süßmann v. Germany*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, par. 29; and *Ionescu v. Romania*, no. 35037/99, par. 68, 28 June 2005).

III. Application of Article 41 of the Convention

36. 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.''

37. The applicant claimed compensation for pecuniary and non-pecuniary damage, and the reimbursement of his costs and expenses.

A. Damage

38. The applicant, partially relying on documentary evidence, claimed € 16,000,= in respect of pecuniary damage, including child benefits for the months July to December 1995 (DEM 420), additional child benefits (*Kindergeldzuschlag*) (approximately DEM 1,000), lost interests (DEM 1,943.37), the costs of the Administrative Court proceedings aimed at obtaining a residence permit (DEM 1,112.50) and the costs of legal counsel relating to these proceedings (DEM 550.04); costs charged by his legal counsel in the proceedings relating to the child benefits (DEM 1,469.15); the applicant's own expenses (DEM 17,000); and an appropriate compensation for inflation (DEM 5,032.92). He argued, in particular, that he instigated proceedings aimed at obtaining a residence permit merely in an attempt to secure the payment of child benefits.

39. The applicant also sought compensation for non-pecuniary damage, arguing that the discrimination and alleged attacks against their human dignity had caused his family severe suffering. He further complained about political persecution. He claimed a total of € 200,000,= under this head. He additionally claimed a sum of € 200,000,= as compensation for the violation of the Convention to the detriment of thousands of families.

40. The Government did not express an opinion on the matter within the set time-limit.

41. The Court awards the applicant € 600,= as recompense for the child benefits and supplements for the months July to December 1995, including compensation for lost interests. With respect to the costs incurred by the proceedings aimed at obtaining a residence permit, the Court does not discern a sufficient causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

42. As to the non-pecuniary damage claimed, the Court, having regard to all the elements before it, considers that the finding of a violation of Article 14 in conjunction with Article 8 constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage sustained by the applicant.

43. The Court further finds that the applicant's claims for reimbursement of the costs and expenses incurred before the domestic courts and before this Court should be considered under the head of ''costs and expenses'' below.

B. Costs and expenses

44. The applicant claimed DEM 1,469.15 for costs and expenses incurred before the domestic courts and € 17,000,= for his own expenses (see paragraph 38 above).

45. The Government did not express an opinion on the matter.

46. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, taking into account the fact that the applicant's complaint was only declared partially admissible, the Court considers it reasonable to award the sum of € 300,= for

costs and expenses incurred by the domestic proceedings. With respect to the applicant's own expenses before this Court, the Court considers it reasonable to award the applicant, who was not represented by a lawyer, the sum of € 500,= under this head.

C. Default interest

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

For these reasons, the Court ananimously

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

2. *Holds*

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 par. 2 of the Convention, € 1,400 (one thousand four hundred euros) for pecuniary damage and costs and expenses, 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. *Holds* that the finding of a violation constitutes sufficient just satisfaction in respect of any non-pecuniary damage sustained by the applicant;

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

» Noot

Niedzwiecki was een Poolse onderdaan die in 1987 naar Duitsland vluchtte en daar asiel aanvroeg. Zijn aanvraag werd afgewezen, maar zijn uitzetting opgeschort op grond van het Duitse beleid voor de eenwording om Poolse onderdanen niet uit te zetten. In 1991 kreeg hij vervolgens een tijdelijke verblijfstitel voor uitzonderlijke doeleinden (Aufenthaltsbefugnis), die elke twee jaar verlengd moest worden. In 1997 verwierf hij een verblijftitel voor onbepaalde tijd. In 1995 vroeg hij een kinderbijslag uitkering aan voor zijn pas geboren dochter. Deze aanvraag werd echter afgewezen omdat hij een tijdelijke verblijfsvergunning had. Verschillende rechters verwierpen vervolgens het beroep dat de heer Niedzwiecki had ingesteld met het argument dat het de bedoeling van de wetgever was alleen kinderbijslag toe te kennen aan vreemdelingen die waarschijnlijk permanent in Duitsland zouden blijven.

De positie van Niedzwiecki was min of meer vergelijkbaar met die van mevrouw Martinez Sala in de uitspraak van het Hof van Justitie EG van 12 mei 1998 (nr. C-85/96, «JV» 1998/128). Mevrouw Sala had ook een zwakke verblijfstitel en kreeg daarom geen kinderbijslag. In haar situatie hielp echter het feit dat ze een EU-burger was haar alsnog aan een recht op kinderbijslag gebaseerd op de art. (nu) 12 en 18 EU-verdrag.

Omdat Niedzwiecki op dat moment nog geen EU-onderdaan was, had hij geen ander alternatief dan naar het Europese Hof in Straatsburg te stappen, waar hij klaagde dat de weigering van kinderbijslag neerkwam op discriminatie, racisme en onmenselijke behandeling en daardoor een schending van art. 14 EVRM met zich meebracht. Verrassend hierbij is dat hij deze klacht niet indient in samenhang met een schending van eigendomsrechten, beschermd door art. 1 Protocol 1 EVRM,

zoals eerder was gebeurd en gehonoreerd in uitspraken van het EHRM in de zaken Gaygusuz (RV 1996, 87) en Poirrez (RV 2003, 81), maar dat hij de klacht koppelt aan een schending van het recht op respect van familieleven van art. 8 EVRM. (Een dergelijke koppeling is noodzakelijk gezien het accessoire karakter van art. 14 EVRM.)

Terwijl deze klacht in Straatsburg in behandeling was, deed het Duitse Constitutionele Hof op 6 juli 2004 in een andere zaak de uitspraak dat het bewuste artikel in de Duitse Kinderbijslagwet waarop de kinderbijslag van Niedzwiecki was geweigerd, in strijd was met het gelijkheidsbeginsel neergelegd in art. 3 van de Duitse Grondwet. Volgens het Constitutionele Hof was er onvoldoende rechtvaardiging te vinden voor het verschil in behandeling tussen ouders die wel en ouders die niet in het bezit waren van een stabiele verblijfstitel. En aangezien het toekennen van kinderbijslag is gerelateerd aan de bescherming van het familieleven op grond van art. 6 van de Grondwet, kunnen alleen zwaarwegende redenen ongelijke behandeling rechtvaardigen en zulke redenen zijn er volgens het Constitutionele Hof niet. Zie overweging 24 waar het EHRM de argumentatie van het Constitutonele Hof aanhaalt: ‘‘In so far as the provision was aimed at limiting the granting of child benefits to those aliens who were 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 permit did not form a sufficient basis to predict the duration of his or her stay in Germany.’’

In de procedure voor het Hof in Straatsburg stelde de Duitse regering zich echter op het standpunt dat kinderbijslaguitkeringen niet onder het bereik van art. 8 EVRM vielen, omdat de algemene verplichting van de Staat om familieleven te beschermen geen concrete rechten op specifieke betalingen zou geven. Het hof is echter een geheel andere mening toegedaan. Volgens het hof zijn staten door het toekennen van kinderbijslag juist in staat om hun respect voor familieleven in de zin van art. 8 EVRM te demonstreren. Kinderbijslaguitkeringen komen daardoor binnen het bereik van art. 8 en derhalve is art. 14 EVRM, in samenhang met art. 8 van toepassing (para 31). Het hof verwijst vervolgens expliciet naar de genoemde uitspraak van het Duitse Constitutionele Hof en is eveneens van mening dat er geen voldoende redenen zijn voor een verschil in behandeling inzake de toekenning van kinderbijslag tussen vreemdelingen die in het bezit zijn van een permanente verblijfstitel en vreemdelingen die dat niet zijn. Het Hof komt vervolgens tot de conclusie dat er een schending is van art. 14, in samenhang met art. 8 EVRM. Het Hof komt tot eenzelfde oordeel in een op dezelfde dag gewezen arrest in de vrijwel identieke zaak Okpisz (no. 59140/00).

Het oordeel van het Duitse Constitutionele Hof liet aan het Europese Hof overigens niet veel ruimte over om anders te beslissen. De duidelijke link die de hoogste Duitse rechter tussen het recht op familieleven en de aanspraak op kinderbijslag had gelegd en de bewoordingen dat rechtvaardiging van een weigering alleen op grond van ‘‘very weighty reasons’’ mogelijk was, maakte de manoeuvreerruimte voor het Europese Hof bij voorbaat vrij klein.

De door het Hof in deze uitspraken gehonoreerde samenhang van art. 14 met art. 8 om het verbod van discriminatie op het gebied van sociale uitkeringen vorm te geven, kan van belang zijn in situaties waarin er twijfel bestaat of de betreffende uitkering onder het eigendomsrecht van art. 1 Protocol 1 kan worden gebracht. Deze uitspraak zal voor het Nederlandse kinderbijslagstelsel, dat gebaseerd is op ingezetenschap overigens weinig invloed hebben. Dit ingezetenschap zal na een aantal jaren over het algemeen worden

aangenomen ook als de vreemdeling nog met een vergunning voor bepaalde tijd in Nederland verblijft. Wel kan deze uitspraak in Nederland in het kader van de Wet BEU mogelijk een rol spelen. Dit zal dan waarschijnlijk niet bij kinderbijslaguitkeringen zijn, omdat de Centrale Raad een schending van art. 14 hier tot nu toe niet aanneemt. Een exportverbod wordt volgens de Centrale Raad voldoende gerechtvaardigd wanneer er geen op handhaafbaarheid gericht verdrag met het betreffende land is afgesloten (zie CRvB 17 september 2004, RV 2004, 78). Maar de vraag is hoe het oordeel zou luiden wanneer bij een in een niet verdragsland verblijvende arbeidsongeschikte een inkomensvervangende uitkering als de WAO wordt ingetrokken vanwege de Wet BEU en hij met achterlating van vrouw en kinderen naar Nederland moet terugkeren om zijn recht op een WAO-uitkering te laten herleven? Zou dat geen schending van art. 8 met zich meebrengen, gekoppeld aan een niet te rechtvaardigen vorm van discriminatie naar nationaliteit?

PEM