

## **Answer**

**of the Federal Government**

**to the Minor Interpellation of the Members of the Bundestag Azize Tank, Ulla Jelpke, Matthias W. Birkwald, further Members of the Bundestag and the Left Party parliamentary group.**

**– Printed paper 18/1183 –**

### **Enabling the payment of ghetto pensions to Jewish resistance fighters and Jewish women and men residing in Poland**

Preliminary remarks of the questioners

Since 2000, the Polish Association of Jewish Veterans and Victims of the Second World War based in Warsaw has been fighting for its members' entitlement to receive German pensions to be recognised. The association brings together former Jewish resistance fighters, insurgents, partisans, inmates of ghettos and fascist concentration camps and Holocaust survivors who were able to save themselves from extermination by the Germans, *inter alia* by acquiring "Aryan papers".

Out of the Polish Jews still alive in 2000, 860 survivors have lodged an application with German authorities for the payment of a pension. To date, however, German authorities have rejected every application. On 1 October 2009, the number of applicants still alive was approximately a mere 250 people. The people are aged between 84 and 90 years old and often have health issues. As part of the "Germany Doctrine", the Federal Republic of Germany considers itself to have been, since 8 May 1945, the same subject under international law as the Third Reich (cf Bundestag printed paper 17/14807). The Federal Republic has a special duty towards the victims of German fascism given the crimes perpetrated to provide them with a humane retirement.

The ruling handed down by the Federal Social Court (*Bundessozialgericht* - BSG) on 3 June 2009 (B 5 R 26/ 08 R) specified criteria paving the way for Jewish women and men who worked in the occupied territories in ghettos to be paid a German pension. According to information provided by the Federal Chancellery to the Association of Jewish Veterans on 1 April 2010 "[this] however only applies to former victims of National Socialist persecution whose domicile is outside of Poland. For victims of Nazi persecution in Poland the ruling did not lead to any change. For persons regularly residing in Poland on 31 December 1990, the German-Polish Pensions Agreement of 9 October 1975 continues to apply for their further residency in Poland".

Here it is important to underline that the seminal ruling by the Federal Social Court was based precisely on the claim filed for a standard old-age pension by a Polish Jewish woman who worked in the Drohiczyn ghetto (in the Poland then occupied by Germans) and after liberation emigrated to Israel in 1956.

In the declaratory part of the court's judgement it was stated that there was nothing to stop a pension payment benefit being exported abroad, as Germany has concluded a Social Insurance Agreement with Israel. Here, the 5th Senate of the Federal Social Court underlined in this judgement that "[t]he unique historical situation of forced periods of

residence in the ghetto with the exploitation of the labour of the victims of persecution, without which the majority of the working relationships in the ghetto would have been subject to statutory pension contributions, however, [is] sufficient a factual differentiation characteristic to counter the accusation that it is an arbitrary distinction that is being made. The Senate believes constitutional concerns relating to the financial burden faced by the pension insurance system as a result of including additional people who have not paid contributions (cf BSG Decision 98, 48 = Social Law 4-5075 Section 1 (3), Recital 118) are not convincing in view of the additional federal subsidy for the blanket compensation of work not covered by contributions pursuant to Section 213 (3) Book 6 of the German Social Code.”

Even in the context of revising the Act regarding the conditions for making pensions payable on the basis of employment in a ghetto (*Gesetz zur Zahlbarmachung von Renten aus Beschäftigungen in einem Ghetto – ZRBG*) and enabling payment of pension entitlements to Jewish ghetto labourers, the Federal Republic of Germany has adhered to the view that it is possible to enable the payment of pension to all countries, apart from the former ghetto labourers who kept their domicile in the Republic of Poland after the liberation from German fascism (cf Answer of the Federal Government to Written Question 74 of the Member Azize Tank in Bundestag printed paper 18/815).

Following the BSG ruling, in 2009 the Association of Jewish Veterans turned repeatedly to the Federal Pension Insurance (*Deutsche Rentenversicherung Bund*) pointing out the unequal treatment. Furthermore, its chairman Tomasz Miedziński asked the Federal Chancellor Dr Angela Merkel personally to put a stop to this unfounded unequal treatment of the ghetto labourers and to pay a pension pursuant to ZRBG to the few remaining living Jewish ghetto labourers in Poland whose application documents have already been at the Federal Office for Central Services and Unresolved Property Issues for several years.

Yet, to this very day, the Federal Republic of Germany refuses to enable payment of pensions for Polish Jewish women and men who worked in ghettos and are resident in the Republic of Poland. The Federal Chancellery issued the following statement to the Holocaust survivors affected in Poland, “no entitlement to the payment of a German pension to Poland [exists] [from] the ghetto contribution periods in accordance with the ZRBG and any other German periods. The accession of Poland to the European Union has not changed this legal situation [...] Even in the event that the German period does not lead to any increase in the pension or Polish insurers reject an application for benefits under Polish regulations, there is still no entitlement to the payment of a pension from the German pension insurance system. Equally, in this case it is not possible for a hardship allowance to be provided or earlier contributions to be reimbursed from the German pensions insurance system”.

The grounds given by the Federal Government for the refusal to enable payment of ghetto pensions under the ZRBG to Jewish ghetto labourers were also verified back on 12 January 2010 by the Polish Social Insurance Organisation ZUS and rejected. According to ZUS’s information “the 1975 German-Polish agreement [concerns] persons who changed their domicile and resettled on the territory of the other state by 31 December 1990 or persons who were employed and insured up until 31 December 1990 on the territory of a state party to the agreement and in this connection either suffered an accident or contracted an occupational illness. [...] The agreement in question dated 9 October 1975 however does not include benefits paid to victims of the Second World War. The matter raised – the decision by the Federal Social Court regarding pensions from employment in ghettos during the Second World War – does not come under the remit of the Polish Social Insurance Organisation (ZUS).”

The Federal Government has been aware of this underlying legal situation in Poland since 4 March 2010 if not earlier (cf. Answer of the Federal Government to Written Question 74

by the Member of the Bundestag Azize Tank, Bundestag printed paper 18/815).

1. What has the Federal Government done to date and what is it currently doing in order to be able to grant the claims of Jewish ghetto labourers residing in Poland to date excluded from the provisions enabling the payment of German old-age pensions – under the Act regarding the conditions for making pensions payable on the basis of employment in a ghetto - and to put them on an equal footing with other Jewish ghetto labourers?

At the end of April, the Federal Ministry of Labour and Social Affairs will conduct talks with the Polish government in order to explore possible solutions departing from the laws in force for the people affected from Poland.

2. What legal obstacles stand in the way of making German pensions under ZRBG payable to Jewish ghetto workers residing in Poland by converting the old-age pensions into compensation payments or periodic payments which would be fully equivalent to pensions pursuant to the Act regarding the conditions for making pensions payable on the basis of employment in a ghetto (please state where appropriate specific norms of international law and the constitutional law of the Federal Republic of Germany and the Republic of Poland)?

3. In the opinion of the Federal Government, what stands in the way of converting old-age pensions pursuant to ZRBG into compensation pensions or period payments in order to honour Germany's historical obligation and responsibility, which the governing coalition announced in its coalition agreement (CDU, CSU and SPD) so that "the legitimate interest of the Holocaust survivors in appropriate compensation for the work performed in a ghetto is accommodated", also in light of the relatively low number of entitled claimants in Poland?

Questions 2 and 3 will be answered together.

The Federal Government is conscious of its historical responsibility for the survivors of the Holocaust and for this reason set a bill in motion to amend the ZRBG enabling former ghetto employees to receive their pensions retroactively from July 1997 in the future as a result of the removal of the 4-year exclusionary period for the payment of benefits and the cut-off date for the submission of their applications.

The Federal Government is of the opinion that it is not possible to "convert" old-age pensions pursuant to the ZRBG into compensation pensions or other "periodic payments". There is no basis whatsoever in law for such a conversion.

Pensions law on the one hand and compensation law on the other are legal areas with completely different provisions pursuing completely different aims and objectives. Whilst under pension law, social insurance pensions are paid on the merits of employment subject to social security contributions, benefits under compensation law are intended to provide reparation. They are paid regularly because a victim has suffered damage. It is not possible therefore, to transfer one type of benefit to another. Please also refer to the answer to question 1.

4. What insurmountable provisions in international law or political facts stand in the way of the Federal Republic of Germany and the Republic of Poland immediately agreeing to a bilateral solution to enable the payment of ghetto pensions pursuant to the ZRBG for Jewish ghetto labourers residing in Poland or providing compensation pensions or periodic payments which would be fully equivalent to the pensions pursuant to the Act regarding the conditions for making pensions payable on the basis of employment in a ghetto?

5. What insurmountable provisions in domestic law or political facts stand in the way of the Federal Republic of Germany using its legislative scope of action to unilaterally

immediately enable the payment of ghetto pensions or to provide compensation pensions or periodic payments which would be fully equivalent to pensions pursuant to the Act regarding the conditions for making pensions payable on the basis of employment in a ghetto?

6. On the basis of which specific political and legal deliberations does the Federal Government hold the opinion that the Federal Government is not able to take action to modify the existing agreement with Poland and thus is not able to change the current legal situation with regard to enabling the payment of ghetto pensions to Jewish ghetto labourers in Poland because the agreement from 1975 “according to Section 110 (3) Book Six of the German Social Code (SGB VI) takes precedence over domestic law as a intergovernmental agreement“ (cf Answer of the Federal Government to Written Question 74 of Member of the Bundestag Azize Tank, Bundestag printed paper 18/815)?

7. On the basis of which specific political and legal deliberations is the Federal Republic of Germany of the opinion that “the payment of pensions to persons living in Poland from Polish as well as German periods of insurance [...] is the sole responsibility of the Polish insurer” if at the same time it regards itself as having constituted, since 8 May 1945, the same subject in international law as the German Reich and according to the coalition agreement is “conscious of its responsibility for the survivors of the Holocaust, who experienced unspeakable suffering during the National Socialist period” (cf. Answer of the Federal Government to Written Question 74 of Member of the Bundestag Azize Tank, Bundestag printed paper 18/815)?

Questions 4 to 7 will be answered together.

A payment of pensions pursuant to ZRBG to former ghetto labourers living in Poland is in opposition to the agreement concluded on 9 October 1975 between the Federal Republic of Germany and the People’s Republic of Poland on pension and accident insurance. The provisions of the 1975 agreement must be seen in connection with the historical context and the political circumstances at the time. The agreement in 1975 resolves the extremely complicated situation in the field of social security between Germany and Poland, which arose as a result of the territorial changes after the First and Second World War and the population shifts this triggered.

The 1975 agreement is an integration agreement. This means the pension insurance agency of the state in which the claimant lives pays a total pension from the insurance periods accumulated in Germany and Poland. The pension insurance agency of the respective other state on the other hand is released from any obligation to pay benefits. In the negotiations on the 1975 agreement, the Polish side had made it clear that it did not want to permit different treatment of eligible claimants on Polish territory.

Even after the political changes and the conclusion of a new agreement in 1990 on the basis of the principle of being able to export benefits to another country, both the German and Polish side explicitly confirmed the continuation of the integration principle contained in the 1975 agreement in order to respect the legitimate expectations of the people affected up until that time, as long as they do not change their place of residence. Even with Poland’s accession to the European Union this was explicitly enshrined in European law as an exception to the principle of being able to export benefits otherwise applicable.

The social insurance agreements concluded by Germany come under intergovernmental law. Their transformation into national law (Article 59 of the German Basic Law) means that whilst these have become ordinary statutory federal law, they do – as more specific provisions - take precedence over it pursuant to Section 110 (3) Book Six of the German Social Code. This type of agreement cannot be changed unilaterally through domestic legislation, but only jointly with the respective other state party to the agreement.

Please also refer to the answer to question 1.

8. In the opinion of the Federal Government, to what extent is the Polish social insurance organisation ZUS's legal interpretation cited in the preliminary remarks that the Social Insurance Agreement from 1975 by no means rules out ghetto pensions being exported to Poland correct (please give reasons)?

The legal interpretation of ZUS cited in the questioners' preliminary remarks is not in connection with an export of pensions with periods pursuant to ZRBG, it is in connection with entitlements and accrued rights in accident insurance.

9. Has the National Regulatory Control Council (NRCC) also examined the special issue of enabling payment of ghetto pensions to Jewish ghetto labourers residing in Poland during the course of its review of the cabinet draft on the Act regarding the conditions for making pensions payable on the basis of employment in a ghetto?

a) If not, why not?

b) If so, what was the outcome?

c) What alternative solutions were proposed by the NRCC as part of its review?

The task of the National Regulatory Control Council is to review the regulatory drafts submitted to it by the Federal Government in line with its mandate. The question of whether Jewish ghetto labourers residing in Poland are also entitled to pension payments pursuant to the ZRBG was not the subject of the change to the ZRBG. Consequently, the National Regulatory Control Council did not deal with this question in the context of its review.

10. What was the outcome of the evaluation of the ZRBG by the National Regulatory Control Council (NRCC) after the expiration of the two-year period after the adoption of the ZRBG and what role did the special issue of enabling payment of ghetto pensions to Jewish ghetto labourers residing in Poland play in this, which has been known to the Federal Government since 2000 if not before, when the German Federal Pension Insurance was informed by the Association of Jewish Veterans and Victims of the Second World War based in Warsaw?

The National Regulatory Control Council was not established until autumn 2006, by the Act on the establishment of a National Regulatory Control Council (*Gesetz zur Einsetzung eines Nationalen Normenkontrollrates*). Consequently it has not conducted an evaluation of the ZRBG.