



**Germany - Federal Fiscal Court, judgment III R 60/99**

The Federal Fiscal Court decided that on a case in which a stateless person applied for child benefits from the German government. The Court held that neither Art. 24 nor Art. 29 of the 1954 Statelessness Convention provide for a right to claim child benefit and that this ruling is not unconstitutional.

**Case name (in original language) :** BFH, Urteil vom 22. November 2007 – III R 60/99 –, BFHE 220, 39, BStBl II 2009, 910

**Case status:** Decided

**Case number:** III R 60/99

**Citation:** Federal Fiscal Court („BFH“), Decision of 22 November 2007 - III R 60/99

**Date of decision:** 22/11/2007

**State:** Germany

**Court / UN Treaty Body:** Federal Fiscal Court

**Language(s) the decision is available in:** German

**Applicant's country of residence:** Germany

**Legal instruments:** 1954 Statelessness Convention, European Convention on Human Rights (ECHR), European Union law

**Key aspects:** Access to social and economic rights, Discrimination

**Relevant Legislative Provisions:**

Art. 24 and Art. 29 of the 1954 Statelessness Convention

Section 62(2) of the Income Tax Act (*Einkommensteuergesetz*, “EStG”)

Federal Child Benefits Act

**Facts**

The parties are in dispute as to whether the plaintiff, as a stateless person with a permit to stay as of February 1998, may apply for child benefits for his two children, A (born in 1986) and B (born in 1996).

The plaintiff was a citizen of the Soviet Union in the past. He lives with his wife in Germany since 1993. According to the travel document issued by the municipal authorities on 8 July 1998, the applicant is stateless and has a residence permit (Aufenthaltsbefugnis) in Germany. On 25 August 1998 the plaintiff applied for child benefits for both children to the defendant (the Family Fund). The Family Fund rejected this application by decision of 17 September 1998, as the plaintiff was not in the possession of a valid residence permit (Aufenthaltserlaubnis or Aufenthaltsberechtigung).

The defendant rejected an appeal against his decision. The plaintiff therefore brought the matter before the Fiscal Court, which ruled in favour of the plaintiff.

### **Legal arguments by the applicant**

The defendant (Family Fund) appeals against the decision of the Fiscal Court. The defendant argues that the decision of the Fiscal Court would violate Article 29 of the 1954 Statelessness Convention and Section 74 of the Income Tax Act in conjunction with Section 107 of the Social Security Code. According to Section 31(3) of the Income Tax Act, the child benefit is paid monthly throughout the year as a tax refund. The extent to which stateless persons are entitled to equal treatment with German nationals, in the area of child benefit under the new rules on family allowance in the 1996 Annual Tax Act (*Jahressteuergesetz*, "JStG"), is therefore governed by Article 29 of the 1954 Statelessness Convention. This provision treats stateless persons unconditionally in the same way as German nationals as regards the taxation of income. However, a stateless person may rely on that equal treatment with German nationals only from the month in which he or she received a travel document under Article 29 JStG as proof of statelessness, according to Article 28 of the 1954 Statelessness Convention. This binding status decision is also relevant for the entitlement to child benefits. As already decided by the Fiscal Court, the possession of a residence permit, as opposed to the mere right to claim a residence permit, is of decisive importance. As the plaintiff only received the travel document according to Article 28 of the 1954 Statelessness Convention in July 1998, he could only claim equal treatment with a German national with regard to child

benefits from that month onwards.

The Family Fund seeks the annulment of the decision of the Fiscal Court in so far as it obliged the Fund to grant child benefits to the applicant from February to July 1998 and from August 1998 and dismissed the applicant's claim in that regard

### **Legal arguments by the opposing party**

The applicant claims that the Court should dismiss the appeal.

### **Decision & Reasoning**

The Federal Fiscal Court held that, contrary to the Fiscal Court's decision, the 1954 Statelessness Convention does not provide a legal basis for the plaintiff's entitlement to child benefits: "According to the Senate's decision regarding the verbally identical Art. 24(1)(b)(i)(ii) of the Geneva Refugee Convention in its ruling of 25 October 2007 III R 90/03 (BFH/NV 2008, 286), refugees are to be treated as equal to German nationals with regard to social security law (including family constitutional law), but to the exclusion of benefits or partial benefits which are provided exclusively from public funds. Similarly, any entitlement to child benefits under Article 24(1)(b)(i)(ii) of the 1954 Statelessness Convention must be denied because child benefits – irrespective of whether it is part of social security (in particular "family obligations") – is paid exclusively from public funds (cf. judgment of the Federal Social Court (*Bundessozialgericht*, ("BSG") of 3 December 1996, 10 RKg 8/96, SozR 3-5870, § 1 no. 12 on the legal situation under the Federal Child Benefits Act in the version applicable prior to 1996)."

Regarding the nature of child benefits as tax refund: "The revision of the structure of family benefits by the Annual Tax Act (*Jahressteuergesetz*, "JStG") 1996 does not change this outcome. Even though the child benefits have since then generally been granted under tax law, Art. 29 of the 1954 Statelessness Convention does not provide for a right to claim child benefits (left open in the decision of the Federal Fiscal Court, BFH of 16 October 1998 VI B 192/98, BFH/NV 1999, 310).

According to Art. 29 of the 1954 Statelessness Convention, the Member States may not impose on stateless persons any duties, charges or taxes of any kind which are different from or higher than those which are or may in the future be imposed on their nationals in similar situations. By being denied child benefits, stateless persons are not subject to higher taxes than German nationals. If the stateless person earns

income subject to income tax, the minimum subsistence level of a child and costs for child care, upbringing and education are exempt from income tax as tax-free allowances under section 32(6) of the Income Tax Act.

The stateless person is therefore not taxed more heavily than a German national, who is wholly or partly exempt from income tax through the tax-free child benefit. Insofar as the tax-free child benefit serves to support the family, there is no entitlement under Art. 29 of the 1954 Statelessness Convention. This is because the child benefit has a social-law purpose which is independent of the constitutional requirements for the tax burden (inter alia, judgment of the Federal Constitutional Court (BVerfG) of 11 January 2005, 2 BvR 167/02, BVerfGE 112, 164, BFH/NV 2005, exhibit 3, 260). For details of the reasons given, reference is made to the Senate's ruling in BFH/NV 2008, 286 concerning the verbally identical provision in the Geneva Convention.

The revision of section 62 of the Income Tax Act, which requires a specific residence status for at least three years and integration into the German labour market as a prerequisite to claim child benefit, is anchored in constitutional law. With regard to potentially contradictory decisions of the European Court of Human Rights and the European Court of Justice: "A limitation of the right to claim child benefit under section 62(2) of the Income Tax Act in its revised version does not, contrary to the Fiscal Court of Cologne's decision in EFG 2007, 1247, conflict with the judgment of the European Court of Human Rights of 25 October 2005, application no. 59140/00, Okpisz/Deutschland (BFH/NV 2006, exhibit 3, 357). The latter dealt with section 1(3) of the Federal Child Benefits Act 1993, as well as the decision of the Federal Constitutional Court in BVerfGE 111, 160, BFH/NV 2005, exhibit 2, 114, but not with section 62(2) of the Income Tax Act in its revised version. Nor can a right to claim child benefit be justified by the judgment of the European Court of Justice of 4 May 1999, C-262/96 (1999, I-2685), which relates to the decision of the Association Council EC-Turkey No. 3/80 (see Senate decision of 15 March 2007 III R 93/03, BFH/NV 2007, 1234)."

## **Decision documents**

[Federal Fiscal Court, judgment III R 60/99](#)

## **Outcome**

The Federal Fiscal Court ruled in favour of the defendant and appellants. The court of first instance had to conduct a full assessment of the plaintiff's compliance with

the prerequisites established in section 62 of the Income Tax Act.

Even under the current legal framework, stateless persons must prove certain residence titles, a three-year stay in Germany, integration into the German labour market in accordance with section 62 of the Income Tax Act in order to be entitled to claim child benefit.

**Links to other relevant materials related to the case (blogs, analysis, articles, reports, etc.)**

Ulrich Dürr, BFH-PR 2008, 304-305 (Comment)

W Greite, FR 2008, 886 (Comment)

Walter Greite, HFR 2008, 579-580 (Comment)

Ralf Jahn, PISTB 2008, 175-176 (Comment)

Georg Schmitt, sj 2008, Nr 9, 8-9 (Comment)

**Caselaw cited**

Federal Fiscal Court (Bundesfinanzhof, BFH) 25 October 2007 III R 90/03 (BFH/NV 2008, 286);

Federal Social Court (Bundessozialgericht ("BSG") of 3 December 1996, 10 RKg 8/96, SozR 3-5870, § 1 No. 12;

Federal Fiscal Court, BFH of 16 October 1998 VI B 192/98, BFH/NV 1999, 310;

Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) of 11 January 2005, 2 BvR 167/02, BVerfGE 112, 164, BFH/NV 2005, exhibit 3, 260;

European Court of Human Rights of 25 October 2005, application no. 59140/00, Okpisz/Deutschland (BFH/NV 2006, exhibit 3, 357);

European Court of Justice of 4 May 1999, C-262/96 (1999, I-2685)