57/6/A/2010

JUDGMENT
of 5 July 2010
Ref. No. P 31/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Teresa Liszcz – Presiding Judge
Marek Kotlinowski
Ewa Łętowska – Judge Rapporteur
Andrzej Rzepliński
Mirosław Wyrzykowski,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 5 July 2010, in the presence of the Sejm, the Public Prosecutor-General and the Council of Ministers, a question of law referred by the Circuit Court in Warsaw as to whether:

1) Article 9 of the Act of 17 December 1998 on Old-Age and Disability Pensions from the Social Insurance Fund (Journal of Laws - Dz. U. of 2009 No. 153, item 1227), insofar as it stipulates that the period of employment abroad of Polish citizens in international organisations, foreign institutions and companies - where they were transferred due to international cooperation or where they were employed with the consent of the competent Polish authorities – is taken into account provided that the worker concerned resides permanently in the current territory of the Republic of Poland, is consistent with the principle of equality before the law, expressed in Article 32 of the Constitution, and with Article 2 of the Constitution, which states that the Republic of Poland shall be a democratic state ruled by law, implementing the principles of social justice,
2) § 3(2) of the Regulation of the Council of Ministers of 9 March 1984 on the periods of employment abroad and the rules for granting old-age and disability pensions due to such employment (Journal of Laws - Dz. U. No. 17, item 81, as amended), insofar as it stipulates that the period of employment abroad of Polish citizens in international organisations, foreign institutions and companies - where they were transferred due to international cooperation or where they were employed with the consent of the competent Polish authorities – is taken into account provided that the worker concerned resides permanently in the current territory of the Polish state, is consistent with Article 2 and Article 32(1) of the Constitution,

adjudicates as follows:

* The operative part of the judgment of 23 July 2010 was published in the Journal of Laws - Dz. U No. 134, item 903.

Article 9(1) of the Act of 17 December 1998 on Old-Age and Disability Pensions from the Social Insurance Fund (Journal of Laws - Dz. U. of 2009 No. 153, item 1227 as well as of 2010 No. 40, item 224)**, as regards the premiss of the place of permanent residence in the current territory of the Republic of Poland, in the part making reference to Article 6(2)(1)(c) in conjunction with Article 65 of the said Act, is inconsistent with Article 2 and Article 32(1) of the Constitution of the Republic of Poland.**

Moreover, the Tribunal decides:

pursuant to Article 39(1)(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417 as well as of 2009 No. 56, item 459 and No. 178, item 1375)**, to discontinue the proceedings as regards the examination of constitutionality of § 3(2) of the Regulation of the Council of Ministers of 9 March 1984 on the periods of employment abroad and the rules for granting old-age and disability pensions due to such employment** (Journal of Laws – No. 17, item 81, as amended)**, due to the withdrawal of the question of law within the indicated scope.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the question of law and of the review conducted by the Constitutional Tribunal.

1.1. The premisses of admissibility of the question of law.

1.1.1. The initial issue is to ascertain whether the question of law referred by the Circuit Court in Warsaw meets the requirements which determine the admissibility of referring a question of law, and consequently the admissibility of examining the said question by the Constitutional Tribunal, in accordance with Article 193 of the Constitution. The Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), by elaborating on the constitutional regulation, specifies formal criteria which should be met by a question of law and which determine whether a given question comes from an "authorised entity" and, as such, is subject to review by the Constitutional Tribunal. The Tribunal, *ex officio* and at every stage of proceedings, verifies the existence of such authorisation; in default of the authorisation, the Constitutional Tribunal discontinues proceedings.

In the present case, there is no doubt that the question of law has been referred by a court.

Pursuant to Article 193 of the Constitution (as well as Article 3 of the Constitutional Tribunal Act, which repeats the content of the constitutional provision), it is also necessary that the answer to such a question of law will determine an issue currently before a given court. It is indisputable that such dependency entails that the content of a ruling by the Constitutional Tribunal is to have an impact on the determination of the case pending before the court which referred the question of law. Therefore, the Constitutional Tribunal has to examine whether the question of law meets the so-called functional premiss.

1.1.2. In the first version of the question of law, the court challenged the constitutionality of Article 9 of the Act of 17 December 1998 on Old-Age and Disability Pensions from the Social Insurance Fund (Journal of Laws - Dz. U. of 2004 No. 39, item 353, as amended; hereinafter: the Act on Pensions from the Social Insurance Fund), insofar as it stipulates that the period of employment abroad of Polish citizens in international organisations, foreign institutions and companies - where they were transferred due to international cooperation or where they were employed with the consent of the competent Polish authorities – is taken into account provided that the worker concerned resides permanently in the current territory of the Republic of Poland, as well as the constitutionality of § 3(2) of the Regulation of the Council of Ministers of 9 March 1984 on the periods of employment abroad and the rules for granting old-age and disability pensions due to such employment (Journal of Laws - Dz. U. No. 17, item 81, as amended; hereinafter: the Regulation of the Council of Ministers of 1984), insofar as it stipulates that the period of employment abroad of Polish citizens in international organisations, foreign institutions and companies - where they were transferred due to international cooperation or where they were employed with the consent of the competent Polish authorities – is taken into account provided that the worker concerned resides permanently in the current territory of the Polish state. In its decision of 26 February 2010, the court specified a question of law by selecting only Article 9 of the Act on Pensions from the Social Insurance Fund as a subject thereof (indicating here the consolidated version of the Act, Journal of Laws - Dz. U. of 2009 No. 153, item 1227). In the opinion of the court, in accordance with Article 186(2)(1) of the Act on Pensions from the Social Insurance Fund in the case with reference to which the court has presented the question of law, the provisions of that Act should be applied.

In that situation, in the context of the stance held by the court referring the question, the Constitutional Tribunal has discontinued the proceedings within the scope of § 3(2) of the Regulation of the Council of Ministers of 1984.

1.1.3. Adopted by the court, the way of describing the subject of the referred question of law which concerns Article 9 of the Act on Pensions from the Social Insurance Fund indicates that the court challenges a given legal norm, but at the same time it should be noted that the norm does not arise from the entire Article 9 of the Act on Pensions from the Social Insurance Fund, but – what has been emphasised in the stance of the Sejm – from a part of its paragraph 1, which stipulates that periods of employment abroad of Polish citizens, which are mentioned in Article 6(2)(1)(c), are taken into account provided that the worker concerned resides permanently in the current territory of the Republic of Poland. The subject of the question of law, which has been determined in that way, due to the functional premiss, will be subject to review of constitutionality.

1.2. The challenged provision and its normative background.

1.2.1. The regulation which was previously in force.

Although the court ultimately did not choose the provisions which were formerly applicable to be the subject of the question of law, it is of significance to analyse them, due to the fact that the case which the question refers to concerns a survivor’s pension to be granted after the death of a worker who was employed and died before the entry into force of the Act on Pensions from the Social Insurance Fund, and whose period of employment was partly governed by the Act of 14 December 1982 on the provision of old-age pensions to employees and members of their families (Journal of Laws - Dz. U. No. 40, item 267, as amended; hereinafter: the Act of 1982 on the provision of old-age pensions) and earlier regulations. The survivor’s pension which is referred to here is determined on the basis of the Act on Pensions from the Social Insurance Fund. By regulating periods taken into

account when determining the right to benefits, the Act on Pensions from the Social Insurance Fund refers to transitional situations where the period of employment overlapped, *inter alia*, with the period under the Act of 1982 on the provision of old-age pensions when (unlike in the Act on Pensions from the Social Insurance Fund) the terms 'contributory and non-contributory periods' were not used. Therefore, the Act on Pensions from the Social Insurance Fund introduces (in Articles 6 and 7) the rules for recognising various situations which were regulated in the light of previous provisions in that regard as contributory and non-contributory periods. Likewise, in the present case, there is a problem of recognising a period of employment abroad of a deceased person - employed with the consent of the competent Polish authorities – as a relevant period for determining the right to a survivor's pension, where the person, despite requirements (put forward on the basis of the Act of 1982 on the provision of old-age pensions, as well as in Article 9(1) of the Act on Pensions from the Social Insurance Fund), does not fulfil the premiss of the place of residence.

Pursuant to Article 1 of the Act of 1982 on the provision of old-age pensions, benefits due to employment in the territory of the Polish state are granted, in accordance with the terms and in the amounts specified in that Act, to the following persons: 1) a worker – in the case of being granted old-age pension rights or in the event of disability – as well as to the members of his/her family; 2) the survivors of the worker or of a person who was entitled to an old-age pension or a disability pension provided for in the Act. Article 9 of the Act of 1982 on the provision of old-age pensions specified the periods of employment in the territory of the Polish state as the periods of employment in the areas constituting part of the People's Republic of Poland as well as employment in the areas constituting the Polish state prior to delineating its present borders. By contrast, in accordance with Article 10(1), when determining the benefits set out in the Act, the periods of employment abroad of Polish citizens are also taken into account as regards: Polish diplomatic missions and consular offices, permanent missions to the United Nations and other missions or special missions, as well as in other Polish diplomatic posts, institutions or companies where Polish workers were posted or transferred; this also refers to the members of the family of the posted or transferred worker who took up employed in those institutions during their stay abroad. The said provision, in its paragraph two, authorised the Council of Ministers to determine, by way of a regulation, the periods of employment abroad of Polish citizens which are other than the periods mentioned in paragraph 1, including the periods of employment of repatriates which are taken into account when determining the right to the benefits set out in the Act, as well as the terms and rules for granting benefits due to such employment.

Exercising the above-mentioned authorisation in § 2 of the Regulation of 1984, the Council of Ministers included, among such periods, the periods of employment abroad of Polish citizens in international organisations, institutions and companies, where they were transferred due to international cooperation or where they were employed with the consent of the competent Polish authorities (consent is not required from the workers who went abroad before 9 May 1945. At the same time - pursuant to § 2(2) – the periods of employment mentioned in paragraph 1 and the periods of work abroad for foreign employers on the basis of employment agreements referred to in Article 26 of the Act of 29 December 1989 on employment (Journal of Laws - Dz. U. No. 75, item 446 and of 1990 No. 9, item 57 and No. 56, item 323; what is meant here is the employment of Polish citizens to work abroad for foreign employers on the basis of the following: 1) international agreements, 2) agreements concluded between authorised entities transferring workers and Polish citizens transferred by them to work abroad for foreign employers, 3) agreements concluded between Polish citizens and foreign employers),

which were after 1 January 1990, are taken into account provided that social insurance contributions were paid in Poland. The periods of employment referred to, *inter alia*, in paragraph 1 are not taken into consideration when determining an increase due to employment if, on the basis of those periods, there is an entitlement to a disability benefit from a foreign institution which is different from a disability pension from an additional insurance or the return of contributions in the form of a disability pension from a French or Belgian institution. However, this does not refer to periods for which social insurance contributions were paid in Poland (§ 2(4)). The Regulation, in its § 3, stipulated that taking periods referred to in § 2 into consideration takes place on the condition that the place of permanent residence of a given worker was in the territory of the Polish state.

The analysis of the provisions that were previously binding requires paying attention to the content of the Resolution No. 123 of the Council of Ministers of 3 September 1984 on the rules for taking up employment abroad by Polish citizens in order to work for foreign employers (Official Gazette - *Monitor Polski* (M. P.) No. 23, item 157, as amended; hereinafter: Resolution No. 123). The said Resolution, pursuant to its § 1, was applied to Polish citizens whose place of permanent residence was in the People's Republic of Poland and who were transferred to work abroad for foreign employers. The provisions of the Resolution were not applied to Polish citizens who were transferred to work abroad for international organisations, trading companies, or production and trading companies with Polish capital, which had their registered offices abroad, banks, as well as Polish citizens who were transferred to work in the Czechoslovak Socialist Republic and the German Democratic Republic on the basis of agreements concluded with those countries. The provisions of the Resolution were not applied to Polish citizens who were transferred to work abroad for foreign employers on the basis of employment agreements concerning the provision of artistic services as well as to persons transferred to work abroad due to employment agreements signed with foreign radio stations.

Pursuant to § 4(1) of the Resolution No. 123, Polish citizens are transferred to work abroad by an organisational unit which has been granted authorisation by the Minister of Foreign Trade to carry out activity within the scope of transferring Polish citizens to work abroad and permission granted by the Minister of Finance for carrying out foreign currency transactions related to such activity.

The Resolution No. 123, in its (§ 5(5)), stipulated that the entity transferring workers may transfer a candidate to work abroad if s/he has entered an employment agreement with a foreign employer and will conclude a separate agreement with the transferring entity, specifying mutual rights and obligations of the candidate and the entity, as regards transferring the candidate to work abroad. The agreement signed between the Polish citizen and the transferring entity in accordance with requirements set out by the Minister of Foreign Trade should, in particular, specify: type of work performed abroad, the date of commencement and completion of work, the amount of fixed wages paid in the Polish currency to the Polish citizen by the transferring entity as well as the amount of foreign currency payments and the procedure for making the payments into the account of the transferring entity by a person transferred to work abroad – in order to cover the costs of social benefits and other costs related to employment (§ 5(6)), which are incurred by the entity.

By contrast, § 6(2) of the Resolution No. 123 stated that the transferring entity was obliged to transfer the funds referred to in § 5(6) to the account of the Social Insurance Institution (Pl. *ZUS*) in order to refund the costs of benefits from social insurance in monthly instalments paid in the Polish currency in the amount of 28% of an average wage in the previous year in the nationalised economy, without taking into account wages in the

mining industry, and also to confirm – for the purposes of social insurance – on the basis of gathered documentation, the periods of employment abroad for which the entity accordingly paid contributions to the Social Insurance Institution. This means that, during the period when the Resolution No. 123 was in force, contributions were paid for the work performed by the persons transferred to work abroad, although the manner of transferring the "contributions" to the Social Insurance Institution was not free from peculiarities.

In accordance with § 8(1) and (2), a given worker that has been selected for working abroad by the transferring entity is granted unpaid leave of absence from his/her workplace for the period of work abroad, and the period of that leave as well as any subsequent period of incapacity for work caused by illness or by isolation due to an infectious illness are included in the years of pensionable service which determines the worker's rights, provided that the worker returns to work in his/her original workplace within the period of 30 days since the end of employment abroad, and in the case of incapacity for work caused by illness or by isolation due to an infectious illness - or for any other significant reasons which are beyond the worker's control - forthwith after the elimination of the causes.

The transitional provisions of the Resolution (§ 13) stipulated that employment agreements concluded between transferring entities and Polish citizens transferred to work abroad for foreign employers, before the date of the entry into force of the Resolution, are governed by previous provisions, unless the provisions of the said Resolution are more beneficial for the citizens, and agreements extended after the entry into force of the said Resolution are governed by the Resolution.

1.2.2. The regulation which is currently in force.

Article 6 of the Act on Pensions from the Social Insurance Fund, contained in Chapter II entitled "Periods taken into account when determining the right to benefits and their amounts", regulates the contributory periods (the periods for which pension contributions were actually paid) and the so-called fictional contributory periods (the periods that are considered contributory despite the fact that pension contributions were not paid under given legislation). The following periods are contributory periods: a) periods of insurance (Article 6(1)(1) within the meaning of Article 4(5), i.e. periods counted since 1 January 1999; b) periods of payment of social insurance contributions from 15 November 1991 to 31 December 1998 specified in the provisions of the statutes mentioned in Article 6(1)(2) as well as c) periods of payment of social insurance contributions prior to 15 November 1991, set out in Article 6(2)(1) and certain other points, provided that the contributions were paid. The chronological character of the classification of contributory periods is related to subsequent statutory regulations of the issues under discussion.

Article 6(2) of the Act on Pensions from the Social Insurance Fund indicates that periods falling before 15 November 1991, "for which social insurance contributions were paid or for which there was no obligation to pay social insurance contributions", are also considered to be contributory periods. Point 1 of that paragraph mentions periods of employment after the person concerned has reached the age of 15 – *inter alia* (that group of workers is relevant to the situation under examination) in point 1(c): "for Polish citizens abroad – in international organisations, institutions and companies, where they were transferred due to international cooperation or where they were employed with the consent of the competent Polish authorities". The situation which occurs in the context of this case concerns the possibility of considering the employment of Polish citizens working abroad with the consent of the competent Polish authorities during the periods prior to the entry into force of the Act on Pensions from the Social Insurance Fund as contributory periods, provided that contributions were paid due to such employment. However, the situation

which is the basis of the question of law has raised the doubts of the court referring the question, as Article 9(1) of the Act on Pensions from the Social Insurance Fund requires fulfilling one more premiss.

Article 9(1) of the Act on Pensions from the Social Insurance Fund introduces the condition of permanent residence (domicile) of the person concerned in the current territory of the Republic of Poland. The said requirement is referred by the Act on Pensions from the Social Insurance Fund to the following periods of employment abroad of Polish citizens: the employment abroad of persons who were not, at that time, Polish citizens, provided that the said persons returned to the country after 22 July 1944 and were regarded as repatriates (Article 6(1)(9) of the Act on Pensions from the Social Insurance Fund), as well as Polish citizens abroad in international organisations, foreign institutions and companies, where they were transferred due to international cooperation or where they were employed with the consent of the competent Polish authorities; the consent is not required with regard to workers who went abroad before 9 May 1945 (Article 6(2)(1)(c) of the Act on Pensions from the Social Insurance Fund), and also as regards the (non-contributory) periods of unpaid leave of absence or breaks in employment in the case of refusal to grant unpaid leave of absence to the spouses of the workers transferred to work in Polish diplomatic missions and consular offices, permanent missions to the United Nations and other special missions abroad, as well as in institutes, information and culture centres established abroad (Article 7(8)).

1.3. The facts of the case in the context of which the court referred the question of law.

Alicja W. submitted an application to the competent pension authority for a survivor's pension after the death of her husband on 25 February 1994. Pursuant to Article 65(1) of the Act on Pensions from the Social Insurance Fund, those entitled to a survivor's pension are eligible family members related the person who, at the moment of his or her death, already had the right to an old-age pension or a disability pension, or met the conditions required to obtain one of those benefits. For the purpose of assessment of the right to a survivors' pension, it is assumed that the deceased person was totally incapable of work.

In its decision of 26 July 2007, the Social Insurance Institution (Pl. *ZUS*) refused to grant Alicja W. the right to a survivor's pension after the death of her husband. The Social Insurance Institution stated in the substantiation for that decision that, at the time of his death, the husband of the applicant did not meet the requirements to acquire an old-age pension or a disability pension. Making reference to Article 9 of the Act on Pensions from the Social Insurance Fund, the Social Insurance Institution stated that the husband's pensionable service might not include the periods of employment in Kuwait, undertaken through PHZ Polservice, from 8 January 1981 to 28 February 1989. The said period, added to a period which is indicated as the basis of acquiring rights, would be sufficient for Alicja W. to be granted a survivor's pension. In the above-mentioned decision, the Social Insurance Institution indicated that the requirements for granting a disability pension due to incapacity for work are set out in Article 57 of the Act; namely, the right to the benefit is granted to a person who can prove that s/he has 5 years of contributory and non-contributory periods within the period of 10 years prior to the submission of the application or the occurrence of the incapacity for work, and the incapacity for work occurred no later than within 18 months from the end of those periods. In the case of a survivor's pension, the date of the occurrence of the incapacity for work is assumed to be the date of the death of a given person. Within the period of 10 years prior to his death, Marian W. did not prove he had had periods of employment which could be taken into account when

determining the right to benefits granted on the basis of the Act on Pensions from the Social Insurance Fund, and his death was after the lapse of 18 months from the end of the last period of eligible employment. On the basis of the submitted documents, the Social Insurance Institution calculated the pensionable service as 17 years and 1 month 28 days of contributory periods (employment periods – the Institution regarded the last period of employment to be the period until 7 January 1981, i.e. the period before leaving the country to work abroad) and as a non-contributory period of 4 years and 6 months (the years of tertiary education), which amounted to the pensionable service of 21 years, 7 months and 28 days. By contrast, in the substantiation for its question, the court indicated that Article 57(1)(3) of the Act on Pensions from the Social Insurance Fund did not apply to an insured person who proved the contributory and non-contributory periods amounting to at least 20 years for a woman or 25 years for a man, and was totally incapable of work.

Marian W. (born on 26 January 1941) began working for Biuro Projektów Przemysłu Hutniczego Biprohut on 8 January 1971. On 20 January 1981, he requested his employer to grant him unpaid leave of absence for the period of 5 years due to undertaking employment in Kuwait via Przedsiębiorstwo Handlu Zagranicznego Polservice. Polservice had been granted consent by the Ministry of Labour, Wages and Social Affairs to employ Marian W. in Kuwait. In addition, the Ministry of the Iron and Steel Industry was notified about the fact that the said person was to go abroad in order to work for a contractor in Kuwait. The period of Marian W.'s unpaid leave of absence was extended until 31 December 1988. Due to the fact that the said leave of absence was not extended and the worker did not return to work, Biprohut concluded that the employment agreement terminated pursuant to Article 64 of the Civil Code. During the period from 8 January 1981 to 28 February 1989, Marian W. was employed abroad by a foreign employer with the consent of Polish authorities. Next he moved with his wife, Alicja W., to Toronto, where he died on 25 February 1994. Recognising Marian W.'s period of employment between 8 January 1981 and 28 February 1989, as a period of employment required for granting an old-age pension benefit, would lead to a situation provided for in Article 57(1)(3) of the Act on Pensions from the Social Insurance Fund, and would result in meeting the requirements for acquiring a survivor's pension by Alicja W. What prevents such an assessment is the fact that, after 28 February 1989, Marian W. had no Polish domicile.

1.4. Meeting the functional premiss by the question of law referred by the Circuit Court in Warsaw.

In his letter concerning the present case, the Prime Minister had doubts whether the functional premiss had been met by the question of law referred by the Circuit Court in Warsaw, and indicated that: "it follows from the presented legal context that a suitable legal basis in the case under examination will be the norm contained in Article 6(2)(1)(d) of the Act on Pensions from the Social Insurance Fund". The problem whether the situation in the present case should be classified as one requiring the application of Article 6(2)(1)(d) of the Act on Pensions from the Social Insurance Fund, or the application of Article 6(2)(1)(c) of the said Act, is a question of subsumption of the actual circumstances. The Constitutional Tribunal has stated that such subsumption, just as the choice of a transitional rule, and consequently the choice of the provision (norm) which is subject to the case under examination, falls within the jurisdiction of the court, considering the assumptions indicated in point 1.1, which the Constitutional Tribunal may not interfere with. In the context of examining the existence of the functional premiss, there may occur (and in practice do occur) border-line situations in which there is no clear result of delineating a dividing line between the jurisdiction of the Tribunal as regards assessing whether the provision (the legal norm) indicated by a court is relevant for adjudication in a

given case and the jurisdiction of the court with regard to carrying out the subsumption of facts. In the present case, it cannot be ruled out that the provision (the legal norm) challenged by the court – Article 9(1) of the Act on Pensions from the Social Insurance Fund, insofar as it stipulates that the period of employment abroad of Polish citizens in international organisations, foreign institutions and companies - where they were transferred due to international cooperation or where they were employed with the consent of the competent Polish authorities – is taken into account provided that the worker concerned resides permanently in the current territory of the Republic of Poland; namely, the situation provided for in Article 9 of the said Act, which refers to Article 6(2)(1)(c) of that very Act - may be applied, due to the multi-faceted nature of the state of affairs and of the legal provisions analysed above. In the substantiation, the court indicates that a ruling declaring that provision to be unconstitutional (and what is challenged is the premiss of domicile, and most probably for that reason the court has not indicated which of the several situations that emerge in the context of Article 9 of the said Act is meant) will allow the court to take the disputable period into account and grant a survivor's pension to the person concerned. Therefore, the Tribunal has concluded that, in the present case, the functional premiss of the question of law has been met.

2. The constitutional issue.

2.1. The allegations of the court which referred the question of law.

The court holds the view that Article 9(1) of the Act on Pensions from the Social Insurance Fund, within the scope indicated in the question of law, is inconsistent with the principle of equality before the law (Article 32 of the Constitution) as well as the principle of social justice (Article 2 of the Constitution). It should be stressed at this point that, despite indicating entire Article 32 of the Constitution, it follows from the content indicated by the court in the context of that provision, and the essence of the allegation, that only Article 32(1) of the Constitution is meant here.

In the opinion of the court, there are no arguments which would justify the different treatment of Polish citizens as regards their right to have the periods of employment abroad recognised, depending on whether their place of permanent residence is in the current territory of the Republic of Poland or outside its borders. Neither has such differentiation, based on the criterion of domicile, been introduced for reasons of public interest.

Moreover, the court stated that the principle of social justice should be implemented also in the context of social insurance law. The implementation of that principle means that the situation of persons living outside the borders of the Republic of Poland should be determined accordingly, in comparison to the situation of persons who permanently reside in Poland.

2.2. Higher-level norms for constitutional review.

In its previous jurisprudence, the Constitutional Tribunal has relied on the understanding of the principle of equality, in accordance with which all the subjects of rights and obligations, to the same extent characterised by a certain essential (relevant) feature, should be treated equally, by applying the same criteria, i.e. should be neither favoured nor discriminated against. Equality before the law also entails that it is necessary to justify the choice of one, but not another, criterion for differentiating among the subjects (addressees) of rights and obligations. The principle of equality is not absolute in character, but the instances of departure from the requirement of equal treatment of similar subjects must be based on sufficiently convincing arguments. The said arguments must: 1) be relevant, i.e. remain directly related to the goal and fundamental content of provisions

which contain the norm under review, as well as support fulfilling the goal and implementing the content; in other words, the introduced differentiation must have a rationally justified character, and it may not be introduced in accordance with an arbitrarily established criterion; 2) be proportional, and thus the significance of the interest, for the protection of which differentiation has been introduced with regard to the situation of the addressees of the norm, must remain adequately proportional to the significance of interests which have been violated due to unequal treatment; 3) remain related, in one way or another, to other constitutional values, principles or norms which justify different treatment of similar subjects.

The Constitutional Tribunal also draws attention to a close relation between the principle of equality and the principles of social justice. The said principles are complementary in a sense that differentiating between similar subjects has greater chances of being declared constitutional if it is consistent with the principles of social justice or if it aims at implementing those principles. By contrast, it is regarded as unconstitutional discrimination (privilege) if it is not justified in the light of the principles of social justice.

Assessing conformity to Article 2 (insofar as the said provision touches upon the aspects of social justice, and this was the way the referring court formulated the allegation of the infringement of Article 2, which actually does not rule out the possibility of taking into account another aspect of Article 2 of the Constitution by the Tribunal) and to Article 32 of the Constitution, it should be considered that the content of the principles of social justice comprises a series of values which must be protected and implemented by the state. The catalogue of constitutional values which constitute social justice includes, *inter alia*, (for instance in the jurisprudence of the Constitutional Tribunal) providing conditions for healthy and stable economic development, budget balance, the right of citizens and their elected representatives to set goals and priorities of social and economic policy in accordance with democratic procedures. The content of the principles of social justice also comprises a series of specific legal principles, addressed to the organs of public authority, such as e.g. the minimum of social security, securing basic living standards for persons remaining unemployed for reasons other than their own fault, as well as the principle of equality. These remarks are vital as they allow to draw a conclusion that, in the case of the infringement of the principle of social justice and the principle of equality by different treatment of similar subjects, without indicating the infringement of other specific principles arising from the principles of social justice – and such a situation occurs in the present case – there is no need to carry out a separate analysis concerning the infringement of Article 2 and Article 32 of the Constitution.

As regards social insurance, the Constitutional Tribunal in its previous jurisprudence linked the principles of social justice also with the requirement to maintain proper (fair) proportion between the amount and period of payment of social insurance contributions, in relation to the acquisition of the right to benefits and the amount of those benefits (see e.g. the judgment of: 12 February 2008, Ref. No. SK 82/06, OTK ZU No. 1/A/2008; item 3; 13 December 2007, Ref. No. SK 37/06, OTK ZU No. 11/A/2007, item 157; 24 April 2006, Ref. No. P 9/05, OTK ZU No. 4/A/2006, item 46; 11 December 2006, Ref. No. SK 15/06, OTK ZU No. 11/A/2006, item 170 and 24 October 2005, Ref. No. P 13/04, OTK ZU No. 9/A/2005, item 102).

Taking the above into consideration in the present case, the Constitutional Tribunal is going to examine Article 32(1) and Article 2 of the Constitution) within the scope of the allegation that the challenged regulation is inconsistent with the principles of social justice).

3. The assessment of conformity of the challenged provision to the principle of equality.

3.1. In the present case, the assessment of conformity of Article 9(1) of the Act on Pensions from the Social Insurance Fund, within the scope indicated in the legal question, requires the acknowledgement that the challenged provision (legal norm) concerns the periods of employment falling before 15 November 1991, and therefore before the main stage of the reform of the social security system. What should not be overlooked is the fact that, under the provisions which were in force before the reform, the payment of contributions to the Social Insurance Institution was incurred by the employer, thus constituting a kind of tax on employment. The amount and collection of the contributions did not affect the regular income of the worker; neither did they constitute his/her individual old-age pension fund. The money from the contributions was allocated to the state budget and the Social Insurance Institution for the systematic payment of old-age and disability pensions to persons who had earlier acquired the right to those benefits. Insured persons who were economically active could count on having their benefits financed in the future from contributions paid to the state budget by the next generations of their successors. What was characteristic of social insurance, at that time, was its redistribution, which was consistent with the principle of solidarity of insured persons (cf. the judgment of the Constitutional Tribunal of 24 October 2005, Ref. No. P 13/04 and the previous rulings mentioned therein).

As early as in the judgment in the case K 5/99, the Constitutional Tribunal confirmed that the aim of the Act on Pensions from the Social Insurance Fund was to create a stable pension system in the context of negative demographic trends, resulting in an increase in the number of beneficiaries and a decrease in the number of contribution payers, and the reform itself reflected constitutional values and norms. In the context of the present case – as well as in many other cases adjudicated upon by the Constitutional Tribunal – a more general issue arises: in what way and to what extent, in the course of the transformation of the Polish old-age pension system, the provisions of the Constitution can protect, and protect, the old-age pension rights and disability pension rights of persons who have acquired their rights to benefits in accordance with provisions based on the old model of the systematic distribution of insurance contributions via the state budget and who currently exercise the rights. What is of significance in the context of the specific case, the subject of which is a survivor's pension being determined at present, the starting point must be the axiological assessment of the right to a survivor's pension.

3.2. There is no doubt that the requirement of domicile as a condition for acquiring the right to a survivor's pension, challenged by the court, (since such is the scope of functional competence arising from the court's use of Article 9(1) of the Act on Pensions from the Social Insurance Fund, insofar as the said provision makes reference to Article 6(2)(1)(c) of the Act on Pensions from the Social Insurance Fund) is not rationally related to *ratio legis* of provisions on a survivor's pension.

In the Polish legal system, a survivor's pension is, in a way, a "substitute" or "secondary" benefit when juxtaposed with the right to an old-age pension or a disability pension, which was granted to a deceased wage earner (see I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne uzbezpieczenia społecznego*, Warszawa 2009, p. 332 and subsequent pages). Although an eligible family member herself/himself acquires the right to a survivor's pension as a separate benefit, but s/he acquires the right in lieu of the right to a benefit which would have been vested in the deceased person. The right to a survivor's pension is a derivative right, but its basic function is to guarantee means of subsistence to

relatives and persons related by affinity who are incapable of supporting themselves. The aim of a survivor's pension as a maintenance payment should be taken in the process of interpretation and assessment of regulations concerning that benefit.

3.3. At present, the Constitution of 1997 explicitly emphasises the freedom to choose one's place of work (Article 65(1) of the Constitution) and the freedom of movement (Article 52(2)). The free movement of workers (within the EU) is one of the fundamental constitutive principles of Community law. Making reference to the principle of domicile as a premiss restricting the acquisition of the rights earned by workers is anachronistic. This argument may directly be referred to Article 9 of the Act on Pensions from the Social Insurance Fund. However, the difficulty in the present case is posed by the circumstance that the period of earning old-age pension rights by Marian W. (which have never been determined for him) coincided with the years when the previous legislation was in force. Nevertheless, also in this instance, it is not convincing to make reference (as done by the Prosecutor-General and the Sejm) to the argument of privilege (arising from the Act on Pensions from the Social Insurance Fund, applied due to transitional provisions) which consists in having the period of work abroad to be counted as a fictitious contributory period. Indeed, it should be indicated that, also during the period of his employment abroad, old-age pension contributions were paid on the work performed there by Marian W. (pursuant to the Resolution No. 123). Therefore, since there is no special privilege here, there is also no margin of freedom for the legislator as regards giving a premiss of acquiring benefits which is random, and unrelated to *ratio legis*. Currently, the premiss of domicile has such character, especially with regard to a survivor's pension which is to serve as a maintenance payment. Differentiating the situation of persons entitled to receive a survivor's pension, based on the premiss of the domicile of the worker, is constitutionally unjustified.

4. The infringement of Article 2 of the Constitution due to the inadequacy and insufficient specificity of the criterion of the "place of residence" in the context of determining a survivor's pension.

4.1. The analysis of court files has revealed that, in the case pending before the court, what has, *inter alia*, been raised is the problem of insufficient specificity of the criterion of the "place of residence" (in what period the said criterion should be met). In its argumentation, the Sejm has also drawn attention to that issue, arguing that it does not follow from the content of Article 9 of the Act on Pensions from the Social Insurance Fund when the requirement of residence in the territory in the Republic of Poland is to be fulfilled, i.e. whether solely at the moment of application by the person concerned as regards determining the right to a benefit, or whether throughout the entire period of receiving a benefit, or whether this occurs at a different time. Moreover, in the case like the one in which the question of law has been referred, when the proceedings are pending to grant a survivor's pension, which is derivative in relation to old-age pension rights of the person employed (which have not been previously determined); also, the person concerned is someone else than the worker whose period of employment is relevant as regards determining his right to benefits.

The Sejm has not presented the problem as a clearly separate allegation. However, Article 2 of the Constitution has been indicated as a higher-level norm for review of constitutionality, although it was meant to support the allegation of inequality, making reference to the principles of social justice. Pursuant to Article 66 of the Constitutional Tribunal Act, the Constitutional Tribunal is bound by the subject of allegation and the

indicated higher-level norm for review; however, the Tribunal is not bound by the reasoning of an applicant (a complainant or a court referring a question of law), presented in order to support the doubts that have been raised, therefore it may take into account different possible aspects of the infringement of a given higher-level norm for review, especially a higher-level norm of a character such as Article 2 of the Constitution.

4.2. The present case is examined in the light of the Constitution of 1997, which strongly emphasises the element of reliability of legislation, the component of which is the conformity of a legal regulation under assessment to the principle of protection of citizens' trust in the state and its laws, which is expressed in Article 2 of the Constitution. The constitutional doubts raised by the court referring the question concern the criterion of domicile, which was introduced in the legislation preceding the Constitution and was moved as a transitional regulation to the Act on Pensions from the Social Insurance Fund, with regard to situations which span over a period of time and which concern acquiring the right to social security benefits in the case of the change of the system. The previous social security system as a distribution system was characterised by the legislator's greater freedom as regards introducing premisses and the conditions for receiving benefits, whereas the present assessment is considerably affected by the necessity to observe the principle of reliability of legislation and imposes stricter requirements on the lack of arbitrariness when it comes to selecting the criteria in that regard. In any case, it limits the possibility that the legislator will introduce criteria which are unrelated to the *ratio legis* of a given institution.

5. The conclusion.

In this situation, it should be concluded that Article 9(1) of the Act of 17 December 1998 on Old-Age and Disability Pensions from the Social Insurance Fund (Journal of Laws - Dz. U. of 2009 No. 153, item 1227), insofar as it makes reference to Article 6(2)(1)(c) in conjunction with Article 65 of the said Act is inconsistent with Article 2 and Article 32 of the Constitution, as regards the premiss requiring permanent residence of the person concerned in the current territory of the Republic of Poland.

6. The effects of the ruling.

6.1. This ruling is issued as a result of constitutional review initiated by a question of law referred by a court. For that reason, a functional relation, on the basis of which the review of constitutionality has been carried out, also determines the effects of this ruling as regards the scope of its impact.

Declaring the premiss of domicile to be unconstitutional, therefore, solely concerns the application of Article 9(1) for the purpose of determining a survivor's pension - if the right which is vested in the person after whose death the pension is granted and which constitutes the basis for the acquisition of the pension, has not been so far determined - and for reference to Article 6(2)(1)(c) of the Act on Pensions from the Social Insurance Fund. Due to the actual situation, which was the basis for referring the question, this judgment has an impact on the problem of domicile of the employees working abroad with the consent of the competent authorities of the Polish authorities.

6.2. This judgment thus allows the court referring the question to dispel the constitutional doubts, which is vital for adjudication in the case pending before the court, in accordance with the case's scope ratione personae and ratione materiae.

6.3. However, as part of the conducted review of constitutionality, the Constitutional Tribunal has not assessed the following: the proper subsumption of the facts of the case (the Prime Minister has voiced doubts in that context, as to the correctness of the qualification of the situation, not so much within the scope of Article 6(2)(1)(c), but within the scope of Article 6(2)(1)(d) of the Act on Pensions from the Social Insurance Fund, as regards reference within the scope of Article 9(1) of the said Act); transitional issues; facts (the actual payment of social insurance contributions for Marian W.). These issues the court referring the question must determine within the scope of its jurisprudence.

6.4. This judgment declaring the unconstitutionality of the premiss of domicile, as a basis for determining a survivor's pension, creates a new legal situation within the scope of premisses of acquiring relevant benefits (survivor's pensions) also by persons for whom they have not been determined. Possible refusals (they were of a declaratory character) were issued on the basis of the provisions which have been changed as a result of the ruling of the Constitutional Tribunal.

6.5. The incorrect information mentioned in the letter of 15 June 2010 by the Minister of Labour and Social Policy, which concerned the relevance of the international agreement with Canada to the case of Alicja W., and the actions she should undertake, was corrected by the representative of the Minister of Labour and Social Policy at the hearing.

6.6. As it has already been presented (point III 3.2.), the premiss of domicile is used by the Act on Pensions from the Social Insurance Fund as a negative premiss which determines refusal to grant an old-age pension or a disability pension within a much broader scope than merely a survivor's pension and only with regard to the persons referred to in Article 6(2)(1)(c). The doubts concerning the conformity of the said premiss to the *ratio legis* of the Act on Pensions from the Social Insurance Fund (Article 2 of the Constitution), the introduction of the said restricting premiss for the protection of other constitutional values and the proportionality of the restriction (Article 67 of the Constitution, not indicated by the court referring the question in the present case), as well as linking those restrictions with the fact of paying social security contributions – require a broader analysis by the ordinary legislator.

7. For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Teresa Liszcz
to the Judgment of the Constitutional Tribunal
of 5 July 2010, Ref. No. P 31/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the statement of reasons for the judgment of the Constitutional Tribunal of 5 July 2010, the case P 31/09, in the part concerning the effects of the judgment.

I wish to emphasise that I agree entirely with the operative part of the judgment. The requirement of domicile, as one of the premisses of the right to social insurance benefits is a relic of the era of the People's Republic of Poland, when a person was "tied to the land", and is incompatible with the axiology of the current Constitution. Also, the statement of reasons for the judgment, in principle, does not raise my reservations, except for two excerpts in point 6 - "The effects of the judgment", which are however important enough, in my opinion that I could not have signed the statement of reasons without voicing any reservations.

The excerpts I mean here are the following two sentences: "Declaring the premiss of domicile to be unconstitutional, therefore, solely concerns the application of Article 9(1) for the purpose of determining a survivor's pension - if the right which is vested in the person after whose death the pension is granted and which constitutes the basis for the acquisition of the pension, has not been so far determined - and for reference to Article 6(2)(1)(c) of the Act on Pensions from the Social Insurance Fund" (point 6.1.) and "This judgment declaring the unconstitutionality of the premiss of domicile, as a basis for determining a survivor's pension, creates a new legal situation within the scope of premisses of acquiring relevant benefits (survivor's pensions) also by persons for whom they have not been determined." (point 6.4.).

It follows from the first sentence that the effects of this judgment which disqualifies the premiss of domicile, in the context of Article 9(1) in conjunction with Article 6(2)(1)(c) and Article 65 of the Act on Pensions from the Social Insurance Fund, do not concern cases in which an insured person, after whose death a family member applies for a survivor's pension, has already acquired a specified right to a disability pension or an old-age pension (as one should presume – without taking into account the periods of employment abroad, which had a direct impact on the amount of his/her benefit, and an indirect one on the amount of a survivor's pension granted after his/her death). Such narrowing down of the effects of the ruling of the Constitutional Tribunal - due to the facts of the case pending before the court, which was the basis for referring the question of law - defies justification either in the light of the Constitution or even in the context of the provisions of the Constitutional Tribunal Act. A constitutional review which is initiated in relation to a specific case examined by a court, and carried out on the basis of a constitutional complaint or a question of law referred by the court, differs from an abstract review only at the stage of the instigation of proceedings. In particular, in the case of a question of law, a necessary premiss of adjudication is that there should be the so-called functional relation between the subject of the case pending before the court and the subject of the question of law, which could only be a legal norm that is to be a legal basis for adjudication in the pending case. In this particular case, the said relation definitely exists, which means that the court which had doubts had the right, and even an obligation, to enquire about the constitutionality of the above indicated provisions, or rather the legal norm which arose therefrom, and the Constitutional Tribunal had the obligation to issue a judgment concerning the conformity of that norm to the Constitution. In the judgment, the

court referring the question will find an answer to its question (dispelling the doubts). However, this judgment is not only an answer of the Constitutional Tribunal to the court's question that was referred in relation to the particular facts of the case. Indeed, the effects of this judgment are not only significant to the court referring the question and the parties to the proceedings in the case pending before that court, but also to all the addressees of the law (*erga omnes*).

The subject of adjudication by the Constitutional Tribunal in the present case is a norm derived from Article 9(1) and Article 6(2)(1)(c) of the Act on Pensions from the Social Insurance Fund. It concerns the premisses of taking into account the periods when Polish citizens were employed abroad with the consent of the competent Polish authorities, "when determining the right to an old-age pension and a disability pension, as well as when calculating their amounts" (Article 8 of the Act on Pensions from the Social Insurance Fund).

In my view, what is dubious is the narrowing down of the effects of adjudicating on the unconstitutionality of domicile as a premiss of recognising these periods only for the purposes of determining the right to a survivor's pension, since, in fact, the norm under examination directly refers to determining the right to an old-age pension and to a disability pension due to incapacity for work of an insured person, after whose death the right to a survivor's pension is to be determined for a member of his/her family, and only indirectly pertains to the survivor's pension itself. It would be strange, to say the least, if after this judgment of the Tribunal, the premiss of domicile with regard to the instances of determining the right to an old-age pension or a disability pension for the insured person (until the time of a possible subsequent adjudication on unconstitutionality by the Constitutional Tribunal). However, such a restriction - in my opinion, being most dubious - falls within the scope of the previous practice of self-restraint on the part of the Tribunal (disapproved of by me), *inter alia* by the broadening interpretation of the principle which states that proceedings are not instituted *ex officio*, but are commenced by application. However, even this practice does not encompass "trimming" of the scope of the effects of the judgment of the Constitutional Tribunal according to the facts in the case pending before the court referring the question (in the situation where the right to an old-age pension or a disability pension due to the incapacity for work of the insured person, being the wage earner of the family, has not been determined so far). Although the assertion, challenged herein, which is contained in the statement of reasons for the judgment is not binding, it may raise doubts in disability pension institutions and courts which adjudicate in cases concerning social insurance benefits.

The second of the above-quoted sentences from the statement of reasons is not comprehensible to me in its final part: "also by persons for whom they have not been determined". It appears to follow therefrom that the judgment of the Constitutional Tribunal "creates a new legal situation within the scope of premisses of acquiring (...) (survivor's pensions)", in particular for persons in the case of whom the right was being determined (but it is not known whether also for those with regard to whom the right has been determined). If such reasoning is correct, then that sentence would be inconsistent – in my view - with the aforementioned statement that the effects of the judgment concern only the cases where the right of the person whose death results in an entitlement to a disability pension has not been so far determined, despite the fact that one sentence directly regards the right of the (deceased) insured person, whereas the other deals with a person who applies for a survivor's pension after the insured person's death. However, if the second sentence, in a somewhat complicated way states that the new legal situation, created by the judgment of the Constitutional Tribunal, concerns the cases where there have already been proceedings with regard to determining the right to a survivor's pension

before the competent organs of public authority – possibly ended with a refusal to grant the pension – it is simply redundant. Indeed, this follows from the content of Article 114(1) of the Act on Pensions from the Social Insurance Fund, which stipulates that "the right to benefits, or their amounts, are redetermined upon the application of the person concerned or *ex officio*, if - after the decision concerning benefits becomes valid - new evidence is presented or new circumstances existing before the issuance of that decision are revealed, and they affect the right to benefits or their amounts". However, if it were assumed that the said provision was not applicable in the situation of the change in the legal system as a result of the entry into force of the ruling of the Constitutional Tribunal, there would be a possibility of reopening the proceedings on the basis of Article 190(4) of the Constitution in conjunction with Article 401^1 of the Code of Civil Procedure.