

Press Release of Kanzlei Menschen und Rechte April 1st 2021

Irish thalidomide victims, who are represented by the law firm Menschen und Rechte, have achieved an important interim success before the Federal Administrative Court (BVerwG) in Leipzig in their legal dispute with the Thalidomide Foundation, which has been ongoing since 2013. At issue are their thalidomide pensions, which have no longer been paid out in full to Irish (and some other foreign) victims since the 3rd Thalidomide Foundation Amendment Act came into force.

The 2013 Act was primarily intended to bring thalidomide pensions into line with injury-related needs. However, it was also regulated in a new provision that in future payments made "by others, in particular by foreign states" because of the intake of preparations containing thalidomide should be offset against the thalidomide pension.

The Republic of Ireland has been paying Irish thalidomide victims on a voluntary basis since 1975, depending on the severity of their injury, to ease their difficult situation. The amounts today range from EUR 514 to EUR 1100 per month. The Republic of Ireland has a social benefit system that does not provide comprehensive medical and rehabilitative care in the sense of the German system of statutory health insurance. Participation and care benefits are also available to people with disabilities to a much lesser extent than in Germany.

In the German lawsuit, the Irish plaintiffs criticise a violation of the principle of equal treatment under Article 3(1) of the Basic Law (GG) and of the guarantee of property (Article 14(1) GG). While they were unsuccessful with their arguments at the Administrative Court of Cologne and the Higher Administrative Court of North Rhine-Westphalia, the 5th Senate of the Federal Administrative Court now judges the legal regulation of the Contergan Foundation Act on which the imputation is based to be unconstitutional. In its press release it writes:

"The unequal treatment, which lies in the fact that the aforementioned group of persons only receives the thalidomide pension in a reduced amount, is not objectively justified because it is disproportionate. The declared legislative goal of the crediting is to avoid better positions through double benefits for those foreign beneficiaries who receive payments from others in addition to the thalidomide pension due to taking thalidomide-containing preparations. However, the crediting is neither suitable nor appropriate for this purpose, because it is already not recognisable that it can achieve this goal. It does not take into account the type and extent of the general social benefits granted to the affected persons in the different states, without which the overall situation of the affected persons cannot be assessed and therefore an "improved position" of the foreign aggrieved persons through benefits from others cannot be properly proven. Moreover, the thalidomide pension and the benefits of the foreign states are not comparable because they pursue different purposes and are therefore categorically different."

For this reason, the BVerwG has suspended the proceedings and will forward a referral order to the Federal Constitutional Court under Article 100(1) of the Basic Law:

"Because the Federal Administrative Court, as a specialised court, is not empowered to determine the unconstitutionality of an Act of Parliament itself, it has stayed the proceedings and referred the question to the Federal Constitutional Court for a decision."

Finola Cassidy, spokesperson for the Irish Thalidomide Association (ITA), welcomes the Federal Administrative Court's decision:

"The fact that we are being listened to, as the Federal Administrative Court has obviously done here, is unfortunately not something we Irish thalidomide survivors are used to."

Attorney and Law-Professor Dr Oliver Tolmein, who is representing the Irish plaintiff Prof John Kearney in the proceedings, refers to the 1976 ruling of the Federal Constitutional Court. This first ruling of the Federal Constitutional Court stated with regard to compensation for thalidomide survivors:

"If the legislature has taken this area of damage out of the private autonomous sphere of regulation and made the solution of what are certainly difficult tasks a matter for the state, it is incumbent on it to ensure in future too that the Foundation's services do justice to the responsibility it has assumed."

Attorney Tolmein comments on the current situation of Irish thalidomide survivors:

"The treatment of the foreign victims, for whom - as for the German victims - the payment of thalidomide pensions has long since not ensured full compensation, but a good measure of basic security, does not do justice to the responsibility demanded by the Federal Constitutional Court in 1976. Discrimination by withholding part of the pension is unacceptable, especially against the background of the overall not particularly good situation of many thalidomide victims worldwide. It is also shameful that in 2013 the long overdue adjustment of thalidomide pensions to the effects of the damage was used to take part of the money away from our clients and other foreign victims. When it comes to saving money, it would have made more sense to remind Grünenthal of its responsibility and to hold it accountable for the increased payments. This was not even attempted."

The decision of the Federal Constitutional Court on the BVerwG's referral decision, which is now pending, will also have an impact on similar proceedings currently being pursued by thalidomide victims in other countries, for example Belgium and Brazil. The 3rd Thalidomide Foundation Amendment Act of 2013 increased the funds of the Thalidomide Foundation to increase pensions by approximately EUR 90 million per year. The payments to be saved for foreign thalidomide victims are just over one million EUR per year. The effects of the offsetting on the individual aggrieved persons, some of whom have to use it to pay for their medical aids and assistance services, are severe.

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