

**Decision**  
**of 29 September 1993 (K. 17/92)**

The Constitutional Tribunal sitting with the bench composed of the Chairman Tomasz Dybowski, and Judges: Czesław Bakalarski, Kazimierz Działocha (Reporting Judge), Henryk Groszyk, and Janina Zakrzewska

held

(...)

**article 32, section 5, Sentence 2 of the Social Assistance Act dated 29 November 1990** (uniform text in Journal of Laws, 1993, Number 13, Item 60) **contravenes articles 1 and 67, section 2 of the Constitution of the Republic of Poland upheld by article 77 of the Constitutional Act on the Mutual Relations Between the Legislative and Executive Branches of the Republic of Poland and Local Self government dated 17 October 1992.**

Reasoning

III

(...)

1. The main part of the Social Assistance Act consists of regulations concerning a specific system of social security in the form of social welfare benefits. The Act specifies both the types of these benefits and the rules according to which they are to be awarded. Social welfare benefits are in the form of what are referred to as community benefits (non-institutional) including cash benefits in the form of allowances (permanent, periodic, and special-purpose), in-kind benefits, benefits in the form of services, and institutional benefits, such as placement in social welfare institutions. The nature of these benefits varies (also in terms of the legal status of the recipient). An analysis of the provisions of the Act indicates that alongside such benefits which under certain circumstances are obligatory (for example, the permanent allowance: see article 27 of the Act), there are benefits that must be granted (for example, in-kind benefits: see article 13 of the Act) and benefits that may be granted (for example, the benefits specified in articles 24, 31, and 32 of the Act).

Therefore, depending on the type of benefit, the legal status of the recipient varies. Alongside the benefits that clearly must be claimed (for example, permanent allowances), there are benefits of a different nature.

The new benefit in the form of a credit ticket, introduced into the Social Assistance Act under its amendment of 1 August 1992 (article 32, section 5), is a form of special purpose allowance. According to the Act, a special purpose allowance is a single benefit (generally in cash) granted „for the purpose of satisfying an essential everyday need” (article 32, section 1). It may be specifically granted for partially or fully covering the cost of medicines and medical treatment, renovation of one’s dwelling place, heating fuel, and clothing (article 32, section 2). It may also be granted to a person or his/her relatives who have incurred losses due to misfortune, or natural or environmental disaster (article 32, sections 3 to 4). Under the more general provision of article 6, section 3 of the Social Assistance Act, cash benefits may, if justified, be granted in a non-cash form. This is the case particularly if cash benefits are used in a manner inconsistent with their purpose. The special purpose allowance in the form of a credit ticket provided for under article 32, section 5 undoubtedly constitutes a non-cash form of discretionary special purpose allowance. The manager of the social assistance center makes the decision to award a special purpose allowance and he/she selects the non-pecuniary form, including the credit ticket.

2. The obligation to carry out social welfare responsibilities with respect to granting statutory benefits falls on the township (commune). Under the Act, the granting of special purpose allowances, depending on the grounds for granting them, falls into the category of the township's own responsibilities (article 10, section 1, sub-section 2; article 10, section 2, subsection 3a) or responsibilities assigned to the township (article 11, sub-sections 3 and 4). The granting of the special purpose allowance in the form of a credit ticket falls into the category of responsibilities assigned to the township (article 11, sub-section 4). Under article 46, sections 1 and 1 a of the Act, the responsibilities assigned to the township are carried out by social welfare centers.

Social welfare benefits are generally granted by means of individual administrative acts, such as administrative decisions (article 36, section 1 of the Social Assistance Act in connection with article 1 of the Administrative Proceedings Code). An exception from this rule are cash or in-kind benefits granted for the purpose of making an individual or a family economically independent. The benefits are granted under civil law agreements (loan agreements or lending for use agreements: see article 24, section 2 and 3 of the Act). An exception to the rule are also benefits in the form of social work and counseling (especially legal and psychological counseling), provided for in the original text of the Act (article 23), which under article 43, section 2 of the Act do not require a decision. Finally, the manner in which aid in the form of a credit ticket is granted or refused also constitutes such an exception.

The words „... does not require a decision” in article 32, section 5, sentence 2 of the Act concerning the granting or refusal of an allowance in the form of a credit ticket do not give rise to any doubts that under an express statutory provision such matters are not subject to any provisions of the Administrative Proceedings Code concerning the conduct of an administrative body in deciding cases by issuing administrative decisions, or any such provisions concerning appellate proceedings, annulment or amendment of decisions or considering them invalid, and appealing decisions with an administrative court. With the exception of filing a complaint with the competent body (the voivode) in the manner described in Part VIII of the Administrative Proceedings Code, the recipient cannot otherwise exert influence so as to change a decision of the competent body if the benefit in the form of a credit ticket is refused.

3. Nowadays social welfare is generally treated as one of the elements of social security understood as a system of facilities and benefits serving the satisfaction of the justified needs of the citizens who are no longer able to work or whose ability to work is limited, or who are burdened with excessive costs of supporting a family. So understood, social protection includes three legal institutions: social security, social provision, and social welfare services. Social welfare services can also complement benefits under social security and social provision. It is, therefore, used in the case of individuals unable to support themselves if they have not become eligible for benefits under social security or social provision or if such benefits are insufficient due to poor health, misfortune, etc.

Until the Social Assistance Act dated 29 November 1990 was passed, this area of the State's activity had been regulated under the Social Care Act dated 16 August 1923 (Journal of Laws of the Republic of Poland, Number 92, Item 726, as amended). That Act imposed on the township an obligation to aid individuals in a state of poverty who reside in a township. The forms and conditions of the aid were specified in article 3 of the Act. They entailed the obligation to provide specific things or goods to eligible individuals.

In the first years following the war, the scope of that Act was confirmed under the Decree dated 22 October 1947 concerning the validity of some social welfare provisions

(Journal of Laws, Number 65, Item 389). The Act was not, however, put into practice as it was replaced by a number of acts, mainly in the form of instructions. Those statutes were largely inconsistent with the Act itself as while the Act provided for an obligation to provide aid, the instructions made aid conditional on the discretion of the respective body. Thus, irrespective of the individual's difficult financial conditions, the competent body was by law permitted to refuse aid.

When the Chief Administrative Court was established and it assumed jurisdiction over social welfare decisions (article 196, section 2, sub-section 20 of the Administrative Proceedings Code), the Court was faced with two solutions: consider the Act of 1923 as remaining in force or to pronounce its expiry due to disuse. In the latter case, the entire area of social welfare (even though it was covered by the clause which specified the powers of the Chief Administrative Court) could not be reviewed by the Court since according to the rules adopted by the Court, only statutes and executive orders may serve as legal grounds for a decision. In the social welfare cases heard by the Court, the Court consistently took the view that the Social Care Act of 1923 remained in force. Despite a certain lack of uniformity and nonconformity of these decisions, the Chief Administrative Court generally did not consider the instructions issued by the Minister of Health and Social Welfare as acts that could serve as the basis for administrative decisions. The substantive grounds for issuing decisions were generally found by the Court in the provisions of the Act of 1923.

The decision of the Chief Administrative Court dated 27 April 1981 (SA 767/81) was an exception, which failed to be corroborated by later decisions but caused dispute in academic circles. In the decision, in recognizing that the Act of 16 August 1923 remained in force, the Court stated that „this does not, nevertheless, warrant the conclusion that the content of article 3 imposes an obligation on administrative bodies to issue administrative decisions, as the provision of food, bed clothes, footwear, etc. is a direct act sharing no features of the process of issuing decisions.!' According to the Chief Administrative Court, the Act does not provide for issuing a decision for the purpose of similar settlements. What the Act mentions are just material and technical measures. According to the Court, issuing a decision is permitted if this form is provided for under the provisions of substantive law in an express manner or it is presumed by the use of such expressions as „permits,” „prohibits,” „acknowledges,” and „states” (*OSPika* 1983, Number 3, Item 50). In the critical gloss on the decision under consideration, based on the interpretation of the Social Care Act and scientific views of administrative law, the authors pointed out that if a provision of the law fails to determine the form of legal determination of the legal situation of the citizen, then the administrative body should make such a determination by an administrative act (i.e., an administrative decision). Material and technical measures do not constitute a legal form of action that can determine the legal situation of a citizen. They constitute a legal form of action that is used to carry out the citizen's rights and obligations directly following from a provision of the law or an administrative decision. By taking a series of material and technical measures or a single action, the administrative body implements such acts, at the same time introducing changes in the social reality in which the citizen's situation conforms with their content. In its concluding remarks, the Court notes that „in cases where the citizen's right or obligation does not follow from the law but from the specification of the state body, the body (unless a different legal form, such as agreement or arrangement, is allowed) is obligated to implement it by means of administrative decision” (J. Jendroska and B. Adamiak: gloss on the Decision of the Chief Administrative Court, dated 27 April 1981, SA 767/81; *OSPika*, Number 5, 1983, p. 257).

Given the faults of the previous legal regulation of social welfare services, the fact that in practice it was based on acts such as instructions, and that it was considerably dispersed,

there was a need for new regulation of the institution. Among the proposals concerning specific changes in social welfare services, one of the primary proposals was to make social welfare services claim-based. In specialist literature, the view was advanced (cf., for example, M. Mincer) that such an act should provide for the rights of citizens to obtain specific benefits upon fulfillment of specific criteria. This would entail imposing an obligation on an administrative body to provide aid, although given special features of social welfare services such an act would have to be flexible. The flexibility should, however, be applicable to exceptions from the general rule. It would permit aid to be granted also in special situations despite failure to fulfill the formal criteria.

The Social Assistance Act passed on 29 November 1990 implements this proposal only partially. This statute does not include a general provision about the right of citizens to social welfare benefits. While the wording of the provisions of the Act envisages the right to social welfare benefits, it is applicable to some benefits (cash benefits) only, subject to the satisfaction of the conditions specified in article 4 of the Act. In terms of legal science, this provision seems to be the result of a kind of compromise between, on one hand, an awareness that there is a need for strengthening the legal position of the recipient in the Act and, on the other hand, a fear that the general provision concerning the right to social welfare benefits will be interpreted in terms of thus granting citizens a legal claim to all social welfare benefits, a solution which given the economic situation would have been impossible to implement in the past and would still be impossible to implement today. In this respect, the solutions adopted in this statute came closer to the solutions provided under the laws of other European countries (such as Germany, Sweden, Finland, and Norway), where depending on the type of benefit, the recipient's legal status is differentiated and the individual is entitled to claim a benefit if it is obligatory in nature (H. Szurgacz: *Wstęp do prawa pomocy społecznej*, [An Introduction to Social Welfare Law], Wrocław, 1992, pp. 46, 99-100, 104).

4. As noted above, in terms of the very principle of granting benefits, the Act of 1990 introduces a division into benefits which must be granted if circumstances specified by law are met (obligatory benefits) and benefits which may be granted (optional benefits). Special purpose allowances, including the allowance in the form of a credit ticket, are of optional nature. Article 32, section 1 of the Act expressly points out that a social welfare special purpose allowance may be granted, and article 32, section 5 provides that a special purpose allowance may be granted in the form of a credit ticket. Such rules of law should be classified as entailing a delegation for an administrative body to act at its discretion. Making a final decision dependent on the discretion of such a body does not, however, mean complete freedom in granting the benefit. Administrative bodies established to provide aid are limited by the fairly precisely specified range of needs they can satisfy and by the funds at their disposal, but the final decision is both discretionary and constitutive. It is the administrative body that evaluates a specific event, and only after a positive decision is issued, one can talk of the person who is to be granted aid as a person eligible to receive a benefit.

Notwithstanding the directives included in article 32 referring to the premises for granting special purpose allowances, the general limits applicable to a body authorized to grant benefits are set in the provisions of Chapter 1 of the Act, concerning general rules governing social welfare services. Such effect is especially associated with article 2, which includes the directives concerning the range of benefits and points out the objectives of social welfare services. In accordance with the requirements of the democratic rule of law and pursuant to article 3, section 2 of the Constitution of the Republic of Poland („all state organs... shall operate on the basis of the law”), no „free” acts (i.e. acts that are not subject to certain legal limits and to review) of the administration are envisaged. From a formal institution providing for the free and totally unrestrained ability to make decisions, free

discretion is only transformed into a form of certain flexibility of the administration, flexibility which enables and obligates suitable organs to examine all the circumstances of a given case in order to seek the most appropriate settlement reflecting the objective truth and the objective of such settlement. Thus, free discretion becomes a special form of implementing the provisions of the law in that the organ following the law is to take into consideration the individual conditions of each case, the establishment of which is possible only to the extent that enables the organ to issue a decision in conformity with the intention of the lawmaker. Such operation of the administrative body must, however, be justified and must be subject to review.

The allocation of goods should also be subject to court review. It is commonly believed that the social importance of court review over the administration with respect to the distribution of goods does not necessitate wider justification. Review is an important factor in ensuring legality in the essential area of operation of the state administration and an effective instrument in protecting the interests of the citizens (cf. S. Biernat: *Rozdział dóbr przez państwo. Uwarunkowania społeczne i konstrukcje prawne*, [The Distribution of Goods by the State. Social Ramifications and Legal Constructions], Ossolineum, 1989, p. 267). However, in the present legal state the permissibility of court review over such acts depends on whether they are recognized as administrative decisions issued under the Administrative Proceedings Code.

5. The allocation of a special purpose allowance in the form of a credit ticket not requiring a decision points to the classification of this form of act performed by the administration as an act in fact. The same position has also been taken by the Prosecutor General. However, it is not a typical act in fact involving action that is not aimed at producing direct legal effects and that cannot be used to specify one's rights or obligations (cf. A. Błas: *Teoria prawnych form działania administracji wobec nowych zjawisk w administrowaniu*, [The Theory of Legal Forms of Acts Performed by the Administration in the Context of New Phenomena in Administration]; *Acta Universitatis Wratislaviensis; Prawo XL*; Wrocław, 1973; p. 79). It is also difficult to classify the act of granting a special purpose allowance in the form of a credit ticket as an ordinary psychophysical act or a material and technical act involving 'simple release of the benefit, as the act must be preceded by the establishment whether the benefit is to be granted, who is to be the recipient, and what is to be the scope of the benefit. The very act of granting or refusing aid in this form is a typical administrative act unilaterally and authoritatively settling in legal terms the situation of a specific person in an individual case. As it has been pointed out, the act is at the same time of a constitutive nature, with rights of the person in question realized only after its execution. The material and technical act involving the release of a credit ticket may take place only on the basis of the prior act of granting the special purpose allowance in such a form.

Under the express provision of article 32, section 5, sentence 2, the Social Assistance Act excluded an administrative act in the form of an administrative decision in the case of this kind of settlement, at the same time excluding the possibility of conducting jurisdictional administrative proceedings. And if there is no decision, then – despite the existence of the legally institutionalized relation between the administration and the individual – one cannot talk of the existence of proceedings formalized under the Administrative Proceedings Code or of court protection.

The classification of the act of the administrative body included in the challenged provision of the Act has considerable financial, legal, and procedural consequences for the individual. This is so because the legal situation of an individual is determined not only by the rules of substantive law, but also by the rules of procedural law, including a system of preventative and repressive guarantees providing the individual with the possibility to

effectively exercise his or her rights. The significance of substantive law in determining the legal situation of the individual therefore depends on whether it is possible to exercise the right, that is on the legal means at the disposal of the individual applying for a benefit. An informal procedure without the participation of the person interested in obtaining the benefit and providing for no appeal or defense before a body of external review reduces the situation of the individual to that of a supplicant whose treatment by the administration may be totally unrestrained and discretionary.

The individual may indeed file a complaint against (in his or her opinion) inappropriate conduct of the body in question in the manner specified in Part VIII of the Administrative Proceedings Code, but from the point of view of the protection of the individual's rights, this measure is imperfect. While the complaint opens a kind of proceedings irrespective of the situation of the person filing the complaint in terms of substantive law, the specificity of the proceedings and the legal consequences of filing a complaint are not procedurally convenient for the individual. Unlike administrative procedure, the complaint procedure is very broad, with its scope practically undefined in terms of the object and the subject, and its nature clearly informal. The complaint procedure is not aimed at the determination or creation of a specific legal situation. Neither does it end when the decision is issued. The person filing a complaint merely has the right to be advised about the positive or negative outcome of the case.

#### IV

1. Having considered the facts established in Part III of the reasoning, the Constitutional Tribunal examined the allegation that article 32, section 5, sentence 2 of the Social Assistance Act contravenes articles 1 and 67, section 2 of the Constitution of the Republic of Poland and shared the position of the Applicant on the following grounds:

2. The granting of a benefit to a citizen in the form of a credit ticket, provided for under article 32, section 5 of the Social Assistance Act, does not (contrary to the intention of the Prosecutor General and as pointed out in Item III.5 of this opinion) constitute an act in fact within the scope of operation of the administration as it is not (as in the case of a typical act in fact) an action that is not aimed at producing direct legal effects and specifying rights or obligations. An act of granting or refusing aid in the form of a credit ticket is essentially in terms of substance a typical administrative act under which the situation of a specific person is settled unilaterally and authoritatively in an individually identified case. It is also a constitutive act, as only upon its execution the rights of the person applying for the benefit specified in the Act are realized.

3. By the exclusion (under article 32, section 5, sentence 2 of the Social Assistance Act) of the form of administrative decision for the purpose of granting the individual one of the benefits specified in the Act, the individual is deprived of the right to administrative proceedings, which provide an effective means of protecting especially the right to appeal and the right to court review of the steps taken by the administration. Thus, the individual is left with the defective right to file a complaint against inappropriate steps taken by the administration in the manner provided for under the provisions of Part VIII of the Administrative Proceedings Code.

The solution adopted in article 32, section 5, sentence 2 of the Social Assistance Act is not justified by the optional nature of the benefit in the form of a credit ticket or the fact that the benefit is granted by an administrative body subject to administrative discretion. Specifically, such discretion (as pointed out in III. 4 of this opinion) in a State in which the operation of the state administration is based on the law (article 3, section of the Constitution

of the Republic of Poland) is also subject to review because it is merely a specific form of the implementation of provisions of the law.

Likewise, the Tribunal did not share the reasoning of the Prosecutor General under which the very nature of the benefit „following from the temporary and short-term situation of the person in need of aid” for practical reasons justified departure from the rules governing the issue of administrative decisions provided for under the provisions of the Code of Civil Procedure. In the opinion of the Tribunal, such a departure cannot be justified with respect to a typical (in terms of substance) procedure for issuing decisions, a procedure deciding about the granting of a single benefit constituting a special purpose allowance in the form of a credit ticket. Likewise, the argument based on alleged difficulties with the establishment of jurisdiction in terms of venue is corroborated neither by the provisions of the Administrative Proceedings Code nor by the Social Assistance Act. These issues are unequivocally settled in article 37 of the Social Assistance Act.

4. The exclusion of an administrative decision as a form of action taken by a state body with respect to the social welfare benefit in the form of a credit ticket, resulting in depriving the individual of significant guarantees for the protection of his or her legal interests provided for under the provisions of the Administrative Proceedings Code is a solution that undermines the system basis of the review of state administration provided for under the Administrative Proceedings Code, including the general clause specifying the powers of the Chief Administrative Court (article 196, section 1 of the Administrative Proceedings Code). The solution also constitutes a completely unjustified violation of the uniform solutions provided for under the Social Assistance Act itself; such as granting social welfare benefits by means of individual administrative acts and making social welfare decisions subject to the jurisdiction of the Chief Administrative Court (article 36; section 1 of the Social Assistance Act), thus proving a lack of conformity on the part of the lawmaker.

In evaluating the challenged solution provided for under article 32, section 5; sentence 2 of the Social Assistance Act in terms of its constitutionality, the Constitutional Tribunal concluded that it contravenes article 1 of the Constitution of the Republic of Poland in the part that provides for the democratic rule of law. First, the solution does not conform with access to courts following from the above rule and article 56, section 1 of the Constitution of the Republic of Poland (cf. decisions of the Constitutional Tribunal in cases: Uw. 9/88, K. 4/91, K. 8/91, K. 3/91). In terms of its object, this right covers, among other things, settlement of cases of administrative nature (see the Constitutional Tribunal’s decision in case K. 8/91), covering cases concerning social welfare benefits and including the special purpose allowance in the form of a credit ticket. Therefore, in the opinion of the Constitutional Tribunal, the act’s exclusion of granting this form of allowance from access to administrative courts constitutes a violation of the constitutional right of access to courts. In the conditions of the democratic rule of law, access to courts is of such import that any narrower interpretation of this right (including the case under consideration) especially one that is claimed to be justified by the temporary and unique nature of the benefit in the form of a credit ticket or by practical considerations, which are in fact unjustified – would not conform with the accepted understanding of access to courts as presented in the Constitutional Tribunal’s Decisions and the meaning of access to courts portrayed in article 14, section 1 of the Political Rights Pact and article 6, section 1 of the European Convention of Rights.

Furthermore, the Constitutional Tribunal acknowledged that the directives following from the constitutional principle of the democratic rule of law was violated by article 32, section 5, sentence 2 of the Social Assistance Act not only as a result of the violation of access to courts, as claimed by the Applicant. Article 1 of the Constitution of the Republic of Poland was also violated in the part laying down the said principle by the provision of the Act

depriving the individual of the right to jurisdictional administrative procedure together with the right to appeal a decision of a body of first instance. The Social Assistance Act failed to ensure the individual yet another effective means of legal protection in the event he or she is refused the benefit referred to in article 32, section 5, sentence 2 of the Act; one which could be considered an effective (out-of court) means of vindicating one's right. The right to a fair („just”) procedure in cases concerning the protection of citizens' legal interests is entailed by the democratic rule of law if it is not expressed in the qualified form of the right of access to courts. As mentioned earlier, these requirements are not satisfied by the right to make a complaint against the refusal to grant a benefit, a right regulated under the provisions of the Administrative Proceedings Code and applicable to the refusal to grant a credit ticket.

5. The Constitutional Tribunal acknowledged that the challenged provision of the Act also contravenes article 67, section 2 of the Constitution providing for equality. In the opinion of the Tribunal, as a result of the introduction of the challenged regulation the legal situation of recipients of specific social welfare benefits, such as the special purpose allowance for travel, was affected by gross differentiation with respect to the right to allowance in a manner that lacks sufficient justification.

Allowing for the system and functional context of article 32, section 5, sentence 2 of the Social Assistance Act, the Constitutional Tribunal assumed that the purpose of granting a credit ticket (like the purpose of each type of special purpose allowance) is the „satisfaction of an essential everyday need” (article 32, section 1 of the Act), and specifically the individual's need to travel, for example, to the place of domicile or for the purpose of satisfying an essential need in his or her life. The satisfaction of this need may (as a rule in the case of a special purpose allowance) take the cash form (that is granting the amount equal to the amount of the ticket) or (as supported by the wording of article 32, section 5, sentence 2) the non-cash form (credit ticket), where the choice of form may be made independent of the applicant's will pursuant to the right of the competent body under article, 6, section 3 of the Act not only to assess the need to grant the allowance, but also to choose its form. If the cash form is selected, the competent body is obligated to grant the allowance by administrative decision, while the recipient is entitled to the rights held by a party to administrative proceedings, including the right to appeal the decision with an administrative court. The granting or refusal of a credit ticket does not require a decision, and besides the possibility of lodging a complaint, the recipient of the benefit cannot avail him/herself of the advantages of the Administrative Proceedings Code. Thus, the introduction of the challenged regulation resulted in the differentiation (barred under article 67, section 2) of the legal situation of citizens with respect to the protection of the said right to social welfare benefits of persons in the same actual situation and in need of aid.

(...)