

**Indemnification at five to twelve –**  
**German Pensions for Work in Ghettos (ZRBG)<sup>1</sup>**  
**Origin, application, problems of jurisdiction<sup>2</sup>**

I. History and origin of the ZRBG law

Even today, 60 years after the end of the war, the compensation of NS victims is a subject that keeps jurisdiction and politics particularly busy<sup>3</sup>. For social jurisdiction, it is primarily a matter of pension rights arising from the respective individual persecution fate. In doing so, German history consistently leads to borderlines of law – in this specific case, conditions prevailing in a system in which all standards of justice and humanity had no value at all are to be judged in accordance with present standards. Soon after civil claims were generated in 1953 in accordance with the German Federal Indemnification Law (BEG<sup>4</sup>), National Security was also integrated into the attempt to compensate at least a small part of the injustice done by Germany. However, a precondition for the equalisation of foreign NS victims with persons from Germany applying for a pension was regularly the affiliation to the so-called German Language and Culture Circle (dSK) in accordance with the Foreign Pension Law (FRG<sup>5</sup>) opened for NS victims in 1963 and/or the Law for Restitution of Nazi Injustice in Social Insurance (WGSVG<sup>6</sup>), which de facto excluded a multitude of other survivors from claims<sup>7</sup>.

Then the Federal Social Security Court (BSG) for the first time declared in 1997 by using the example of the ghetto of Lodz that in principle the same pension rights can arise from the employment in a ghetto as otherwise in national social insurance<sup>8</sup>. Since

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<sup>1</sup> Federal Law Gazette – (BGBl) – part I page 2074.

<sup>2</sup> Speech at congress, held on April 9, 2008, before the Institute for Contemporary History in Munich; dedicated to my father in law, Janusz Wisniewski, born 7.12.1926 in Warsaw

<sup>3</sup> From the London Debt Agreement dated February 27, 1953 – BGBl part II 331- to the Two-plus-Four Contract dated September 12, 1990, within the scope of the reunification of Germany – BGBl part II 1317 –.

<sup>4</sup> BGBl part I page 1387.

<sup>5</sup> BGBl part III, outline number 824-2.

<sup>6</sup> BGBl part I page 1876.

<sup>7</sup> § 20 par 1 sentence 1 WGSVG, § 17a FRG.

<sup>8</sup> Sentence dated June 18, 1997 – 5 RJ 66/95 B – BSGE 80, 250, furthermore: sentences dated June 18, 1997 – 5 RJ 66/95 – 5 RJ 66/95 -; April 21, 1999 – B 5 RJ 48/98 R –; and

Lodz/"Litzmannstadt" was located in the (contradicting international law<sup>9</sup>, but formally effective<sup>10</sup>) annexed part of Poland, the BSG based the acknowledgement of the payment of contribution on the Reich Insurance Code (RVO) that had been put into force there. In accordance with § 1226 par 1 no. 1 RVO then-effective version (aF), in particular those workers were insured in the disability insurance (workers' old-age pension insurance) who had been paid for their work (§ 160 RVO). Mere granting of free subsistence did not lead to obligatory insurance (§ 1227 RVO aF). Incidentally, dependent employment was and still is regarded as typical of the development of an employment relation, especially in an employment, which may on the one hand be distinguished by the integration of the employee into the employer's business, but on the other hand is also aimed at the exchange of services by a mutual decision of employment (as a rule job performance for remuneration). However, according to the then prevailing legal situation – stoppage of payments in accordance with § 113 par 1 sentence no. 1 and sentence no. 2 Social Security Code Sixth Book (SGB VI), – the pension rights acknowledged by the BSG were not payable abroad.

After the German Parliament Committee for Labour and Social Affairs had initially favoured a possible solution outside the old age pension scheme<sup>11</sup> in 1998 and the BSG had called for statutory reopening of subsequent payment rights for NS victims in 2001 with the aim of making it possible to pay for ghetto times of contribution<sup>12</sup>, the German Bundestag implemented this jurisdiction in 2002 with the ZRBG "in order to close a gap in the indemnification for NS victims" – it was, however, instituted within social security law – and unanimously passed the ZRBG<sup>13</sup>. The new law made the pension rights of NS victims payable abroad if they can make it credible that they had been "employed of their own accord in a ghetto for remuneration" – the wording used in § 1 ZRBG. By virtue of legal fiction, the applications are retroactive to the year 1997 (§ 3 ZRBG). They apply to ghettos in the entire area occupied by the Wehrmacht. The calculated

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July14, 1999 – B 13 RJ 61/98 R – all Social Welfare Court sentences available free of charge under: [www.sozialgerichtsbarkeit.de](http://www.sozialgerichtsbarkeit.de).

<sup>9</sup> Same remark already made by the head of the "Kreisauer Kreis" Helmuth James Graf v. Moltke 1940 under reference to the Hague Convention : session of section Public International Law of Academy for German Law, minutes of discussion, Federal Archives Berlin/Koblenz R 61/360; furthermore: Ipsen, Public International Law, 5<sup>th</sup> edition 2004, § 23 Rn 42ff.

<sup>10</sup> Regulation on Eastern Territories dated December 22, 1941 – Reich Law Gazette part I 777.

<sup>11</sup> See Bundestag printed paper (BT-Drucks.) – 13/11142.

<sup>12</sup> Sentence of 12th senate of BSG dated March 22, 2001 – B 12 RJ 2/00 R – under reference to term of subsequent payment (expired on December 31, 1990) of § 21 par 1 sentence 3 WGSVG.

<sup>13</sup> See Bundestag printed paper ( BT-Drucks.) 14/8583 and 14/8602.

pension regularly amounts to approximately 200 euros per month on account of the chargeable further (war) substitute qualifying periods. If the applications were successful, the amount of the additional payment on average amounts to approximately 10,000 Euros. The Federal Government estimates the total volume of possible ZRBG claims at 2.3 billion Euros<sup>14</sup>. However, the subsidies paid by the Federal Government to the pension insurance carriers for consequential costs of the war were not increased when the ZRBG was enacted. After the ZRBG came into effect, the Federal Government and the German pension insurance carriers intensely published press releases, messages to victim associations and internet statements with information on the new law<sup>15</sup> abroad. Approximately 70,000 applications (including approximately 30,000 from applicants with permanent residence in Israel) were subsequently received by the German pension insurance carriers. In parallel, negotiations of the German-Israeli liaison agencies about questions concerning the ZRBG took place in Munich from 1 until 3 July, 2003, between representatives of the Israeli national insurance institution and delegates of the German pension insurance carriers. The result of these negotiations was determined: "The authentication of contribution periods in ghettos is sufficient for their recognition. A fact is credible if its existence is predominantly supposable in accordance with the result of the enquiries that are supposed to cover all obtainable evidence (§ 3 par 1 sentence 2 WGSVG). Already existing documents from other agencies and authorities (e.g. compensation authorities) and testimonies are primarily taken into consideration as evidence. Deviating statements made in previous proceedings normally do not exclude the recognition of contribution periods in ghettos. Statements made by beneficiaries in previous compensation proceedings that they had performed compulsory labour during their stay in the ghetto are a comprehensible expression of subjective feeling and by themselves do not generate the decline of a claim. The German side shall immediately undertake to put the consensually achieved results into practice."

Nevertheless, about 95 % of the applications were usually rejected based on the presented documents on the grounds that the applicant's statements were not credible, controversial in respect of the old BEG files or insufficient. In August 2006, the Federal Government declared that the high rate of rejection was the result of the lack of knowledge on the part of the persons concerned with regard to the complex legal status and conformed to the expectations of the legislator<sup>16</sup>. Malpractice by the pension insurance carriers was not found even after extensive revision with the assistance of the supervisory authorities<sup>17</sup>.

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<sup>14</sup> BT-Drucks. 16/5518.

<sup>15</sup> For this purpose see BT-Drucks. 15/1475.

<sup>16</sup> BT-Drucks. 16/1955.

<sup>17</sup> GS committee printed matter (Ausschussdrucks.) 0825 dated February 28, 2005.

This presentation by German public authorities, however, could and can still not be imparted to survivors of the ghetto who as a rule lost all their relatives in the Shoa – especially since they were not given any chance in the administrative procedures of the pension insurance carriers to comment on the inconsistencies they were reproached with in a personal and oral hearing. Therefore a large number of applicants filed an action before the competent social courts. Today the average age of the petitioners is about 80 years. Several thousand court and administrative procedures are still pending throughout Germany, most of them since the year 2003 (including the opposition proceedings at the pension insurance carriers). Judicially asserted claims have been hereditary from the filing of an application on. In addition, insured persons with concluded ZRBG proceedings are still entitled in accordance with § 44 SGB X to apply at any time for a new revision of their rejected applications which is retroactive for four years. Since the year 2007, the Israeli government has furthermore allowed German courts to hear ghetto survivors in their home country; this was previously only possible by way of time-consuming legal assistance (periods up to three years). About 50% of all survivors intend to make use of these new possibilities. Others now present the records of their fate with the assistance of the Steven Spielberg Foundation<sup>18</sup> and/or by Yad Vashem<sup>19</sup>. In parallel, the courts of appeal have now increasingly started to have the hitherto unexplored archives in East Europe evaluated by historians in detail on location<sup>20</sup>. At the same time, clarification of central terms of the ZRBG – ghetto, employment, remuneration – by the Supreme Courts in view of contradicting sentences pronounced by the responsible pension senates<sup>21</sup> and a respective submission decision now to be issued by the Great Senate of the BSG in accordance with 41 par 4 Social Court Act (SGG) cannot be expected in the foreseeable future<sup>22</sup> because this will block appeal jurisdiction at the competent senates of the BSG for the time being. The administrative practice of the pension insurance carriers is also inconsistent. While RV-Rheinland – responsible for Israel – follows the 13<sup>th</sup> senate of the BSG, e.g. RV-Oberbayern applies the jurisdiction of the 4<sup>th</sup> senate of the BSG. The position of RV-Nord and RV-Bund who are responsible for the USA is at least in view of the consideration of evidence remarkably less restrictive. This frequently leads to the result that survivors of the same ghettos and job locations do or do not receive ZRBG recognition depending on their

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<sup>18</sup> In part retrievable under [www.usc.edu/vhi](http://www.usc.edu/vhi).

<sup>19</sup> In part retrievable under [www.yadvashem.org.il](http://www.yadvashem.org.il).

<sup>20</sup> In the area of the 8th senate of the LSG NRW alone about 100 proceedings are at present pending with historical enquiries under engagement of historians.

<sup>21</sup> On the one hand: sentence of the 4th senate of the BSG dated December 14, 2006 – B 4 R 29/06 R – on the other hand: sentence of the 13<sup>th</sup> senate of the BSG dated July 26, 2007 – B 13 R 28/06 R –.

<sup>22</sup> Decision of the 4th senate of the BSG dated December 20, 2007 – B 4 R 85/06 R –.

present residence. This cannot be imparted to the affected persons either. Against this background, time-consuming legal proceedings in trial courts and extensive historical enquiries are to be expected for many years. These may lead to success in the proceedings, but they will take very long. The final result will be a carefully researched conclusion, but will also lead to great bitterness because the affected persons did not enjoy any of the benefits in their lifetime.

The Federal Government (primary responsibility the Federal Ministry of Finances – BMF) conducted negotiations with the Israeli government and the Jewish Claims Conference (JCC) about a fund solution by analogy with the fund for forced labourers<sup>23</sup> with the aim to avoid such a situation. In doing so, the Israeli side fundamentally supported a composition solution within the scope of the ZRBG in the form of a 50% nuisance settlement. This was also previously proposed by competent German courts<sup>24</sup>. The pension insurance carriers declared that they welcomed every constructive and legally acceptable approach that would take the concerns of the Holocaust survivors into account in an unbureaucratic and contemporary manner. And now the German Bundestag will also have to concern itself with a legislative initiative to the ZRBG at the request of the parliamentary wing of the Green Party<sup>25</sup>. However, the Federal Government still does not consider a change of the ZRBG as necessary<sup>26</sup>. It has in fact now in lieu of a legislative procedure for the time being enacted a directive by cabinet decision on September 19, 2007, that facilitates a humanitarian "recognition indemnification". That is intended "for labour in a ghetto that was not forced labour and has thus far not received any recognition in respect of social security law"<sup>27</sup>. According to this, every person is entitled to benefit who was acknowledged as a victim of persecution in the sense of the BEG and who worked in a ghetto "without any constraint in a position similar to an employment (§ 1 of the directive). The recognition indemnification consists of a one-off payment of 2000 Euros. The procedure is carried out in accordance with the directive by the Federal Office for Central Services and Unresolved Property Issues and is dormant as long as a ZRBG procedure is still or again pending with the German pension insurance (§1 par 3 of the directive). If a ZRBG procedure is successful, the recognition indemnification has to be returned (§1 par 2 of the directive). However, only

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<sup>23</sup> Based on the law for the establishment of a foundation "Remembrance, responsibility and future" (Stiftung "Erinnerung, Verantwortung und Zukunft") dated August 2000, BGBl part I 1263.

<sup>24</sup> v. Renesse, Magazine for Legal Policy, 2008, 18ff.

<sup>25</sup> BT-Drucks. 16/6437.

<sup>26</sup> BT-Drucks. 16/5720.

<sup>27</sup> Federal Gazette 2000, page 7693, complete text available on home page of BMF – [www.bundesfinanzministerium.de](http://www.bundesfinanzministerium.de).

about 800 applications of the about 16,000 applications submitted in accordance with the directive have received positive recognition<sup>28</sup>.

## II. Application of the ZRBG in jurisdiction

In jurisdiction by the Supreme Court of the BSG, not only the interpretation of the central terms of the ZRBG "employment and remuneration" has still not been clarified against this background, but even the legal character of the ZRBG in total is still under dispute: in the opinion of the 13<sup>th</sup> senate of the BSG, the old-age pension rights are solely based upon Social Security Code Sixth Book (SGB VI) without the ZRBG representing a basis of claim in its own<sup>29</sup>. On the other hand, the 4<sup>th</sup> senate of the BSG points out<sup>30</sup> that the legislator has entered new territory with the ZRBG and has created an own settlement that is rather based on compensation rights. According to the opinion of the 13<sup>th</sup> senate of the BSG that has been adapted by several judicial panels of the Superior State Special Courts (LSG) in the meantime<sup>31</sup>, the old legal situation in accordance with the RVO will remain relevant until an employment against payment in a ghetto has been ascertained.

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<sup>28</sup> Thus the representative of the BMF Dr. Langner in his congress speech on the recognition directive before the Insitute for Contemporary History on April 10, 2008.

<sup>29</sup> Urteil vom 26.07.2007 – B 13 R 28/06 R –.

<sup>30</sup> Urteil vom 14.12.2006 – B 4 R 29/06 R –.

<sup>31</sup> Thus at first the 3rd senate of the LSG NRW with sentence dated May 7, 2007 – L 3 R 34/07 -, also the 14<sup>th</sup> senate of the LSG NRW with sentence dated January 11, 2008 – L 14 R 146/06 – furthermore the 6<sup>th</sup> senate of the LSG Rhineland-Palatinate with sentence dated February 27, 2008 – L 6 R 18/07 –, also the 1<sup>st</sup> senate of the LSG Hamburg with sentence dated April 30, 2008 – L 1 R 195/07; on the other hand differentiating the 2<sup>nd</sup> senate of the LSG Lower Saxony/Bremen with sentence dated January 24, 2007 – L 2 R 464/06; also the 8<sup>th</sup> senate of the LSG NRW in principle follows the 13<sup>th</sup> senate of the BSG, but adopts elements from the argumentation of the 4<sup>th</sup> senate of the BSG in its jurisdiction: sentences dated June 6, 2007 L 8 R 54/05 – revision pending under B 13 R 115/07R, dated June 20, 2007 – L 8 R 74/05 – legally binding; the opinion of the 4<sup>th</sup> senate of the BSG has also met consent and rejection in the literature, see on one hand Strassfeld in: Social Jurisdiction 2007, 598ff, on the other hand Bieback in: jurisPR-SozR 19/2007 note 3 –.

### III. Employment on own free will

First of all, it is important to realise – irrespective of all dogmatic questions – that legally and historically an assessment in accordance with the ZRBG cannot depend on a comparison between the circumstances prevailing in the ghettos in those days and the present working conditions in the Federal Republic of Germany, but exclusively on the conditions of state-insured working conditions during the Second World War – and that means such working conditions that even today serve as an unquestionable basis for times of contribution in the German Federal Pension Fund. Insofar it is common knowledge and also known to the pension insurance carriers (RV-Träger) that general obligation to work was introduced in the German Reich for men and women of full age at the outbreak of the war<sup>32</sup> and former constitutional labour legislation of the Weimar Democracy was fundamentally denatured after Hitler's seizure of power as a consequence of NS ideology<sup>33</sup>. According to the guiding principle "May whatever serves the German people be legal", there was no space for the individual human being and his dignity<sup>34</sup>. From 1933 on, subjective rights were no longer conceded to the individual, but at best to the collective of the so-called "master race"<sup>35</sup>. The individual worker was not seen as an individual any more, but only as part of the so-called "Betriebsgefollgschaft (corporate workforce)". Breaches of the previously individual-legal labour contracts were now draconically punished for "defection" or "loafing" with police custody in so-called "labour correction camps" of the Gestapo (there were about 200 of them in the entire area of the Reich in which about 700,000 persons served terms of imprisonment during the war)<sup>36</sup>. The German social insurance carriers were also actively tied into this system by the locally responsible employment offices or state labour agencies<sup>37</sup>. And until today there is no doubt for all of the German pension insurance carri-

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<sup>32</sup> Official Duty Directive dated February 20, 1939 – Reich Law Gazette part I page 206; for more details see Gagel, in: *Neue Zeitschrift für Sozialrecht – NZS* -, 2000, 231, 234.

<sup>33</sup> Further details by Rùthers, *Unbegrenzte Auslegung (Unlimited Interpretation)*, 6th edition, 2004 with numerous references from contemporary jurisdiction and literature.

<sup>34</sup> Further details by Mitteis-Lieberich, *German History of Law*, 19<sup>th</sup> edition, 1992, chapter 50 I. No. 2.

<sup>35</sup> Paradigmatic for the prevailing mentality: Larenz, *Legal person and subjective law*, in: the same (editor) *Basic questions of new jurisprudence 1935*; also the same: *About subject and method of "völkisch" (racial) principles of justice*, 1938.

<sup>36</sup> Further details by Lofti, *KZ der Gestapo – labour correction camps in the Third Reich*, 2003.

<sup>37</sup> Lofti, same reference, page 123; in general: Maier, *Beginnings and disruptions of labour administration until 1952 – At the same time a hardly known chapter of German-Jewish history*, 2004, pages 86ff.

ers that even work performed under such circumstances contrary to rule of law has to be taken into consideration for the current pensions of German insured persons as times of contribution. Equal circumstances contrary to rule of law – whether in the "Alt-reich" (initial area of the German Reich) or in the incorporated and/or occupied areas – can therefore not be cited in opposition to the pension claims of Jewish employees who survived<sup>38</sup>. The fact that they were in addition exposed to far more frightful sufferings as inhabitants of the ghetto outside the company is not in opposition to their claim either. For the separation of work and employment area in the ghetto as established by the BSG in its ghetto jurisdiction since 1997 has now become law in §1 ZRBG and is now even normative basic prerequisite for the claim.

However, the pension insurance carriers have a historically unfounded impression not only of German "regular", but also of forced labour performed during WWII as legal antonym. This is to say that in their constant administration routine – in part expressly, in part tacitly – they act on the assumption that these items were two contrary antipoles that were easy to distinguish. It is, however, a fact that in the reality of the Nazi state of injustice they were only gradual nuances of a deprivation of individual rights, which characterised the entire NS system of those days. In doing so, the extent of constraint applied by the Germans against the foreign labourers was also variable and in addition had different characteristics. Thus many so-called "Fremdarbeiter" (foreign labourers) voluntarily registered with the recruitment offices of the German labour agencies in the occupied areas at the beginning of the war. Although the promises that were made to them were normally not kept later on, they still received regular remuneration. They were within certain limits able to change their jobs on their own accord. In accordance with the judicial conception of the Reichsversicherungsamt (RVA = Reich insurance agency) as supreme authority and at the same time supreme administrative organ of justice of former German National Security, even forced labourers were allowed to sue for benefits from accident insurance<sup>39</sup>. Contributions were paid for them to National Security and – even though lower – benefits by medical support were granted by National Security<sup>40</sup>. The German pension insurance carriers – especially those whose territorial area of responsibility included the Ruhrgebiet area and thus one of the central defence industry and forced labour regions of the German Reich – received the deductions from

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<sup>38</sup> See BSG SozR 3 2200 § 1248 No. 7 page 50 f. regarding claims of so-called "Eastern labourers" (non-German workers).

<sup>39</sup> Quoted from Reininghaus, Archive and collected material about the history of forced labour in Germany 1939 – 1945, in: *Forced labour in Germany 1939 – 1945*, editors Reininghaus/Reimann, 2001, 38, 41, 43 with further evidence.

<sup>40</sup> Confirmative remarks from former German point of view by the subsequent president of the BSG Bogs who worked in the RVA in: *Die Ortskrankenkasse (local social health insurance fund)*, 1940, 165ff; 1941, 2ff.

the forced labourers' wages in their area of responsibility accordingly and to this day have only furnished pension benefits according to pension law to a very limited extent<sup>41</sup>. According to calculations made by the historian Aly, the German pension insurance carriers received about one billion Reichsmark in the form of contributions from the forced labourers during WWII without any actual valuable consideration<sup>42</sup>.

The conclusion makes it clear that the term "forced labour" did not specify a definite category or a clearly defined group of legal or employment relationships. Against this background, the pension insurance carriers' assumption of a definite differentiability of forced labour on one hand and free employment relationships on the other hand is historically unfounded in respect of the Nazi regime. In fact, the differentiation has to be accomplished by means of a bundle of findings in a judgemental-gradual manner and not in the sense of a schematical-simplifying Yes-No classification based on a single criterion<sup>43</sup>. The jurisdiction of the BSG has thus far done nothing else on the basis of individual cases submitted to it for decision. In particular, the following findings result from this regarding the cause and the external circumstances of the employment:

The determination of the work as "forced labour", especially in condemnation proceedings, is not sufficient in order to negate the attribute<sup>44</sup>. It is also innocuous that there was abstract-generally ordered compulsion to work. The fact that work was procured by the Judenrat (Jewish council) in principle is not opposed to the appraisal of an employment, even if the local Judenrat was obligated to "supply" a certain number of labourers for the accomplishment of specific tasks. In particular the fact that there were comparable persons in a certain temporary and local frame of reference who did not work can speak for a free employment relationship and against the assumption of forced labour<sup>45</sup>.

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<sup>41</sup> Since even an in principle existing claim for pension by the former "Eastern labourers" can still to this day not be paid to East European countries on account of the stoppage of payments based on § 113 SGB VI – see BSG SozR 3 2200 § 1248 RVO No. 7 page 50 f.

<sup>42</sup> Aly, Hitlers Volksstaat, 3<sup>rd</sup> edition 2005, 186ff.

<sup>43</sup> In this differentiating sense also Gagel, NZS, 2001, 231, 233; also Strassfeld, in: Die Sozialgerichtsbarkeit (social court jurisdiction), 2007, 598ff.

<sup>44</sup> See BSG, sentence dated August 23, 2001 – B 13 RJ 59/00 R –.

<sup>45</sup> BSG, sentence dated June 18, 1997 – 5 RJ 20/96 – about Trudarmee <= labour army> in the USSR under Stalin.

- The motives why the employment was taken up are irrelevant. Even existential hardship (e.g. fear of starvation or deportation to an extermination camp) as motive do not oppose the assumption of voluntary commencement of work<sup>46</sup>.
- In contrast, there is the characteristic of forced labour in public and other authoritarian assignment of specific labourers to specific enterprises without giving the employee any influence on whether or where the labour performance is to be rendered. On the other hand, there can still be a "free" employment relationship in spite of the order to take up a specific job if the working conditions incidentally corresponded to those of "normal" employees<sup>47</sup>. Furthermore, authoritarian guarding during work can indicate forced labour (however, not on the way to and from work since this guarding itself can be legally provided proof of compulsory detention in a ghetto). According to each individual case, corporal punishment at the working premises contradict voluntary employment; in particular, reasons and cruelty of punishment as well as further circumstances, e.g. the age of the victim at that time, are relevant.
- Accordingly the following can be an indication against voluntary employment: the performance of work that can virtually not be expected from the specific person under the assumption of own free will (e.g. on grounds of age, unreasonable demands on individual physical strength or the type of work itself). In doing so, there is no bottom age limit. However, in case of particularly young petitioners, the individual case has to be examined as to whether the entire circumstances of the case still indicate voluntariness.
- A final indication for forced labour is the fact that remuneration for individually performed labour was not or only to a very small extent paid to the labourers<sup>48</sup>.

In general, one can say that the more facts speak for a voluntary employment, the closer the definition of the actual work is located to the type of "normal" work relationship<sup>49</sup>.

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<sup>46</sup> See BSG, sentence dated July 14, 1999 – B 13 RJ 75/98 R -; BSG, sentence dated June 18, 1997 – 5 RJ 20/96 –.

<sup>47</sup> Thus e.g. BSG, sentence dated March 17, 1993 – 8 RKnU 1/91 – about work of Wolgadeutsche (Germans living in Wolga area) also with further evidence regarding question of employment in imprisonment.

<sup>48</sup> See in reference to last criteria mentioned in particular BSG, sentence dated July 14, 1999 – B 13 RJ 75/98 R –.

<sup>49</sup> Also Gagel, NZS 2001, 231, 233.

#### IV. Remuneration

The provision of § 1226 RVO at that time did not contain a precise definition of the amount of remuneration for blue-collar and white-collar workers that was subject to compulsory insurance. In accordance with § 160 RVO aF (old version), remuneration in the sense of the RVO included in addition to salary or wages also shares in profits, payments in kind and other benefits that the insured person, even if only habitually, received instead of salary or wages or besides him from the employer or a third person. However, an employment for which only free subsistence was granted was exempt from insurance (§ 1227 RVO aF). These provisions are based upon § 3 par 2 of the Disability Insurance Law (IVG) from 1889 and express a central basic principle of social security law, which is still relevant to this day. Among others, the historical background was the fact that it was common usage – when National Insurance was created in Germany – to remunerate in agriculture, but also household servants, with benefits in kind. According to this, the reason for the stipulation in accordance with legal provisions<sup>50</sup> and prevailing contemporary literature was the protection of the insurance carrier against exploitation by means of pretended employment relationships as they especially could possibly have been constructed by accepting elderly persons into the common household of related families<sup>51</sup>. As today set forth in § 14 SGB IV, even the directive in those days did not rid free subsistence of the legal property as remuneration in the sense of § 160 RVO, but only justified an exception in respect of the commencement of insurance liability<sup>52</sup>. Even then the interpretation of "free subsistence" only regarded the amount of economic commodities that was considered as required for the immediate satisfaction of essential necessities of the employee<sup>53</sup>. It was also already accepted that in principle only benefits in kind, but not monetary payments could belong to free subsistence – and that means not even when the purchasing power of these payments was only sufficient for the employee's essential subsistence<sup>54</sup>. Even the fact that third parties granted the remuneration did not oppose insur-

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<sup>50</sup> See commission report to RVO 4<sup>th</sup> part, page 19.

<sup>51</sup> Menzel/Schulz Sitzler, comments on insurance law for employees – AVG –, 1<sup>st</sup> edition, 1913, § 7 AVG – parallel regulation to § 1227 RVO – note 1; critical in contrast: Laß in: Weymann, Invaliden- und Hinterbliebenenversicherung, 2<sup>nd</sup> edition 1912, § 1227 RVO note 1.

<sup>52</sup> Thus already RVA -, Official News – AN – 1898, 627 to § 3 par 2 IVG.

<sup>53</sup> RVA appeal decision by augmented senate no. 75 from the year 1891 page 178,179 and no. 963 a from the year 1902 page 387; furthermore RVA AN 1891, 4ff.; 1899, 532, 739; in detail Menzel, Schulz, Sitzler, *ibid.* § 7 AVG note 3 at the end with further evidence from previous judicature of the RVA.

<sup>54</sup> See RVA, AN 1896, 271 to § 3 par 2 IVG.

ance liability according to the opinion in those days. The law itself expressly determined the commencement of insurance liability in § 1437 RVO. As early as 1911, the RVA clarified with the example of a Jewish orphan whose employer had paid the remuneration to the orphanage that insurance liability does not depend on the form of remuneration the employee receives, but solely on the remuneration granted by the employer<sup>55</sup>. Problems were, however, already created by the case that in addition to free subsistence there was a claim to salary or wages in cash, even though it may in fact not have been paid. In these cases, the application of § 1227 RVO (resp. for white-collar workers the parallel standard of § 7 AVG) was regularly considered as excluded<sup>56</sup>. In doing so, insignificant cash payments to the extent of mere pocket money granted in addition to complete or partially free subsistence and only intended for the satisfaction of certain insignificant necessities were admittedly regarded as negligible accessory, which adopted the character of the main remuneration, i.e. the grant of subsistence<sup>57</sup>. However, even then – as today – it was recognised that this could only be decided according to the state of the individual case under consideration of the living conditions of the persons involved. That is to say that the same amount of money could in the opinion of those days "be of substantial value for people living in humble conditions, but elsewhere in comparison to higher maintenance costs or for members of well-off classes could only be regarded as pocket money"<sup>58</sup>. It was also recognised in those days that it was not insignificant from the social insurance point of view whether an agreed amount was paid in fixed periods or monetary gifts of variable amounts and without any settlement were only granted for the respective demand for tobacco, visits to restaurants, festivities etc.<sup>59</sup>.

For this purpose, the RVA established general rules after WWI – but prior to the NS seizure of power – on the basis of its sentences until then, which are still relevant to this day. In the decision dated August 9, 1927<sup>60</sup>, and the circular order dated December 19, 1930<sup>61</sup>, it regarded a remuneration in cash granted in addition to free subsistence and not exceeding one third of the local daily wages as insignificant and thus as dependent part of free subsistence. Later on, it pronounced in general in its jurisdiction

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<sup>55</sup> RVA AN 1911, 404.

<sup>56</sup> Unless a simulated transaction was detected with the aim of aducing insurance liability; RVA, AN 1899, 624

<sup>57</sup> RVA, AN 1891, 155; 1892 36,120; 1896, 271.

<sup>58</sup> Thus Menzel/Schulz/Sitzler, at indicated location, § 7 AVG note 3; RVA, AN 1891, 153, 156; 1892, 4; 1893, 91f; 1907, 477.

<sup>59</sup> RVA, AN 1906, 640.

<sup>60</sup> EuM 21, 86, no. 6.

<sup>61</sup> EuM 26, 507, no. 54.

that the former general limit could very well fall short of one third of the local daily wages whenever not only cash remuneration, but also board and lodging were granted; however, the assessment of a limit would have to be left to a decision on the individual case<sup>62</sup>. One year earlier, the standing committee of the Reichsverband (imperial federation) of German state insurance institutions announced in accordance with the association of the German federations of employers and the Reichsverband of German trade associations in the directives dated March 1, 1932, under no. 3: "An apprentice who receives cash remuneration in addition to free subsistence is subject to disability insurance liability whenever the cash remuneration exceeds one sixth of the respective local wages"<sup>63</sup>.

The BSG has also followed this principle of the RVA after WWII and has stuck to it to this day. The definition of free subsistence and remuneration subject to insurance liability is still to be conducted by means of comparison with the respective local wages. In doing so, the BSG as previously the RVA does not consider one third of the local wages as a rigid barrier. According to the circumstances of the individual case, the amount can fall short of this mark. The directives dated March 1, 1932, and the resulting constant application by the disability insurance carriers can even give substantial support to the BSG for decisions in individual cases<sup>64</sup>. As far as the 13<sup>th</sup> senate of the BSG specified in relation to the ZRBG that in case of granting of food it had to be examined whether it was made available according to extent and type of needs for immediate consumption or use or depending on predefined extent at optional disposal – in this case, good food was not sufficient<sup>65</sup> – it did nothing but apply the classical criteria of social security law. Thus the 13<sup>th</sup> senate of the BSG neither limited nor increased these (afore mentioned) criteria. In doing so, only the question according to this jurisdiction regarding the ZRBG remains unanswered which general legal order the application of the RVO even without (formally effective but contrary to international law) act of annexation in the areas occupied by Germany should apply to. If these doubts in respect of international law<sup>66</sup> are left aside and one assumes – just like the 8<sup>th</sup> senate of

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<sup>62</sup> Leading decision dated March 30, 1933, AN IV 81ff.,197.

<sup>63</sup> Quoted from: Beurskens/Grantsch, Official statement by State Social Insurance Board Rheinprovinz 1971, 310, 314, under IV.

<sup>64</sup> See the summarised comments of the BSG in the sentence dated November 30, 1983 – 4 RJ 87/92 –.

<sup>65</sup> Sentence dated October 7, 2004 – B 13 RJ 59/03 R –.

<sup>66</sup> That in particular results from Art. 43 of the Hague Convention respecting the Laws and Customs of War on Land which sets forth that the old local rights still remain valid in occupied areas.

the LSG NRW<sup>67</sup> for the application of the ZRBG – at least internally equal treatment of all currently living Jewish ghetto inhabitants who survived (wherein the 8<sup>th</sup> senate of the LSG NRW still does not only refer to the materials of the ZRBG, but also feels vindicated by the oral contributions of the government factions in the latest debate of the German Bundestag about the ZRBG on November 16, 2007<sup>68</sup>), the following applies in accordance with ghetto jurisdiction by the 13<sup>th</sup> and 15<sup>th</sup> senate of the BSG supported by § 1227 RVO aF<sup>69</sup>:

- Exclusive granting of remuneration in the form of a national currency (e.g. Zloty or Reichsmark) in principle lead to monetary compensation of an employment. This applies in any case up to the minimum level of 1/6 of local wages as far as this can be determined. Below this level, it has to be examined in individual cases and without rigid regulations whether the insignificance of the remuneration indicated forced labour and thus was evidence against voluntary employment. As a rule, the ZRBG claim should not fail in view of the monetary compensation.
- Granting of consideration equating such a currency in the specific reference area (i.e. the ghetto in which the petitioners were forced to stay) – e.g. payment of ghetto money and granting of ration coupons which facilitated the acquisition of goods or services exceeding free subsistence as well as corresponding trade by barter – corresponds to remuneration in the form of a national currency<sup>70</sup>.
- Coupons in ghettos – just like ration cards issued to the local inhabitants in the Reich area during WWII – exclusively represented written confirmation that the owner was entitled to receive the foodstuffs shown on the card in the respectively quoted amounts<sup>71</sup>.
- In the opposite sense, the edition of food coupons that were not convertible but personal equals the granting of foodstuffs in kind.

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<sup>67</sup> Sentences dated June 6, 2007 – L 8 R 54/05 – appeal pending under B 13 R 85/07 R dated June 20, 2007 – L 8 R 244/05 – appeal pending under B 13 115/07 R – as well as dated July 4, 2007 – L 8 R 74/05 – legally binding.

<sup>68</sup> See oral contributions in plenary minutes of 127th session of German Bundestag dated November 16, 2007, regarding item 41 (BT-Drucks 16/6437).

<sup>69</sup> See sentence of 8th senate of LSG NRW dated January 28, 2008 – L 8 RJ 139/04 – legally binding.

<sup>70</sup> In addition: legally binding sentence of the 8th senate of the LSG NRW dated January 28, 2008 – L 8 RJ 139/04.

<sup>71</sup> Supreme court of German Reich, sentence dated November 13, 1917 – V 523/17 –.

- Whenever free subsistence and remuneration were granted in parallel, the employment is for remuneration when the remuneration reached a minimum level, which under the given circumstances can be allocated at about 1/6 of local wages.
- Finally, no further discussion is required about the fact that an "equivalence" of service and return service is not necessary in accordance with the clear-cut jurisdiction of the BSG<sup>72</sup>.
- If only food was exclusively granted, it may be assumed that the employment was not for a consideration when the granted rations – according to the petitioner's statements and/or in connection with known sources or historical findings – did not exceed the extent that must be considered as intended for personal use under the known poor conditions of subsistence. In this case, it does not lead to compensation either when workers receive not closely specified better foodstuffs (defined by the BSG as "good") than non-workers, in particular when these special rations simply covered the required increased amount of calories for the work<sup>73</sup>.
- It is also to be considered as part of free subsistence when in addition to the food only non-cash benefits were granted that belonged to basic personal needs (e.g. soap or – in individual cases – articles of clothing).
- However, the granting of foodstuffs led to compensation whenever it obviously exceeded the personal needs of the working person in respect of the volume. If the volume of benefits in kind then received in the ghetto is neither precisely assessed according to the statements of the petitioner nor to details provided by other sources or historical expertises, an indication for compensation under consideration of all circumstances of the individual case under the aspect of the auxiliary criterion in case of lack of evidence can be the fact that other persons who did not work and did not have any (sufficient) right to provision of food could be supported by using the granted foodstuffs for a considerable period of time. Only in this case, the auxiliary criterion used by the 8<sup>th</sup> senate of the LSG NRW applies; it was developed in continuation of the jurisdiction of the 13<sup>th</sup> senate of the BSG and itself can be supported by a long tradition in National Security<sup>74</sup>. The meaning of this rule of

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<sup>72</sup> See BSG, sentence dated July 14, 1999 – B 13 RJ 75/98 R –.

<sup>73</sup> In addition: sentence of 8th senate of LSG NRW dated July 4, 2007 – L 8 R 74/05 – legally binding.

<sup>74</sup> RVA Appeal decision by the enhanced senate No. 75 from the year 1891 pages 178,179 and Nr. 963 a from the year 1902 page 387; more details: Menzel, Schulz, Sitzler AVG § 7 note 3 at the end with further evidence from the judicature of the RVA; also see Verband der Rentenversicherungsträger (association of pension insurance carriers; editor) comments on RVO 5<sup>th</sup> edition 19543, § 1228 RVO marginal number 5.

evidence is exclusively the attempt to estimate the extent of provisions received at free disposal even today after more than 60 years in a verifiable manner (in doing so, it can be assumed on the basis of food scientific findings, that a substantial period of time is reached and/or exceeded when another person was objectively co-supported for at least seven weeks with the support received for work<sup>75</sup>). This will only take the particular state of evidence into account. The substantive basic declaration of jurisdiction by the 13<sup>th</sup> senate of the BSG is not changed.

In doing so, the auxiliary criterion in case of lack of evidence does not serve to assist every petitioner in achieving a claim, but is meant to ask the simple question what the legislator – in awareness of the difficult state of evidence 60 years after the war – really intended with the ZRBG. In this respect, the approach applied by the 8<sup>th</sup> senate of the LSG NRW has been confirmed by the Bundestag debate on November 16, 2007, by the majority factions of Parliament ( and thus also in the sense of an authentic interpretation by the legislator). The objections filed by the pension insurance carriers ignore the fact that there is a fundamental difference between assessing the Nazi despotism by decision of the trial judge and then continuing this despotism by argumentation (even if only in the allegedly neutral provisions of social security law). First of all, the former – the assessment of despotism – has to be faced by jurisdiction with all available means as the numerous obtained historical expertises impressively substantiate. The latter – the continuation of national socialist evaluations in current application of law – has to be avoided by means of a judicial approach that solely takes General Equal Treatment in accordance with Art 3 Basic Constitutional Law into account.

In addition, the 4<sup>th</sup> senate of the BSG also made it clear in the afore mentioned preliminary ruling to the Great Senate of the BSG dated December 20, 2007, that it will not consider any remuneration in the sense of the ZRBG either unless the foodstuffs granted to the employees were more than only "allowances assuring their subsistence"<sup>76</sup>. Therefore, in case of appropriate application of law the actual differences between the legal opinion of the 4<sup>th</sup> and the 13<sup>th</sup> senate of the BSG are in many cases de facto considerably smaller than presented by the pension insurance carriers<sup>77</sup>.

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<sup>75</sup> Thus the nutritionist Prof. Dr. Stehle, University of Bonn, in his expertise prepared for the 8<sup>th</sup> senate of the LSG on the food situation in the ghetto in Kaunas, in addition sentence dated February 6, 2008 – L 8 R 287/06 –.

<sup>76</sup> Decision dated December 20, 2007 – B 4 R 85/06 – marginal number 120.

<sup>77</sup> Thus also Bieback in: jurisPR-SozR 19/2007 note 3 under C.

## V. The "ghetto" concept

The employment against payment must have had a connection to the forced detention in a ghetto. In doing so, it is not required in accordance with the established opinion of the LSG NRW<sup>78</sup> that the employment actually took place in the ghetto itself. On the contrary, even an employment outside the ghetto is to be considered as sufficient if the person returned to the ghetto every day. Legal practice has not yet determined whether this also applies to temporary absence in external work places (similar to present-day "assembly jobs")<sup>79</sup>. In order to define the "ghetto" concept in the sense of § 1 ZRBG, three characteristic features must be existent: isolation, concentration and accommodation similar to internment of the Jewish population. There is no specific "prototype" of configuration of these features e.g. in accordance with ghettoisation in the Generalgouvernement (General Government in Poland). As a rule, the beginning of the isolation can be assumed when the Jewish inhabitants were obligated to wear an indicating mark that distinguished them from the remaining inhabitants. Another typical feature was the imposition of a "ban on Jews", i.e. the prohibition of entering individual municipal areas and the imposition of rigid commercial as well as traffic restrictions. The attribute of concentration of the Jewish population can be derived from the following indications that – not in total, but in essential traits – must be on hand:

- restriction of freedom movement in relation to other locations and (in addition) within the municipal area.
- Allocation of a residential area; mere forced relocation from individual municipal areas does not solely lead to concentration.
- Concentration of Jewish inhabitants from surrounding areas in certain areas/locations and local areas
- Institution of a specific Jewish administration ("Judenrat") and a Jewish security force ("Ghettopolizei")
- Creation of a specific Jewish labour organisation ("jüdisches Arbeitsamt")

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<sup>78</sup> Sentence of the 13th senate of the LSG NRW dated December 15, 2006 – L 13 RJ 112/04 – with pending appeal B 5 R 12/07 R and the 14<sup>th</sup> senate of the LSG NRW dated September 1, 2006 – L 14 R 41/05 – legally binding; for further details also sentence of the 8<sup>th</sup> senate of the LSG NRW dated February 6, 2008 – L 8 R 287/06 –.

<sup>79</sup> Different in case of permanent separation from ghetto in an external camp – see sentence of the 8<sup>th</sup> senate of the LSG NRW dated February 2, 2008 – L 8 R 257/06 –.

- Remains of an urban structure (shops, synagogue, etc.)
- Predominance of accommodation in family organisations

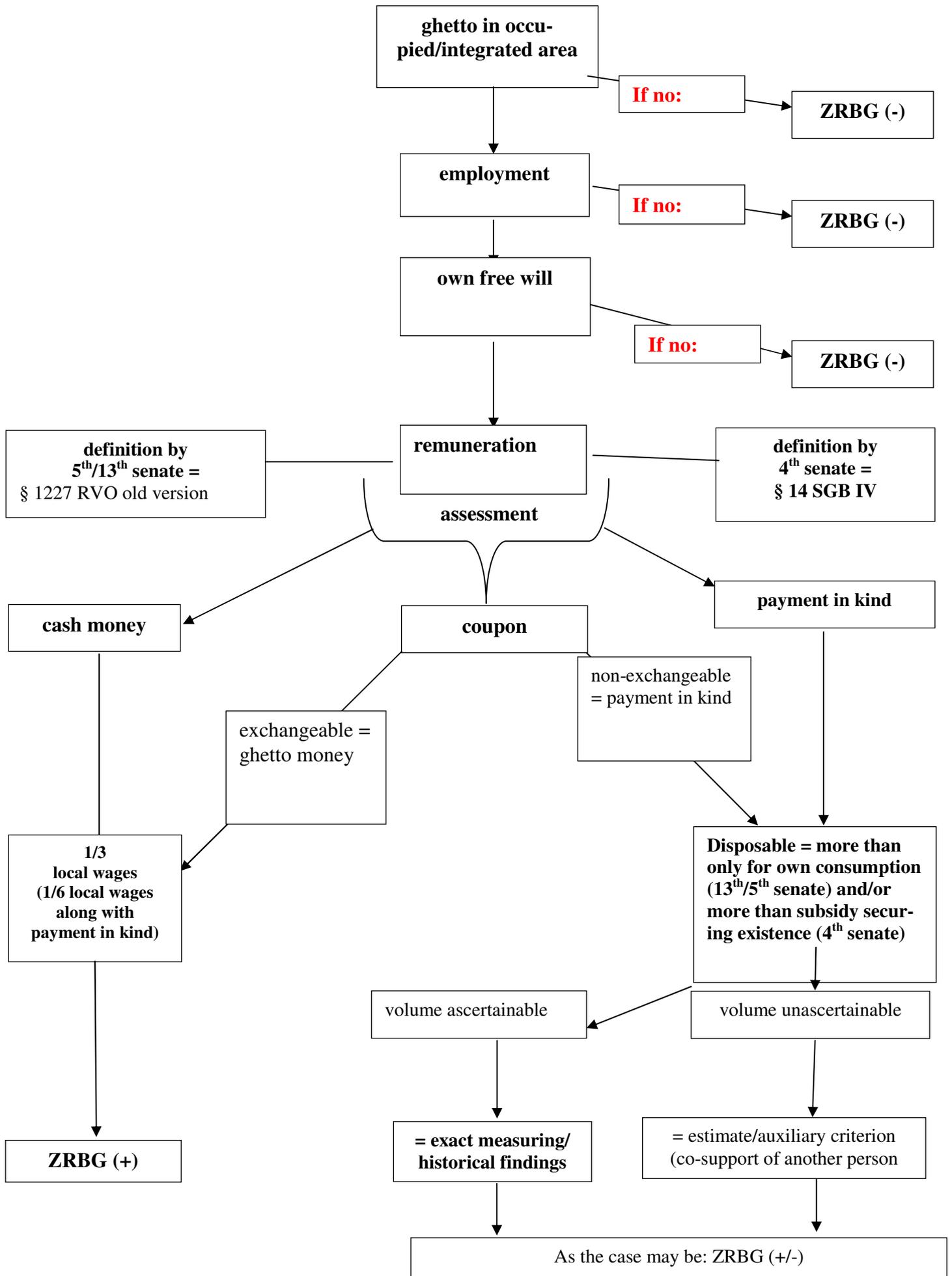
The last-mentioned criteria serve for the differentiation of the "ghetto" concept from the conditions in camps for forced labourers ("ZAL"), the first-mentioned for the differentiation of not (yet) area-related measures of persecution by the Germans in the forefield of ghettoisation. It is, however, not required for the spatial assumption of a ghetto in the sense of § 1 ZRBG that exclusively Jewish inhabitants lived in the areas of concentration. By the same token, strict separation, e.g. by boundary fences, or even the closing of the ghetto was not required for the ZRBG either. The same applies to the fact problematised by the pension insurance carriers in particular for the area of Oberschlesien (Upper Silesia) that the Jewish inhabitants of the ghetto were sometimes allowed to leave the ghetto at least during the day (e.g. in order to go to work). That is to say that in view of the term of forced detention – as in social legislation (§ 30 par 3 SGB I) – the place of abode and/or the conditions that make it obvious where someone does not only stay for the time being are relevant.

In some cases, even the question whether the ghetto was located in an "occupied or integrated area" can become historically complicated and disputable. This primarily applies to the territories of the German allies and/or areas in which they conducted military operations or which were – if applicable for the time being or in part – adjudicated to them. The most problematic and at the same time for the ZRBG numerically most important case in this respect is the region of so-called Transnistria, i.e. the area to the east of the river Bug in which there were Rumanian as well as German forces between 1941 and 1944 and which was governed by Rumania on the basis of the agreement of Tighina, which was disputed in respect of its classification according to international law<sup>80</sup>. According to estimates made by the representatives of the petitioners, approximately 20.000 of all ZRBG applications were submitted by survivors from Transnistria and were rejected by the pension insurance carriers without further examination of the contents for the sole reason that their fate as victims of persecution (as consequence of an annexation based on international law) was exclusively a matter of Rumanian responsibility. For this purpose, several pension senates of the LSG NRW are currently conducting extensive historical investigations whose result remains to be seen.

All in all, the afore-mentioned statements lead to the following diagram:

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<sup>80</sup> In this connection – insofar in conformity with the requirement for further historical investigations – 4<sup>th</sup> and 13<sup>th</sup> senate: sentence dated December 14, 2006 – B 4 R 29/ – and sentence dated July 26, 2007- B 13 R 28/06 R –.



## VI. Evidence and consideration of evidence

### 1. Evidence

The petitioner's side can and should present all available previous details about the fate as victim of persecution at the beginning of the proceedings. This primarily applies to interviews of Yad Vashem and/or the Spielberg Foundation, also to possible family reports (for instance essays prepared for the grandchildren's school, letters, etc.). Original documents or photographs from old work cards or identification papers are very rarely still available. Apart from that, the inclusion of documents and information from previous proceedings is "classical" evidence in ZRBG proceedings. In doing so, a strict differentiation has to be made between statements by the persons involved and the witnesses in ZRBG proceedings and those from other coherences. As far as previous statements from BEG proceedings are concerned, they are not official documents in the sense of § 415 Code of Civil Procedure (ZPO). They can merely provide evidence that the statements included in the files were then formulated in this manner and received by the compensation authorities. Only the positive acknowledgement as persecuted person represents a decision under public law with effect in favour of or against everyone and thus is legally binding for the social courts in accordance with § 417 ZPO<sup>81</sup>.

Only by way of reference to the WGSVG, the admissibility of a statutory declaration in accordance with 23 SGB X is only effective for statements in ZRBG proceedings. It is then proper evidence, even if the examination of parties in social court proceedings is not intended as evidence. According to the *lex fori* principle, a statutory declaration has to comply with the local formal requirements, i.e. for statements from Israel with the Israeli Notarial Recording Act. For this purpose, the 8<sup>th</sup> senate of the LSG NRW obtained an expertise from the German consul general in Haifa – who is an Israeli notary himself – for the proceedings under L 8 R 29/06 (result: the formal requirements complied with Ottoman law until 1976, since then, they have complied with specific Israeli regulations, which, however, to a large extent correspond to the German Notarial Recording Act)<sup>82</sup>.

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<sup>81</sup> See BSG sentence dated March 29, 2006 – B 13 RJ 7/05 R – marginal number 12.

<sup>82</sup> §§ 1, 21, 41, 43 and 44 of Ottoman Notary Law dated 27th Bazilkada 1333 (= year 1913 Christian era) as well as § 1 of Israeli Foreign Documents Law from 1950; since 1976 §§ 11, 21 Israeli Notary Law from 1976 and § 2 Notary Regulation from 1976.

Insofar as the ZRBG questionnaires used by pension insurance carriers for the entire Federal Republic are concerned, the list of questions – that was not published in two languages – is already confronted with legal objections against the background of Art. 26 of the German-Israeli Social Insurance Security Agreement dated December 17, 1973<sup>83</sup> in the version of the revision agreement dated January 7, 1986<sup>84</sup>. This applies primarily whenever the pension insurance carriers should have known from the basic application (field dSK negated or left unanswered) that the applicants do not speak German. Even a legally trained representative will probably not be able to change anything since the pension insurance carriers were also officially informed that most of the correspondents abroad are not proficient in the German language and the representatives in Germany do not have any direct contact with the client. Incidentally, the phrasing of the questions is misleading. For instance, the question concerning the supervision by guards in the first place does not give a field for negation, but only opens two fields for marking ("on the way to work" / "at work"). This leads to the fact that as a general rule there are only extremely short Yes/No answers, which defy individual consideration of evidence from the beginning on<sup>85</sup>. The pension insurance carriers do not even explain difficult concepts of law in their questionnaire – such as "benefits in kind" – that can only be correctly answered with very specific background knowledge of social law. Above all, the questionnaire lacks an open question concerning the fate of persecution and sufficient space to describe it. The space of approx. 18 mm between the lines is normally hardly sufficient in order to merely give the scantiest information. Thus a meaningful description has from the beginning on been needlessly complicated by the pension insurance carriers on account of the optical design of the questionnaire. For this reason, the answers of the affected persons only have limited evidential value on account of regularly missing problem consciousness and lacking elaborateness. Nevertheless, the result is the fact that it is easy for the pension insurance carriers to dismiss current answers as non-credible under reference to previous statements<sup>86</sup>. This is even more questionable since this type of consideration of evidence – even if not intended – entails the risk of promoting anti-constitutional intentions in the name of German authorities or even courts that intend to discredit the credibility of the ghetto

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<sup>83</sup> BGBl. part II 246, 443.

<sup>84</sup> BGBl. part II 863, 1099.

<sup>85</sup> In addition Arnzen, *Psychology of Testimony*, 4th edition, 2007, 112, 132.

<sup>86</sup> Critical in view of administrative practice of the pension insurance carriers also: Dwertmann, *Zeitspiele (time games)*, in: *Praxis der Wiedergutmachung (practice of indemnification)*, editors Brunner, Frey, Goschler, – in print–.

survivors in order to sow the seeds of doubt in the historical dimension of the Holocaust<sup>87</sup>.

## 2. Consideration of evidence

There are no general rules for consideration of evidence in respect of submissions by involved persons in ghetto pension cases. The principle of free consideration of evidence applies in accordance with § 128 SGG. In doing so, first of all the respective contemporary context of these statements needs to be regarded in respect of the consideration of the contents of BEG files from the 50s and 60s of the past century because these documents have also only become comprehensible historical sources for the present – second – post-war generation in the meantime<sup>88</sup>. Much of what was then known and "communicatively concealed" – thus the well-known phrase used by the philosopher Lübbe<sup>89</sup> – is nowadays not in common use in this manner any more and therefore has to be explained by contemporary classification. For this reason, the 8th senate of the LSG obtained a contemporary expertise by the historian Prof. Dr. Goshler in view of the historical context and the genesis of the statements at that time<sup>90</sup>.

In particular the seemingly undisputed use of legal terms such as "forced labour" or "ZAL", "KL/KZ" seen individually does not allow any safe inference to the actual meaning at that time – especially since the current legal meaning of these terms within the scope of the ZRBG is different from the meaning in accordance with the relevant provisions of the BEG in those days. In addition, the central factor in own experience and natural sensation of every person who experienced and survived the time in the ghetto is the experience of force in its most extreme intensity. Therefore the short questionnaires of the pension insurance carriers do not leave anything else to be expected but

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<sup>87</sup> About the abuse of an accidentally worded press release by the Social Court Düsseldorf in reference to the ZRBG by rightist extremists: report by the Federal Office for the Protection of the Constitution 2006, advance report no. 129 under reference to the publication "Nation und Europa deutsche Monatshefte"(Nation and Europe German monthly magazines) no.10, 2006, page 3f; critical in view of historically non-founded consideration of evidence by social courts in ZRBG cases also: Lehnstädt, congress lecture at the Institute for Contemporary History dated April 9, 2008.

<sup>88</sup> See Grau, Entschädigungs- und Rückerstattungsakten als neue Quelle der Zeitgeschichtsforschung am Beispiel Bayerns (Indemnification and restoration files as new sources for contemporary research by example of Bavaria), in: *Zeitenblicke* 3 (2004) no. 2.

<sup>89</sup> Lübbe, *Historische Zeitschrift* (Historical Magazine) 1983, 579, 585, 589, 594.

<sup>90</sup> Detailed citations in sentence by the 8th senate of the LSG NRW dated February 6, 2008 – L 8 R 287/06 –.

the indication of "voluntary labour" by the survivors of the NS regime. The category of voluntary labour in a ghetto was only generated by the current context of BSG jurisdiction in respect of the ghetto in Lodz consciously abstracting from other ghetto constraint and the ZRBG based on it. According to findings of trauma psychology research, the term of "labour" is also experienced as massively ambivalent by the survivors of the NS regime to this day<sup>91</sup>. Labour is not only seen as a means by which one could successfully resist persecution or at least reduce the risk of being considered as "unnecessary" and abducted to the extermination camps. In fact, it can also be (mis)understood as an attempt to "curry favour" with the persecutors and to betray oneself and the other persecuted people. The institution of the "Judenrat" can be quoted as a super-individual example for this conflict; on the one hand, it gave the Nazis the chance to exploit it, but on the other hand it was also able to save lives of persecuted persons<sup>92</sup>. In this case, only very differentiated and sensitive questioning can generate the humane basis for survivors to open up and relate about their experiences in the ghetto and how they survived. In respect of the complexity of the term "ghetto", the use of this term by survivors or in those days by German authorities etc. is not decisive. Finally, this applies accordingly to the absence of statements about individual (in particular short-termed) periods of employment as well as remuneration in BEG statements because this was at that time not relevant either. The inadmissibility of negative consideration of evidence in such BEG statements based on the terms of "force" or "forced labour" was with good reason accordingly detected in the German-Israeli liaison office talks on July 1-3, 2003 (in this respect, these results according to their clear wording – "the German side undertakes to implement the results instantly" – obviously contain a self-commitment of the administration toward the state of Israel, which is legally binding in respect of international law via Art. 3 GG and Art. 26, 31 of the Vienna Convention of Treaties<sup>93</sup>).

However, in the opposite sense the principle applies that the more detailed older statements are, the higher their authenticity is. The differentiated and source-critical

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<sup>91</sup> See the expertise by the clinical psychologist Prof. Dr. Quindeau as expert for the 8th senate of the LSG NRW in the case L 8 R 54/05, quoted in the sentence dated June 6, 2007 for the same reference number.

<sup>92</sup> Paradigmatic in this respect is the report by Hannah Arendt about the Eichmann trial in Jerusalem in 1963.

<sup>93</sup> In contrast to this, the results of the liaison office talks about the proceedings for the assessment of the dSK were worded in a considerably more reserved manner and included an expressed reservation. The BSG therefore insofar rightly negated the bindingness in respect of international law; sentence dated March 13, 2002 – B 13 R J 15/01 R –. The 8th senate of the LSG has left the bindingness of the German-Israeli liaison office talks in respect of the ZRBG open for the time being. Sentence dated December 12, 2007 – L 8 R 187/07 –.

approach to consideration of evidence of the 8<sup>th</sup> senate of the LSG NRW was in this respect expressly affirmed on October 29, 2007, in a comprehensive taking of evidence by the experts Prof. Dr. Goschler<sup>94</sup>, Prof. Dr. Quindeau<sup>95</sup> and Prof. Dr. Golczewski<sup>96</sup>. In addition, the frequently used general objection of "contrary allegation" is inadmissible whenever it is not a matter of actual opposites according to logic, i.e. stringently alternative factual variants, but simply of variations, amendments or omissions<sup>97</sup>. According to the afore-mentioned contemporary and psychological findings and the general rules of judicial consideration of evidence for the evaluation of testimonies made by traumatised victims of force<sup>98</sup>, the latter must rather be regularly rated in case of statements lying so far apart as evidence for the credibility of the statement and/or the credibility of the person making a statement<sup>99</sup>.

## VII. Credibility of evidence, burden of evidence and official appraisal

Alleviation of the burden of proof applies in ZRBG proceedings for the substantiation, i.e. strict evidence of the claim-proving facts is not required. In the sense of a good possibility in comparison to other possibilities, there only have to be more reasons speaking for than against the fact that there was paid employment in the ghetto based on own free will (§ 1 ZRBG in connection with § 3 WGSVG and § 4 FRG). In doing so, remaining doubts are harmless<sup>100</sup>. The applicants do not bear the burden of producing evidence in the sense of conclusiveness of their application either<sup>101</sup>. The maxims of official appraisal in accordance with §§ 20, 23 SGB X to the detriment of traumatised survivors do not permit this (as the Federal Court (BGH) already clarified in constant jurisdiction by the example of parallel official appraisal in accordance with § 144

<sup>94</sup> See Goschler, congress lecture at the Institute for Contemporary History on April 10, 2008

<sup>95</sup> See Quindeau, congress lecture at the university of Montreal.

<sup>96</sup> Anonymised minutes (accessible for judges only) available under: [www.sozialgerichtsbarkeit.de](http://www.sozialgerichtsbarkeit.de).

<sup>97</sup> See Schneider/Schnapp, *Logic for judges*, 6th edition 2006, § 18ff. § 42.

<sup>98</sup> Full particulars to this: BGH, *Neue Juristische Wochenschrift* (new legal weekly paper) – NJW – 1999, 2746; further sentences dated February 19, 2002 – 1 StR 5/02 – and August 21, 2002 – 1 StR 129/02 –.

<sup>99</sup> *Sic also v. Hinckeldey/ Fischer: Psychotraumatology of capacity of memory*, 2001, with further evidence.

<sup>100</sup> BSGE 8, 159.

<sup>101</sup> General opinion, see e.g. Kummer in: Peters, Sautter, Wolf, *SGG loose-leaf*, status April 2007, § 103 note 1 and 4.

BEG<sup>102</sup>). Of course, the applicants have to cooperate in the clarification of the facts and bear the detriments of evidence if sufficient assessments cannot be made any more (material burden of evidence). Cases in which further taking of evidence fails on account of meanwhile missing memory and ability to follow a hearing are problematic. In these cases, it will be necessary to differentiate: if the pension insurance carriers (also on the basis of their own legal conception) in spite of a perceivable reason refrained from investigations that objectively already suggested themselves at that time, a reduction of the burden of evidence is to be considered<sup>103</sup>. Alternatively they could be obliged to supplement the now missing possibilities of proof for the person involved by re-searching their files for comparable cases with details of the same location of persecution and employment (§§ 421, 432 ZPO). General reversal of the burden of proof, however, is excluded in the ZRBG (as in social law as well) on account of the principle of official appraisal for the public benefit<sup>104</sup>.

In doing so, the obligation to official appraisal in accordance with §§ 20, 23 SGB X means – as in law proceedings in accordance with §§ 103, 106 SGG – that the authorities have to investigate all facts relevant for the legal assessment of the claim on their own initiative without being bound to the presentation and possible submissions of evidence. In doing so, the social authorities are not entitled to one-sided exclusive pursuit of investigative leads to the disadvantage of the applicants, but they have to be objective and impartial, just like the courts and the departments of public prosecution. In practice, the pension insurance carriers do not sufficiently take into account that the aged ghetto survivors as applicants according to the ZRBG do not bear the burden of presentation and clarification for the decision-relevant facts. There is only limitation of official appraisal whenever persons involved deny their incumbent cooperation, e.g. by disallowing access to the BEG files. The BSG has also assigned unlimited significance to the principle of official appraisal in respect of ZRBG proceedings<sup>105</sup>. Although this task is extremely difficult today from a personal and legal point of view, more than 60 years after the end of WWII, but this does not mean any decrease of the duties of the administration and the courts to be accomplished. As far as the pension insurance carriers on the other hand refer to lack of personnel or limited factual means, this objection

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<sup>102</sup> Sentence dated January 31, 1980 – IX ZR 46/79 –; sentence dated May 19, 1981 – IX ZR 13/80 –; sentence dated May 13, 1971 – IX ZR 148/70 –; decision dated October 17, 1996 – SI ZB 42/96 – JURIS.

<sup>103</sup> See Leitherer in Meyer-Ladewig, SGG 8th edition 2005, § 103 marginal number 15ff.

<sup>104</sup> Constant jurisdiction of the BSG, last sentence dated June 28, 2000 – B 9 VG 3/99 R – in addition Krasney/Udsching, Handbuch des sozialgerichtlichen Verfahrens (manual of social court proceedings), 4<sup>th</sup> edition 2005, page 71 f.

<sup>105</sup> Thus 4th and 13th senate unanimously: sentence dated December 14, 2006 – B 4 R 29/ – and sentence dated July 26, 2007- B 13 R 28/06 R – JURIS.

is not effective since the official has to follow the legal mandate and not the other way round. The Federal Constitutional Court (BVerfG) has also determined that economic considerations must not be used to the detriment of the persons involved as an argument in proceedings under the rule of law<sup>106</sup>. Furthermore, it must be taken into consideration that the matter concerns the realisation of legal claims and the official task does not consist of defence against those claims. On the contrary, the pension insurance carriers are obligated to implement the legal specifications – as for any other insured person as well – as extensively as possible after objective investigation of the facts in accordance with § 2 par 2 SGG I. In doing so, when the ZRBG was decreed, it was clear from the beginning on that the ghetto survivors would naturally neither normally be able to prove the circumstances of their persecution in detail by presentation of documents nor would they remember or be able to relate any details in view of the traumatic experience affecting them. They are practically all in a state of excusable lack of evidence.

Of course, actual presumptions are also to be taken into consideration in social court proceedings<sup>107</sup>. In doing so, there is no general presumption of forced labour for the ghettos according to the historical findings<sup>108</sup>. In this respect, the local conditions were too varied. However, two aspects can have dispute-resolving relevance as basis of assumption for the consideration of temporally proven employment: on the one hand, the phrase concerning general life experience that labour (when based on own free will) in case of doubt is only taken up and continued against the promise of remuneration considered as adequate according to circumstances<sup>109</sup> – can claim relevance as general basis of assumption in a ghetto conditions. The situation must have been different whenever specialist passes were evidently issued for work that protected against deportation; these on their own were a plausible reason for taking up work. On the other hand, the often proven wage directives of the German dictators are to be considered according to which Jews were also normally promised remuneration for certain jobs. Even though this claim was often not substantiated and depended on mere arbitrary

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<sup>106</sup> BVerfG NJW, 1979, 413.

<sup>107</sup> See Zeihe SGG commentary, loose leaf, status February 2008, before § 103, note 3.C.ff.

<sup>108</sup> However, authorising practice in respect of the Foundation Law proceeded on such an assumption; this leads in some cases to the fact that the same periods of time can be invoked in parallel in accordance with the Foundation Law and the ZRBG – to that end, legally binding sentence by the 8th senate of the LSG NRW dated June 29, 2005 – L 8 RJ 97/02 –.

<sup>109</sup> Thus in the result expressly also BSG, sentence by the 4th senate dated December 14, 2006 – B 4 R B 4 R 29/06 R –.

action<sup>110</sup>, it is still possible – however only if the preliminary question whether there was a work contract was positively clarified<sup>111</sup> – to establish the respective wage directive based on the wage amount<sup>112</sup>.

### VIII. Historical expert opinions and expenses

All these circumstances relevant for the ZRBG in respect of the decision of controversies can only be investigated and judicially assessed in case of detailed knowledge of the conditions in the respective ghetto on location. In doing so, the tasks of the trial judge in the ZRBG are practically always appraisals at the contemporary "micro-level" of individual places of work up to investigations over sometimes very short periods of a few weeks because one single month of contribution during the war is sufficient for the ZRBG claim. The courts do not dispose of any own expert knowledge of the occurrences that took place meanwhile more than 60 years ago and contemporary literature also regularly conceals information about the conditions in the smaller, less known locations of persecution of which there were more than 5800 in Poland alone<sup>113</sup> – particularly since the local conditions there were historically extremely complex facts in the "Gray Zone" of extermination<sup>114</sup>. In the meantime, the BSG has clarified that the social courts themselves are not authorised to evaluate primary or secondary sources in view of the contemporary conditions since they do not have the scientific expert knowledge required for this purpose, but in accordance with §§ 103, 106 SGG they have to consult historians for such complex queries<sup>115</sup>. The investigations required for this purpose can only be conducted on location in the archives in East Europe or in the extensive files and documents of Yad Vashem in Jerusalem and/or the US Holocaust Memorial Cen-

<sup>110</sup> Reason why the 8<sup>th</sup> senate of the LSG NRW did not join the claim theory, thus already in sentence of L 8 R 249/05 legally effective, dated June 6, 2007 – L 8 R 54/05 – appeal pending under B 13 R 85/07 R and dated February 2, 2008 – L 8 R 257/06 –.

<sup>111</sup> Seewald in: Kasseler Kommentar (Kassel comments) volume IV status February 2008, §14 SGB IV Rn 42ff.

<sup>112</sup> In view of such case sentence by the 8<sup>th</sup> senate of the LSG NRW dated December 12, 2007 – L 8 R 187/07–.

<sup>113</sup> Schwarz, Das nationalsozialistische Lagersystem (The National Socialist Camp System), 1996, pages 84ff.

<sup>114</sup> Thus the well-known phrasing by the Holocaust survivor Primo Levi, see e.g.: Gray Zones: Ambiguity and Compromise in the Holocaust and its Aftermath, Abelshausen/Petropolous, Roth 2005.

<sup>115</sup> Thus 4th and 13th senate unanimously: sentence dated December 14, 2006 – B 4 R 29/ – and sentence dated July 26, 2007- B 13 R 28/06 R – JURIS.

ter in Washington. However, such expertises can sometimes take more than a year and the costs can come up to 20,000 Euros. It is already becoming apparent that the history of the Jewish ghettos will have to be rewritten as a result of these extensive efforts. Although the ghetto in Lodz has been considered as a special historical case, it is becoming more and more apparent that the local conditions of "pretended normality" with paid labour during "quiet phases" before the activities of extermination could at least temporarily be found in almost every East European ghetto.

The persons involved can of course submit motions to take evidence. They will have to be judicially complied with, as long as the activity does not constitute inadmissible proof of exploration<sup>116</sup>. However, this does not mean that the persons involved already have to know the result of the taking of evidence in advance. Furthermore, it is sufficient for the qualification of the evidence if they can demonstrate that the taking of evidence will "only" make the actual conditions known to the experts more probable<sup>117</sup>.

Usually the costs of all these investigations are borne by the judiciary budget of the Federal States because the social court proceedings are free of charge for the plaintive insured persons. In case of loss they only have to defray the costs for the own legal representative. However, if the opposing administrative carrier has given rise to the legal dispute, the reimbursable extrajudicial costs of the legal dispute can be imposed on him independent of the recovery (§ 193 SGG). If the pension insurance carrier refrained from necessary investigations contrary to duty in administrative proceedings (e.g. a formerly still possible inquiry with the applicant or a historical expertise), they will now after the revision of § 192 par 4 SGG<sup>118</sup> also have to defray the costs of the judicial investigations. In the – more and more frequent – cases of succession, however, the Court Fees Act comes into action in accordance with § 197 a SGG. This implicates that in case of loss the heirs of the survivors will also be faced with the costs of the entire legal inquiries.

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<sup>116</sup> In addition: Leiterher in Meyer-Ladewig SGG 8th edition § 103 marginal number 8 a as well as Meyer-Ladewig in Meyer Ladewig *ibid.* § 160 marginal number 18 e, each with further evidence.

<sup>117</sup> In addition: finally BGH in *Neue Zeitschrift für Strafrecht* (new magazine for criminal law), 2008, 116.

<sup>118</sup> BGBL 2008 part I page 444.

## IX. Personal hearing/ means of acceleration

The courts also regularly use questionnaires in the beginning for the clarification of facts (that are indeed far more detailed than those of the pension insurance carriers and in addition translated into the respective native language of the persons involved). But not all petitioners and/or witnesses are in a position to relate (in writing) what they experienced during the persecution. In doing so, the inhibition threshold can in part simply not be overcome in a written questioning<sup>119</sup>. In this case, a conversational situation is quite frequently indispensable in order to obtain information. Classical legal assistance in accordance with the German-Israeli mutual legal assistance agreement – i.e. personal questioning by a foreign judge on location – in the meantime quite often takes up to three years and is rarely productive for an assessment of individual credibility on account of the frequently very scanty recording of the answers. Furthermore, consular interviewing of petitioners is possible. This can be conducted on the premises of an embassy or a consulate by a member of the German Foreign Service with the qualification for judgeship. The legal basis for this is § 5 SGG in connection with § 19 Consular Act. These proceedings meanwhile also take several years – according to locally existing personal conditions. Commissioning of foreign private persons, e.g. as judicial experts, for the purposes of personal hearing is normally not considered<sup>120</sup> since such a hearing deals with the core area of judicial activity and thus in accordance with the SGG may only be assigned to third persons if an appropriate mutual legal assistance agreement expressly permits this. This is only the case for legal assistance

<sup>119</sup> Thus also Hoffmann, *Schichten der Erinnerung (layers of memory) – Zwangsarbeitererfahrungen und Oral History (experiences of forced labourers and oral history)*, in: Reininghaus/Reimann (editors), *Zwangsarbeit in Deutschland (forced labour in Germany) 1939 – 1945*, 2001, pages 62ff. that expressly indicates on page 66 that own written language products do not belong to “normal” everyday life for many contemporary witnesses and thus can only relate memories in a rudimentary manner; in addition Frankl, ... *trotzdem Ja zum Leben sagen (nevertheless say Yes to life) – ein Psychologe erlebt das Konzentrationslager (a psychologist experiences a concentration camp)*, 27<sup>th</sup> edition 2006, page 21 f.; see also the memoirs of the judge at the International Court of Justice in Buerghenthal, *Ein Glückskind (a darling of fortune)*, 2006, who relates the fact on the pages 242 f that it was impossible for his mother to write down her experiences in the ghetto.

<sup>120</sup> There is only an exception for genuine credibility expertises which, however, have already been acknowledged by high courts in social jurisdiction as genuine evidence in proceedings in accordance with the Victims Compensation Act for the appraisal of testimonies by traumatised victims of acts of violence – here: decision of the BSG dated June 4, 2007 – B 9a VG 7/07 B – previously LSG Bavaria, sentence dated October 10, 2006 – L 15 VG 10/01 – ; also sentence by LSG Bavaria dated June 30, 2005 – L 15 VG 13/02 – and LSG NRW, sentence dated October 14, 2004 – L 7 VG 16/03 – and sentence dated October 16, 2003 – L 7 VG 44/00 –.

expressly provided in an appropriate mutual agreement by governmental courts or authorities. Other informative questioning of the petitioners by their own representatives is not a suitable alternative either since a representative – according to foreign as well as German law – cannot be neutral per se, but has to remain a person representing specific interests and can thus not conduct an interview like an impartial judge.

For reasons in accordance with the rule of law, petitioners in the area of responsibility of the 8th and lately also the 13th senate of the LSG NRW are offered a personal hearing in their home country. This has been possible since February 2007 because the Israeli government now also permits such proceedings for the hearing of Israeli petitioners in accordance with the ZRBG by German judges in the home country<sup>121</sup>. This opportunity is desired by approximately half of the people concerned by appropriate judicial request. The experiences meanwhile acquired in about forty proceedings of the LSG NRW in Tel Aviv and in Jerusalem are positive (although the defendant pension insurance carrier did not participate in the hearings): possible contradictions in view of preceding assertions can be clarified by the court in a personal hearing (normally about two hours) and thus a more extensive impression of the facts – that are only reported in fragments in the files – can be acquired. It is also undisputed that the details furnished by the persons involved in the course of the investigation of the facts by the social courts in accordance with §§ 103, 106 SGG provide an important source of findings<sup>122</sup>. Therefore, personal hearings and the disposition of appearance in person to appointments at the social courts in practically all cases except ZRBG proceedings in accordance with § 111 SGG are common usage and in many cases lead to successful decisions on claims in trial court practice<sup>123</sup>. Furthermore, there have regularly been expressions of personal gratitude and conciliation by the Israeli petitioners after personal oral hearings by German courts at the end of the appointments. This applies independent of the outcome of the proceedings in economic respect. There has so far been no clarification by high courts and constitutional courts regarding a settlement in view of hearing of a party about the question whether petitioners in addition have their own

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<sup>121</sup> Verbal notes from December 5, 2006 – ref. no. 1 – 3270849 – and from February 13, 2007 – ref. no. 10-1/07 –.

<sup>122</sup> Representative: Leitherer in: Meyer/Ladewig SGG, 8th edition 2005, § 103 Rn12 and § 106 Rn 15 with further evidence.

<sup>123</sup> Different from ZRBG proceedings, the success rate at social courts averages about one third. Evidence of the success rates at the social rates can be found e.g. in *Wissing, 40 Jahre Sozial- gerichtsbarkeit in Rheinland-Pfalz (40 years of social jurisdiction in Rhine-land.Palatinate)*, in memorial publication, *40 Jahre Landessozialgerichtsbarkeit (40 years of state social jurisdiction)*, 1994, 1, 27.

procedural right to make personal statements about their fate before a court<sup>124</sup>. The BSG has not made any comments on this matter yet.

The Federal Constitutional Court has already decided in case of comparable questions regarding lack of evidence pertaining to the right of asylum and has pointed out that the courts as a rule have to conduct hearings in person of the petitioners about their – here also frequently related in a contradictory manner – personal fate of persecution<sup>125</sup>. Federal Administrative Court (BVerwG) and Federal Labour Court (BAG) also share the judicial conception regarding the need for hearings in person in such cases<sup>126</sup>: in view of the right of indemnification in accordance with the BEG comparable with the ZRBG, the BGH has also emphasized the special obligation to official appraisal and has pointed out that no "conclusive" submission by the party can be expected in respect of the events during the time of NS persecution, but that it is the obligation of the courts to close possible gaps in affidavits regarding fate of persecution by hearing of witnesses or parties<sup>127</sup>. The BSG has at least clarified in respect of the hearing of witnesses about persecution experiences that the denial of a (new) hearing by trial courts violates the interdiction of anticipated consideration of evidence<sup>128</sup>. It has also permitted the credibility expertise in respect of the statements themselves made by the petitioner as true evidence in view of the compensation of traumatised victims of force<sup>129</sup>. The BVerfG has come to the same decision in respect of credibility expertises by example of the right of asylum<sup>130</sup>. This high-court jurisdiction strengthens the constitutional weight of the right of personal hearing as the result of the right to legal hearing in the sense of Art. 103 par 1 GG and to effective legal protection in the sense of Art. 19 par 4 GG. Ac-

<sup>124</sup> There are also different opinions on the question whether appearance in person according to § 111 SGG has to be mandated if the petitioners are prepared to come to Germany – on the one hand (however in a case in which it only depended on a mere legal question of international law for the settlement of a dispute) LSG NRW, sentence dated February 3, 2006 – L 4 R 57/05 – on the other hand sentence by the 8<sup>th</sup> senate of the LSG NRW March 19, 2008 – L 8 R 264/07 –.

<sup>125</sup> BVerfG, decisions by the 1st court of the Second Senate dated January 22, 1999 – 2 BvR 86/97 – and July 22, 1996 – 2 BvR 1416/94 – in each case JURIS.

<sup>126</sup> BVerwG decisions dated March 8, 2007 – 1 B 101/06 -; dated May 10, 2002 – 1 B 392/01 -; dated July 7, 1999 – 9 B 401/99 and dated June 14, 1999 – 7 B 47.99 – in each case JURIS; BAG, NJW, 2007, 2427.

<sup>127</sup> BGH, sentence dated January 31, 1980 – IX ZR 46/79 -; sentence dated May 19, 1981 – IX ZR 13/80 – ; sentence dated May 13, 1971 – IX ZR 148/70 -; decision dated October 17, 1996 – SI ZB 42/96 – in each case JURIS.

<sup>128</sup> BSG sentence dated March 14, 1992 – B 13 RJ 15/01 R –.

<sup>129</sup> BSG decision dated June 4, 2007 – B 9a VG 7/07 B – precedent: LSG Bavaria, sentence dated October 10, 2006 – L 15 VG 10/01 –.

<sup>130</sup> Decision dated September 27, 2007 – 2 BvR 1513/07.

ording to the conviction of the signatory, it can also be assigned to the ZRBG since it can hardly be denied that the acknowledgement of the fate of persecution of the local petitioners whom the German government attempted to deprive of their human dignity is a question of existence to them. The aspect of lack of evidence that was already directive for the BGH in former compensation proceedings today applies more than ever. In addition, the ZRBG – as well as the BEG – refers to the affidavit as evidence for credibility and thus makes it legislatively clear that contributions made by persons involved in this case can be admitted as "genuine" evidence (the more so considering the mild standard of evidence in respect of credibility).

After all, the time factor plays an increasingly important role in legal respect; on account of the old age of the persons involved, the ZRBG proceedings are generally already under a special dictate of acceleration. In addition, the maximum period of four years considered as normally permissible for proceedings by the European Court of Human Rights (EGMR) and the BSG in accordance with Art. 6 of the European Convention of Human Rights<sup>131</sup> in pension issues of older petitioners has in many cases already been considerably exceeded<sup>132</sup>. Against this background, measures of acceleration such as contemporary hearings in person in Israel are to be preferred for legal reasons in view of their short organisational time for preparation of now only about three months compared to time-consuming legal assistance. In legal reality, the hearing of Israeli petitioners in person has so far been a rare exception. The enforcement of such hearings may be possible at long sight. However, the aged ZRBG petitioners in Israel who often live in modest circumstances do not have the necessary power – and span of life – to enforce their procedural rights.

## X. Conclusion

From a constitutional point of view, the obtained result is unsatisfactory since Israeli and other petitioners living abroad – who as traumatised survivors of ghettos cannot travel to Germany – thus in legal reality do not have the same procedural chances as domestic persons involved. The few decisions that have so far been made and even more so the (more frequent) mutually agreed compositions based on hearings in per-

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<sup>131</sup> To which Israeli petitioners can refer by means of equality with German insured persons in the DISVA.

<sup>132</sup> EGMR sentences dated October 30, 1989 – 28616/95 – (legal matter Styranowski/ Republic of Poland), in particular marginal number 57ff., and dated October 26, 2000 – 30210/96 – (legal matter Kud&322 and others./ Republic of Poland); BSG decision dated December 13, 2005 – B 4 RA 220/04 B –.

son on the other hand prove that the chances for success of a ZRBG claim can be considerably improved<sup>133</sup>. It is still open whether this course of action will become accepted under realistic conditions of stress prevailing in judicial practice of social jurisdiction (400 – 600 entries per year as workload at first instance, 120 – 140 entries at second instance) without an impulse from the outside and personnel augmentation at the courts. This is, however, not only necessary from a constitutional point of view, but also in the sense and for the purpose of the ZRBG. That is to say that the purpose of the ZRBG according to its aim is to close a last gap in the legal right of indemnification and thus – and not least – to implement a moral obligation of the German state under the rule of law<sup>134</sup>.

*Dr. Jan-Robert v. Renesse*

*Judge at LSG NRW*

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<sup>133</sup> See LSG NRW, sentences dated June 6, 2007 – L 8 R 54/05 – and June 20, 2007 – L 8 244/05 –.

<sup>134</sup> See BGH Recht der Wiedergutmachung (right of indemnification) – RzW -, 1955, 55,57; 1959, 215, 216; BSGE 10, 113, 116; BSG RzW, 1973, 37 f.; Supreme Court of Israel, sentence dated January 17, 2002 – 1496/02 -, German translation available at German-Israeli Association of Jurists -; BT print 14/ 8823 page 5; 14/8583 ; and 14/8602; furthermore 14<sup>th</sup> German Parliament 230th session. Plenary debate on April 24, 2002.