

'NEW' SUPPORT SERVICE – SELECTED ISSUES AND AN ATTEMPT TO EVALUATE THE REGULATION

MACIEJ BORSKI*
ANNA ROGACKA-ŁUKASIK**

DOI 10.2478/in-2024-0023

ABSTRACT

On 1 January 2024, the Act of 7 July 2023 on support benefits came into effect, introducing a new type of benefit, the support benefit. This publication aims to present the essence of the newly introduced support benefit and to attempt an evaluation of the adopted regulations. The authors also indicate the necessary directions for changes in the support system for people with disabilities, with the main goal being the empowerment of people with disabilities.

Keywords: person with a disability, care services, support benefits

INTRODUCTION

The Strategy for People with Disabilities¹ covers areas of the state that are significant for pursuing policy for this social group in a comprehensive manner. Like the Convention on the Rights of Persons with Disabilities,² it concerns thematic

* LLD hab., Professor of AH, Institute of Legal Sciences, Humanitas University in Sosnowiec (Poland), e-mail: maciej.borski@humanitas.edu.pl, ORCID: 0000-0001-8210-7968

** LLD, Faculty of Law and Economics, Department of Judicial Law, Jana Długosz University in Częstochowa (Poland), e-mail: a.rogacka-lukasik@ujd.edu.pl, ORCID: 0000-0001-6140-0591

¹ Strategy for People with Disabilities 2021–2030 adopted by Resolution No. 27 of the Council of Ministers of 16 February 2021 on the adoption of the document Strategy for People with Disabilities 2021–2030 (M.P. 2021, item 218). Hereinafter referred to as: 'the Strategy'.

² Convention on the Rights of Persons with Disabilities, signed in New York on 13 December 2006, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities> [accessed on 26 August 2024].



areas; therefore, its effective implementation requires active involvement of not only the central administration but also local government and non-governmental organisations. The strategy is thus a call for concerted actions to realise the vision of equal opportunities and rights for people with disabilities on an equal basis with others. In priority V of the strategy, entitled *Living conditions and social protection*, it was assumed that the main objective of activities under this priority is to provide appropriate living conditions, including meeting basic living and material needs, and necessary social protection to persons with disabilities and their families. This priority includes an action called the *Financial Support System for People with Disabilities*,³ which assumes that 'the policy of benefits will be aimed at empowering people with disabilities, so that support is directed to the person concerned. A person with a disability is to be the decisive entity regarding how the received support is to be used.'⁴

The aforementioned priority is to be realised by the Act of 7 July 2023 on support benefits,⁵ which came into force on 1 January 2024. On the one hand, this Act introduces a new type of benefit, the support benefit, and on the other, it introduces a number of changes to many legal acts, such as the Act on Family Benefits,⁶ the Act on Vocational and Social Rehabilitation and the Employment of Disabled Persons,⁷ the Act on the Social Insurance System,⁸ and the Act on Employment Promotion and Labour Market Institutions,⁹ in which the legislator added a chapter entitled *Activation program for disabled people or guardians of disabled people*.

The analysis of the amendments to the aforementioned acts is not the subject of this publication. The reference to selected acts is only intended by the authors to signal that, with the Act on Support Benefits, the legislator has introduced a significant change to the existing system of benefits for persons with disabilities and their carers. The purpose of this publication is to present the essence of the newly introduced support benefit and to attempt an evaluation of the adopted regulations. Although the assessment is general, a detailed and practical evaluation will *de facto* only be possible after the new institution has been in use for some time.

This approach to the topic also determines the choice of research methods. It seems necessary, first of all, to analyse the existing legal solutions in this area using the dogmatic method. The use of this method of analysing legal provisions allows, on the one hand, for the determination of the essence and the subjective and objective scope of support services as a new form of support for people with disabilities and, on the other hand, for a very preliminary attempt to assess the

³ V. 1 of the Strategy.

⁴ The Strategy, p. 220.

⁵ Journal of Laws of 2023, item 1429. Hereinafter referred to as: 'Act on Supportive Benefits', 'ASB'.

⁶ Act of 28 November 2003 on family benefits (Journal of Laws of 2023, item 390, as amended).

⁷ Act of 27 August 1997 on vocational and social rehabilitation and employment of disabled people (Journal of Laws of 2023, item 100, as amended). Hereinafter referred to as: 'Act on Vocational and Social Rehabilitation and Employment of Disabled Persons', 'AVSREDP'.

⁸ Act of 13 October 1998 on the social security system (Journal of Laws of 2023, item 1230).

⁹ Act of 20 April 2004 on employment promotion and labour market institutions (Journal of Laws of 2023, item 735).

introduced solutions in terms of their validity and rationality. Indeed, there is no doubt that an in-depth assessment will only be possible after the adopted solutions are compared to practice and assessed by the judicial authorities. Then it will also be possible to present the views of the judiciary regarding practice of applying the recently adopted law. This method is supported by a literature survey to explore the views of the doctrine on both existing and postulated instruments of the disability support system.

THE ESSENCE AND SUBJECTIVE AND OBJECTIVE SCOPE OF THE SUPPORT BENEFIT

The support benefit, introduced on 1 January 2024, is a new cash benefit aimed at adults with disabilities who have the greatest need for support due to difficulties in independent living. Unlike other care benefits intended for the caregiver of a person requiring care,¹⁰ the support benefit is addressed directly to a person with disabilities.¹¹ Entitlement to this benefit may be exercised jointly with other benefits such as the social pension or the supplementary benefit for incapacity.¹²

In Article 2 of the Act on Support Benefits, the legislator defines the subjective scope of the benefit, indicating the group of eligible persons. The support benefit is available to Polish citizens and foreigners who, on the basis of Community regulations and international agreements, have been granted rights analogous to those of Polish citizens in the field of social benefits. In addition, foreigners – third-country nationals with the right to legal residence in the territory of the Republic of Poland and the right to access the Polish labour market – will also be entitled to the support benefit, provided they meet the condition of residence in the territory of the Republic of Poland. The Act on Support Benefits further conditions the right to a support benefit on residing in the territory of the Republic of Poland for the period during which the benefit is to be granted.¹³ Moreover, the benefit will be due to a person who has a decision determining the level of need for support,¹⁴ in which the need for support is specified at the following levels: 1 to 3 points on the scale of need for support in case of children under 3 years of age; and from 70 to 100 points on the scale of need for support in case of children and people over 3 years of age.¹⁵

¹⁰ For more information on this type of benefits, see: Borski, M., 'Świadczenia opiekuńcze dla opiekunów dorosłych osób z niepełnosprawnościami – przykład niekonsekwentnej polityki państwa', *Zeszyty Prawnicze*, 2020, Vol. 20, No. 3, pp. 91–118.

¹¹ On the subject: Mrozek, P., in: Mrozek, P., Pawka-Nowak, E., *Świadczenia rodzinne*, 2023, Legalis. *Pismo RPO z dnia 02 stycznia 2024 r., sygn. akt XI.503.4.2016.DB*, https://bip.brpo.gov.pl/sites/default/files/2024-01/Do_KPRP_ozn_asystencja_projekt_opinia_2.01.2023.pdf [accessed on 26 August 2024].

¹² Redakcja BISP, 'Nowe świadczenie dla osób z niepełnosprawnością o największej potrzebie wsparcia', *Biuletyn Instytutu Studiów Podatkowych*, 2023, No. 11, Legalis.

¹³ Article 2 ASB and justification to the Act on Supportive Benefits, p. 5, available: <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=3130> [accessed on 11 January 2024].

¹⁴ Decisions determining the level of need for support are issued by provincial disability assessment teams at the request of a person with a disability.

¹⁵ Article 3(2) ASB.

In accordance with Article 5 of the Act on Support Benefits, the support benefit is not payable if:

- The person entitled to a support benefit is placed in a nursing home, a family welfare home, a care and treatment facility, a nursing and care facility, a facility providing 24-hour care for disabled, chronically ill, or elderly persons, a prison, a correctional facility, a remand centre, or a shelter for minors;
- The person entitled to a support benefit is also entitled to a benefit of a similar nature abroad, unless bilateral social security agreements provide otherwise;
- Another person abroad is entitled to a benefit to cover the expenses of caring for a person entitled to a support benefit, unless bilateral social security agreements provide otherwise.

It should be noted that the amount of the support benefit is linked to the amount of the social pension. However, this does not mean that it will replace the annuity; both benefits will be paid simultaneously.¹⁶ The legislator has determined that the support benefit ranges from 40% to 220% of the social pension, depending on the level of need for support. Decisions determining the level of need for support will be issued by provincial disability assessment teams¹⁷ at the request of disabled persons for a maximum period of 7 years.¹⁸ The monthly support benefit is as follows:

- 220% of the social pension if the need for support is assessed at a level of 95 to 100 points.
- 180% of the social pension for 90 to 94 points.
- 120% of the social pension for 85 to 89 points.
- 80% of the social pension for 80 to 84 points.
- 60% of the social pension for 75 to 79 points.
- 40% of the social pension for 70 to 74 points.

In 2023, the amount of the social pension was set at PLN 1,588.44 gross.¹⁹ Therefore, until March 2024, the support benefit will range from a minimum of approximately PLN 635 to nearly PLN 3,495. The amount of the benefit will depend on the number of points awarded. The indexation of the social pension amount will result in an increase in the amount of the support benefit.

In order to monitor the process of implementing the support benefit, in July 2023, the Team for Monitoring the Implementation of the Support Benefit was established at the Ministry of Family and Social Policy as an auxiliary body of the Minister of Family and Social Policy.²⁰ This team monitors various aspects, including the flow

¹⁶ Dąbłaż, B., 'Sejm uchwalił ustawę o świadczeniu wspierającym', *Prawo.pl*, 26 May 2023, <https://www.prawo.pl/kadry/swiadczenie-wspierajace-sejm-uchwalil-ustawe,521428.html> [accessed on 26 August 2024].

¹⁷ Article 6b³ AVSREDP.

¹⁸ Article 6b⁵ (3) AVSREDP.

¹⁹ Social pension is indexed annually on 1 March of a given year in accordance with the Act of 17 December 1998 on Pensions and Annuities from the Social Insurance Fund (Journal Laws of 2022, item 504, as amended).

²⁰ Pursuant to Order No. 27 of the Minister of Family and Social Policy of 5 July 2023 on the Establishment of a Team in the Ministry of Family and Social Policy for Monitoring the Implementation of Support Services (Official Journal of the Ministry of Labor and Social Policy, 2023, item 27), which took effect on 8 July 2023.

of information regarding support benefits, especially their dissemination to people with disabilities and their guardians, to local government units, and to the mass media. It also oversees the implementation of necessary changes in ICT systems, primarily those relating to the procedures for electronic applications for support benefits, process of granting support benefits by the Social Insurance Institution, securing of financial resources for the implementation of tasks arising from the Act on Support Benefits, employment of specialists, development of a tool for assessing the level of need for support, and training of specialists in the principles and procedures for determining the level of need for support, as well as the use of new tools for assessing this level.²¹

PROCEDURE FOR GRANTING A SUPPORT BENEFIT

Proceedings regarding the support benefit are conducted, and the benefit is paid by the Social Insurance Institution,²² with supervision over the compliance of the Social Insurance Institution's activities in this area carried out by the minister responsible for family matters. The proceedings are initiated at the request of the person authorised or their representative. Such an application should be submitted no earlier than in the month in which the decision establishing the level of need for support becomes final. Importantly, the legislator has adopted a fully electronic process for both applying for and granting support benefits. Applications and attachments are submitted only in electronic form using:

- (1) An information profile created in the IT system provided by the Social Insurance Institution;
- (2) The ICT system of domestic banks and cooperative savings and credit unions providing services electronically, meeting the requirements specified in the information available on the BIP Social Insurance Institution website;
- (3) An ICT system created by the minister responsible for family affairs.

If the person submitting the application does not have an information profile in the IT system provided by the Social Insurance Institution, this profile is created by the Social Insurance Institution. With this solution, the legislator adopted a model of support from the state apparatus. Additionally, the Social Insurance Institution, based on an agreement, may provide access to technical means enabling the submission of the application and attachments, and assist in submitting these documents at locations other than the head office, branches, or designated organisational units of the Social Insurance Institution.²³ Electronicisation applies to both parties to the proceedings; information from the Social Insurance Institution on the granting of a benefit or a negative decision, subject to judicial review in the event of an appeal by the interested party, will also be provided via the aforementioned IT system.

²¹ § 2 of the Order No. 27.

²² Article 7(1) ASB.

²³ Article 11 ASB.

As indicated above, the Social Insurance Institution is the entity competent to grant and pay the support benefit, but the condition for granting the benefit is that the disabled person must first obtain a decision determining the level of need for support. This decision is issued by the provincial team for assessing disability on the basis of the provisions of the Act on Vocational and Social Rehabilitation and Employment of Disabled Persons, as mentioned above. Therefore, the procedure for support benefits is a two-stage process. First, a person with a disability must submit an application to the provincial disability assessment team for a decision determining the level of need for support, and only after this decision is obtained and becomes final, and if the other criteria are met, can the person with a disability submit an application to the Social Insurance Institution for a support benefit.²⁴

In accordance with Article 12 ASB, the granting of a support benefit by the Social Insurance Institution does not require issuing a formal decision, and information about the granting of the benefit and registration for health insurance is provided by the Social Insurance Institution on its information profile created in the IT system. The legislator has also provided for the possibility for the Social Insurance Institution to communicate this information to the person applying for the support benefit via the e-mail address or telephone number provided in the application. Importantly, failure to receive information about the granting of a support benefit does not suspend the payment of this benefit. However, a formal decision issued by the Social Insurance Institution is required in cases of refusal to grant a support benefit, annulment or change of the right to a support benefit, or in instances of unduly collected support benefits.

The support benefit, in principle, will be available from the month of application. However, considering the nature of this benefit and its connection with the requirement to obtain a decision determining the level of need for support, the legislator has allowed for an extended period for submitting an application for the support benefit.²⁵ Specifically, 'if an application is submitted within a period of 3 months from the date of issuance of the decision determining the level of need for support, the right to a support benefit is established from the month in which the application for issuing the decision determining the level of need for support was submitted (...). If a person, (...), applies within 3 months from the date of turning 18, the right to the support benefit is established from the month the person turns 18.'²⁶ Conversely, in the event of submitting an appeal to the court against the decision determining the level of need for support, the deadline is counted from the date the decision establishing this level becomes final.

It follows from the wording of Article 27 ASB that the payment of the support benefit by the Social Insurance Institution will only be made in a non-cash form, to the payment account number in the country indicated in the application or the number of the payment instrument issued in the country within the meaning of

²⁴ Redakcja BISP, 'Nowe świadczenie...', op. cit.

²⁵ Justification to the Act on Support Benefits, p. 9, <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=3130> [accessed on 26 August 2024].

²⁶ Article 26 ASB.

the Payment Services Act of 19 August 2011.²⁷ As stated in the justification of the Act, 'the introduction of such a solution is intended to reduce the administrative costs on the part of the Social Insurance Institution related to the payment of the above benefit. This goal is to be achieved by introducing non-cash forms of payment, while excluding other methods that require direct contact between the beneficiary and employees of the office or postal operator.'²⁸

Under the Act on Support Benefits, the legislator has also regulated the issue of unduly received support benefits, obliging the recipient to refund such benefits.²⁹ At the same time, the Act specifies when a benefit is considered to be unduly received. Article 29(2) ASB states that the benefit paid is considered unduly received if:

- (1) It is paid on the basis of false statements or documents, or in other cases of deliberate misrepresentation by the person receiving the support benefit;
- (2) It is received despite the lack of entitlement to the support benefit;
- (3) It is received by a person other than the one entitled to a support benefit, for reasons beyond the control of the authority which granted the benefit.

Statutory interest for delay is charged on the amounts of unduly collected support benefits, unless the granting of the support benefit was the result of an error by the Social Insurance Institution. Receivables for unduly collected support benefits become time-barred after three years from the date on which the decision to determine and refund the unduly collected support benefit becomes final. The death of a person who received an unduly paid support benefit causes both the benefit itself and the receivables (interest) to expire.

It should also be noted that the support benefit, including the costs of its administration and health insurance contributions, is financed from the state budget.³⁰ Additionally, the legislator introduces, through Article 32 ASB, reporting obligations for the Social Insurance Institution, which is required to prepare a material and financial report on the performance of tasks related to the benefit for the period from 1 January to 31 December of a given year, and then submit it to the minister responsible for family matters by 15 February of the year following the year for which the report is submitted.

AN ATTEMPT TO EVALUATE THE REGULATION

After a brief presentation of the essence of the newly introduced support benefit, an attempt should be made to determine whether the legislator acted appropriately and rationally by introducing a new benefit into the Polish legal system addressed directly to people with disabilities, rather than to their guardians. In our opinion, this assessment is not straightforward. On the one hand, this is a groundbreaking act in the sense that, for the first time, a functional assessment of the need for support is introduced into the Polish system of supporting people with disabilities. Moreover,

²⁷ Journal of Laws 2023, item 1394.

²⁸ Justification to the Act on Support Benefits, *op. cit.*, p. 10.

²⁹ Article 29(1) ASB.

³⁰ Article 31 ASB.

the point system introduced by the legislator, allowing for greater individualisation of support, can also be considered groundbreaking. It represents a departure from the previously implemented policy of equal treatment of people with disabilities, which was based solely on the degree of disability. Meanwhile, there is no doubt that the needs of people classified as, for example, severely disabled, vary greatly depending on the type of disability and its intensity. In this sense, the adopted solution allowing for greater individualisation of support according to needs should be assessed very positively, as a kind of breakthrough in the current approach to supporting people with disabilities. On the other hand, it must be clearly emphasised that the Act, by introducing a new, previously non-existent benefit, does not streamline the system by maintaining existing forms of support, such as supplementary benefits for people unable to live independently or care allowance. It seems that the legislator, when enacting the Support Benefit Act, could have gone a step further and integrated the existing solutions. This would have made the system of financial support for people with disabilities, unlike the complicated system of supporting their caregivers, more structured and transparent.

Of course, it is difficult to assess its individual provisions only a few days after the Act entered into force. A complete assessment of the adopted solutions will only be possible when the established practice regarding the granting of support benefits is reviewed by the judicial authorities. However, this does not mean that it is impossible to formulate certain *ad hoc* assessments and conclusions.

Referring to the general assumptions of the Act, in our opinion, the adoption by the legislator of a functional assessment focusing on the need to support people with disabilities, rather than on their dysfunctions, should be assessed very positively. Another important achievement is the assignment of support benefits directly to the person with a disability, rather than to their caregiver. It is also worth emphasising that the Act provides a greater opportunity to individualise support by introducing six thresholds for assessing the level of need for support for a person with a disability.

In more detailed matters, the fact that the new benefit is to be granted without any income criteria can be assessed very positively. The Act also does not impose any restrictions on the earnings of persons with disabilities receiving benefits. This approach should be assessed positively, as the benefit is intended solely to 'partially cover the expenses related to meeting the special living needs of a person with a disability'.³¹ For the rest, these individuals should be given the opportunity to take up employment in order to facilitate their full integration and participation in society as far as possible.

The changes introduced by the Act in the field of care services should also be assessed positively. In addition to increasing the amount of this benefit by 100% for the second and each subsequent person cared for, the Act removes the controversial condition that made the granting of the benefit dependent on the caregiver resigning

³¹ Cf. Article 3(1) ASB.

from or not taking up employment in order to care for a person with a disability.³² The demand to waive the above-mentioned condition has been raised for many years by groups working for people with disabilities, as it was seen as discriminatory, especially against parents of disabled children who were forced to give up full-time work due to the care they provide. The complete resignation from professional life, and sometimes from an important career, was extremely unfavourable for caregivers, so the possibility of combining the receipt of care benefits with work, especially part-time work, should be assessed very positively.³³

Of course, not all solutions adopted in the Act deserve a positive assessment. Some groups working for people with disabilities indicate the need for changes to the Act. For example, the Polskie Forum Osób z Niepełnosprawnościami (Polish Disability Forum)³⁴ (PFON/PDF) points to the problem of excessively large differences in the amount of support benefits between individual thresholds, calling for reconsidering the percentages on which the amount of support granted depends. This is undoubtedly a noteworthy postulate, because the rationality of expenditure on supporting people with disabilities depends on whether these indicators are determined correctly. From this point of view, the psychological factor is also important, as the sense of justice among those who receive support seems to be significant. In our opinion, they should be convinced that they receive support adequate to the level of their needs and that they fully deserve it.

A significant problem affecting the granting of support benefits is the imprecise regulation of the scale for assessing the level of need for support. There is no doubt that assessing the level of need for support is extremely important, as it determines the amount of the support benefit. Therefore, establishing precise and transparent rules for this assessment is absolutely crucial for the proper application of the Support Benefit Act. However, the regulation on determining the level of need for support, in

³² Currently, Article 17(1) of the Act of 28 November 2003 on Family Benefits (Journal of Laws of 2023, item 390, as amended) states that 'Care benefit is due to:

- (1) mother or father,
- (2) other persons who, in accordance with the provisions of the Act of February 25, 1964 – Family and Guardianship Code (Journal of Laws of 2020, item 1359 and of 2022, item 2140), are obliged to pay maintenance, as well as spouses,
- (3) the child's actual guardian,
- (4) a foster family, a person running a family children's home, the director of a care and education facility, the director of a regional care and therapy facility or the director of an intervention pre-adoption center,
 - if they take care of a person up to 18 years of age who has a certificate of a significant degree of disability or a certificate of disability together with the indications of: the need for permanent or long-term care or assistance from another person due to a significantly limited ability to exist independently and the need for constant participation in every day as a child's caregiver in the process of treatment, rehabilitation and education.'

³³ For more on this topic, see: Borski, M., 'Aktywizacja zawodowa opiekunów osób z niepełnosprawnościami jako ważne zadanie państwa – wybrane zagadnienia', *Studia z zakresu prawa pracy i polityki społecznej*, 2019, Vol. 26, No. 2, pp. 155–158.

³⁴ A non-profit organisation with the status of a public benefit organization (OBP), bringing together associations and unions of associations of disabled people in Poland. Since 2004, PFON/PDF has been a member of the European Disability Forum (EDF). For more information see <https://pfon.org/> [accessed on 11 January 2024].

force from 29 November 2023,³⁵ has been assessed very negatively by communities working for people with disabilities. Primarily, it is criticised as an unsuccessful attempt to adapt the Spanish BVD scale to Polish conditions.³⁶ Addressing this criticism, it should be noted that, on the one hand, this is a pioneering solution, as the Polish legislator has no experience in formulating similar assessment scales. Therefore, it is clear that the solutions developed will need to be verified in the future, taking into account the practicalities of assessing the level of need for support. On the other hand, the legal language used by the legislator deserves strong criticism. In many places, the regulation is grammatically incoherent, and the wording used is overly complicated and chaotic. It should be remembered that a potential support beneficiary who wishes to understand the process of assessing the need for support should be able to learn this from the regulation itself. However, considering the regulation volume and complexity, this is not only impractical, but the interpretation of its individual provisions often yields contradictory results. Therefore, there is no doubt that work on clarifying the regulations should continue, and the regulation itself should be amended as soon as possible,³⁷ because the very concept of support benefit, as well as the scale for assessing the level of need for support, is, in our opinion, a step in the right direction towards strengthening the autonomy of persons with disabilities and providing an opportunity to individualise support.

Regardless of the above, it seems that such an important issue as the scale for assessing the level of need for support should be regulated at the statutory level, given its significant impact on the rights of people with disabilities. As the Constitutional Tribunal rightly noted in its judgment of 24 September 2013, 'The more the statutory regulation concerns the issue of fundamental rights for the position of an individual (similar entities), the more complete the statutory regulation must be and the less space there is for references to implementing acts.'³⁸ The Tribunal also emphasised that 'the legislator may not delegate for regulation the matters of significant importance for the realisation of human and civil rights and freedoms guaranteed by the Constitution. The mentioned matters must be regulated directly in the act.'³⁹ In our opinion, we can thus speak of the development of

³⁵ Regulation of the Minister of Family and Social Policy of 23 November 2023 on Determining the Level of Need for Support (Journal of Laws of 2023, item 2581).

³⁶ See, *inter alia*, statements by Dr. Maria Libura, head of the Department of Medical Teaching and Simulation of the Collegium Medicum of the University of Warmia and Mazury in Olsztyn, or Dr. Agnieszka Dudzińska, sociologist, lecturer at the University of Warsaw – Róžański, M., 'Rozporządzenie o ustalaniu potrzeby wsparcia. Co trzeba zmienić?', *niepełnosprawni.pl*, 7 November 2023, <http://www.niepelnosprawni.pl/ledge/x/2157090?sessionid=1834DAEEE6D6B27992899CD23BE862AB> [accessed on 7 January 2024].

³⁷ The Commissioner for Human Rights draws attention to this in his opinion on the presidential draft law on personal assistance, emphasising that 'it seems justified to re-analyse the issue of the scale determining the level of support. This scale will affect not only the determination of the right to personal assistance, but also the possibility benefiting from assistance under the proposed Act and its possible scope.' See letter of the Commissioner for Human Rights of 2 January 2024, ref. no XI.503.4.2016.DB, https://bip.brpo.gov.pl/sites/default/files/2024-01/Do_KPRP_ozn_asystencja_projekt_opinia_2.01.2023.pdf [accessed on 7 January 2024].

³⁸ Cf. judgment of the Constitutional Tribunal of 24 September 2013, ref. no. K 35/12, OTK ZU 2013, issue 7a, item 94.

³⁹ *Ibidem*.

the Tribunal's jurisprudence, which outlines broad requirements for statutory regulation. Therefore, the need to regulate the scale of assessment of the level of need for support by statutory means cannot be doubted.⁴⁰

We also negatively evaluate the failure to adopt in the Act the proposed exclusion of support benefits from the income of a person with a disability when applying for care services (CS) and special care services (SCS). There is no doubt that this benefit should not be considered when calculating the fees for these services, especially in the context of Article 55 of the Act on Support Benefit, which states that this benefit is not included in the income criterion for supplementary benefits for persons unable to live independently. This means that a person receiving supplementary benefit may also receive a support benefit and vice versa. In our opinion, the lack of consistency in this area negatively affects the situation of less independent people with disabilities who need to use CS and SCS. Thus, in practice, a person who receives support benefit and uses care services will, effectively, return this benefit by paying for the services mentioned above. Consequently, the funds intended for people with disabilities will instead go to municipalities responsible for providing care services.

In our view, the rejection at the procedural stage of the Support Benefit Act of the Senate amendments, proposed by groups working for people with disabilities, should also be assessed negatively. One of the rejected proposals was to lower the point threshold from 70 to 50 points when determining the level of need for support, along with a proposal to increase the percentage values of the social pension, which would translate into a higher amount of the support benefit. Another important amendment that was rejected by the majority of the Parliament concerned granting the right to support benefits to individuals staying in facilities such as social welfare homes, family welfare homes, or other establishments providing 24-hour care, with the assumption that the payment of the benefit would be suspended during the stay in the given facility. Consequently, in families where the caregiver resigns from care services so that the person under their care can receive a support benefit, it may occur that the family does not receive any benefits for a period of time. This situation only applies temporarily, as the support benefit will eventually be awarded with compensation. We also negatively evaluate the rejection of the Senate amendments aimed at considering additional factors when determining the level of need for support, such as time or level of pain and discomfort during activities performed. These amendments were intended to further individualise the form of support granted, and would undoubtedly have made the benefit more tailored to its beneficiaries.

CONCLUSION

Summarising the above considerations, there is no doubt in our view that the Support Benefit Act is a step in the right direction, which, however, still needs further development. Beyond the need to consider the aforementioned comments

⁴⁰ Similarly, *inter alia*, Garlicki, L., *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa, 2018, p. 155.

in the next amendment of the Act, it also seems necessary to introduce additional measures allowing for greater individualisation of support for people with disabilities based on their needs.

For this reason, the statutory regulation of the institution of personal assistance seems to be an absolutely fundamental issue. This project was prepared by the Chancellery of the President and subjected to public consultations, which concluded on 22 December 2023. The Commissioner for Human Rights has already highlighted certain shortcomings, such as the risk of dualism in assistance services for people with disabilities: ‘systemic’ – based on the proposed Act, and ‘programmatic’ – based on the continuation of the government programme on personal assistance.⁴¹ There is no doubt that all identified problems, and those likely to arise, should be eliminated both at the design stage and during the legislative process. However, this Act is crucially important and should be thoroughly analysed as soon as possible during parliamentary work. It could become a significant step towards the deinstitutionalisation of the support system for people with disabilities.

Of course, the normative regulations indicated above are not sufficient to ensure respect for the individual’s right to an independent life, in accordance with their autonomous choice. To this end, it is necessary to carry out a comprehensive and systematic reform of the support system for people with disabilities, which also includes replacing the institution of incapacitation with a system of supported decision-making. This change is absolutely fundamental to the full realisation of the principle of living independently in society for persons with disabilities, as set out in Article 12 of the Convention on the Rights of Persons with Disabilities. The UN Committee on the Rights of Persons with Disabilities has already highlighted this issue⁴² calling for the State Party ‘to withdraw its interpretative declaration on article 12 of the Convention and (...) to repeal all discriminatory provisions (...) allowing for deprivation of legal capacity of persons with disabilities, considering that legal capacity includes the capacity to be both, a holder of rights and an actor under the law, and capacity to legal acts, as it is defined in legislation’.⁴³ The Committee also stressed the need to ‘establish a procedure aimed at restoring full legal capacity of all persons with disabilities, and to develop supported decision-making mechanisms that respect the autonomy, will and preferences of the person.’⁴⁴

Taking the above into account, it should be assumed that the Act on Support Benefits is only the first step, albeit in the right direction, towards creating a support system aimed at empowering people with disabilities.

⁴¹ See letter from the Commissioner for Human Rights of 2 January 2024, op. cit.

⁴² The Committee on the Rights of Persons with Disabilities has the power to consider individual complaints under the Convention on the Rights of Persons with Disabilities, and its Optional Protocol, <https://www.ohchr.org/en/treaty-bodies/crpd> [accessed on 7 January 2024].

⁴³ See Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Poland, point 20 <https://bip.brpo.gov.pl/sites/default/files/Rekomendacje%20Komitetu%20ONZ%20dla%20Polski%20%28%20C4%99z.%20angielski%29.pdf> [accessed on 7 January 2024].

⁴⁴ *Ibidem*.

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Cite as:

Borski M., Rogacka-Łukasik A. (2024) 'New support service – selected issues and an attempt to evaluate the regulation', *Ius Novum* (Vol. 18) 3, 65–77. DOI 10.2478/in-2024-0023