

JUDGMENT OF THE COURT

31 May 2001 \*

In Joined Cases C-122/99 P and C-125/99 P,

**D**, an official of the Council of the European Union, residing in Arvika (Sweden), represented by J.-N. Louis, G.-F. Parmentier and V. Peere, avocats, with an address for service in Luxembourg,

**Kingdom of Sweden**, represented by L. Nordling, acting as Agent, with an address for service in Luxembourg,

appellants,

supported by

**Kingdom of Denmark**, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

and by

**Kingdom of the Netherlands**, represented by M.A. Fierstra and J. van Bakel, acting as Agents, with an address for service in Luxembourg,

interveners in the appeals,

\* Language of the case: French.

Two APPEALS against the judgment of the Court of First Instance of the European Communities (Second Chamber) in Case T-264/97 *D v Council* [1999] ECR-SC I-A-1 and II-1, seeking to have that judgment set aside,

the other party to the proceedings being:

Council of the European Union, represented by M. Bauer and E. Karlsson, acting as Agents, with an address for service in Luxembourg,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet, V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet (Rapporteur), P. Jann, L. Sevón, R. Schintgen, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,

Advocate General: J. Mischo,  
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 January 2001, at which D was represented by J.-N. Louis, the Kingdom of Sweden by A. Kruse, acting as Agent, the Council by M. Bauer and E. Karlsson, and the Kingdom of Denmark by J. Molde,

after hearing the Opinion of the Advocate General at the sitting on 22 February 2001,

gives the following

## Judgment

- By two applications lodged at the Registry of the Court of Justice on 13 and 14 April 1999 respectively, D and the Kingdom of Sweden brought an appeal pursuant to Article 49 of the EC Statute and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the judgment in Case T-264/97 *D v Council* [1999] ECR-SC I-A-1 and II-1 ('the contested judgment'), in which the Court of First Instance dismissed the application by D, supported by the Kingdom of Sweden, for annulment of the refusal by the Council of the European Union to award the applicant the household allowance.

## Legal background

2 Article 1(2) of Annex VII to the Staff Regulations of Officials of the European Communities ('the Staff Regulations') provides as follows:

'The household allowance shall be granted to:

- (a) a married official;
  
- (b) an official who is widowed, divorced, legally separated or unmarried and has one or more dependent children within the meaning of Article 2(2) and (3) below;
  
- (c) by special reasoned decision of the appointing authority based on supporting documents, an official who, while not fulfilling the conditions laid down in (a) and (b), nevertheless actually assumes family responsibilities.'

3 Article 1 of Chapter 1 of Lagen (1994:1117) om registrerat partnerskap of 23 June 1994 (the Swedish law on registered partnership) provides that '[t]wo persons of the same sex may apply for registration of their partnership'. Article 1 of Chapter 3 of the same law provides that '[a] registered partnership shall have the same legal effects as a marriage, subject to the exceptions provided for...'

## Facts

- 4 D, an official of the European Communities of Swedish nationality working at the Council, registered a partnership with another Swedish national of the same sex in Sweden on 23 June 1995. By notes of 16 and 24 September 1996 he applied to the Council for his status as a registered partner to be treated as being equivalent to marriage for the purpose of obtaining the household allowance provided for in the Staff Regulations.
- 5 The Council rejected the application, by note of 29 November 1996, on the ground that the provisions of the Staff Regulations could not be construed as allowing a 'registered partnership' to be treated as being equivalent to marriage.
- 6 The complaint against that decision brought by D on 1 March 1997 was rejected on the same ground, by a note of 30 June 1997 from the Secretary-General of the Council ('the contested decision').
- 7 Following that rejection D, by application lodged at the Registry of the Court of First Instance on 2 October 1997, brought an action seeking that the refusal to recognise the legal status of his partnership be annulled and that he and his partner should be granted the remuneration to which he claimed entitlement under the Staff Regulations and the regulations and other general provisions applicable to officials of the European Communities.

## The contested judgment

- 8 The Court of First Instance held, in paragraphs 14 to 18 of the contested judgment, that the pre-litigation procedure related only to the application for the

household allowance and that therefore the action could seek only annulment of the refusal to grant that application.

- 9 In paragraphs 19 to 21 of the contested judgment, the Court of First Instance rejected the objection of inadmissibility raised by the Council with regard to some of the pleas put forward by the applicant in support of the claim for annulment.
- 10 With regard to the first plea, alleging infringement of the principles of equal treatment and non-discrimination, the Court of First Instance held first of all, in paragraphs 23 to 25 of the contested judgment, that Council Regulation (EC, ECSC, Euratom) No 781/98 of 7 April 1998 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities in respect of equal treatment (OJ 1998 L 113, p. 4), which introduced Article 1a into the Staff Regulations giving officials entitlement to equal treatment irrespective of their sexual orientation, without prejudice to the provisions of the Staff Regulations requiring a particular marital status, did not enter into force until after the adoption of the contested decision and so it was not appropriate to take that regulation into consideration.
- 11 The Court of First Instance went on to observe in paragraphs 26 and 27 of the contested judgment that, according to its case-law, for the purposes of the Staff Regulations the concept of marriage must be understood as meaning a relationship based on civil marriage within the traditional meaning of the term (Case T-65/92 *Arauxo-Dumay v Commission* [1993] ECR II-597, paragraph 28) and reference to the laws of the Member States is not necessary where the relevant provisions of the Staff Regulations are capable of being given an independent interpretation (Case T-43/90 *Díaz García v Parliament* [1992] ECR II-2619, paragraph 36).
- 12 Lastly, on the basis of the case-law of the European Court of Human Rights and that of the Court of Justice (Case C-249/96 *Grant* [1998] ECR I-621, paragraphs 34 and 35) the Court of First Instance held in paragraphs 28 to 30 of the contested judgment that the Council was under no obligation to regard as

equivalent to marriage, for the purposes of the Staff Regulations, the situation of a person who had a stable relationship with a partner of the same sex, even if that relationship had been officially registered by a national authority. It added, in paragraphs 31 and 32 of the contested judgment, that the Commission had been requested to submit proposals concerning the recognition of situations involving registered partnerships and that it would be for the Council, as legislator and not as employer, to make any necessary amendments to the Staff Regulations following those proposals.

- 13 In paragraphs 36 and 37 of the contested judgment, the Court of First Instance rejected as unfounded the second plea, which alleged that the applicant was entitled to respect for the integrity of his personal status as a registered partner as distinct from the status of being unmarried.
  
- 14 As regards the third plea, alleging infringement of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Court of First Instance held, in paragraphs 39 to 41 of the contested judgment, that the Council could not have infringed that provision since long-term homosexual relationships are not covered by the right to respect for family life protected under that article.
  
- 15 As regards the fourth plea, alleging infringement of the principle of equal pay for men and women contained in Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), the Court of First Instance merely stated in paragraphs 42 to 44 of the contested judgment that the relevant provisions of the Staff Regulations apply equally to men and women and thus do not lead to any discrimination prohibited under Article 119 of the Treaty.
  
- 16 On those grounds, the Court of First Instance dismissed the application.

## The appeals

- 17 D and the Kingdom of Sweden claim that the Court should set aside the contested judgment and the Council's decision dismissing D's application and order the Council to pay the costs of the proceedings before the Court of First Instance and the Court of Justice, respectively, and the costs incurred by the Kingdom of Sweden in the proceedings before the Court of Justice.
- 18 The Council contends that the Court should dismiss the appeals as unfounded and order D and the Kingdom of Sweden to pay the costs.
- 19 By order of the President of the Court of Justice of 20 May 1999, the two cases were joined for the purposes of the written and oral procedure and the judgment.
- 20 By orders of the President of the Court of Justice of 24 September 1999 the Kingdom of Denmark and the Kingdom of the Netherlands were given leave to intervene in support of the submissions of D and the Kingdom of Sweden. They submit that the Court should set aside the contested judgment.

## The plea concerning the scope of the application

- 21 D asserts that the Court of First Instance erred in law in considering that the dispute before it related only to award of the household allowance when, in fact, by his action D was seeking entitlement, by reason of his registered partnership, to all the benefits to which a married official would be entitled under the Staff

Regulations. The Court of First Instance was wrong to consider that the pre-litigation procedure related only to the application for the household allowance when, on the one hand, D's notes dated 16 and 24 September 1996 to his administration contained no such restriction and, on the other hand, his complaint of 1 March 1997, which forms part of the pre-litigation procedure, made express reference to other entitlements and benefits besides the household allowance.

- 22 The Court of First Instance determined the precise subject-matter of the application made by the official to his administration on the basis of the documents in the case at first instance. It is clear that it was entitled, without any distortion of the relevant facts, to hold that in D's initial application he sought to receive the household allowance, as he himself confirmed in his note of 16 October 1996, even though his handwritten notes of 16 and 24 September 1996 did not mention this expressly, and that his complaint of 1 March 1997, lodged after the contested decision was taken, did indeed refer to other aspects but could not, as a matter of law, extend the scope of the application.
  
- 23 The plea concerning the scope of the application must therefore be rejected.

#### **The plea alleging failure to provide adequate reasoning for the contested judgment**

- 24 D contends that the contested judgment is inadequately reasoned because in paragraph 36 it merely dismisses as 'unfounded', 'assuming that it is different from the first [plea in the application]', the second plea, alleging infringement of the principle of the 'integrity of a person's status'. To deal with the plea in this way does not make it possible to tell, from a reading of the contested judgment,

whether the plea was rejected because the principle relied on did not exist, was inapplicable or had not been infringed.

- 25 In the second plea, which, it is alleged, was not dealt with satisfactorily, the applicant maintained in essence that the right of a national of a Member State to have his civil status respected throughout the Community had been infringed by the contested decision treating his situation as being equivalent to that of an unmarried official. This plea followed on from the first plea, in which the applicant alleged infringement of equal treatment and discrimination on grounds of sexual orientation in that the Council did not recognise that the legal effects of a partnership registered in Sweden should result in its being treated as equivalent to a marriage, including for the purposes of the Staff Regulations.
- 26 In those circumstances, it appears, given the reasoning it adopted, that the Court of First Instance considered the second plea from two separate perspectives in turn. If the plea was a restatement of the idea that national law must take precedence as regards interpretation of the term 'married official' in the Staff Regulations, the Court of First Instance considered, quite rightly, that it had already dealt with it in its consideration of the first plea. If it was based on a separate rule that a person's civil status should be the same throughout the Community, the reply was that assessment of entitlement to an allowance provided for in the Staff Regulations does not, on any view, alter the applicant's civil status and therefore that, if there were such a rule, it would not be relevant.
- 27 The reasoning, though brief, is none the less sufficient to convey the grounds of fact and law on which the Court of First Instance rejected the second plea.
- 28 The plea alleging failure to provide an adequate reasoning must therefore be rejected.

## The pleas concerning interpretation of the Staff Regulations

- 29 D and the Kingdom of Sweden, supported by the Kingdom of Denmark and the Kingdom of the Netherlands, assert that, since civil status is a matter which comes within the exclusive competence of the Member States, terms such as ‘married official’ or ‘spouse’ in the Staff Regulations should be interpreted by reference to the law of the Member States and not be given an independent definition. Thus, where a Member State has legislated to give legal status to an arrangement such as registered partnership, which is to be treated in respect of the rights and duties it comprises as being equivalent to marriage, the same treatment should be accorded in the application of the Staff Regulations.
- 30 That interpretation does not conflict with Community case-law, which has not so far dealt with statutory partnership and has merely distinguished between marriage and stable relationships involving *de facto* cohabitation, which differ essentially from the statutory arrangement constituted by registered partnership. Moreover, it accords with the aim of the Staff Regulations, which is to bring about the recruitment on a wide geographical basis of high-quality staff for the Community institutions, which entails compensation for actual family costs incurred when staff take up their duties.
- 31 The Council supports the more restrictive interpretation adopted by the Court of First Instance, mainly on the grounds that there is no ambiguity in the wording of the Staff Regulations, that even in the law of those Member States which recognise the concept of registered partnership that concept is distinct from marriage and is treated as being equivalent only as regards its effects and subject to exceptions and, lastly, that a registered partnership arrangement exists only in some of the Member States and to treat it as being equivalent to marriage for the purposes of applying the Staff Regulations would be to extend the scope of the

benefits concerned, which requires a prior assessment of its legal and budgetary consequences and a decision on the part of the Community legislature rather than a judicial interpretation of the existing rules.

- 32 The Council points out in this connection that at the time Regulation No 781/98 was adopted a request by the Kingdom of Sweden for registered partnership to be treated as being equivalent to marriage was rejected; the Community legislature chose instead to instruct the Commission to study the consequences, especially the financial ones, of such a measure and to submit proposals to it, if appropriate, and decided in the meantime to maintain the existing arrangement as regards provisions requiring a particular civil status.
- 33 It is true that the question whether the concepts of marriage and registered partnership should be treated as distinct or equivalent for the purposes of interpreting the Staff Regulations has not until now been resolved by the Court of Justice. As the appellants contend, a stable relationship between partners of the same sex which has only a *de facto* existence, as was the case in *Grant*, cited above, is not necessarily equivalent to a registered partnership under a statutory arrangement, which, as between the persons concerned and as regards third parties, has effects in law akin to those of marriage since it is intended to be comparable.
- 34 It is not in question that, according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex.
- 35 It is equally true that since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite

sex and conferring on such unions certain effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage.

- 36 It is clear, however, that apart from their great diversity, such arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage.
- 37 In such circumstances the Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. The intention of the Community legislature was to grant entitlement to the household allowance under Article 1(2)(a) of Annex VII to the Staff Regulations only to married couples.
- 38 Only the legislature can, where appropriate, adopt measures to alter that situation, for example by amending the provisions of the Staff Regulations. However, not only has the Community legislature not shown any intention of adopting such measures, it has even (see paragraph 32 above) ruled out at this stage any idea of other forms of partnership being assimilated to marriage for the purposes of granting the benefits reserved under the Staff Regulations for married officials, choosing instead to maintain the existing arrangement until the various consequences of such assimilation become clearer.
- 39 It follows that the fact that, in a limited number of Member States, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term ‘married official’ as used in the Staff Regulations.

- 40 It follows from the above considerations that the Court of First Instance was right to hold that the Council could not interpret the Staff Regulations so as to treat D's situation as that of a married official for the purposes of granting a household allowance.
- 41 The pleas concerning the interpretation of the Staff Regulations must therefore be rejected.

The plea alleging infringement of the 'principle of the integrity of a person's status'

- 42 In this plea, the appellant argues that the contested decision to treat him as being 'unmarried' infringes the principle that all nationals of Member States are entitled to respect throughout the Community for the civil status they enjoy in their own Member State.
- 43 It is sufficient to state in this connection, as did the Court of First Instance in paragraph 35 of the contested judgment, that in any event, in applying to the appellant a provision of the Staff Regulations concerning an allowance, the competent institution was not taking a decision affecting his situation with regard to his civil status.
- 44 The plea alleging infringement of 'the principle of the integrity of a person's status' must therefore be rejected.

**The pleas relating to infringement of the principle of equal treatment, discrimination on grounds of sex and nationality and restriction of the free movement of workers**

- 45 D contends that the contested decision, which deprives him of an allowance to which his married colleagues are entitled solely on the ground that the partner with whom he is living is of the same sex as himself, constitutes, contrary to what the Court of First Instance held, discrimination based on sex, in breach of Article 119 of the Treaty, and infringement of the principle of equal treatment.
- 46 It should be observed first of all that it is irrelevant for the purposes of granting the household allowance whether the official is a man or a woman. The relevant provision of the Staff Regulations, which restricts the allowance to married officials, cannot therefore be regarded as being discriminatory on grounds of the sex of the person concerned, or, therefore, as being in breach of Article 119 of the Treaty.
- 47 Secondly, as regards infringement of the principle of equal treatment of officials irrespective of their sexual orientation, it is clear that it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner.
- 48 The principle of equal treatment can apply only to persons in comparable situations, and so it is necessary to consider whether the situation of an official who has registered a partnership between persons of the same sex, such as the partnership entered into by D under Swedish law, is comparable to that of a married official.

- 49 In making such an assessment the Community judicature cannot disregard the views prevailing within the Community as a whole.
- 50 The existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union (see paragraphs 35 and 36 above).
- 51 In those circumstances, the situation of an official who has registered a partnership in Sweden cannot be held to be comparable, for the purposes of applying the Staff Regulations, to that of a married official.
- 52 It follows that the plea relating to infringement of the principle of equal treatment and discrimination on grounds of sex must be rejected.
- 53 D also contends that by depriving partners registered under the legislation in force in some Member States of the rights associated with their status under national law, a decision such as the contested decision constitutes discrimination on grounds of nationality and at the same time an obstacle to freedom of movement for workers.
- 54 The Council argues that this is a fresh plea introduced for the first time at the appeal stage and as such is inadmissible. D replies that it is not a fresh plea but a limb of the plea previously put forward alleging infringement of the principle of non-discrimination.

- 55 It is common ground, however, that no mention was made earlier in the proceedings of the different treatment which, as the result of a decision such as the contested decision, nationals of the Kingdoms of Denmark, the Netherlands and Sweden receive as compared with nationals of other Member States or the fact that the measure concerned might deter nationals of any of those three Member States from exercising their right to free movement.
- 56 Those are issues which constitute separate pleas, distinct from the plea alleging breach of the principle of equal treatment and discrimination on grounds of sex, which attack the contested decision from a different perspective and challenge its validity by reference to other rules and principles.
- 57 It follows that the pleas relating to discrimination on grounds of nationality and restriction of the free movement of workers must be declared inadmissible.

### **The plea based on the right to respect for private and family life**

- 58 According to D, the protection for family life provided for in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms applies to homosexual relationships and, by requiring recognition of the existence and effects of a civil status acquired by law, prohibits the interference constituted by the transmission of incorrect data to third parties.

- 59 It is sufficient to observe that refusal by the Community administration to grant a household allowance to one of its officials does not affect the situation of the official in question as regards his civil status and, since it only concerns the relationship between the official and his employer, does not of itself give rise to the transmission of any personal information to persons outside the Community administration.
- 60 The contested decision is not therefore, on any view, capable of constituting interference in private and family life within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- 61 The plea based on the right to respect for private and family life must therefore be rejected.
- 62 It follows that the appeals must be dismissed in their entirety.

### Costs

- 63 Under Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded the Court shall make a decision as to costs.

- <sup>64</sup> Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(4), also applicable to the procedure on appeal, the Member States and institutions which intervene in the proceedings are to bear their own costs.
- <sup>65</sup> Since the Council applied for D and the Kingdom of Sweden to pay the costs, and since they were unsuccessful, they must be ordered jointly and severally to pay the costs.
- <sup>66</sup> The Kingdom of Denmark and the Kingdom of the Netherlands, which intervened in the appeals, must be ordered to bear their own costs.

On those grounds,

## THE COURT

hereby:

1. Dismisses the appeals;

2. Orders D and the Kingdom of Sweden jointly and severally to pay the costs;
  
3. Orders the Kingdom of Denmark and the Kingdom of the Netherlands to bear their own costs.

Rodríguez Iglesias	Gulmann	La Pergola
Wathelet	Skouris	Edward
Puissochet	Jann	Sevón
Schintgen	Macken	Colneric
von Bahr	Cunha Rodrigues	Timmermans

Delivered in open court in Luxembourg on 31 May 2001.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President