

of the existing fact. It is not open to the administration simply to find that, because custody of the children is given to one of the officials by an order of court, that official alone actually maintains the children and that the other parent is therefore not entitled to the family allowances.

Family allowances, which are exclusively intended for the maintenance of children, are paid in favour of the person who, pursuant to

legal provisions or by an order of court or of the competent administrative authority, has custody of the children. If that person is one of two divorced Community officials, the family allowances will be paid to that official both on his or her behalf and in his or her name and also on behalf and in the name of the other official, with the proviso that, in accordance with the general principle laid down in Article 67(2) of the Staff Regulations, an official may not draw two allowances of the same kind.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)  
3 March 1993 \*

In Case T-69/91,

**Georgios Peroulakis**, an official of the Commission of the European Communities, residing at Brussels, represented by Athos Damis, of the Athens Bar, with an address for service in Luxembourg at the office of Emmanuel Kaili, 62 Rue Adolphe Fisher,

applicant,

v

\* Language of the case: Greek.

Commission of the European Communities, represented by its Legal Adviser, Dimitrios Gouloussis, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 18 January 1991 to pay the household allowance, dependent child allowance and education allowance, with effect from 1 January 1991, to the person with custody of the children, as the person entitled,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: C. W. Bellamy, President, H. Kirschner and C. P. Briët, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 12 November 1992,

gives the following

**Judgment**

**Facts and procedure**

1 The applicant, who is of Greek nationality, is a grade B4 deputy assistant in Directorate-General XI 'Environment, Nuclear Security and Civil Protection' of the Commission.

- 2 In 1984 he married Mrs A. There were two children of the marriage. Mrs A is also an official of the Commission, in a lower grade than the applicant.
  
- 3 The marriage was dissolved by decree of 5 December 1990, which was delivered by the Court of First Instance, Athens, and entered in the Athens civil register on 3 January 1991. The decree approved the agreement concluded by the applicant and his ex-wife on 9 February 1990 concerning the custody and maintenance of their children and the applicant's right of access.
  
- 4 Under the agreement, custody of the parties' children was granted to the ex-wife. The applicant undertook to pay her BFR 6 000 per month per child. This amount was indexed to the salaries of officials of the European Communities.
  
- 5 A copy of the decree of the Athens court of 5 December 1990 and of the agreement of 9 February 1990 was sent to the appropriate Commission departments. On 18 January 1991 the head of the Individual Rights Unit sent a memorandum to the applicant worded as follows:

'My services are in possession of a divorce decree drawn up by the Athens court.

It appears from this document that custody of the children (B) and (C) has been granted to their mother, Mrs (A).

Council Regulation No 2074/83, published in Official Journal L 203 of 27 July 1983, provides that family allowances are henceforth to be paid to the person with custody of the children.

Consequently, the dependent child, education and household allowances to which you have hitherto been entitled will in future be payable to Mrs A and will be paid to her with effect from 1 January 1991.'

- 6 On 27 April 1991 the applicant's ex-wife married a Greek national, an official of the Commission in a grade higher than the applicant.
  
- 7 On 27 February 1991 the applicant had already submitted a complaint, under Article 90(2) of the Staff Regulations of officials of the European Communities, concerning the Commission's decision of 18 January 1991. He subsequently received from the Commission a memorandum dated 11 June 1991 informing him that the Commission had decided to refer the point which he had raised to the inter-institutional authorities and drew his attention to the fact that, in the absence of an express decision, his complaint would be deemed to have been rejected on 27 June 1991.
  
- 8 By an application lodged at the Registry of the Court of First Instance on 26 September 1991, the applicant thereupon brought the present action.
  
- 9 The written procedure followed its normal course. Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiries.
  
- 10 The hearing took place on 12 November 1992. The parties' representatives made their submissions to the Court and gave their replies to the Court's questions.
  
- 11 After the closure of the oral procedure the Commission gave a written reply to a question put by the Court during the hearing.

## Forms of order sought by the parties

12 The applicant claims that the Court should:

1. order that the implied decision rejecting his complaint, deemed to have been adopted on 27 June 1991, be withdrawn;

2. order that the Commission's decision concerning the family allowances, which was notified to him by memorandum of 18 January 1991, be withdrawn;

3. declare that he is entitled to the household allowance, dependent child allowance and education allowance, and to any other advantage granted by the Commission;

4. order that the household allowance, dependent child allowance and education allowance be paid to his ex-wife on behalf and in the name of the applicant for as long as she has custody of both the children who are dependent on him;

5. declare that he is entitled to those allowances with effect from 1 January 1991;

6. order the Commission to pay the costs.

13 The Commission claims that the Court should:

1. dismiss the action as unfounded;

2. order the applicant to pay the costs.

## Admissibility

- 14 Under his third and fifth heads of claim the applicant asks the Court to recognize various entitlements. In reality these seek to justify a number of submissions on which he relies in support of his action for annulment. These heads of claim must be ruled inadmissible because it is not for the Court, in exercising its power of review under Article 91 of the Staff Regulations, to make such declarations.
- 15 With regard to the fourth head of claim, in which the applicant asks the Court to issue directions to the Commission, the applicant did not give a wholly unequivocal answer at the hearing to the Judge-Rapporteur's question as to whether he was prepared to withdraw that head of claim. In any case it must be ruled inadmissible because it is not for the Court, in exercising its power of review under Article 91 of the Staff Regulations, to issue directions to the authority responsible for implementing the judgment to be given in the present case.

## Substance

- 16 In support of his claims the applicant relies on a single ground alleging the infringement of Article 1(2)(b) in conjunction with Article 1(5) and Article 2(2) of Annex VII to the Staff Regulations.
- 17 These provisions are worded as follows:

*'Article 1*

...

2. The household allowance shall be granted to:

...

- (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;

...

5. If the official is entitled to the household allowance only by virtue of paragraph 2(b) and a person other than the official has by law or by an order of court or of the competent administrative authority been given custody of all his dependent children within the meaning of Articles 2(2) and (3) below, the household allowance shall be paid to that other person in the name and on behalf of the official.

...

If the person eligible by virtue of the foregoing to receive the household allowance paid in the official's name is also eligible to receive this allowance by reason of his or her own status as official or other member of the staff, that person shall receive the higher of the two allowances only.

## *Article 2*

...

2. "Dependent child" means the legitimate, natural or adopted child of an official, or of his spouse, who is actually being maintained by the official.

...'

- 18 Similar provisions, namely Article 2(1) and (7) and Article 3, first and last paragraphs, of Annex VII to the Staff Regulations, apply to the dependent child allowance and the education allowance.

*Arguments of the parties*

- 19 According to the applicant, it follows from the abovementioned provisions that the person who actually bears the cost of maintaining children must be recognized as entitled to the household allowance, dependent child allowance and education allowance.

- 20 The applicant contends that he has an obligation to maintain his infant children under the Greek Civil Code and under the agreement of 9 February 1990 with his ex-wife, which was approved by a Greek court and a copy of which was forwarded to the Commission.

- 21 He accepts that his ex-wife contributes to the children's maintenance by caring for them, but he states that the amounts which he pays her and the allowances from the Commission are sufficient to cover the cost of their maintenance. He adds that during holidays, that is for at least three months each year, in addition to his usual financial contribution he has sole responsibility for maintaining his children.

- 22 In his reply the applicant, who emphasizes that the contested decision relates to the period prior to his ex-wife's re-marriage and the period subsequent thereto, contends that her re-marriage in no way altered the previous situation, that he continues to meet most of the expenses of maintaining the children and that his ex-wife's new husband is under no obligation, either in law or in fact, to contribute to such expenses.

- 23 In his reply he also challenges the Commission's argument that it was the legislature's intention to favour the person with custody of the children. He refers to Article 1(5), third subparagraph of Annex VII to the Staff Regulations, which provides that if a person is eligible to receive the household allowance in more than one capacity, he is to receive the higher of the two allowances only, and concludes that the decisive criterion for the legislature is the children's interest.
- 24 The applicant therefore considers that the family allowances at issue in the present case must be paid to his ex-wife on his behalf. He explained at the hearing that by being recognized as the person entitled he would obtain a number of advantages, including the payment of his children's travelling expenses from his place of employment to his place of origin, a dependent child tax allowance and a higher daily subsistence allowance in the event of transfer.
- 25 The Commission, which admits that this is a borderline case, considers that the contested decision is well-founded. It states that the decision relates only to the period from 1 January 1991 to Mrs A's re-marriage and contends that during this period both the applicant and his ex-wife satisfied the conditions laid down in Article 1(2)(b) of Annex VII to the Staff Regulations and were therefore eligible to draw the household allowance as they both had dependent children, that is children towards whose maintenance they actually contributed.
- 26 In its defence, the Commission explained that in those circumstances it chose the applicant's ex-wife as the person entitled to the allowances in question. Its reason for doing so was that, in the Commission's view, the legislature clearly expressed its intention to favour the person with custody of the children by deciding, in Article 1(5), third subparagraph and in Article 2(7) of Annex VII to the Staff Regulations, to pay the family allowances in question to that person.

- 27 At the hearing the Commission stated that the main question which it had had to answer was by whom were the children 'actually maintained', independently of any legal obligation to maintain them. The Commission took the view that, since that phrase was to be interpreted as meaning 'principally maintained', in the present case it was the ex-wife who played the greater part in maintaining the children as they lived with her and this involved extra expenditure, such as, for example, housing costs.
- 28 With regard to the period following Mrs A's re-marriage, the Commission, which maintains that a new legal situation existed from that date, considers that because the children live with the applicant's ex-wife and her husband it is they who, regardless of any legal obligation to maintain them, in practice pay for the greater part of their maintenance. This is why, according to the Commission, pursuant to Article 1(2)(b) in conjunction with Article 2(2), first subparagraph, and Article 2(5) of Annex VII to the Staff Regulations, Mrs A's new husband, who is in a higher grade than the other two persons concerned, must be regarded as the person eligible to receive the allowances in question.

### *Findings of the Court*

- 29 It should be observed, firstly, that the Court's power of review is limited to ascertaining the lawfulness of the contested decision as adopted on 18 January 1991. In carrying out such review, the Court cannot take account of facts or circumstances which arose after that date, such as, for example, the fact mentioned by the parties that the applicant's ex-wife has re-married. It should also be observed that the Commission stated at the hearing that it did not subsequently adopt a decision other than the one which is the subject of this action.
- 30 Secondly, Article 1(2)(b) of Annex VII to the Staff Regulations, entitled 'Remuneration and reimbursement of expenses', provides that the household allowance is to be granted to an official who is divorced and has one or more dependent children within the meaning of Article 2(2) and (3) and, under Article 2(1) and the first

paragraph of Article 3, such an official, in certain circumstances, is to receive a dependent child allowance and an education allowance for each dependent child. The first subparagraph of Article 2(2) of Annex VII provides that 'dependent child' means the legitimate child of an official who is actually being maintained by the official.

31 It follows from the scheme of these provisions that the phrase 'who is actually being maintained by the official', in the first subparagraph of Article 2(2) of Annex VII, is the decisive criterion for determining who is entitled to the household allowance and who is to receive the dependent child allowance and education allowance.

32 In Case C-132/90 P *Schwedler v Parliament* [1991] ECR I-5754 the Court of Justice held that there was nothing to prevent a child's being regarded as being actually maintained by a number of persons at the same time. Accordingly, the legitimate child of two divorced Community officials may be regarded as being actually maintained by those two officials at the same time and may therefore be regarded as being dependent on them simultaneously.

33 It therefore follows logically from Article 1(2)(b) of Annex VII to the Staff Regulations that if two divorced Community officials actually support jointly the children of their dissolved marriage, so that the children are dependent on both of them simultaneously, the officials are both entitled to the household allowance. Moreover, in such a case it follows from Article 2(1) and the first paragraph of Article 3 of Annex VII that both divorced Community officials are eligible to receive the dependent child allowance and the education allowance for the children simultaneously dependent on them, on the specific conditions laid down in those articles.

- 34 The Court of Justice has further held that the family allowances listed in Article 67(1) of the Staff Regulations are not intended for the official's upkeep but for that of his children (Case 33/87 *Christianos v Court of Justice* [1988] ECR 2995) and, secondly, that the clear aim of Article 67(2) of the Staff Regulations, which, by requiring an official to declare allowances of like nature paid from other sources so that they may be deducted, expresses a general principle, is to prevent two allowances from being drawn (Case 142/78 *Exner, née Berghmans v Commission* [1979] ECR 3125). It follows that where two divorced Community officials are entitled to the household allowance and are jointly entitled to a dependent child allowance and an education allowance, those allowances must be paid, in accordance with Article 1(5), Article 2(7) and Article 3, fourth paragraph of Annex VII, on their joint behalf and in their joint name to the person to whom custody of the children of the dissolved marriage has been given pursuant to legal provisions or by an order of court or of the competent administrative authority. If the person to whom custody of the children has been given is one of the two divorced Community officials, he or she will receive the allowances both on his or her behalf and in his or her own name and also on behalf and in the name of the other official.
- 35 At the hearing the Commission stated that it interpreted the phrase 'actually maintained' as meaning 'principally maintained' and that, as the children of the applicant and his ex-wife lived under the latter's roof, it was she who, as a matter of fact, provided the greater part of the children's maintenance. The Commission adopted the contested decision on the basis of this reasoning.
- 36 The Court considers that 'actually maintained' must be interpreted as referring to the existing factual situation. The Court is unable to find any legal basis in the Staff Regulations for the Commission's interpretation to the effect that 'actually maintained' means 'principally maintained' which, moreover, is contrary to the judgment of the Court of Justice in the *Schwedler* case, cited above. The Commission's interpretation of the phrase must therefore be rejected.

37 In order to determine the person or persons actually maintaining the children of the applicant and his ex-wife, the Commission ought to have considered and checked the existing factual situation.

38 The Court finds that the Commission has admitted in its observations that, before adopting the contested decision, it neither considered nor checked who actually maintained the children of the applicant and his ex-wife and that, consequently, it did not establish whether the applicant or his ex-wife, or both, were entitled to the household allowance, or whether one or both of them could receive the dependent child allowance and the education allowance. In those circumstances the Court takes the view that, by providing, on the sole basis of the finding that, pursuant to the divorce decree of the Court of First Instance, Athens, custody of the children of the applicant and his ex-wife was entrusted to his ex-wife, that 'the dependent child, education and household allowances ... will in future be payable to Mrs (A)', the contested decision was adopted in breach of Article 1(2)(b), Article 2(1) and (2) and Article 3, first paragraph of Annex VII.

39 To that extent, therefore, the decision must be annulled.

## Costs

40 Under Article 87(2) of the Rules of Procedure of the Court of First Instance the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Annuls Commission Decision No IX/DO/3(91)D-302 of 18 January 1991 in so far as it recognizes the applicant's ex-wife as the person entitled to household allowance, dependent child allowance and education allowance;
2. Dismisses the remainder of the application;
3. Orders the Commission to pay the costs.

Bellamy

Kirschner

Briët

Delivered in open court in Luxembourg on 3 March 1993.

H. Jung

C. W. Bellamy

Registrar

President