2. Orders the Council to pay the costs.

Galmot Everling Kakouris

Delivered in open court in Luxembourg on 19 January 1984.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 15 DECEMBER 1983 [1]

Mr President,
Members of the Court,

1. The parties to the case which the Court is called upon to decide are an official and the administration of a Community institution: the official claims payment of a household allowance and the institution denies any obligation to pay it to her. The dispute between them is in essence merely a problem of interpretation: the Court must determine whether an official who has been granted the allowance provided for in Article 2 (4) of Annex VII to the Staff Regulations in respect of a person "treated as if he were a dependent child" may, under Article 1 (2) (c) of the same annex, be granted the household allowance. The case is of particular interest because there are no exact precedents.

The facts are as follows: Gabriella Erdini, an official employed by the Council, submitted an application on 23 July 1981 to the Director of Administration of the Council for the household allowance provided for by Article 1 (2) (c) of Annex VII. In support of her application she stated that her mother — who was already treated as a dependent child for payment of the appropriate allowance as from 1 November 1978 — was not only financially dependent upon her but also lived under her roof; thus Miss Erdini had come to assume the role of head of household. By a memorandum of 21 September 1981, the Director of Administration notified her that her request could not be granted because

(a) the fact that a relative had been treated as a dependent child for the

1 — Translated from the Italian.

purpose of the allowance provided for in Article 2 did not automatically entail entitlement to the household allowance as well;

(b) the decision to pay her an allowance in respect of her mother was of an exceptional nature and could not be followed by another no less exceptional decision, such as the grant of a household allowance under Article 1 (2) (c).

By a second memorandum of 5 July 1982, the Director of Administration confirmed his refusal. Then (on 22 September 1982) Miss Erdini lodged a complaint through official channels under Article 90 (2) of the Staff Regulations, requesting that the household allowance be paid to her; but by a memorandum of 17 February 1983, the Secretary-General of the Council rejected the complaint, on the ground that Miss Erdini's mother had her own income and to uphold the request would have led to discriminatory treatment as between officials. Miss Erdini then brought an action (on 22 April 1983). She requested the Court to annul the refusals of 5 July 1982 and 17 February 1983 and to recognize her entitlement to the household allowance as from the date of lodgement of the application, since in her case the conditions laid down in Article 1 (2) (c) of Annex VII were satisfied; she also asked for costs. For its part, the Council requested that the action be dismissed and the applicant be ordered to pay the costs.

2. A word about the admissiblity of the application: according to the Council, of the two administrative decisions of which the applicant seeks annulment — that of 5 July 1982 adopted by the Director of Administration and that of 17 February 1983 signed by the Secretary-General — only the second may be contested in legal proceedings because only that decision reflects the intention of the appointing authority. I should point out, however, that if that observation were correct, all three claims set out in the application would be inadmissible, as well as the complaint against the decision contained in the memorandum of 5 July 1982. Suppose in fact that the measure in question had no adverse effect: under Article 90 (2) of the Staff Regulations a complaint could not even be made against it and the fact that the complaint was vitiated would reflect upon the admissibility of the action. But in fact the objection is without foundation. In other words, the memorandum of 5 July 1982 may be the subject of a complaint.

That is the case, it seems to me, because that memorandum too evidenced the unwillingness of the appointing authority to grant Miss Erdini's application and it therefore affected her adversely. This is confirmed by the Court: in its judgment of 24 February 1981 in Joined Cases 161 and 162/80 *(Carbognani and Zabetta* v *Commission* [1981] ECR 543, paragraphs 12 to 14) it stated that a communication from a director-general to an official does not as a rule merely constitute preparation for a decision incumbent upon the appointing authority; the content thereof and the position occupied by its author may on the contrary, according to that judgment, make it classifiable as a definitive, and in any event independent, decision of the competent authority. It seems to me obvious that that is the case here — in other words, that the Director of

Administration in this case was expressing the view of the appointing authority. Moreover, the Secretary-General thought so too since in his memorandum of 17 February 1983 he expressly recognized the prejudicial nature of the measure of 5 July 1982 and therefore the fact that it could be challenged through official channels.

If the foregoing considerations are well founded, the complaint appears to be in order and the subsequent action to be admissible.

3. I shall now consider the substance of the case. As I have already said, the provision which the Court is asked to apply is Article 1 (2) (c) of Annex VII. I quote the text thereof: "The household allowance shall be granted to: . . . (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) [that is to say who is not married, widowed, divorced, legally separated or unmarried and has one or more dependent children], nevertheless actually assumes family responsibilities."

In order to establish whether that provision may be relied upon in this case it is necessary to define its scope; in particular, it must be ascertained whether or on what conditions it allows a household allowance to be paid to an official who has already been granted an allowance for a person treated as a dependent child. It is therefore necessary to identify the relationship between that provision and the rule governing the second allowance. The latter rule, which is contained in Article 2 (4) of Annex VII, is as follows: "Any person [that is to say other than a legitimate, illegitimate or adopted child] whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child by special reasoned decision of the appointing authority, based on supporting documents."

If the two provisions are read together, a number of questions arise. May an allowance in respect of a person "treated as if he were a dependent child" and a household allowance coexist? If they may, does the award of the first in all cases automatically give rise to the second? And if there is no such automatic entitlement, what different conditions must be fulfilled to enable the recipient of an allowance in respect of a person "treated as if he were a dependent child" to receive the household allowance as well? Let me say immediately that, in my opinion, coexistence of the two allowances is possible but not automatic. The arguments of a literal and systematic nature which lead me to this point of view relate to the preconditions for the two allowances.

Let me start with the household allowance. The Staff Regulations make the grant of that allowance conditional upon the official's actually assuming family responsibilities. In turn, that condition logically comprises two requirements: (a) the existence of a family unit for which the official is responsible and (b) payment by that official of the associated costs. The implications of requirement (a) are immediately apparent. On the basis of the Staff Regulations and according to

ordinary practice, for a family to be defined in a broad sense, that is as extending to parents and indeed to persons who are neither the spouse nor the children of the official, it is essential for the members thereof to live together; this means that if an official's parent is accommodated in a rest home and the official bears the costs, the two persons do *not* constitute a family unit. A specific logical factor moreover militates in favour of the essential nature of the requirement that for the purposes of the household allowance the family should live together.

Article 8 (1) of Annex VII provides in fact that an official is entitled for himself and, if he receives the household allowance, for his spouse and dependants within the meaning of Article 2 (and thus also for the persons envisaged in Article 2 (4)) to payment of the cost of travel from the place where he is employed to his place of origin. The connection thus established between the allowance and travel expenses clearly presupposes that the member of the family (including therefore a parent) whose expenses are reimbursed resides in the official's house, that is to say the relative and the official together constitute a real family in the broad sense. And that is not all. The provision also confirms that of the two possible forms of assistance for old people — either keeping the person within the family or bearing the expenses arising from their being cared for in a suitable home — the Staff Regulations favour or rather encourage the first. I say "confirms" because even more precise and eloquent evidence in that behalf is provided by the fact that the household allowance is granted only to an official who chooses that option.

The second requirement, as I have said, is the assumption of the responsibilities deriving from the fact of living together as a family. The Staff Regulations require those responsibilities *actually* to be assumed — that is to say they use a word which evokes the idea of a substantial commitment but not necessarily one which is all-embracing or indeed necessarily burdensome. In other words, it is not stated that, to be entitled to a household allowance, the official must bear those costs in their entirety. It is sufficient if he bears a substantial proportion of them, even if he is not thereby called upon to make heavy sacrifices, and leaves the member of the family living with him to cover the remaining costs, if he can, using his own resources.

The pre-conditions to which Article 2 (4) of Annex VII makes the grant of the other allowance subject are quite different. In that case residence at the same place is not required; on the other hand, it is necessary for the official to be under a legal obligation to maintain the person "treated as if he were a dependent child" and for the maintenance of that person to entail "heavy" expenditure. It should be added that in all cases that allowance is granted only exceptionally and that, as is indicated by the words "may ... be treated as if he were a dependent child" (by the administration), it is the subject of a margin of discretion.

The defendant institution maintains that that margin exists also in the case of the household allowance. I do not agree. The relevant provision does not speak of any exceptional basis, neither does it use the word "may" with respect to the administration; on the contrary, it is introduced by the words "The household allowance shall be granted" which

certainly do not bring to mind any power of appraisal. Neither let it be said, as the Council states, that the discretionary nature of the decision granting the household allowance is demonstrated by the fact that it is "special" and must state the reasons on which it is based. There is no connection between the requirement to state reasons and a discretionary power, in so far as the former neither implies nor excludes the latter; as the Court is aware, a decision is special when it relates to an individual case and requires an *ad hoc* assessment. However, *ad hoc* certainly does not mean discretionary.

To summarize, therefore, on the one hand there is the requirement of residing together, the assumption of significant but not heavy responsibilities, and the fact that the grant of the allowance is normal and compulsory; on the other, the mere fact that the person concerned is dependent upon the official, together with the requirement of heavy financial burdens and a legal responsibility for maintenance and the exceptional and discretionary nature of the allowance: it seems to me that the pre-conditions for the two allowances are sufficiently different for them to be payable simultaneously. Moreover, in so far as it is necessary to check whether the requirements laid down for each allowance are satisfied, that difference means that the two allowances are not automatically payable simultaneously.

4. However, the Council's legal adviser contests the interpretation which I have given of Article 1 (2) (c) from a different standpoint: the fact that it is liable to lead to inequality of treatment as between officials. That is to say, it would favour an official who takes the person whom he maintains into his own home by comparison with an official who bears the expenses of having that person looked after in an appropriate establishment or at least outside the family circle. However, being the same, the two situations should be treated in the same way and that means that, at least as a rule, the household allowance cannot be paid in either case.

Once again I disagree. I have already said that the Staff Regulations encourage officials to bring aged parents with scant or non-existent resources of their own into the family unit. But even someone who does not share that view must admit that the two situations described by the Council are not the same: to take an old person into the family is in the majority of cases socially more useful and financially more burdensome (bearing in mind the need for a larger dwelling, medical or para-medical assistance, and so forth) than to put the old person into an institution and, if that is the case, it is not merely fair to treat those situations differently, it is a duty.

5. In view of those considerations, all that remains is to ascertain whether in fact in this case the conditions for the grant of the household allowance to the applicant are satisfied. In my opinion, the answer can only be affirmative.

In the first place there is a "family" in the broad sense attributed to that word by Article 1 (2) (c). In fact, since the defendant has not contested that fact, it is agreed that Miss Erdini's mother has lived in her daughter's house in Brussels on a permanent basis since 1978. In addition, the applicant has assumed

family responsibilities. In this case also it is incontestable that the applicant's mother has a rather modest monthly income (so modest as to have justified, at least until 1982, the grant of an allowance for a person "treated as if he were a dependent child"), with the obvious consequence that a substantial portion of the costs associated with family life are borne by the daughter.

6. In view of all the foregoing considerations, I suggest that the Court give judgment in favour of Gabriella Erdini in the action brought by her against the Council of the European Communities by application of 22 April 1983 and therefore declare that the applicant is entitled as from 23 July 1981, the date on which the application for an allowance was submitted to the administration, to receive a household allowance from the defendant institution under Article 1 (2) (c) of Annex VII to the Staff Regulations.

The Council, as the unsuccessful party, should be ordered to pay the costs.