JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
8 March 1990 *

In Case T-41/89

Georg Schwedler, an official of the European Parliament, 36, rue des Vergers, L-7339 Steinsel, Luxembourg, represented by Vic Elvinger, of the Luxembourg Bar, in the written procedure, assisted by James Junker, in the oral procedure, with an address for service in Luxembourg at the Chambers of Mr Elvinger, 11 A, boulevard Joseph-II,

applicant,

v

European Parliament, represented by Manfred Peter, Head of Division, assisted by Francis Herbert, of the Brussels Bar, both with an address for service at the Secretariat-General of the European Parliament, Kirchberg,

defendant,

APPLICATION for the annulment of two decisions of the Parliament refusing to grant the tax abatement for a dependent child to the applicant,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

composed of: H. Kirschner, President of Chamber, C. P. Briët and J. Biancarelli, Judges,

Registrar: H. Jung

having regard to the written procedure and to the hearing on 13 February 1990,

gives the following

* Language of the case: French.

Judgment

Facts

1 Until 1 September 1987 Georg Schwedler, in the service of the European Parliament, received the tax abatement, the dependent child allowance and reimbursement of travel expenses for his son Christoph, who was deemed to be a dependent child. From 1 September 1987, and for the duration of his son's military service, the European Parliament stopped the benefits he received on account of his son's dependence on him on the ground that his son was doing his military service in the German army.

2 On 6 November 1987 Mr Schwedler submitted a request to the Director-General for Personnel, the Budget and Finance of the European Parliament pursuant to Article 90(1) of the Staff Regulations that he should be granted the Community tax abatement for a dependent child. In that request he pointed out that he had not received the tax abatement for a dependent child since 1 September 1987 and requested that it should be applied to him for September 1987 and until his son completed his military service.

3 By a letter of 22 December 1987, the Director-General refused that request on the ground that Article 3(4) of Regulation No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (Official Journal, English Special Edition 1968 (I), p. 37), which makes provision for the tax abatement for a dependent child, is not applicable when the child is performing his military service, since the child's upkeep is then the responsibility of the army.

4 By a letter of 12 January 1988, Mr Schwedler submitted a complaint to the President of the European Parliament, pursuant to Article 90(2) of the Staff Regulations, against the decision of 22 December 1987 summarized above, in which he asked to receive the tax abatement for September 1987, as his son did not start his military service until 1 October 1987, and requested that his son should not be treated as no longer dependent on him for the duration of his military service. In

that regard, the applicant pointed out the following facts: first, his son spent his weekends and his leave at the applicant's home and during those periods the applicant looked after his needs; secondly, his son's monthly pay was not enough to meet his personal needs, in particular his transport costs; thirdly, the tax abatement for a child doing military service was granted in the Federal Republic of Germany and therefore should also be granted by the Community scheme.

5 By a letter of 2 May 1988, the Secretary-General of the European Parliament rejected Mr Schwedler's complaint. He stated first of all that in order to qualify under Article 3(4) of Regulation No 260/68 the child must actually be maintained by the official, which was not the case; secondly, that the comparison with the German system was of no assistance since the Court had laid down the principle that the Community tax system was autonomous and independent of the national systems; finally, that the complaint was upheld in so far as it concerned the tax abatement for September 1987.

6 By an application received at the Court Registry on 1 August 1988, Mr Schwedler therefore brought the present action against the Parliament.

Procedure

7 Mr Schwedler claims that the Court should:

(1) annul the decision of 22 December 1987 of the Director-General for Personnel, the Budget and Finance and the decision of 2 May 1988 of the Secretary-General of the European Parliament;

(2) order the defendant to pay the costs.

8 The Parliament claims that the Court should:

(1) dismiss the application as unfounded;

(2) order the applicant to pay the costs pursuant to the provisions of Article 69(2) and Article 70 of the Rules of Procedure.

9 The written procedure took place entirely before the Court of Justice. By an order of 15 November 1989, the Court of Justice referred this case to the Court of First Instance pursuant to the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

10 Upon hearing the report of the Judge-Rapporteur the Court of First Instance decided to open the oral procedure without any preparatory inquiry. However, it requested the European Parliament to produce, before the oral procedure, the circular of 31 October 1963 of the Secretary-General of the European Parliament, Mr Nord, and Conclusion 49/80 of the July 1980 meeting of the heads of administration. Those documents were lodged at the Registry of the Court of First Instance on 26 January 1990.

11 The oral procedure took place on 13 February 1990. An advocate general was not appointed in this case, and the President declared the oral procedure closed at the end of the hearing.

Substance

12 In support of his action the applicant put forward two types of claim seeking the annulment of the two abovementioned decisions of the European Parliament in so far as they refused him entitlement both to the tax abatement and to the dependent child allowance.

Entitlement to the tax abatement

13 The applicant puts forward two submissions in support of this claim: first, the European Parliament misinterpreted Article 3(4) of Regulation No 260/68 of the Council, cited above; secondly, the European Parliament ought to have interpreted Community law in the light of certain national laws.

The submission that Article 3(4) of Regulation No 260/68 of the Council was misinterpreted

14 Mr Schwedler claims that in order to interpret the concepts of 'dependent child' and 'actual maintenance' each case must be examined on its own merits and account must be taken of the special conditions under which each young man does his military service. The use of the word 'actually' in the definition of a dependent child in Article 2(2) of Annex VII to the Staff Regulations is intended to prevent Regulation No 260/68 being applied too rigidly. However, the European Parliament did not exercise sufficient care in considering his son's special situation, which was characterized by the following four factors: first, as is evident from the declarations provided by the military authorities, his son has spent almost half his military service outside the barracks and at his father's home; secondly, his monthly pay, DM 294.50, was not enough to meet all his needs outside the barracks, having regard in particular to the travel expenses he incurred; thirdly, the young man in question was receiving medical treatment in Luxembourg the cost of which was reimbursed at the rate of only 85%; finally, the applicant maintains that 'as his son is a young man who is almost an adult, and who has a particular socio-cultural and intellectual background, the scope of the concept [of maintenance] becomes wider and goes beyond the narrow confines of board and lodging and clothing'.

15 The European Parliament, relying on the provisions of Article 2(2) of Annex VII to the Staff Regulations and on the case-law of the Court, contends that it is undeniable that the German State provides for the needs of Mr Schwedler's son. Therefore, since responsibility for Mr Schwedler's son has been assumed by his State of origin, he cannot at the same time be actually maintained by his father. The European Parliament adds that that is a generally applicable rule and that it is not necessary to consider the situation of each child doing military service on its own merits in order to determine whether he is actually dependent on his parents. In any event, Mr Schwedler has not adduced proof that ultimately he bore all or at least most of the cost of maintaining his son during his period of military service, since his son's frequent absences from the barracks were of his own choosing. Finally, the European Parliament bases its view on 'the instruction on the implementation of Article 2 of Annex VII' of 31 October 1963 of Mr Nord and on Conclusion 49/80 of the July 1980 meeting of the heads of administration.

16 The second paragraph of Article 3(4) of Regulation No 260/68 of the Council provides that 'an additional abatement equivalent to twice the amount of the allowance for a dependent child shall be made for each dependent child of the person liable as well as for each person treated as a dependent child within the meaning of Article 2(4) of Annex VII to the Staff Regulations'. It is evident from that provision that Regulation No 260/68 of the Council refers to the definition of a dependent child in Article 2 of Annex VII of the Staff Regulations, which concerns entitlement to the dependent child allowance.

17 Under Article 2 of Annex VII to the Staff Regulations an official who has one or more dependent children receives a monthly allowance of a certain amount for each dependent child. Article 2(2) provides that '"dependent child" means the legitimate, natural or adopted child of an official, or of his spouse, who is actually being maintained by the official'. Consequently, it is the concept of the 'actual maintenance' of the child which must be interpreted in order to determine the conditions of application of the abovementioned provisions of Regulation No 260/68.

18 As the Court pointed out in its judgment of 27 November 1980 in Joined Cases 81/79, 82/79 and 146/79 *Sorasio and Others* v *Commission* [1980] ECR 3557, it is necessary above all to look at the aim and structure of the system of tax abatements for dependent children. Such a system is justified only if they are granted for social reasons connected with the existence of the child and the cost of actually maintaining him, that is to say the cost to the person who assumes actual responsibility for all the child's basic needs.

19 It follows that a child cannot be considered to be actually maintained within the meaning of Article 2(2) of Annex VII to the Staff Regulations by a number of different persons or organizations at the same time and that he cannot therefore be regarded as being simultaneously dependent on all of them.

20 It is evident from the documents before the Court, and it has not been disputed, that the German army provides for the needs of young people who are called on to do military service; in particular it supplies board and lodging, medical care and

expenses, kit and uniform, takes care of their laundry and pays them almost DM 300 each month to cover their personal needs.

21 Consequently, since it has been shown that the army provides for all the basic needs of young people called on to do military service, the applicant cannot claim that he, simultaneously, actually maintained his son for the period during which he was serving, and there is no need to examine on a case-by-case basis the particular conditions under which each young man is required to do his military service.

22 That conclusion is confirmed by examination of the conditions for the grant of the dependent child allowance. Article 2(3), (4) and (6) of Annex VII to the Staff Regulations provides in particular that:

'...

3. The allowance shall be granted:

(a) automatically for children under 18 years of age;

(b) on application, with supporting evidence, by the official for children between 18 and 26 who are receiving educational or vocational training.

4. Any person 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.

...

6. Not more than one dependent child allowance shall be paid in respect of any one dependent child within the meaning of this article, even where the parents are in the service of two different institutions of the three European Communities.'

23 Accordingly, even though the provisions of the Staff Regulations, in particular Article 2(3)(b) and (4) of Annex VII, provide that children between 18 and 26 who are receiving educational or vocational training are special cases and that persons whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if they were dependent children, those provisions do not include any special scheme for children doing military service, establishing a right to receive the dependent child allowance in respect of such children. As the Court pointed out in its judgment of 6 May 1982 in Joined Cases 146/81, 192/81 and 193/81 *BayWa* v *Balm* [1982] ECR 1503, Community legal measures which create a right to financial benefits must be given a strict interpretation.

24 Consequently, and in any event, it is impossible to accept the arguments put forward by the applicant in support of this submission on the basis, first, that his son spent approximately half his period of military service at his parents' home, since that circumstance was of the son's own choosing; secondly, that his son incurred medical expenses in Luxembourg, since that again was of his own choosing (and it is not disputed that those expenses were reimbursed pursuant to Community law by the Sickness Insurance Scheme of the European Communities); and, thirdly, that the actual maintenance of a child of 20, such as his son, cannot, in view of his 'socio-cultural background' and of his intellectual level, be limited to basic board, lodging and clothing needs, but involves considerable additional expense. Such circumstances cannot be taken into account in order generally to determine the tax treatment of Community officials with a child doing military service.

The submission that the European Parliament ought to have interpreted Community law in the light of certain national laws

25 Mr Schwedler claims that since German law and Luxembourg law make provision for a tax abatement for taxable persons with a child doing military service, Community law should be interpreted in the same way, and that in any event a comparison with the laws of the Member States cannot be dismissed out of hand.

26 The Parliament, on the other hand, maintains that Mr Schwedler's reference to the German and Luxembourg legislation is of no assistance and points out that the Community's tax system is autonomous in nature. It adds that, in any event, those national laws have made express provision for such an abatement, which the Staff Regulations have not.

27 The Court has consistently held that the Community legal order does not in principle seek to define its concepts on the basis of one or more national legal systems without express provision to that effect (see, *inter alia* the judgment of 14 January 1982 in Case 64/81 *Corman* v *Hauptzollamt Gronau* [1982] ECR 13). The terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant legislation (see, *inter alia*, the judgment of 18 January 1984 in Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] ECR 107).

28 More specifically, with regard to the tax abatement for a dependent child, the Court ruled in its judgment in *Sorasio*, cited above, that the tax system of the Communities is an independent system which is applied irrespective of the national systems.

29 The Parliament was thus right not to refer to German or Luxembourg tax legislation in order to interpret the concept of a dependent child for the purposes of Article 3 of Regulation No 260/68 of the Council and Article 2 of Annex VII to the Staff Regulations.

30 It follows from the foregoing that this claim of the applicant must be rejected.

Entitlement to the dependent child allowance

31 In his reply and in the oral procedure Mr Schwedler maintained that the subject-matter of the action was the grant not only of the tax abatement but also of the dependent child allowance.

32 In its rejoinder and during the oral procedure the Parliament argued that it was not permissible for Mr Schwedler to broaden the scope of his action at that stage of the proceedings.

33 First of all, as the Court held in its judgment of 7 May 1986 in Case 52/85 *Riboux* v *Commission* [1986] ECR 1555, the subject-matter of the complaint and of the application must be sufficiently similar to permit and encourage the amicable settlement of differences which have arisen between officials and the administration. It is clear from the documents before the Court, and in particular from the request which the applicant made on 6 November 1987 to the competent Director-General and his complaint of 12 January 1988 to the President of the European Parliament, that in the request and the complaint the applicant challenged only the refusal of the Parliament to grant him the tax abatement for a dependent child and did not claim entitlement to the dependent child allowance.

34 Secondly, the Court has consistently held (see, *inter alia*, the judgment of 7 May 1986 in Case 191/84 *Barcella* v *Commission* [1986] ECR 1541) that under Article 38(1) in conjunction with Article 42(2) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to the Court of First Instance, the subject-matter of the claim must be set out in the application, and a claim which is put forward for the first time in the reply modifies the original subject-matter of the application and must be regarded as a new claim and, therefore, as inadmissible. It is apparent from Mr Schwedler's application to the Court that it concerned solely the European Parliament's refusal to grant him the tax abatement for an allegedly dependent child. It was not until the reply stage that the applicant extended and consequently changed the very subject-matter of the dispute, by maintaining that the application also concerned the grant of the dependent child allowance.

35 It follows from all the foregoing that this claim must be rejected as inadmissible. Mr Schwedler's application must therefore be dismissed.

Costs

36 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the parties to bear their own costs.

Kirschner Briët Biancarelli

Delivered in open court in Luxembourg on 8 March 1990.

H. Jung
Registrar

H. Kirschner
President of Chamber