

from the general terms of Article 2(4) of Annex VII that the Community legislature did not intend to exclude from the scope of that provision, merely because he is the legitimate, natural or adopted child of an official or of his spouse, a child who does not satisfy the conditions for the grant of dependent child allowance under Article 2(3) and (5).

Any other interpretation would not be in conformity with the principle of equal treatment, which prohibits discrimination based solely on the status of a person, and would be even less justified since the family bond linking an official to his child is stronger than that linking him to other persons who may be treated as dependent children.

2. The general implementing rules adopted under the first paragraph of Article 110 of the Staff Regulations may lay down criteria capable of guiding the administration in the exercise of its discretionary power or explain more fully the scope of provisions of the Staff Regulations which are not wholly clear. However, they cannot, by way of explaining more fully a clear term of the Staff Regulations, reduce the scope of those regulations.

The Council Decision of 15 March 1976 adopting general provisions for applying Article 2(4) of Annex VII of the Staff Regulations is illegal in so far as it excludes from the scope of that provision any person who is between the minimum and maximum age-limits which it imposes and thus deprives the administration of the opportunity to exercise its discretion in each individual case.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber) 14 December 1990 *

In Case T-75/89,

Anita Brems, an official of the Council of the European Communities, residing in Relegem (Belgium), represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 rue Glesener,

applicant,

* Language of the case: French.

Council of the European Communities, represented by Gijs Peeters, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of J. Käser, Director of the Legal Department of the European Investment Bank, 100 boulevard Konrad-Adenauer, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Secretariat-General of the Council refusing to treat the applicant's son, Alessandro Tardioli, as a dependent child,

THE COURT OF FIRST INSTANCE (Third Chamber),

composed of: C. Yeraris, President of Chamber, B. Vesterdorf and K. Lenaerts, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the Hearing on 27 November 1990,

gives the following

Judgment

Facts and procedure

Until 1988 the applicant, a Council official, received household allowance and dependent child allowance in respect of her son, Alessandro Tardioli, born on 17 June 1967, pursuant to Articles 1(2)(b) and 2(3)(b) of Annex VII to the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Annex'). On 1 July 1988 the allowances were terminated on the ground that the applicant's son was no longer receiving educational training.

- 2 By two separate letters dated 27 October 1988 the applicant requested that the two allowances should be reinstated on the ground that her son, who at the time was registered with the Rijksdienst voor Arbeidsvoorziening (National Employment Office) as seeking employment, resided with her and involved her in heavy expenditure.
- 3 By a letter of 29 November 1988, the administration of the Secretariat-General of the Council informed the applicant that her application for household allowance would be granted as soon as a document certifying the composition of her family had been supplied.
- 4 The administration refused to grant the application for dependent child allowance, stating that a special decision could be taken by the appointing authority pursuant to Article 2(4) of the Annex whereby a person was treated as if he were a dependent child 'only in respect of any person other than dependent children'.
- 5 In a letter of 6 December 1988 the applicant noted that her application for household allowance was to be granted but contested the refusal to grant her application for dependent child allowance. In particular the applicant stated that her child, who was over 18 years of age and was no longer receiving educational training, was no longer considered as a dependent child within the meaning of Article 2(2) and 2(3) of the Annex. In the circumstances, there was no provision of the Staff Regulations which in her view prevented her son from being treated as if he were a dependent child provided that his maintenance involved heavy expenditure. The applicant added that since 1 November 1988 her son was receiving a monthly salary of BFR 22 008.
- 6 By a letter of 19 December 1988, the administration of the Secretariat-General of the Council informed the applicant that the household allowance would be granted to her only until October 1988, in view of the change in her son's financial situation. Furthermore, as regards his being treated as if he were a dependent child, the administration confirmed its previous position, to the effect that it was impossible for an official, under the rules laid down in the Staff Regulations, to request that her own child should be treated as if he were a 'dependent child'.

- 7 In these circumstances the applicant, by an application lodged at the Court Registry on 17 March 1989, claimed that the Court should annul the decision rejecting the application that her son Alessandro Tardioli should be treated as if he were a dependent child.
- 8 By order of 15 November 1989 the Court assigned the case to the Court of First Instance, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.
- 9 The applicant did not lodge a reply.
- 10 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

The conclusions of the parties

- 11 The applicant claims that the Court of First Instance should:
 - (i) declare the application admissible and well founded;
 - (ii) consequently:
 - (a) declare the decision of the Council of 15 March 1976 on the general provisions for giving effect to Article 2(4) of Annex VII to the Staff Regulations of Officials and in particular Article 3 of that decision, unlawful;
 - (b) annul the decision of the appointing authority of 29 November 1988 refusing her request that her son Alessandro Tardioli, born on 17 June 1967, should be treated as if he were a dependent child;
 - (c) in so far as is necessary, annul the decision of the appointing authority of 19 December 1988 rejecting the administrative complaint submitted on 6 December 1988 by the applicant pursuant to Article 90(2) of the Staff Regulations;

- (iii) order the defendant to pay the costs, pursuant to Article 69(2) or the second subparagraph of Article 69(3) of the Rules of Procedure, and the expenses necessarily incurred for the purposes of the proceedings, in particular the cost of arranging for an address for service, the travel and subsistence expenses and the remuneration of the applicant's lawyer, pursuant to Article 73(b) of the Rules of Procedure.

The Council contends that the Court of First Instance should:

- (i) dismiss the application as unfounded;
- (ii) order the applicant to pay the costs.

Substance

- 12 In support of her application, the applicant makes two submissions: first, infringement of Article 2(4) of the Annex; and secondly, misuse of procedure and misuse of power on the part of the administration when it drew up the Council Decision of 15 March 1976 adopting general provisions for giving effect to Article 2(4) of the Annex.
- 13 Before the arguments put forward by the parties are set out, the various provisions of the Staff Regulations forming the legal background of this dispute should be cited.
- 14 Article 2(2) to (5) of the Annex defines the conditions on which an official receives family allowance for each of his dependent children. Those provisions read as follows:
 - ‘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. The same shall apply to a child for whom an application for adoption has been lodged and the adoption procedure started.

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.

5. Payment of the allowance in respect of a child prevented by serious illness or invalidity from earning a livelihood shall continue throughout the period of that illness or invalidity, irrespective of age.'

15 Those legal provisions are supplemented by the Council Decision of 15 March 1976 laying down general rules for implementing Article 2(4) of Annex VII of the Staff Regulations of Officials (hereinafter referred to as 'the general implementing rules'). Article 1 of that decision, which was adopted under the first paragraph of Article 110 of the Staff Regulations, provides that a person may exceptionally be treated as if he were a dependent child, in accordance with Article 2(4) of the Annex, subject to conditions which it then lays down.

16 Article 3 of the decision lists certain of these conditions as follows:

'The person in respect of whom application is made must be:

(i) over 60 years of age, in the case of a man, and over 55 years of age in the case of a woman, or

(ii) under 18 years of age, or, if the person is receiving education or vocational training, under 26 years of age, or,

(iii) prevented by illness or invalidity from earning a livelihood.’

Lastly, Article 7 of the decision states as follows:

‘The application may be granted where:

(a) on the one hand, the conditions laid down in Articles 2, 3 and 4 are satisfied;

(b) on the other hand, the cost of maintenance is above . . . ’

17 The applicant claims that Article 2(2) and (3) of the Annex confers circumscribed powers upon the appointing authority and that the appointing authority is bound to grant dependent child allowance if it finds that the conditions laid down in that provision are fulfilled (judgment in Case 65/83 *Erdini v Council* [1984] ECR 211, paragraph 19). By contrast, Article 2(4) of the Annex confers a discretionary power upon the appointing authority. In order to avoid any wholly discretionary, or even arbitrary, assessment the applicant acknowledges that it is appropriate, as part of general implementing provisions, to lay down criteria for the application of Article 2(4), in particular by fixing the threshold above which expenditure is sufficiently heavy to justify the treatment of the person as a dependent child and therefore the granting of dependent child allowance.

18 However, the applicant claims that the fixing of these criteria in the general implementing provisions may not result in the exclusion of one or other category of persons, because a mechanical application of predetermined rules and criteria would conflict with the need for evaluation of the often complicated factual circumstances peculiar to each individual case (judgment in Case 46/71 *Brandau v Council* [1972] ECR 373, paragraphs 13 and 14). Following this line of reasoning, the applicant considers that Article 3 of the general implementing rules is vitiated by illegality. In her view, this provision adds to Article 2(4) of the Annex conditions which were not provided for by the Community legislature, which would result in the automatic exclusion of a substantial number of persons who are above or below the age-limits laid down. That applies, *inter alia*, to children over 18 years of age, who may cause the official concerned to incur heavy expenditure for some reason not connected with educational or vocational training, illness or

invalidity. In conclusion, the applicant maintains that the general implementing rules in practice deny the administration the discretionary power conferred upon it by the legislature and that the contested decision is therefore merely a mechanical application of rules that are manifestly illegal.

- 19 The defendant states first that according to Article 2(4) of the Annex the decision to treat a person as if he were a dependent child is exceptional, as is clear from the terms of the provision: ‘... heavy expenditure ... exceptionally, ... by special reasoned decision ... based on supporting documents ...’. In order to clarify these very general concepts, the institutions laid down in 1964 objective criteria to be adhered to by the appointing authorities when they exercise their discretionary power. On that basis, which was approved by the Court (judgment in *Brandau*, cited above) the Council adopted the general implementing rules at issue.
- 20 Secondly, the defendant states its view that the request for the applicant’s son to be treated as if he were a dependent child could not be granted because the scheme of the Staff Regulations does not permit the issue of an official to be treated as dependent children where they do not satisfy the conditions laid down for receiving dependent child allowance. The Council considers that such treatment constitutes a misuse of procedure making it possible, by recourse to an exceptional power, to circumvent a provision of the Staff Regulations which applies to all officials’ children without any exception being authorized. The administration also states that the Council has never granted such applications and believes that the same applies to the other institutions.
- 21 Thirdly, the defendant seeks to refute the three arguments which it considers may be identified in the applicant’s criticism of the general implementing rules. First of all, the administration casts doubt on the significance attributed by the applicant to paragraphs 13 and 14 of the judgment in *Brandau* (cited above). In that case the general implementing rules in question had been relied upon by the official as maximum conditions imposing on the administration an obligation to grant the family allowance applied for without leaving it any discretionary power. In this case, the general implementing rules merely lay down minimum conditions, and their application is contested by the official on the ground that they do not leave the administration any discretionary power. Furthermore, the Council denies that

the general implementing provisions add additional conditions not provided for by the Staff Regulations. It states that the conditions concerning the contested points (age between 18 and 26 years and educational or vocational training) apply criteria identical to those provided for by the Staff Regulations for dependent children of officials. Lastly, the defendant notes that, although the applicant considers that the recognition of a discretionary power is justified by equitable considerations, she has not identified any equitable ground. The sole ground which she has put forward is that her son has involved her in heavy expenditure. This ground may be relied upon in support of an application for assistance under Article 76 of the Staff Regulations but it cannot, without further explanation, justify the application of rules of the Staff Regulations outside their terms or spirit.

- 22 The Court observes first that the arguments of the parties are concerned essentially with a single legal question, namely how far the provisions of the Staff Regulations allow an official to be granted dependent child allowance in respect of a child who is over 18 years of age, is not receiving educational or vocational training and is not prevented by serious illness or invalidity from earning a livelihood. In other words, the question of law upon which this dispute turns concerns the interpretation to be given to Article 2(4) of the Annex, and in particular whether the child of an official is included in the words 'any person' as the applicant maintains or whether this expression must be read as meaning 'any person other' than the child of an official, as the defendant contends.
- 23 It should be pointed out that 'dependent child' is defined in Article 2(2) of the Annex as meaning the legitimate, natural or adopted child of an official, or of his spouse. An allowance is payable in respect of such a child in so far as he is actually being maintained by the official and also satisfies one of the conditions listed in Article 2(3) and (5), which are the following: (a) under 18 years of age, (b) between 18 and 26 and receiving educational or vocational training, (c) prevented by serious illness or invalidity from earning a livelihood. In each of these three cases, the Staff Regulations confers on the appointing authority circumscribed powers, in so far as the appointing authority is bound to grant dependent child allowance if it finds that these conditions are satisfied. Dependent child allowance is granted automatically for children under 18 years of age and on application by the official in the other cases.

- 24 By contrast, Article 2(4) of the Annex confers on the appointing authority a discretionary power to decide to treat any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure as if he were a dependent child. The purpose of this provision is to permit the appointing authority in exceptional cases to assist officials who incur heavy charges as a result of a legal obligation.
- 25 The difference in the nature of the powers conferred on the appointing authority, on the one hand, by Article 2(3) and (5) of the Annex and, on the other, by Article 2(4), and the general terms used in the latter provision ('any person') — these terms being identical in all the language versions other than the Italian — show that the Community legislature did not intend to exclude from the scope of Article 2(4) a child who does not satisfy the conditions for granting dependent child allowance defined in Article 2(3) and (5), merely because he is 'the legitimate, natural, or adopted child of an official, or of his spouse', within the meaning of Article 2(2).
- 26 In the absence of any indication to the contrary in the Staff Regulations, it is impossible to accept an interpretation which, by excluding the children of an official from the benefit of a general rule, is not compatible with the principle of equal treatment, which prohibits discrimination based solely on a person's status. Such an interpretation is even less justified since the family bond linking an official to his child is stronger than that linking him to other persons — such as parents, grandparents and former spouse — who may be treated as if they were dependent children by virtue of the general provisions implementing Article 2(4) of the Annex adopted by the institutions or in accordance with the judgments of the Court (see judgments in *Brandau*, cited above, in Case 6/74 *Moulijn v Commission* [1974] ECR 1287; see also the facts in the judgments in *Erdini*, cited above, paragraph 2, and in Case 248/87 *Mouriki v Commission* [1988] ECR 1721, paragraph 2).
- 27 Such a solution cannot, as the defendant maintains, result in a misuse of procedure. This argument would be relevant if the sole purpose of Article 2(4) of the Annex was to permit children actually maintained by an official who were not the legitimate, natural or adopted children of the official or of his spouse to be

treated as if they were dependent children subject to the same conditions as to age and other conditions as those provided for in paragraphs (3) and (5) of Article 2. However, since, as has already been stated, it has been acknowledged both in the general implementing rules adopted by the institutions and in the judgements of the Court that various categories of persons may be treated as if they were dependent children, it cannot be accepted that the scheme of the Staff Regulations precludes an official from applying for his own child to be treated as if he were a 'dependent child'. That term must be regarded as having been specifically conceived by the Staff Regulations (Article 2(2) of the Annex) to define the three cases in which the payment of family allowance is automatic (Article 2(3)(a) and (b) and Article 2(5)). The concept of a dependent child cannot prevent an official's own child from being treated as if he were a dependent child by reason of the different scope of Article 2(2), (3) and (5) on the one hand, and Article 2(4) on the other.

28 The objection of illegality raised by the applicant against Articles 3 and 7 of the Council Decision of 15 March 1976 adopting general provisions for applying Article 2(4) of the Annex must be examined in the light of the interpretation of Article 2 set out above.

29 It should be noted first of all that the general implementing rules adopted under the first paragraph of Article 110 of the Staff Regulations may lay down criteria capable of guiding the administration in the exercise of its discretionary power or explain more fully the scope of provisions of the Staff Regulations which are not wholly clear. However, they cannot, by way of explaining more fully a clear term of the Staff Regulations, reduce the scope of those regulations (see the judgments in Case 110/63 *Willame v Commission* [1965] ECR 649, and in *Brandau*, cited above, and the judgment of the Court of First Instance in Case T-44/89 *Gowras-Laycock v Commission* [1990] ECR II-217).

30 In this case the expression 'any person' in Article 2(4) of the Annex is clear and requires no further explanation. The contested articles of the general implementing rules, by attempting to explain this term more fully, imposed minimum and maximum age-limits applicable to persons who may be treated as dependent children. By so doing, the general implementing rules excluded from the scope of Article 2(4) of the Annex all the persons who were in between the age-limits

imposed, and thus deprived the appointing authority of the opportunity of exercising its discretion in each individual case. Consequently, the contested articles of the general implementing rules are vitiated by illegality, and the objection raised against them by the applicant is well founded.

- 31 It follows from all the foregoing considerations that the contested decision, by refusing to treat the applicant's son as if he were a dependent child solely because he is outside the scope of Article 2(4) of the Annex, is vitiated by an error of law and must therefore be annulled.
- 32 In accordance with Article 176 of the EEC Treaty, the appointing authority must take the necessary measures to comply with this judgment by re-examining the applicant's application, in the light of the interpretation of Article 2(4) of the Annex set out above.

Costs

- 33 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to procedure before the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. As the Council has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- (1) Annuls the decision of the Secretariat-General of the Council refusing to treat the applicant's son as if he were a dependent child;**

(2) Orders the Council to pay the costs.

Yeraris

Vesterdorf

Lenaerts

Delivered in open court in Luxembourg on 14 December 1990.

H. Jung
Registrar

C. Yeraris
President