JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
18 December 1992 *

In Case T-85/91,

Lilian R. Khouri, a former member of the auxiliary staff of the Commission of the European Communities, residing in Brussels, 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,

v

Commission of the European Communities, represented by Joseph Griesmar, of its Legal Service, acting as Agent, assisted by Jean-Luc Fagnart, of the Brussels Bar, with an address for service in Luxembourg at the office of Roberto Hayder, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the implied decision rejecting the applicant's complaint of 24 July 1991 against the decision of the Commission of the European Communities refusing to treat her nephew as a dependent child,

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

composed of: R. García-Valdecasas, President of the Chamber, R. Schintgen and C. W. Bellamy, Judges,

Registrar: B. Pastor, Administrator,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 7 July 1992,

gives the following

Judgment

The facts of the case

1 The applicant, Lilian R. Khouri, who resides in Belgium, was employed by the Commission of the European Communities (hereinafter 'the Commission') as a member of its auxiliary staff for a period of 12 months from 16 October 1990. Because of the state of insecurity which had existed in the Lebanon for several years, her nephew, Christian Khouri, born on 7 June 1972, had been entrusted to her care since September 1989 by his parents, who lived in the Lebanon. He attends a secondary school in Anderlecht (Belgium). The applicant states that he is wholly dependent on her. She states that, in order for her nephew's name to be entered on the Aliens' Register for the Commune of Anderlecht, she had to sign an undertaking that she would be responsible for his upkeep. Under the terms of that undertaking, she is required, *vis-à-vis* the Belgian State, to bear all charges relating to his health care, subsistence expenses and repatriation. The applicant adds that before her entry into the Commission's service she received a tax allowance under Belgian legislation by reason of her undertaking of responsibility for her nephew, who was treated as a dependent child for income tax purposes. At that time, the family allowances fund to which she was affiliated also paid to her family allowances in respect of her nephew.

2 By letter of 20 February 1991 addressed to the Commission, the applicant submitted a request under Article 90(1) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations'). She asked for her nephew to be treated as a dependent child pursuant to Article 2(4) of Annex VII to the Staff Regulations, which provides that: '*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*'.

3 By letter of 24 April 1991 (incorrectly dated 24 June 1991), received by the applicant's counsel on 2 May 1991, the Head of the Commission department dealing with 'individual rights' informed the applicant that it would not accede to her request. The grounds of the refusal were as follows: '*According to the provisions of the Belgian Code, Mrs Khouri's nephew is not a person whom she has a legal responsibility to maintain, as required by Article 2(4) of Annex VII to the Staff Regulations, and therefore her nephew does not come within the scope of that article*'.

4 On 16 May 1991, in a case between Christian Khouri, plaintiff, and Lilian Khouri, defendant, the Magistrate's Court, Anderlecht, delivered a judgment, the operative part of which was as follows:

'*... The maintenance due from the defendant to the plaintiff is fixed at fifteen thousand francs per month and, should she discontinue voluntary payment of maintenance, the defendant is ordered, if necessary, to pay fifteen thousand francs per month to the plaintiff as maintenance from 1 May 1991 ...*'.

That court gave the following reasons for its decision:

'*... Although there is no legal obligation to maintain collateral relations, maintenance as between collateral relations can be regarded as a moral obligation which may become a civil obligation ...*

The defendant has voluntarily given to her brother an undertaking to look after her nephew and has complied with that undertaking for almost two years;

The defendant can be regarded as having voluntarily replaced that natural obligation arising from ties of affection by a civil obligation which is judicially enforceable if voluntary payments are discontinued ...'.

5 By letter sent on 24 July 1991 to the Commission, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the decision of 24 April 1991.

6 The applicant and her counsel presented oral submissions to the administration at a meeting held on 9 October 1991. The Commission did not expressly reply to the complaint of 24 July 1991.

Procedure

7 In those circumstances, by application lodged on 26 November 1991 at the Registry of the Court of First Instance, the applicant brought the present action for annulment of the Commission decision of 24 April 1991.

8 In the written procedure, the applicant decided not to submit a reply, in accordance with Article 47 of the Rules of Procedure of the Court of First Instance.

9 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry.

10 The oral procedure took place on 7 July 1992. The parties' representatives submitted oral argument and replied to questions put by the Court.

11 The applicant claims that the Court should:

— annul the decision rejecting her request that her nephew be treated as a dependent child;

— order the Commission to pay the costs.

12 The Commission contends that the Court should:

— declare the application for annulment inadmissible or, alternatively, unfounded;

— make such an order for costs as it may consider appropriate.

13 At the hearing, the applicant admitted that there had never been any legal dispute between her nephew and herself and that she had gone to the Magistrate's Court in Anderlecht solely in order to obtain a judgment establishing that she was civilly liable to provide maintenance under Belgian law.

Admissibility

Arguments of the parties

14 The Commission observes first of all that the applicant is basing her action for annulment on the '*Commission's misinterpretation of the Belgian law concept of the "legal responsibility to maintain" and, consequently, on misapplication of Article 2(4) of Annex VII to the Staff Regulations*'. In the Commission's view, the Court of First Instance has no jurisdiction to annul a decision interpreting a concept of national law and the action must therefore be regarded as based solely on misapplication of Article 2(4) of Annex VII to the Staff Regulations and, as such, as inadmissible.

15 In support of its plea of inadmissibility, the Commission states that Article 2(4) of Annex VII to the Staff Regulations gives the appointing authority a discretion in assessing the facts and circumstances put forward in support of an application for a person whom an official has a legal responsibility to maintain to be treated as a dependent child (see the judgment in Case T-75/89 *Brems* v *Council* [1990] ECR II-899). Accordingly, the Commission argues that the rejection of the applicant's request to have her nephew treated as a dependent child cannot amount to a misapplication of Article 2(4) of Annex VII to the Staff Regulations, which is the only relevant provision in this case, since that article gives a discretion precisely to the appointing authority, even where the conditions laid down for its application are satisfied. A decision taken by the appointing authority in such a matter cannot, in itself, be a source of illegality.

16 From this the Commission concludes that no judicial review is possible in the present case, since it is not a question of examining an issue of legality but of looking at the expediency of a choice. In so far as it seeks a ruling on the expediency of the Commission's use of the discretion conferred on it by the aforementioned provision of the Staff Regulations, the action should be declared inadmissible.

Findings of the Court

17 As its reason for refusing to treat the applicant's nephew as a dependent child under Article 2(4) of Annex VII to the Staff Regulations, the Commission states that the applicant had no legal responsibility to provide maintenance. In coming to that view, the Commission was not exercising its power under that provision to assess the facts and circumstances adduced in support of an application to have a child treated as a dependant but was making a legal interpretation of one of the conditions necessary for such treatment to be granted. It follows that the Court has jurisdiction to review the legal interpretation which the Commission gave in this case regarding the condition that there must be a legal responsibility to maintain.

18 The Court considers that where, as in the present case (see paragraphs 31 and 32), the application of a rule of the Staff Regulations depends on the application of a legal rule applying in the legal system of one of the Member States, it is in the interest of the sound administration of justice and proper application of the Staff Regulations that its review should also extend to an examination of the way in which the appointing authority of a Community institution has applied the national law of one of the Member States.

19 It follows from all of the foregoing that the plea of inadmissibility raised by the Commission must be rejected.

Substance

The single plea of misapplication of Article 2(4) of Annex VII to the Staff Regulations

Arguments of the parties

20 The applicant submits that under Belgian law she has a 'legal' responsibility to maintain her nephew. She puts forward three supporting arguments: her natural obligation towards her nephew became a civil obligation; the abovementioned judgment of 16 May 1991 delivered by the Magistrate's Court, Anderlecht, set the amount of her contribution to the maintenance and educational costs of her nephew; and she signed an undertaking assuming responsibility for the maintenance of her nephew.

21 So far as concerns the first argument, relating to a change in her obligation, the applicant states that at the start she had a natural obligation to maintain her nephew by reason of the affective bonds between them, the promise to take care of him which she had made to her brother, who is the child's father, and the undertaking which she had assumed *vis-à-vis* the Belgian authorities. According to the case-law of the Belgian courts, an undertaking to maintain a child, assumed and performed on a voluntary basis, constitutes a natural obligation which, once it has been performed for a number of years, becomes a civil obligation. During the hearing, counsel for the applicant described the obligation in question as 'quasi-legal'.

22 So far as her second argument is concerned, the applicant states that it follows from the Belgian court's judgment of 16 May 1991 that she does have a legal responsibility under Belgian law to maintain her nephew, within the meaning of Article 2(4) of Annex VII to the Staff Regulations.

23 As regards the third argument, the applicant claims that her nephew was allowed to settle in Belgium only by virtue of her signed undertaking that she would personally meet the costs of his stay there. That undertaking was given pursuant to the statutory provisions on the residence of aliens in Belgium, that is to say, Articles 3 and 11 of the Law of 15 December 1980 on the entry into the national territory, residence, establishment and removal of aliens. That undertaking, the

applicant argues, is itself proof of the fact that she bears a legal responsibility to maintain her nephew, within the meaning of Article 2(4) of Annex VII to the Staff Regulations.

24 The Commission points out first of all that Belgian law, applicable to the present case by virtue of the Hague Convention of 24 October 1956 on the Law applicable to Maintenance Obligations towards Children, does not provide for the existence of maintenance obligations as between collateral relations. A distinction must be drawn between, on the one hand, the right to maintenance, which the law grants in certain cases, and, on the other hand, the natural obligation to provide maintenance, which the person owing it may voluntarily turn into a civil obligation. By arguing that she has voluntarily transformed a natural obligation into a civil obligation, the applicant is necessarily admitting that she has no legal responsibility to maintain her nephew.

25 The Commission then goes on to refer to the General Implementing Provisions concerning Article 2(4) of Annex VII to the Staff Regulations which it adopted on 28 September 1989 and which determine the objective criteria for the uniform exercise of the appointing authority's discretion in the matter, and, in particular, to Article 3 of those Provisions, which states that: '*Legal responsibility for maintenance means the obligation between relatives by blood or marriage expressly laid down by the law, to the exclusion of any obligation of a contractual, moral or compensatory nature*'.

26 As regards the argument based on the judgment of 16 May 1991 of the Anderlecht Magistrate's Court, the Commission first submits that the application made by Christian Khouri to the Magistrate's Court was patently inadmissible since he was unable to show an actual interest and was unable to establish the existence of a grave and serious threat jeopardizing his rights. Secondly, the Commission argues that the Magistrate's Court was wrong to accept that there was a natural obligation in this case, since under Belgian law such an obligation was confined to ties between very close relations, that is to say, in practice only between brothers and sisters. Thirdly, the Commission criticizes the Magistrate's Court for not having taken account of the fact that Christian Khouri was not destitute, given that he was being maintained by his aunt, or of the fact that there were other persons owing him a duty of maintenance, in particular his mother and father, who bear primary responsibility for the maintenance of their son. Furthermore, the Commission adds, since the Magistrate's Court's judgment was binding only between the parties to the proceedings before that court, it cannot be relied on against the Commission.

27 In the event that the Court of First Instance might none the less take into consideration the judgment of 16 May 1991, the Commission draws the Court's attention to the fact that the judgment in question states that '*there is no legal obligation to maintain collateral relations*' and that '*the defendant has voluntarily given to her brother an undertaking to look after her nephew*'.

28 As regards the argument based on the applicant's undertaking to meet the costs of her nephew's upkeep, the Commission states that the statutory provisions on which the applicant has based her argument, that is to say, those which require an alien to have sufficient resources by way of 'the lawful exercise of a gainful activity', are irrelevant in this case. In actual fact, the applicant's nephew could have been authorized to reside in Belgium only by way of a decision taken in accordance with Article 9 of the Law of 15 December 1980, which confers on the Minister of Justice a discretion in the matter. One of the conditions to which the Minister normally makes authorization of residence subject is that a Belgian citizen must undertake to meet the costs relating to health care, residence and repatriation expenses of the alien seeking a residence permit. Consequently, the applicant's obligation to maintain her nephew is derived not from Belgian legislation but from the agreement which the applicant has concluded with the Belgian State, which includes a provision for the benefit of a third party, within the meaning of Article 1121 of the Belgian Civil Code, agreed to by the applicant in favour of her nephew. That obligation, which is purely a matter of agreement, cannot be treated as a legal responsibility to maintain within the meaning of Article 2(4) of Annex VII to the Staff Regulations.

Findings of the Court

9 Under Article 2(4) of Annex VII to the Staff Regulations, which applies by analogy to auxiliary staff by virtue of Article 65 of the Conditions of Employment of Other Servants of the European Communities, any person whom an official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, by special decision, be treated as a dependent child for the purposes of the dependent child allowance.

0 Since treatment of another person as a dependent child is an exceptional step, as the very text of the Staff Regulations emphasizes, the condition that an official must

have a legal responsibility to maintain another person must be interpreted strictly (see the judgment in Case 6/74 *Moulijn* v *Commission* [1974] ECR 1287).

31 The concept of a 'legal responsibility to maintain', used in the Staff Regulations, is derived from the legal systems of the Member States, which, under their laws, impose a mutual obligation to provide maintenance on relatives by blood and/or marriage of a greater or lesser degree of proximity. By employing the concept of a legal responsibility to maintain in Article 2(4) of Annex VII, the Staff Regulations are referring exclusively to an obligation of maintenance imposed on an official by a source of law independent of the will of the parties. Maintenance obligations of a contractual, moral or compensatory nature are therefore excluded. It follows that the Commission properly applied that concept when it defined, in Article 3 of its General Implementing Provisions, legal responsibility for maintenance as 'the obligation between relatives by blood or marriage expressly laid down by the law, to the exclusion of any obligation of a contractual, moral or compensatory nature'.

32 As the Court of Justice has consistently held (see, *inter alia*, the judgment in Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] ECR 107), 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 interpretation which must take into account the context of the provision and the purpose of the relevant regulations. The Court of First Instance considers, however, that, in the absence of an express reference, the application of Community law may sometimes necessitate reference to the laws of the Member States where the Community court cannot identify in Community law or in the general principles of Community law criteria enabling it to define the meaning and scope of such a provision by way of independent interpretation.

33 Neither Community law nor the Staff Regulations provide the Community court with any guide as to how it should define, by way of independent interpretation, the meaning and scope of the concept of a legal responsibility to maintain, whose existence entitles an official to receive a dependent child allowance under Article

2(4) of Annex VII to the Staff Regulations. Therefore, it is necessary to determine the national legal system to which the applicant is subject and to ascertain whether that system imposes on her a legal responsibility to maintain, within the meaning of the Staff Regulations, in relation to her nephew.

34 According to the documents before the Court, the applicant, who is resident in Belgium, has dual Belgian and Lebanese nationality. Whilst the applicant was, pursuant to Article 55 of the Conditions of Employment of Other Servants, engaged by the Commission on the basis of her Belgian nationality, her nephew, also resident in Belgium, has in fact dual Netherlands and Lebanese nationality.

35 In those circumstances, the Court considers that it is necessary to identify the legal system relevant to the present case in the light of the conflict-of-law rules applicable by the court having jurisdiction. Article 4(1) of the General Implementing Provisions provides that: '*Where there exist factors connecting the case with more than one law, the applicable law shall be determined in accordance with the rules concerning conflicts of laws applicable by the court having jurisdiction including, where appropriate, those laid down by the relevant international agreements, notably the Convention on the Law Applicable to Maintenance Obligations signed in The Hague on 2 October 1973*'.

36 The applicant brought the matter before a Belgian court in order to obtain a declaration that she has a responsibility to maintain her nephew. She based her case on the rules of Belgian law. The court to which she applied declared that it had jurisdiction and delivered judgment on 16 May 1991, as mentioned above, on the basis of provisions of Belgian law. Finally, in the proceedings before this Court, the Commission, too, bases its own case on Belgian law.

37 In those circumstances, the Court considers that the applicable law must be determined in this case in accordance with the conflict-of-law rules applicable by the Belgian courts.

38 It must be noted first that the Convention on the Law applicable to Maintenance Obligations, signed at The Hague on 2 October 1973, has not been ratified by the Kingdom of Belgium and that the Convention on the Law applicable to Maintenance Obligations towards Children, signed at The Hague on 24 October 1956 and ratified by the Kingdom of Belgium, does not, according to Article 5 thereof, apply to maintenance relationships as between collateral relations.

39 The Court is unable to identify, either in Belgian private international law or in the case-law of the Belgian courts, any clear and precise conflict rule for determining the law applicable to maintenance relationships between an aunt and her nephew.

40 None the less, in the light of the foregoing, the Court considers that it is entitled to accept that, in this case, the question whether the applicant bears a legal responsibility, within the meaning of the Staff regulations, to maintain her nephew must be decided in accordance with Belgian law, by reason of the applicant's nationality and residence as well as the residence of her nephew.

41 Under Belgian law, there is, however, no obligation of maintenance between collateral relations within the meaning defined above. At most, Belgian courts recognize the existence as between collateral relations of a natural obligation which may be transformed into a civil obligation. This is confirmed by the actual wording of the judgment of 16 May 1991, which states expressly that 'there is no legal obligation to maintain collateral relations'. It follows that the obligation which the applicant may have to maintain her nephew is not an obligation imposed by a source independent of the will of the parties and consequently cannot be treated as a legal responsibility to maintain within the meaning of the Staff Regulations.

42 As regards the undertaking to assume financial responsibility for her nephew given to the Belgian authorities by the applicant, the Court finds that, even supposing that it could create an obligation to maintain, such an undertaking likewise cannot be treated as a legal responsibility to maintain within the meaning of the Staff Regulations since it originates from the official's own will.

43 It follows from all the foregoing that the single plea of misapplication of Article 2(4) of Annex VII to the Staff Regulations is unfounded. The application must accordingly be dismissed.

Costs

44 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings brought by servants of the Communities the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

García-Valdecasas Schintgen Bellamy

Delivered in open court in Luxembourg on 18 December 1992.

H. Jung

Registrar

R. García-Valdecasas

President