

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
26 September 1990*

In Case T-48/89,

Fernando Beltrante and Others, officials of the Council of the European Communities, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 6-8 rue Origer,

applicants,

supported by

European Civil Service Federation, which is based in Brussels, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 avenue Guillaume,

intervener,

v

Council of the European Communities, represented by Arthur Alan Dashwood, Director of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 boulevard Konrad-Adenauer,

defendant,

APPLICATION for the annulment of a Council decision, notified by a memorandum of 6 May 1988, refusing the applicants the flat-rate payment of travel expenses in respect of persons treated as dependent children who do not reside at the place where the official is employed,

* Language of the case: French.

THE COURT OF FIRST INSTANCE (Third Chamber)

composed of: A. Saggio, President of Chamber, C. Yeraris and B. Vesterdorf,
Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 3 July 1990,
gives the following

Judgment

Facts

- 1 The 14 applicants, who are officials of the Council, receive the allowances provided for in the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations') in respect of persons treated as dependent children pursuant to Article 2(4) of Annex VII to the Staff Regulations (hereinafter referred to as 'Annex VII'). According to the documents before the Court, until 1987 the Council paid in respect of those persons travel expenses from the officials' place of employment to their place of origin, pursuant to Article 8 of Annex VII, even if the persons concerned did not reside at the place where the official was employed.

- 2 By a memorandum dated 6 May 1988, the administration of the General Secretariat of the Council informed the officials concerned that the appointing authority had decided to implement a conclusion of the Committee of Heads of Administration to the effect that the flat-rate repayment of travel expenses should no longer be made in respect of persons treated as dependent children, unless such persons resided at the place where the official was employed or within a 50 kilometre radius of that place.

3 The memorandum also stated that the decision was applicable with effect from 1
January 1988 and that the administration would continue to pay annual travel
expenses in respect of the official's spouse and children.

4 Each of the applicants submitted a complaint pursuant to Article 90(2) of the Staff
Regulations against the decision notified in the form of the memorandum refusing
them the travel expenses provided for in Article 8(1) of Annex VII in respect of
persons recognized as being dependent on them.

5 In their complaints, which were received between 24 May and 13 July 1988, the
applicants claimed that as long as an official received the household allowance he
was entitled to the payment of travel expenses in respect of his spouse and all his
dependants within the meaning of Article 2 of Annex VII, whether or not they
resided at the place where the official was employed.

6 Those complaints were rejected by decisions of the Secretary- General of the
Council dated 27 July 1988. In those decisions, which took the form of standard
memoranda, the appointing authority stated that, in view of the wording of Article
8 of Annex VII and the link which that article established between entitlement to
the household allowance and payment of travel expenses in respect of persons
treated as dependent children, the provisions in question had to be interpreted
strictly.

Procedure and the conclusions of the parties

7 It was in those circumstances that, by application lodged at the Registry of the
Court of Justice on 28 October 1988, the applicants requested the annulment of
the decision refusing the repayment of travel expenses in respect of persons treated
as dependent children who did not reside at the applicants' place of employment.

- 8 By order of 15 November 1989, the Court of Justice referred 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 By order of 8 December 1989, the Court of First Instance (Third Chamber) gave the European Civil Service Federation leave to intervene in the proceedings in support of the applicants' conclusions.
- 10 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. The parties' representatives presented oral argument and replied to the questions put by the Court of First Instance at the hearing on 3 July 1990.
- 11 The applicants claim that the Court of First Instance should:
- (i) declare the application admissible and well founded;
 - (ii) annul:
 - (a) the defendant's decision refusing the applicants reimbursement of annual travel expenses for persons treated as if they were dependent children by a previous decision of the appointing authority;
 - (b) the defendant's decision, notified by a memorandum dated 6 May 1988, changing the interpretation of Article 8 of Annex VII to the Staff Regulations, in so far as it precludes the reimbursement of travel expenses for persons treated as if they were dependent children unless those persons reside at the official's place of employment or within a 50 kilometre radius thereof;
 - (c) in so far as is necessary, the express decision — notified to each of the applicants by a standard memorandum dated 27 July 1988 — rejecting the administrative complaints submitted individually by each of the applicants;

(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 by the parties for the purpose of the proceedings, in particular the costs of providing an address for service and the travel and subsistence expenses and the remuneration of lawyers, pursuant to Article 73(b) of the Rules of Procedure.

12 The defendant contends that the Court of First Instance should:

(i) dismiss the application as unfounded;

(ii) order the applicants to pay the costs in so far as they are not to be borne by the defendant pursuant to Article 70 and Article 95(3) of the Rules of Procedure.

Substance

13 In support of their application, the applicants rely on two submissions one of which is based on infringement of Article 8 of Annex VII and the other on infringement of the principle of equal treatment and non-discrimination as between officials.

14 The intervener, which supports all the applicants' arguments relating to the infringement of Article 8, also claims that the contested measure in fact constitutes a decision within the meaning of the first paragraph of Article 110 of the Staff Regulations and that that decision was adopted by the administration as a measure implementing a prior decision of the Committee of Heads of Administration. The latter decision is unlawful on the following grounds: it was adopted by a body which was not competent to adopt it; it did not respect the essential procedural safeguards laid down by the first paragraph of Article 110 of the Staff Regulations; it completely lacks any statement of reasons; it was not given sufficient publicity; and it constitutes, in general, a misuse of procedure.

- 15 The Council stated at the hearing that the contested decision constituted neither an amendment of the Staff Regulations nor the adoption of a general provision for giving effect thereto, but defined the position of the appointing authority with regard to the implementation of Article 8(1) of Annex VII with effect from 1988. The Secretary-General of the Council communicated that position to the administration orally. The administration notified it by means of the memorandum of 6 May 1988 only to the officials concerned who had one or more persons treated as dependent children who did not reside at their place of employment. In bringing the Council's practice into line with the conclusion adopted by the Committee of Heads of Administration, the Secretary-General acted on his own authority and not in implementation of the decision of that committee.
- 16 In that regard, it must be observed, in the first place, that the reasoning of the intervening trade union is based on the mistaken assumption that the contested decision was adopted under the first paragraph of Article 110 of the Staff Regulations, which is concerned with the adoption by each institution of general provisions for giving effect to the Staff Regulations. In fact, what is involved is a series of individual decisions adopted by the appointing authority refusing the reimbursement of travel expenses for 1988, which were communicated to the officials in question by memorandum dated 6 May 1988 from the administration of the General Secretariat of the Council. The appointing authority confirmed those individual decisions by rejecting the complaints submitted by the applicants individually.
- 17 Secondly, it must be stated that Conclusion No 185/88, which the contested decisions took into account, was formulated by the representatives of the administrations of the institutions, meeting in committee in what they themselves describe as the 'Collège des chefs d'administration', as part of the process whereby 'the administration departments of the institutions...consult each other regularly' pursuant to the third paragraph of Article 110 of the Staff Regulations. That conclusion, whose adoption was motivated by a concern to follow a uniform administrative practice with regard to the interpretation of Article 8(1) of Annex VII, was not binding on the authority competent to adopt the contested individual measures. The appointing authority acted by virtue of the competence conferred upon it by Article 8(1) of Annex VII and the intervener's claims to the contrary cannot find their justification in the mere fact that the memorandum dated 6 May 1988 contains the words 'the appointing authority has decided to implement at the Council a conclusion of the Committee of Heads of Administration...'

The first submission

- 18 The applicants maintain that the only condition to which Article 8 of Annex VII subjects the flat-rate reimbursement to an official of the travel expenses of his spouse, children and dependants is that the official concerned must be entitled to the household allowance. In the applicants' submission, there is no provision of the Staff Regulations which supports the view that a person treated as if he were a dependent child does not enjoy exactly the same rights as those granted to an official's spouse and children. An official whose place of employment and place of origin are in Europe is entitled — once or twice per calendar year, depending on the distance — to the flat-rate payment of travel expenses from his place of employment to his place of origin for himself and, where applicable, for his spouse and all his dependants within the meaning of Article 2 of Annex VII. According to the applicants, it follows that dependants are not required to reside at the place where the official is employed in order for the official to qualify for the flat-rate reimbursement of travel expenses.
- 19 In order to arrive at that conclusion the applicants first analyse the combined provisions of Articles 1, 2, 7(1), 8(1) and 8(4) of Annex VII, interpreting each of them in the light of the others, and, secondly, reject the appointing authority's literal interpretation of Article 8. They point out that the adoption of a literal interpretation would make it necessary to accept all the inevitable consequences, even if they proved to be absurd or incompatible with the aims of the article. With regard in particular to Article 7(1) and Article 8(1) of Annex VII, the applicants observe that under Article 7(1) the spouse and dependants are required to be actually living in the official's household, whereas the only condition imposed by Article 8(1) is that the official must be entitled to the household allowance and there is no reference in that provision to any requirement of cohabitation. Moreover, in the applicants' view, it is interesting that the second subparagraph of Article 8(4), relating to the travel expenses of officials whose place of employment and/or place of origin are outside Europe, expressly provides that, where they do not live with the official at his place of employment, only the spouse and dependent children are entitled to reimbursement of travel expenses, thereby excluding persons treated as dependent children. The applicants observe that if the authors of the Staff Regulations had also intended to disqualify that category of persons for the reimbursement of travel expenses 'in Europe', they would not have failed to make an express reference to that fact.

- 20 In the first part of its submissions, the Council argues that according to the provisions of Annex VII, the household allowance is granted to: (a) a married official, or (b) an official who has one or more dependent children, or (c) an official who actually assumes family responsibilities in respect of persons other than a spouse and dependent children. The Council argues on the basis of the judgments of the Court of Justice in Case 65/83 *Erdini v Council* [1984] ECR 211 and in Case 248/87 *Mouriki v Commission* [1988] ECR 1721 that an official is not entitled to the household allowance in respect of dependent family members other than his spouse and children unless those persons live under the same roof as him. According to the Council, the Staff Regulations thus draw a distinction between an official's entitlement in respect of his spouse and children, in which case there is an irrebutable presumption that they live in the same household as the official, and his entitlement in respect of other dependants. Moreover, Article 2 of Annex VII envisages two categories of dependants, namely children, on the one hand, and persons treated as if they were dependent children, on the other. The official must prove, in the case of the latter category, that he has a legal responsibility to maintain the person or persons concerned. In contrast, such proof is not required in the case of dependent children.
- 21 The Council considers that Article 8(1) of Annex VII must be interpreted as meaning that the flat-rate payment of travel expenses must be made:
- (i) as far as the spouse and dependent children are concerned, on the basis of the presumption that the family unit lives together at the official's place of employment;
 - (ii) as far as persons treated as dependent children are concerned, on condition that the person treated as if he were a dependent child lives at or near the official's place of employment.

According to the Council, that interpretation is justified for the following reasons: firstly, the wording of the provision at issue refers to travel from the place where the official is employed to his place of origin, and not to travel in the opposite direction; secondly, the purpose of repaying travel expenses is to provide the official with the financial means to return once or twice a year to his place of origin in order that he may retain his family, social and cultural links there. The travel expenses of the members of his family are also repaid in case he will not undertake the journey without them. Thirdly, in view of the development of the abovementioned case-law of the Court of Justice relating to entitlement to the household allowance, which is in the nature of a strict interpretation, a similar

interpretation ought to be adopted with regard to entitlement to the reimbursement of travel expenses in view of the close link between those two entitlements.

- 22 Before considering the merits of the parties' arguments, it is appropriate to call to mind the content of the provisions at issue in the present dispute. According to Article 67(1) of the Staff Regulations, family allowances comprise: (a) household allowance; (b) dependent child allowance; (c) education allowance. Moreover, Article 71 of the Staff Regulations provides that an official is entitled, as provided for in Annex VII, to reimbursement of expenses incurred by him in the course of or in connection with the performance of his duties. In accordance with those provisions, Section 1 of Annex VII (Articles 1 to 3) lays down the conditions for the grant of family allowances and the detailed rules for their payment, and Section 3, subsection C (Articles 7 and 8), lays down the conditions for the reimbursement of travel expenses.
- 23 As far as the household allowance is concerned, Article 1(2) of Annex VII provides that those entitled are as follows: '(a) a married official; (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; (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), nevertheless actually assumes family responsibilities'. As for the dependent child allowance, Article 2(2) of Annex VII 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'. Article 2(4) then 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'.
- 24 As regards travel expenses, Article 7(1) of Annex VII provides that an official is entitled to reimbursement of travel expenses for himself, his spouse and his dependants actually living in his household, on taking up his appointment, on termination of service and on any transfer. Finally, under Article 8(1) of Annex VII 'an official shall be entitled to be paid in each calendar year a sum equivalent

to the cost of travel from the place where he is employed to his place of origin as defined in Article 7 for himself and, if he is entitled to the household allowance, for his spouse and dependants within the meaning of Article 2,

- (i) once in each calendar year if the distance by rail between the place of employment and the place of origin is more than 50 km but less than 725 km;
- (ii) twice in each calendar year if the distance by rail between the place of employment and the place of origin is more than 725 km . . . '.

The way in which the travel expenses are paid, at a flat-rate or exceptionally subject to the submission of supporting documents, is set out in Article 8(2) and (3), and the special case of a journey outside Europe is governed by Article 8(4).

- 25 It follows from Article 8(1) of Annex VII, to which reference has already been made, that an official is to be paid travel expenses once or twice a year for himself and, if he is entitled to the household allowance, for his spouse and all his dependants within the meaning of Article 2 of Annex VII.
- 26 According to the wording of Article 8(1), the payment relates to the cost of travel 'from the place where [the official] is employed to his place of origin'. Repayment of travel expenses for travel in the opposite direction, from the place of origin (or some other place) to the place of employment is envisaged only in the special case where the place of origin and/or the place of employment are outside Europe. Consequently, a literal interpretation of the applicable provision supports the administration's interpretation, namely that the persons treated as if they were dependent children must live at the official's place of employment in order for the official to be entitled to repayment of their travel expenses once or twice a year to his place of origin.
- 27 That interpretation, which is consistent with the wording of Article 8 of Annex VII, is borne out by the objective which the Staff Regulations seek to achieve in granting repayment of travel expenses. The objective of Article 8 is to enable the official and his dependants to return to his place of origin once or twice a year in order to maintain family, social and cultural links there. It must be emphasized in

that regard that the possibility for an official to retain his personal links with the place where his principal interests are situated constitutes a general principle of the law governing the European public service (judgment of the Court in Case 144/84 *De Angelis v Commission* [1985] ECR 1301).

28 The Staff Regulations provide for repayment of travel expenses even in respect of persons who are part of an official's family only in the broad sense out of concern to enable that journey to be made by all members of the family who were obliged to leave their place of origin because the Community official took up his appointment. Accordingly, the benefit at issue cannot be regarded as a family allowance whose purpose is to relieve the official of expenses incurred for persons treated as if they were dependent children. In fact, the benefit is a payment intended to cover expenses incurred by the official in the performance of his duties. The nature of the benefit at issue is borne out by the fact that the provision relating to it has been included in Section 3 of Annex VII, which lays down the conditions for the application of the basic principle enshrined in Article 71 of the Staff Regulations.

29 The applicant's argument to the contrary, to the effect that dependent persons have exactly the same rights as dependent children, rests, as far as its underlying principle is concerned, on the erroneous view that the benefit in question is a family allowance.

30 Moreover, valid arguments cannot be derived from the comparison of the provisions of Article 7(1) and Article 8(4), on the one hand, with Article 8(1), on the other hand, which is made by the applicants. Since each of those provisions governs specific cases differently, it would be possible to use them to construct arguments to support either interpretation.

31 It follows from the foregoing considerations that an official who is entitled to the household allowance qualifies for repayment of travel expenses for persons treated as if they were dependent children, provided that those persons reside for most of the year at the place where the official is employed or within a radius defined, on a case-by-case basis, in the light of local circumstances and the means of transport.

Consequently, the applicants' first submission, which is based on an erroneous interpretation of Article 8(1) of Annex VII as permitting the repayment of the travel expenses at issue even where the dependent persons reside at the official's place of origin, must be rejected.

The second submission

- 32 The applicants maintain that the effect of the decision adopted by the administration is that dependent children and persons treated as if they were dependent children are treated differently even though such persons must, by definition, receive the same rights and advantages. The contested decision thus infringed the principle of equal treatment and non-discrimination as between officials.
- 33 The Council observes that the new interpretation adopted by the appointing authority does not involve discrimination as between officials, because the rights conferred on officials by the Staff Regulations in respect of their children differ significantly from the rights conferred on them in respect of persons treated as if they were dependent children. That difference in treatment is justified by the presumption of cohabitation which follows from the very nature of the family unit.
- 34 Whilst the general principle of equality is one of the fundamental principles of Community law, the Court of Justice has consistently held that it applies only to persons who are in identical or comparable situations (see, for example, the judgment in Case 147/79 *Hochstrass v Court of Justice* [1980] ECR 3005, particularly at p. 3019). It follows that in this case the submission that that principle has been infringed must be rejected as unfounded, chiefly because an official's children, who are part of the family unit in the strict sense and in respect of whom there is a presumption of cohabitation, are not in the same circumstances as persons treated as if they were dependent children, who are members of the family only in the broad sense.
- 35 It follows from all the foregoing considerations that the application must be dismissed.

Costs

36 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which are applicable *mutatis mutandis* to the Court of First Instance pursuant to the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. 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 (Third Chamber)

hereby:

- (1) Dismisses the application;**
- (2) Orders the parties to bear their own costs.**

Saggio

Yeraris

Vesterdorf

Delivered in open court in Luxembourg on 26 September 1990.

H. Jung
Registrar

C. Yeraris
President of the Third Chamber