JUDGMENT OF THE COURT
17 May 1994 *

In Case C-416/92,

Mrs H., represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

applicant,

v

Court of Auditors of the European Communities, represented by Jean-Marie Stenier and Jan Inghelram, of its Legal Service, acting as Agents, with an address for service at the Court of Auditors, 12 Rue Alcide de Gasperi, Kirchberg,

defendant,

APPLICATION for annulment of the decision of the Court of Auditors of 12 October 1992 determining the survivors' pensions awarded to Mrs H. and her children following the death of her husband, a member of the Court of Auditors, during his term of office,

* Language of the case: French.

THE COURT,

composed of: O. Due, President, G. F. Mancini (Rapporteur), J. C. Moitinho de Almeida, M. Diez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. O. Lenz,
Registrar: H. v. Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 October 1993,

after hearing the Opinion of the Advocate General at the sitting on 19 January 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 December 1992, Mrs H., the widow of Mr H., brought an action under Article 173 of the EEC Treaty for annulment of the decision of the Court of Auditors of 12 October 1992 determining the survivor's pension to which she was entitled as a widow and the orphans' pensions to which her dependent children were entitled.

2 Mr H. was a member of the Court of Auditors. He took up his duties on 17 October 1987. He died on 15 March 1992, during his term of office, in a road accident.

3 Article 16(1) and (2) of Council Regulation (EEC, Euratom, ECSC) No 2290/77 of 18 October 1977 determining the emoluments of the members of the Court of Auditors (OJ 1977 L 268, p. 1), as amended by Council Regulation (Euratom, ECSC, EEC) No 1416/81 of 19 May 1981 (OJ 1981 L 142, p. 1), reads as follows:

'1. The widow and dependent children of a member or former member of the Court of Auditors to whom pension rights have accrued at the time of his death shall be entitled to a survivor's pension.

That pension shall be equal to a percentage of the pension accruing to the member or former member of the Court of Auditors under Article 10 at the date of death, namely:

— for a widow 60%,

— for each child where the mother is still alive 10%,

— for each child where both father and mother are dead 20%.

However, if the death of the member of the Court of Auditors occurs during his term of office,

— the survivor's pension for the widow shall be equal to 36% of the basic salary received at the time of death,

— the survivor's pension for a first orphan of both father and mother shall not be less than 12% of the basic salary received at the time of death.

Where several orphans of both mother and father are left, the total amount of the survivor's pension shall be divided equally among the orphans entitled.

2. The total amount of these survivors' pensions shall not exceed the amount of the pension of the member or former member of the Court of Auditors on which they are calculated. The maximum total survivor's pensions payable shall be divided, where applicable, between the beneficiaries in accordance with the above percentages.'

4 The amount of the pension of the member or former member is defined in the first paragraph of Article 10 as follows:

' The amount of the pension shall be 4.5% of the basic salary last received for each full year in office and one-twelfth of that sum for each complete month. The maximum pension shall be 70% of the basic salary last received. '

5 In the contested decision the Court of Auditors first noted that the deceased had been in office for four years and four months and would have been entitled to a gross pension of 19.5% of his last basic salary, from which sickness insurance contributions and taxes had to be deducted. The Court of Auditors then calculated, on the basis of the second subparagraph of Article 16(1) of Regulation No 2290/77, the monthly amount of the orphans' pensions for his two children. Since Mr H. had died during his term of office, the Court of Auditors fixed the survivor's pension for his widow by applying the first indent of the third subparagraph of Article 16(1) of that regulation. The Court of Auditors then deducted sickness insurance contributions and taxes.

6 As the total amount of the survivors' pensions exceeded the amount of the pension accruing to Mr H. for his four years and four months in office, the Court of Auditors applied Article 16(2) of Regulation No 2290/77 and reduced the survivors' pensions for the widow and orphans proportionately.

7 In support of her application Mrs H. alleges that there was a breach of Article 16 of Regulation No 2290/77 and of the prohibition of discrimination.

8 In her opinion, her pension as a widow must be calculated in accordance with the specific provisions of the third subparagraph of Article 16(1), covering the case of the death of a member during his term of office. The pension is thus based on the 'basic salary received at the time of death', not on the 'pension of the member or former member' referred to in Article 16(2). The reduction provided for in Article 16(2) therefore does not apply to the determination of her entitlement to a survivor's pension.

9 The Court of Auditors, on the other hand, considers that Article 16(2) applies to 'the total amount of [the] pensions' allocated under Article 16(1). The reduction consequently applies to all survivors' pensions for orphans and widows, regardless of whether or not the member has died during his term of office.

10 Neither of the solutions put forward by the parties leads to acceptable results.

11 A systematic application of Article 16(2) even in a case where the member has died during his term of office will have the consequence, for example, that the survivors

will have no pension at all if the member dies before pension rights have accrued to him. While that disadvantage will indeed be reduced as the term of office continues, it will nevertheless not disappear altogether until after the eighth year in office, that is to say, when the member would be entitled under Article 10 to a retirement pension of eight times 4.5%, in other words 36% of the last basic salary, that being the same percentage as that provided for in the third subparagraph of Article 16(1) for the widow.

12 If, on the other hand, Mrs H.'s argument is followed, namely that Article 16(2) relates only to cases where the survivor's pension is calculated on the basis of the second subparagraph of Article 16(1), Article 16(2) would be meaningless, as the Advocate General has explained in paragraph 39 of his Opinion, except for instance where the member who dies during his term of office leaves a spouse and more than ten dependent children. Only in such a case would the total of the 10% entitlements of the orphans be capable of exceeding the amount of the pension to which the deceased member would have been entitled.

13 It is therefore necessary to consider the purpose of the third subparagraph of Article 16(1) and of Article 16(2), starting from the history of that article.

14 An examination of the various amendments made to the provisions in question shows that the legislature intended to accord favourable treatment to the widow if the member died during his term of office. However, the successive changes to the pension rates show that the authors of those provisions always took care to ensure that the total amount allocated to the survivors could not exceed the maximum amount of the pension to which the deceased would have been entitled on ceasing to hold office.

15 The evolution of the rules concerning the emoluments of members and former members of the European institutions shows that provisions such as Article 16(2) of Regulation No 2290/77 were intended from the outset to apply to all cases of the calculation of survivors' pensions and to ensure that the total amount of those pensions did not exceed the member's maximum retirement pension.

16 Since Mr H. died during his term of office, the ceiling applicable to the total amount of pensions payable to his widow and orphans is thus the 'maximum pension' referred to in Article 10 of the regulation, namely 70% of the basic salary last received.

17 By considering the maximum amount to be that of the pension Mr H. would have been entitled to on the date of his death, and by limiting the pensions payable to the survivors accordingly, the Court of Auditors infringed Articles 10 and 16 of Regulation No 2290/77.

18 Its decision of 12 October 1992 must therefore be annulled.

Costs

19 Since the Court of Auditors has been unsuccessful, it must be ordered to pay the costs, pursuant to Article 69(2) of the Rules of Procedure.

On those grounds,

THE COURT

hereby:

1. **Annuls the decision of the Court of Auditors of 12 October 1992 determining the entitlement of Mrs H. and her children to survivors' pensions as widow and orphans;**

2. **Orders the Court of Auditors to pay the costs.**

Due Mancini Moitinho de Almeida

Diez de Velasco Kakouris Joliet

Schockweiler Rodríguez Iglesias Zuleeg

Kapteyn Murray

Delivered in open court in Luxembourg on 17 May 1994.

R. Grass
Registrar

O. Due
President