JUDGMENT OF THE COURT (SECOND CHAMBER)
7 JUNE 1972[1]

Georg Brandau
v Council of the European Communities

Case 46/71

Summary

1. *Officials — Remuneration — Family allowances — Treatment of a person as a dependent child — Rejection of request — Special reasoning not compulsory*
(Staff Regulations of Officials of the European Communities, Annex VII, Article 2(4))

2. *Officials — Remuneration — Family allowances — Treatment of a person as a dependent child — Discretion of the administration — Foundation*
(Staff Regulations of Officials of the European Communities, Annex VII, Article 2(4))

3. *Officials — Remuneration — Family allowances — Treatment of a person as a dependent child — Objective criteria determined by the institutions — Discretion of the administration — Exercise — Compatibility with equal treatment of officials*
(Staff Regulations of Officials of the European Communities, Annex VII, Article 2(4))

1. Article 2(4) of Annex VII to the Staff Regulations requires a special statement of reasons to be given only for a decision allowing a request for a person to be treated as if he were a dependent child. In the event of rejection the administration is not therefore compelled to give reasons for its decision.

2. The words used in Article 2(4) of Annex VII it clear that those who drafted the regulations intended to leave the administration some discretion in making a fair appraisal of the facts and circumstances adduced, in each case, in support of a request for assimilation.

3. Although, in applying Article 2(4) of Annex VII to the Staff Regulations, each institution of the Community can lay down in advance and in general terms the objective criteria which it intends to observe, such a statement cannot prejudge the exercise, in each individual case, of the discretion conferred on the administration by the Staff Regulations themselves.
This discretion, which is essential for taking account of the manifold unforeseeable facts peculiar to each case, is not incompatible with the general principle of equal treatment for officials.

In Case 46/71

GEORG BRANDAU, an official of the Secretariat-General of the Council of the European Communities, Brussels, living at Tervuren, 1 Evenaarsbinnenhof, represented

1 — Language of the Case: French.

and assisted by Michel van Doosselaere, Advocate before the Cour d'appel, Brussels, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 rue Goethe,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, Brussels, represented by its Legal Adviser, Gonzague Lesort, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Emile Reuter, 4 boulevard Royal,

defendant,

Application for annulment of the implied decision rejecting the request for family allowances submitted by the applicant on 26 March 1971 and, in the alternative, for annulment of the express decision of 16 July 1971 rejecting that request,

THE COURT (Second Chamber)

composed of: H. Kutscher, President of Chamber, A. Trabucchi (Rapporteur) and P. Pescatore, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and law

I — Summary of facts and procedure

The facts and procedure may be summarized as follows: on 26 March 1971 the applicant, who is an official in Grade A 3, Step 6, at the Secretariat-General of the Council of the European Communities, submitted a request for his mother to be treated as a dependent child on the basis of Article 2(4) of Annex VII to the Staff Regulations of Officials. In support of his request he listed the increased expense which he was called upon to bear in respect of his 83-year-old mother, who had hitherto been domiciled in Austria but whom he had been obliged to lodge, in view of her state of health, at the Résidence Maria Assumpta at Dilbeek in Belgium, which is managed by the Soeurs Hospitalières de Saint-Joseph and is approved by the Belgian Ministry of Health. It appears

from additional information supplied by the applicant to the administration concerned that in Austria his mother drew a pension of 1854 schillings which at the material time was equivalent to 3541 Belgian francs per month.

As the Secretariat-General had not replied to his request within the period of two months following 26 March 1971, Mr Brandau on 26 July 1971 submitted to the Court an application for annulment of the implied decision rejecting the request which was to be assumed in view of the absence of reply.

On 19 July 1971 the Secretariat-General of the Council communicated to the applicant its express decision dated 16 July 1971 stating the grounds for the rejection of the request referred to above. In the alternative and in so far as necessary the applicant also contests that decision.

Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

The parties presented oral argument at the hearing on 8 March 1972.

The Advocate-General delivered his opinion at the hearing on 18 May 1972.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare and, in so far as is necessary, rule that, on expiry of the period of two months from 26 March 1971, the day on which the applicant's request was lodged, the defendant by implication rejected his request;

2. Declare null and void the implied decision rejecting the applicant's request for his mother to be treated as a dependent child for the purposes of the grant of the family allowance provided for in the Staff Regulations of Officials of the European Communities;

3. Declare and, in so far as necessary, rule that the applicant fulfils the conditions laid down in Article 67 of the Staff Regulations, in Article 2(4) of Annex VII to the Staff Regulations and in the provisions of the decision of the Councils of 2 April 1964 laying down the conditions for implementation of the Staff Regulations governing the treatment of a person as a dependent child;

4. In consequence, rule and adjudge that the defendant is required to recognize that the applicant is entitled to have his mother treated as a dependent child with effect from 1 December 1970, or at least with effect from 6 March 1971, and on account of this to grant him all benefits of whatever kind arising from the application of the Staff Regulations, its Annexes and of the general provisions for its implementation;

5. In so far as necessary and in the alternative, declare null and void the express decision dated 16 July 1971 and communicated to the applicant on 19 July 1971 rejecting the applicant's request;

Order the defendant to pay the costs.

The *defendant* contends that the Court should:

— declare the application to be unfounded;

— order the applicant to pay the costs in so far as they are not chargeable to the defendant under the provisions of Articles 70 and 95(1) of the Rules of Procedure.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

As regards the *admissibility* of the application, the defendant states that it was lodged in compliance with the periods and forms prescribed and that this applies both to the main conclusions and to the alternative conclusions set out therein.

As regards the substance

A — Submissions relied on in respect of the implied decision of rejection

1. *Infringement of essential procedural requirements*

The *applicant* contends that, not being a 'special reasoned' decision, the implied decision of rejection infringes the procedural requirements laid down in Article 2(4) of Annex VII to the Staff Regulations.
The *defendant* argues that the exceptional nature of a decision to treat a mother as if she were a dependent child means that not to treat her as such is the general rule. The obligation for the decision to be special and reasoned is linked with the exceptional nature of such treatment. As the decision not to accord this treatment is the rule it does not require any special procedure.
The *applicant* replies that the fact that the right to a family allowance, which Article 2(4) of Annex VII to the Staff Regulations confers on an official, is exceptional is no justification for departing from Article 25 of the Staff Regulations under which any decision relating to a specific individual and adversely affecting an official shall state the reasons on which it is based.
The *defendant* replies that the applicant's contention would risk setting at nought the second indent of Article 91(2), which provides for an implied decision of rejection.

2. *Submission concerning the infringement of Article 67 of the Staff Regulations of Officials, Article 2(4) of Annex VII to the Staff Regulations and of Article 1 of the Decision of the Council of 2 April 1964 laying down the conditions for treatment of a person as a dependent child*

The *applicant* states that, since he satisfied the objective criteria set out in Article 2(4) of Annex VII, the defendant ought to have allowed his mother to be treated as a dependent child. The fact that the conditions for the application of Article 2(4) of Annex VII are specified defeats the argument that the power conferred by that provision is a discretionary one. The Decision of the Council of 2 April 1974 cannot be compared with a mere explanatory circular containing provisions which may be applied at will. The mandatory nature of the decision is clear from its wording. The wording of Article 2(4) of Annex VII does not necessarily imply an unlimited discretion.
In the *alternative* the applicant comments that, even if the Court were to hold that, in the circumstances of the case, the appointing authority enjoyed discretionary powers, the Court could nevertheless examine the substance of the request by carrying out a 'minimum review' relating to the existence of grounds for the request and whether the facts are as stated.
The *defendant* denies that an official has an individual right to have his mother considered as a dependent child. Such a claim would be quite out of keeping with the exceptional nature of such treatment. The use made in the main provision of the words 'may' and 'exceptionally' demonstrates that the provision endows the administration with discretionary powers, which does not affect the power of the Court to review the legality of the decision, not as regards the exercise of the discretion but as regards compliance with the mandatory rules to which acts of the administration are subject. As the decision of the Council of 2 April 1964 (the text of which is annexed to the statement of defence) applies the basic principle laid down in the said Article 2, its object could only be to prescribe general and non-mandatory conditions for the submission of a request; above all it could not transform a discretionary power into a conditional one. On the question of assimilative treatment, the power is conditional upon compliance with the minimum conditions laid down by the Staff Regulations; but over and above these limits the authority's power is discretionary and it is always free to grant or refuse a request. The conditions laid down in the Staff Regulations and clarified in the Decision of the Council are, accordingly, essential but not exhaustive.

3. *Submissions alleging infringement of the general principle of equal treatment for officials*

The *applicant* contends that the general principle of equal treatment requires that once an official satisfies the objective conditions prescribed, the administration must, as far as these conditions are concerned, treat him like any other official in the same situation. In doing otherwise in the present case, the defendant acted *ultra vires* as regards the powers conferred on it by the Staff Regulations.

The *defendant*, whilst recognizing that the principle of equality also applies to the exercise of the power at issue in this case, contends that the administration may take account of imponderable factors of a personal and social nature which call for a different reply from one case to another.

The *applicant* contends that the fact that the discretion involved is limited does not permit the administration to subject the rejection or the grant of assimilation to conditions other than those established on the basis of objective considerations.

The *defendant* comments that the applicant, without claiming that he was in this case the victim of a discriminatory measure, has merely tried to demonstrate that a discretionary power or the failure to state the reasons for the implied decision of rejection may lead to discrimination.

B — Complaints concerning the express decision of rejection

The *applicant* contends that, in so far as the reply of the Council of 16 July 1971 is regarded as a decision rejecting his request it is, for the reasons set out in the second and third submissions of the appeal against the implied decision of rejection, null and void.

He claims, moreover, that the decision of 16 July 1971 is also illegal because its statement of reasons is incorrect in law and in fact. That decision reversed the order of the provisions of Article 1(4) of the Decision of the Council of 2 April 1964 in that it makes a general rule of the suppletive criterion which prescribes the proportion which the cost of maintaining the person to be treated as a dependent child must bear to the official's remuneration. In the present case, the second subparagraph of the said paragraph (4) does not apply, because the applicant fulfils the conditions of the first subparagraph and has produced proof that he devotes a sum equal to at least 20% of his taxable remuneration to the upkeep of his mother. The second paragraph of the Decision of 16 July 1971 was, therefore, wrong in applying the abovementioned provision by fixing the cost at Bfrs 6360 per month. The amount of help provided or to be provided by the person responsible for maintenance is a question of private law and, consequently, does not come within the purview of the administrative authority. Furthermore, the wording of the provisions concerned does not require the extent of the maintenance obligation to be proved.

Even on the supposition that the administrative authority had such a power of discretion, rejection in the circumstances of this case of the request for a family allowance on the basis of an assessment of the ratio between the outgoings of the person responsible for maintenance and the extent of the maintenance obligation is the result of a factual error. Under both German and Belgian civil law, the amount of maintenance assistance is calculated on the basis both of the degree of need of the person to be maintained and of the resources and financial standing of the person responsible. In the light of the factual considerations in the present case the sum of Bfrs 21 000 to 22 000 per month devoted to the maintenance of the applicant's mother is not only fair and proper but essential to enable the applicant to carry out the obligation to maintain her.

The *defendant* does not deny that certain conditions referred to in the implementing Decision of 2 April 1964 and relating to the person proposed for treatment as a dependent child are fulfilled by the applicant's mother. On the other hand, it states that a condition personally concerning the official requesting this treatment has not been satisfied. Paragraph (4) of the decision lays down the principle that the official applying for the assimilation

shall in fact devote to the maintenance of the person in respect of who the application is made not less than 20% of his taxable salary. The method of applying the principle enunciated in the second subparagraph is based on the presumption that the cost of maintaining a person is Bfrs 6360. If the necessary cost is, actually, in excess of this flat amount, the applicant may rebut the presumption by the submission of evidence for consideration by the appointing authority, which alone is competent to decide whether the evidence is or is not sufficient. In particular, the administration has the right to have regard to the obligations which, under the law of his country, the applicant is called upon to fulfil. In the absence of rules laid down by Community law, reference to national law and decided cases forms a valid basis for determining the facts.

In the present case the considerations of fact drawn to the attention of the administration are insufficient proof that the amount devoted to maintenance of the applicant's mother is fair and proper.

The *applicant* replies that the explanation given by the defendant of paragraph (4) is based on the *a priori* belief that the administration's powers are discretionary. The method of proof by presumption assumes the absence of direct evidence. If direct evidence exists, there is no longer any need for proof by presumption. The use of the presumption introduced by the second paragraph of Article 4 of the Decision of the Council is important, especially when the person proposed for treatment as a dependent child lives with the official and his family.

The applicant contends that the phrase 'in the absence of evidence to the contrary' which appears in the second subparagraph of paragraph (4) must be taken in conjunction with the first subparagraph, which means that, if the official does not produce the direct evidence provided for under the first subparagraph, the cost to be borne is, in accordance with the second subparagraph, presumed. Thus, direct evidence and a legal presumption are, in fact, two alternative methods of proving the calculation of the expenditure involved.

In these circumstances, the only question to be resolved is whether the documents produced by the applicant suffice to demonstrate that the cost of maintaining his mother, subject to deduction of the latter's own resources, represents more than 20% of the taxable income of the applicant. In this connexion there can be no doubt as to the probative character of the documents supplied by the applicant.

The *defendant* objects that a presumption is not on the same level as direct evidence and that, in order to satisfy the condition laid down under the second subparagraph of paragraph (4), it is not enough to provide evidence of any kind of expenditure for the benefit of the maintained person. In order to do so it is necessary to estimate the costs 'involved' provided for in the basic provision. On the basis of that criterion the defendant contends that the expenditures claimed by the applicant exceeded the sum laid down in subparagraph 2 of Article 1 (2) of the Decision concerned and that the documents submitted by the applicant, although undoubtedly genuine, do not demonstrate that the said outgoings were incurred to pay for what can be regarded as 'normal' maintenance, since these outgoings vastly exceeded the applicant's obligation under national law.

In addition, the defendant has produced a list of private old people's homes in the province of Brabant from which it is clear, according to the defendant, that the home selected by the applicant for his mother applies charges far higher than those generally prevailing in the region.

Grounds of judgment

(a) *Submission concerning infringement of an essential procedural requirement*

1 The applicant complains that the defendant infringed an essential procedural requirement laid down in Article 2(4) of Annex VII to the Staff Regulations of

Officials in that the implied decision rejecting his request for family allowances was not a 'special reasoned decision'.

2 Article 2(4) of Annex VII to the Staff Regulations requires a special statement of reasons to be given only for a decision allowing a request for a person to be treated as if he were a dependent child.

3 This express provision is based on the exceptional character, emphasized by the wording of the provision concerned, of such treatment and by the need to make it possible for the use made by the administration of the powers available to it in this connexion to be more easily reviewed.

4 It is not, therefore, possible to read into the provision an obligation for the administration, in the event of rejection, to take a special reasoned decision.

5 This submission is, in consequence, unfounded.

(b) *The submission concerning infringement of Article 2(4) of Annex VII to the Staff Regulations of Officials and of Article 1 of the Decision of the Council of 2 April 1964*

6 The applicant contends that once the conditions provided for under Article 2(4) of Annex VII to the Staff Regulations are satisfied, the institution is obliged to grant the treatment requested.

7 According to the defendant, the provision relied upon by the applicant leaves the administration a margin of discretion in dealing with each individual case.

8 The actual words used in Article 2(4) of Annex VII make it clear that those who drafted the regulations intended to leave the administration some discretion in appraising the facts and circumstances adduced, in each case, in support of a request for assimilation.

9 Such a margin of discretion is justified by the considerations of natural justice to which the administration must have regard in exercising the special power provided for under the provision in question and by the resultant need to judge each case on its merits.

10 Nevertheless, in support of his contention, the applicant refers to the decision of the Council of 2 April 1964 laying down objective criteria for determining the conditions on which a person may be treated as a dependent child.

11 Although, in applying Article 2(4) of Annex VII to the Staff Regulations, each institution of the Community can lay down in advance and in general terms the objective criteria which it intends to observe, they cannot be regarded as other than a statement of minimum requirements, applicable in all cases, without prejudice to the exercise, in each individual case, of the discretion conferred on the administration by the Staff Regulations themselves.

12 This discretion on the part of the administration, which is essential to enable it to take account of the manifold unforeseeable facts peculiar to each case, is not incompatible with the general principle, relied on by the applicant, of equal treatment for officials.

13 This general principle does not mean that, in applying the provision concerned, the administration must merely carry out a mechanical application of predetermined rules and criteria.

14 Such an interpretation would conflict with the need for evaluation of the often complicated factual considerations peculiar to each individual case.

15 In the alternative, the applicant requests the Court to consider whether the administration has made a proper use of its discretion.

16 During the present proceedings, the defendant justified its rejection of the applicant's request on the ground that the home which the latter had chosen for his mother charged much higher fees than the average charged by private homes in the same district and that the applicant had not proved that it was necessary and proper to place his mother in such a home.

17 Without prejudice to consideration of the extent of the applicant's legal obligation to maintain his mother, and with due regard in particular to any need for special medical attention which the state of health of the dependent person may require, it may be stated that, in the light of the relevant information supplied in this case by the two parties, the reasons given by the defendant in support of its refusal do not appear to be wholly without foundation.

18 The applicant has not produced the required evidence that the payments made for his mother's benefit were necessary.

19 In these circumstances, when the defendant refused to accede to the request for assimilation submitted by the applicant, it did not exceed the margin of discretion conferred upon it by Article 2(4) of Annex VII to the Staff Regulations of Officials.

20 It follows from all the above considerations that this submission is unfounded.

(c) *The application for annulment of the express decision rejecting the request*

21 Finally the applicant claims annulment of the decision contained in the reply of the Council of 16 July 1971 stating the reasons for rejection of the request for assimilation.

22 In support of his claim, the applicant confines himself to referring to the submissions made against the implied decision rejecting the request.

23 Without prejudice to the question whether the express reply of the Council merely confirms the previous implied decision of rejection, which would make the present application inadmissible, it is sufficient to observe that from the considerations mentioned above it would appear that this application is unfounded.

24 Consequently, this claim must also be dismissed.

Costs

25 Under Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

26 The applicant has failed in his submissions.

27 Nevertheless, under Article 70 of the Rules of Procedure, in proceedings brought by servants of the Communities, institutions shall bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of Officials of the European Communities, especially Article 2 of Annex VII;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as regards both the principal and the alternative claims;**

2. **Orders the parties to bear their own costs.**

Kutscher Trabucchi Pescatore

Delivered in open court in Luxembourg on 7 June 1972.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 18 MAY 1972[1]

Mr President,
Members of the Court,

Under Article 2 of Annex VII to the Staff Regulations of Officials an official of the Communities receives a monthly allowance for each dependent child. Paragraph (2) of the Article contains a definition of 'dependent child'. Paragraph (3) lays down the age-limits to which grant of the allowance is subject. Finally, paragraph (4) provides (and this point has particular importance in this case) as follows: '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'. By decision of 2 April 1964, the Council adopted general provisions for its implementation by its administration department. I shall consider them in more detail later.

For the moment it need only be said that Mr Brandau, the applicant in the present case, married, with no children and living in Brussels, is an official, in Grade A 3/6, of the Secretariat-General of the Council, and wished to take advantage of these provisions. He is the only son of his widowed mother, who was 83 years of age when the application was lodged. Like the applicant, she is of German nationality but previously lived in an old people's home in Vienna. She receives an Austrian pension amounting to 1854 schillings (or Bfrs 3541). Owing to serious illness (cerebral haemorrhage), which occurred on 12 December 1970, Mrs Brandau had to stay until 2 January 1971 at the University Hospital in Vienna, and, since then, she has required constant attention. It was for this reason that, after she left the hospital, she was first put into a private sanatorium in Austria. On 6 March 1971, because of the attention which, on account of her state of health, his mother needed and in order to have her near him, Mr Brandau brought

1 — Translated from the French version.