JUDGMENT OF THE COURT (SECOND CHAMBER) OF 16 DECEMBER 1976 [1]

Maria Mascetti v Commission of the European Communities

Case 2/76

Summary

Officials - Leave on personal grounds - Reasons for the request - Institutions' power of appraisal - Criminal proceedings against an official - Situation irrelevant to the position of leave on personal grounds
(Staff Regulations, Article 40)

The institutions enjoy a very extensive power of appraisal with regard to the validity of the reasons advanced by the official or servant wishing to take advantage of leave on personal grounds and to the compatibility of the grant of leave with the interests of the service.

Although the practice of the institutions indicates a wide range of reasons for garanting leave on personal grounds, it seems certain that such leave is not the appropriate means of dealing with the case of an official against whom criminal proceedings have been instituted.

In Case 2/76

MARIA MASCETTI, an official of the Euratom Joint Nuclear Research Centre, Ispra, Varese, residing in Monvalle Turro, Varese, represented by Ettore Maccapani, Advocate of the Varese Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Centre Louvigny, 34 B/IV, rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Sergio Fabro, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Bâtiment CFL, Place de la Gare,

defendant,

1 — Language of the Case: Italian.

Application for the annulment of the decision of the Commission of 11 August 1975 by which leave on personal grounds was refused,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts giving rise to the case, the procedure, the conclusions of the parties and their submissions and arguments may be summarized as follows:

I — Facts

Miss Maria Mascetti, a servant of the Communities of Italian nationality employed since 1 March 1961 as a principal secretary at the Euratom Joint Nuclear Research Centre, Ispra, Varese, did not come to work on 18 November 1974.

On 14 December 1974 an examining judge of the XVth Chamber of the Ufficio d'Istruzione of the Tribunale di Roma issued a warrant for the arrest of Miss Mascetti on the grounds of her participation in a political conspiracy and armed rebellion against the State.

By a letter of 9 January 1975 the Administration of the Centre at Ispra notified Miss Mascetti of a decision whereby, under Article 60 of the Conditions of Employment of Other Servants of the Communities (Article 60 of the Staff Regulations of Officials), payment of her salary was suspended since her unauthorized absence could no longer be deducted from her annual leave, which had been used up.

By a letter of 30 January 1975 Ettore Maccapani, an Advocate of the Varese Bar, sent to the Administration of the Joint Nuclear Research Centre, Ispra, a request, dated 22 December 1974, whereby Miss Mascetti asked for unpaid leave on personal grounds for a period of one year, under Article 91 of the Conditions of Employment of Other Servants of the European Communities (Article 40 of the Staff Regulations of

Officials). The reason given for this request was one 'of *force majeure*, that is to say, court proceedings initiated against me on the grounds of an offence of a political nature' which made it impossible for her to appear at work.

In his covering letter Mr Maccapani explained that 'a warrant for the arrest of Miss Mascetti is currently in force in connexion with criminal proceedings (of a political nature) initiated by the examining judge of the Tribunal di Roma'.

By a letter of 20 February 1975 the Director of the Centre at Ispra informed Miss Mascetti that he was unable to grant her request 'because the reasons advanced provide no justification whatever for granting leave on personal grounds'.

By a letter of 6 March 1975, recorded on 16 April, Miss Mascetti, through her lawyer, submitted a complaint against that decision under Article 90 (2) of the Staff Regulations.

By a registered letter of 1 October 1975 the Commission notified Miss Mascetti of its decision of 11 August whereby it confirmed the previous decision of refusal of the Administration of the Joint Nuclear Research Centre at Ispra and declared that it concurred with the reasons stated by the latter.

II — Written procedure

On 6 January 1976 Miss Mascetti lodged this application.

The written procedure followed the normal course.

Upon hearing the views of the Advocate-General the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

III — Conclusions of the parties

The *applicant* claims that the Court should annul the decision of the Commission of 11 August 1975 with all the legal consequences thereof.

The *Commission* contends that the Court should dismiss the application as unfounded and order the applicant to bear the costs.

IV — Submissions and arguments of the parties put forward in the course of the written procedure

The *applicant* emphasizes that Article 40 of the Staff Regulations of Officials provides that unpaid leave may be granted on personal grounds and in exceptional circumstances; it is difficult to imagine a more personal ground and a more exceptional circumstance than a decision depriving an official of his individual liberty.

It is true that Article 40 of the Staff Regulations does not establish an actual right to the grant of leave, conferring instead a discretionary power on the Administration. Nevertheless, that discretionary power must embody a relevant and logical appraisal, giving the reasons on which it is based, of the pertinence and validity both of the grounds advanced by the applicant and those which prompted the decision itself.

In this respect it is maintained that the finding in the contested decision is quite irrelevant and, on any view, inconsistent with a calm, objective and independent decision. Moreover, in so far as it is found in the decision that to have acceded to the request would have furthered the applicant's intention to evade the warrant for her arrest, it tends towards a line of argument which is quite at variance with the criteria (of mere administrative expediency rather than the

'personal' nature of the reasons) on the basis of which the decision required for the implementation of the measure provided for by Article 40 of the Staff Regulations must be taken.

The present proceedings bear no relation either to the applicant's absence from work after 18 November 1974 or to the administrative decision taken as a precaution under Article 60 of the Staff Regulations and notified to the applicant by letter of 9 January 1975. The request for leave on personal grounds in no way constitutes a reply to that letter: there can be no relation between the decision taken under Article 60 and the request submitted pursuant to Article 40 of the Staff Regulations. The reference to 'the quite unjustified absence; of the applicant cannot constitute an adequate statement of reasons for the decisions adopted, in particular the contested decision, since such a reason is quite extraneous and irrelevant to the subject-matter of the dispute to which the request for the grant of leave on personal grounds gave rise.

The discretionary power conferred upon the administration with regard to leave on personal grounds does not amount to an arbitrary power and does not justify a 'semblance' of a statement of reasons.

The lack of a valid reason for rejecting the applicant's request is confirmed by the fruitless endavours of the Commission to find arguments. For example, on the Commission's view, travel abroad must be regarded as a more valid reason for granting leave on personal grounds than the preservation of the physical and personal freedom of the individual in relation to charges of a wholly political nature (of which she has not been found guilty) based upon presumptive evidence.

The contested decision is made to appear all the more arbitrary by the attempt made to justify it by reference to the applicant's evasion of arrest, although such conduct is not even penalized by the criminal law to which the person concerned is subject.

The discretionary power of the administration amounts to a reasoned and considered appraisal as to whether the grounds relied upon are essential and well founded, within the framework of the 'exigencies of the service of the administration'. This last factor could certainly not have occasioned the refusal to grant the leave requested. Moreover, the contested decision in no way relied upon the fact that the exigencies of the service might have been adversely affected or disturbed by the grant of the request. A peremptory and general reference to a particular condition is insufficient to justify a decision.

The *Commission* states that a measure taken under Article 40 of the Staff Regulations by its very nature implies a broadly discretionary appraisal, based on two classes of grounds: the personal grounds put forward by the official in support of his request and the exigencies of the service of the Administration. The official must set out the reasons why he requests the benefit of the measure and the appointing authority must consider those reasons in full exercise of its discretionary power of appraisal. Even if the grounds put forward appear valid the Administration is entitled to refuse the request on the basis of the criterion of the exigencies of the service alone.

In practice, leave on personal grounds is granted, provided that the service can dispense with the official, for study, travel abroad for the purposes of training or for other similar reasons. Grounds such as those put forward by the applicant cannot justify the grant of such leave; this finding alone is sufficient to justify the contested decision.

If a person wishes to evade investigation by the judical authorities of his country he does so at his own risk and cannot

claim the support and approval of a Community institution. With regard to expediency, a measure adopted on such grounds might even be considered as a veiled criticism of the judgment of the criminal court, since the Community authorities would be treating an irregular situation as if it were regular, if only at the level of internal administration.

With regard to the alleged lawfulness of being a fugitive from justice, whilst it is true that that state, as it is defined by the law of criminal procedure, does not entail adverse consequences for the suspect this by no means indicates that such conduct is not regarded with disfavour within the Italian legal system. The national law by no means regards the situation of a fugitive from justice with 'indifference'. In any case, imprisonment cannot constitute a valid reason for obtaining leave on personal grounds; it would at the least be odd if the mere fact of evading a warrant for arrest could render the legal situation of the official more worthy of consideration.

At the point when the applicant submitted her request for leave on personal grounds her administrative status was already entirely irregular since her unjustified absence dated from 18 November 1974, that is to say, not only before the request but before the existence of the very ground (the warrant for her arrest) upon which it was based. Furthermore, the application of Article 60 of the Staff Regulations to the period up to 10 December, taking into account days of leave not used up, cannot regularize *a posteriori* her improper behaviour with regard to the Administration of her institution. Thus the applicant's unjustified absence, dating from 18 November 1974, can in no way be vindicated on the grounds, which are furthermore unacceptable, upon which she relies for the period after 14 December.

The application is essentially based on the complaint of the total lack of a statement of reasons in the contested decision. In this respect both Italian administrative law and the case-law of the Court of Justice show that, whilst the obligation to provide a statement of reasons is absolute with regard to a measure which may infringe a right of the person concerned, that obligation is diminished when, as in the present case, the administrative measure amounts to an exercise of the discretionary power of the Administration in which the person concerned has a mere interest.

Furthermore, whilst the contested decision confirmed the decision of 20 February 1975 of the Director of the Centre at Ispra, it leaves no room for doubt as to the Community authorities' appraisal of the reasons which led it to refuse the applicant's request. In particular, the decision shows clearly that, in refusing to grant a person against whom a warrant of arrest is in force leave requested for the purpose of regularizing her administrative position, the Commission refused to adopt an attitude the sole effect of which would have been to confer upon the applicant an advantage unjustified either by the interests of the service or by a personal interest of a kind which the Administration may protect and which is worthy of protection.

In any case, although the decision of 20 February 1975 itself no doubt contains a very brief statement of reasons, none the less, taken in conjunction with the applicant's request of 22 December 1974, it shows clearly that, whether or not one accepts the relevance of the argument regarding the political nature of the offence, the fact that the applicant is involved in legal proceedings cannot be accepted either as an instance of *force majeure* preventing her from coming to work or as a reason for allowing her to take leave on personal grounds. The decision thus complies in addition with such criteria for the justification of the measure as may be considered necessary.

A reference to the exigencies of the service would only have been necessary if the Administration had considered that the grounds put forward by the applicant in support of her request were valid but nevertheless decided that it must refuse the request on grounds relating to the requirements of the service; this was not so in the present case.

V — Oral procedure

At the hearing on 27 October 1976 the parties presented oral argument and replied to questions put to them by the Court.

The Advocate-General delivered his opinion at the hearing on 1 December 1976.

Law

1 The application is for the annulment of the decision of the Commission of 11 August 1975 refusing to grant the applicant leave on personal grounds.

2 It is common ground between the parties that the applicant, who is an Italian national employed as a principal secretary at the Joint Nuclear Research Centre at Ispra, Varese, did not carry out her duties as from 18 November 1974 and did not provide an explanation for this at the time.

By a letter of 9 January 1975 the Administration of the Centre at Ispra notified her of a decision whereby, under Article 60 of the Conditions of Employment of Other Servants of the Communities (Article 60 of the Staff Regulations of Officials) it had suspended payment of her salary since the duration of her unjustified absence had exceeded the annual leave to which she was entitled.

3 By a letter of 30 January 1975 Ettore Maccapani, an Advocate of the Varese Bar, forwarded to the Administration of the Centre at Ispra an application, dated 22 December 1974, whereby the applicant submitted a request under Article 91 of the Conditions of Employment of Other Servants of the Communities (Article 40 of the Staff Regulations of Officials) for unpaid leave of one year on personal grounds.

This request was based on 'reasons of *force majeure*, that is court proceedings instituted against her in connexion with an offence 'of a political nature' which made it impossible for her to come to work.

In this connexion it was explained in the course of the procedure that on 14 December 1974 the examining judge of the Tribunale di Roma had issued a warrant for the arrest of the applicant because of her participation in a political conspiracy and armed rebellion against the State.

4 By a letter of 20 February 1975 the Director of the Centre at Ispra notified the applicant that he could not grant her request since the ground upon which she relied provided no justification whatever for the grant of leave on personal grounds.

By a letter of 6 March 1975 recorded on 16 April the applicant, through her lawyer, lodged a complaint against this decision with the Commission, under Article 90 (2) of the Staff Regulations.

By a letter of 1 October 1975 the Commission notified the applicant of its decision of 11 August 1975 whereby it confirmed the decision of refusal previously taken by the Administration of the Centre at Ispra and stated that it agreed with the reasons stated in the latter decision.

That decision of refusal constitutes the subject-matter of the application.

5 Under Article 40 of the Staff Regulations, which applies to the applicant under Article 91 of the Conditions of Employment of Other Servants of the Communities, 'An official may, in exceptional circumstances and at his own request, be granted unpaid leave on personal grounds'.

Although this power was created in the interest of the personal convenience of officials and servants it is none the less true that the institutions enjoy a very extensive power of appraisal with regard both to the validity of the reasons advanced by the official or servant wishing to take advantage of that opportunity and to the compatibility of the grant of leave with the interests of the service.

6 Although the practice of the institutions indicates a wide range of reasons for granting leave on personal grounds, such as family reasons, the pursuit of further education or training or the resumption of other occupations, it seems certain that leave on personal grounds is not the appropriate means of dealing with the case of an official against whom criminal proceedings have been instituted.

It thus appears that the Commission has correctly exercised in relation to the applicant the power of appraisal reserved to it by Article 40 (1) of the Staff Regulations with regard to leave granted on personal grounds.

The application must therefore be dismissed.

Costs

7 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to bear the costs.

The applicant has failed in her submissions.

Nevertheless, under Article 70 of the Rules of Procedure, in proceedings commenced by an official or other servant, institutions shall bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders each party to bear its own costs.**

Pescatore Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber