OPINION OF MR ADVOCATE GENERAL TESAURO

delivered on 3 July 1991 *

Mr President,
Members of the Court,

1. Mr Schwedler, an official of the European Parliament, being of the opinion that he was entitled to the tax abatement for a dependent child provided for in Council Regulation (EEC) No 260/68 of 29 February 1968, [1] brought an action before the Court of First Instance against the administration's decision not to grant such an allowance on the ground that his son was doing military service in the German army,

By judgment of 8 March 1990 (in Case T-41/89), the Court of First Instance dismissed his application, observing that a tax abatement may be granted only to the person who assumes actual responsibility for all the child's basic needs (paragraphs 18 to 21) and that that responsibility had been assumed by the German army.

The Court of First Instance also rejected the argument based on the fact that the young man had spent about half his period of military service at his parents' home, regarding it as immaterial since he had done so of his own volition (paragraph 24).

It is essentially those points of the judgment appealed against that are the subject of Mr Schwedler's complaints — complaints against which, in part, the European Parliament raises an objection of inadmissibility because, in its view, they call in question a finding of fact made by the Court of First Instance which, as such, is not open to review in an appeal to the Court of Justice.

2. In view of the European Parliament's objection, I think it is appropriate briefly to outline the limits to which an appeal to the Court of Justice is subject.

As is apparent from Article 168a of the EEC Treaty and Article 51(1) of the Statute of the Court of Justice, an appeal is to be limited to points of law and, more particularly, lack of competence, breaches of procedure which adversely affect the interests of the appellant and infringement of Community law by the Court of First Instance.

The reasons for that limitation of the grounds available for appeals against judgments of the Court of First Instance are well known. Whilst the aim pursued in establishing a Court of First Instance was to preserve the quality and effectiveness of judicial protection within the Community legal system and to allow the Court of Justice to concentrate on its main task, which is to ensure the uniform interpretation of Community law, [2] it was also

* Translated from the Italian

1 — OJ, English Special Edition 1968 (I), p. 37.

2 — See the fourth recital in the preamble to Council Decision No 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

necessary to make certain that the Court of Justice was not compelled, on appeal, to re-examine the facts already established by the Court of First Instance.

For that reason, the Court of Justice operates as the supreme court within the legal system and the matters within its purview as such are limited to issues of legality, so that any errors of law by which the judgment appealed against may be vitiated can be remedied; the aim in view is to preclude any discordant implementation or application of legislation which might detract from the consistency of the Community legal order.

If, therefore, that is the function of the appellate jurisdiction, the third ground of appeal mentioned in Article 51(1) of the Statute, namely infringement of Community law by the Court of First Instance, must be construed as extending to all errors of law attributable to the Court of First Instance: not only, as is obvious, misinterpretation of a provision but also incorrect identification of the provisions that are applicable or an incorrect legal classification of the facts established or of the particular case before it, or both, the consequence of which is the application of the provision to a set of circumstances which is not covered by it. Such defects are all liable to detract from the uniform application of Community law, which it is the duty of the Court of Justice to safeguard.

3. That said, and before the three grounds of appeal are examined, it is appropriate to recall the tenor of the two provisions which, the appellant contends, have been infringed. Pursuant to the second subparagraph of Article 3(4) of Regulation No 260/68, 'An additional abatement equivalent to twice the amount of the allowance for a dependent child shall be made for each dependent child of the person liable as well as for each person treated as a dependent child within the meaning of Article 2(4) of Annex VII to the Staff Regulations'.

It appears from that wording that the provision refers, for the definition of 'dependent child', to Article 2 of Annex VII of the Staff Regulations, paragraph 2 of which states 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*' (emphasis added).

4. In his first ground of appeal, which in fact comprises three specific complaints, the appellant challenges the Court of First Instance's statement that the tax abatement is only justified if it is granted to the person who assumes actual responsibility for all the child's basic needs (paragraph 18).

By referring to actual provision for *all the needs of the child* and then limiting it to *basic* needs, the Court of First Instance, in the appellant's view, imposed a twofold and unacceptable limitation on the concept of 'actual maintenance', in particular by excluding the possibility of taking account of partial maintenance and consequently treating as entirely irrelevant the fact that, in the present case, both the appellant himself and the German army actually contributed to the young man's maintenance.

In that connection, the appellant emphasizes that it appears from the instructions given by the Secretary-General of the European Parliament in October 1963 concerning the implementation of Article 2 of Annex VII to the Staff Regulations, and from Conclusion 188/89 of the Heads of Administration, that *even partial maintenance* of a child may give rise to entitlement to a dependent-child allowance.

The European Parliament's first response to that claim is an objection of partial inadmissibility based on the view that, by claiming actually to have contributed to his son's maintenance, the appellant again calls in question the finding of fact made by the Court of First Instance to the effect that the German army provides for all the needs of young people called on to do military service.

However, that objection does not seem to me to be well founded. The fact is that the appellant does not purport to challenge the fact that, in principle, the army provides for the needs of young people doing military service but rather is contesting the conclusion contained in the judgment of the Court of First Instance that such a fact is sufficient to exclude any possibility of the young man being treated as a 'dependent child' of a parent, with the result that, in his case, it is unnecessary to establish who *in actual fact* undertook maintenance of the young man: and, indeed, the Court of First Instance did consider it unimportant to find out whether, and if so to what extent, the appellant (or conversely the army) actually maintained the young man.

The complaint relates therefore not to the finding of fact but to the Court of First Instance's interpretation of the part of Article 2 of Annex VII to the Staff Regulations which, in defining 'dependent child', refers to the requirement of his *actually being maintained* by the official.

That, moreover, is the nub of the problem in this case. In other words, we must ask whether the wording of the provision which defines the concept of dependent child is such as to make it impossible or irrelevant for a parent to prove that he *in fact* ('actually') maintained his son in circumstances where another person or body, theoretically, provides for the young man's upkeep.

The Court of First Instance answers that question affirmatively, stating (in paragraph 21) that 'there is no need to examine on a case-by-case basis the particular conditions under which each young man is required to do his military service' and taking the view that if he spent any time at his parents' home during his period of military service that was irrelevant since that circumstance was of his own choosing.

I cannot agree with an answer to that effect. Article 2(2) of Annex VII to the Staff Regulations provides unequivocally that a child who is *actually being maintained* by an official is his dependent child, thus referring to the *factual* situation and not laying down any additional requirement that there must be no theoretical possibility of the child's being maintained by others, be they public authorities or private individuals.

Admittedly, it is reasonable to assume that a young man doing military service is being

maintained by the army but such a presumption cannot be absolute and therefore preclude any possibility of proof to the contrary. In other words, it is probable that an examination of the facts will not lead to a different result, but that examination must in fact be carried out if any meaning is to be given to the term 'actual maintenance'.

Accordingly, the fact that a young man called on to do military service may remain in barracks outside duty hours, in which case the army will be required to provide him with board and lodging, seems to me to be irrelevant. If the organizational arrangements for military service are such that young people are free to stay at their parents' home outside duty hours, only that factual situation is important and must be taken into account in determining by whom the young man is *actually being maintained.*

Nor do I consider that any support for the Court of First Instance's interpretation can be found in the decision of the Court of Justice cited in paragraph 23 of the judgment appealed against, according to which the provisions of Community law, and in particular those of Council or Commission regulations which create a right to financial benefits, must be given a strict interpretation.

In the first place, the present case is concerned not with a restrictive interpretation of the provision but with an interpretation which considerably alters its scope, in a manner contradictory to its purport; secondly, in my opinion it is rather dubious for that principle, to which the Court of Justice habitually refers in relation to financial payments made under the common agricultural policy, to be applied to the interpretation of a fiscal provision which pursues a social purpose (in such cases, if anything, the interpretation adopted must in principle *favour* the taxpayer).

5. It likewise seems to me that the appellant is correct to criticize the Court of First Instance's statement that the tax abatement is available only to those who assume responsibility for *all* the child's needs.

If it is borne in mind that the aim pursued by the provisions at issue is to provide assistance for a parent who bears the expenses of maintaining a child, it becomes quite clear that the construction of the provision adopted by the Court of First Instance excessively and unjustifiably limits the concept of dependent child, with the unacceptable consequence that a young man in receipt of a very modest income, which in any event is insufficient for him to support himself, cannot be regarded as being maintained by his parents.

Such an interpretation is, on the one hand, liable to produce consequences that run counter to the *ratio* of the provision and, on the other, diverges from the actual practice followed by the Community institutions and has no basis in the relevant case-law of the Court of Justice.

Indeed, it is apparent from the instructions of 31 October 1963 issued by the Secretary-General of the European Parliament, to which I referred earlier, that

an official whose spouse receives income from an activity outside the Community institutions is entitled, by reason of assuming responsibility for *even partial* maintenance of a child, to the tax abatement for a dependent child (see the first example given); and the same approach is taken by Conclusion 188/89 of the Heads of Administration, as revised on 30 January 1990, which indicates that the income limit beyond which a child of between 18 and 26 years of age cannot be regarded as dependent on a parent who is employed by the Community, for the purposes of granting the allowance in question, is fixed as 40% of the basic salary of an official in the first step of Grade D4.

The principle whereby even partial maintenance (subject to determination of the extent) of a child may give rise to entitlement to a tax abatement in respect of a dependent child is thus not undermined by the Court of Justice's dicta in the *Sorasio* judgment.[3]

In that case, in which an issue was the legality of the Commission's refusal to grant the tax abatement in question *for both parents, who were officials of the European Communities,* the Court of Justice, after making clear that the tax abatement for a dependent child is justified only if granted for social reasons connected with the existence of the child and the cost of maintaining him (paragraph 15), went on to say that, for the purpose of applying the provisions of the second subparagraph of Article 3(4) of Regulation No 260/68, a child cannot be deemed to be *actually* maintained by each of his parents individually, so that, if *only one* dependent child allowance is to be paid in respect of him within the meaning of Annex VII to the Staff Regulations and of Article 3(3) of Regulation No 260/68, an additional *tax abatement* cannot be allowed in respect of him either (paragraph 17).

As is apparent, in *Sorasio* the Court of Justice merely upheld the principle whereby it cannot be concluded that a young person is *actually* being maintained *entirely* by more than one person or body — it certainly did not intend to say that whichever of the two parents *in fact provides mainly,* although not exclusively, for the maintenance of his son cannot be entitled to the tax abatement.

What does emerge from *Sorasio* is that the parent's contribution must account for the major part of the child's maintenance; the Court, in saying that both parents cannot simultaneously claim to be maintaining the child, properly sought to ensure that not more than one person claimed to be actually maintaining the child, with the result that it is necessary, in principle, to find out upon whom the burden of maintenance primarily falls.

Similarly, it would run counter to the very *ratio* of the provision to regard as being actually maintained, within the meaning of Article 2(2) of Annex VII to the Staff Regulations, a young person who was in fact being supported primarily by others.

6. Whilst that part of the first ground of appeal thus deserves to be upheld, I am not persuaded that there is any foundation for the complaint against the Court of First Instance's other statement, namely that account must be taken only of the young person's *basic* needs.

3 — Judgment of 27 November 1980 in Joined Cases 81/79, 82/79, and 146/79 *Sorasio and Others* v *Commission of the European Communities* [1980] ECR 3557.

The basis of the tax abatement is the expenditure needed to maintain the child and possibly to provide him with education or vocational training, and it is therefore the needs linked with those requirements that are to be taken into account in determining whether or not the provision is applicable.

Furthermore, the appellant was unable to indicate precisely what other needs should be taken into account.

7. In his second ground of appeal the appellant contends that, in saying that the young man's absences from barracks were of his own choosing, the Court of First Instance had failed to take account of how military service is at present organized in Germany.

In that regard, it must be observed that, as correctly pointed out by the European Parliament, the finding in question is one of fact and is not open to review on appeal.

Nor am I convinced by the appellant's reasoning in his rejoinder in which he says that, in putting forward that argument his intention was to challenge the incorrect interpretation of the concept of actual maintenance. That aspect of the Court of First Instance's reasoning was in fact the subject of a separate, specific complaint. Moreover, as I said earlier, the fact that the young man left his barracks by his own choice has no bearing on the interpretation of the concept of dependent child.

8. The appellant's third ground of appeal is directed against the conclusions that the Court of First Instance draws from its analysis of Article 2(3), (4) and (5) of Annex VII to the Staff Regulations which, in setting out the conditions for the grant of a dependent child allowance, do not lay down any specific conditions applicable to young people doing military service or create entitlement to any payment of an allowance in respect of them.

This criticism also seems to me to be well founded, since the Court of First Instance draws the wrong inference from its interpretation of those provisions. Whilst it is true that the tax abatement and the grant of a dependent child allowance share the same logical basis and pursue a common aim, it is also true that there is no complete parallelism between the two cases and in practice it is entirely normal for an official to qualify for a tax abatement even if he is not entitled to a dependent child allowance.

It may be readily observed in that regard that, if the legislature had wished the preconditions for entitlement to the two benefits to correspond exactly, it would have taken the much simpler and clearer course of saying that entitlement to the tax abatement would automatically accrue to those in receipt of a dependent-child allowance.

9. I consider therefore that the concept of dependent child under Article 2(2) of Annex VII to the Staff Regulations is to be interpreted as meaning that a child who is doing

military service may be regarded as dependent on the official where the latter provides evidence to show that he was in fact primarily responsible for providing for the basic needs of the child.

Consequently, I suggest that the Court of Justice set aside, to the extent to which it was appealed against,[4] the judgment of the Court of First Instance of 8 March 1990 in Case T-41/89.

Pursuant to Article 54 of the Statute, where an appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

In the present case, the state of the proceedings is not such as to permit the Court of Justice to establish whether the appellant bore the major part of the costs of providing for his son's basic needs, because the Court of First Instance wrongly considered that it was inappropriate to consider that matter and did not therefore undertake any examination in that regard.

I therefore suggest that the Court of Justice refer the case back to the Court of First Instance so that it can be decided by the latter in the light of the judgment of the Court of Justice; the Court of First Instance will also make an order as to the costs of the present proceedings.

4 — In the same judgment the Court of First Instance dismissed the applicant's plea concerning the refusal to grant him a dependent child allowance, but that part of the judgment was not appealed against.