

# CONSEIL DE L'EUROPE—— ——COUNCIL OF EUROPE

## COMMISSION DE RECOURS APPEALS BOARD

**Appeal No. 114/1985 (SORINAS BALFEGO v. Secretary General)**

The Appeals Board, composed of:

Mr Walter GANSHOF VAN DER MEERSCH, Chairman,  
Sir Donald TEBBIT,  
Mr Emmanuel DIEZ, Members

assisted by:

Mr Michele de SALVIA, Secretary and  
Mrs Margaret KILLERBY, Deputy Secretary,

having deliberated, has given the following decision.

### PROCEDURE

1. The appellant lodged his appeal on 31 January 1985. The appeal was registered on the same day under No. 114/1985.
2. On 18 March 1985, the appellant's supplementary pleadings were communicated to the Secretary General of the Council of Europe.
3. By a letter dated 18 March 1985, the Secretary General was asked to submit his observations on the appeal before 18 April 1985. His observations were received on 22 April 1985 and communicated to the appellant for reply.
4. On 13 May 1985, the appellant's representative, Maître Nadal, barrister practicing at the Strasbourg Bar, sent in her reply.
5. By a letter date 15 May 1985, the parties were informed of the date of the hearing fixed for 17 June 1985.
6. On 5 June 1985, the appellant was asked to produce before 11 June a copy of the court decision containing the provisions relating to the maintenance allowance for the children of Mrs Gavalda Macip.
7. The public hearing took place on 17 June 1985 at the Council of Europe in the presence of Mr Sorinas Balfego, represented by Maître Nadal and Mr Harremoes, Director of Legal Affairs, representing the Secretary General, assisted by Mr Buquicchio, Head of the

Central Section of the Directorate of Legal Affairs, Mr Sims, Administrative Officer in the Directorate of Legal Affairs, Mrs Tubach-Ortiz, Principal Administrative Officer in the Establishment Division, and Miss G. Podestà, Deputy to the Director of the Private Office of the Secretary General.

## THE FACTS

The facts as presented by the parties may be summarised as follows:

8. Mr Sorinas Balfego, of Spanish nationality, entered the service of the Council of Europe on 1 September 1978. At present, he holds a grade A3 post in the Office of the Clerk of the Parliamentary Assembly.

9. In a memorandum of 19 April 1984, the appellant informed the Head of Establishment Division of a change in his civil status following the divorce judgment pronounced by the Barcelona Court on 28 March 1984 granting him custody of his two minor children.

10. On 24 April 1984, he also sent a certificate relating to a dependant to the Strasbourg Regional Social Security Authority ("Caisse primaire d'assurance maladie de Strasbourg") in which Mrs Gavalda Macip, divorced on 7 March 1984, who had received the custody of her two children, declared that she was living in a marital situation with the appellant and that she was "effectively, totally and permanently dependent on him".

11. On 2 May 1984, the Regional Social Security Authority sent a new social security card to Mr Sorinas Balfego on which Mrs Gavalda Macip's two children appeared as beneficiaries.

12. In a memorandum of 15 May 1984 sent to the Head of Establishment Division, Mr Sorinas Balfego asked whether Mrs Gavalda Macip's two children, whom he maintained, could be deemed to be children dependent on his household within the meaning of Article 5 of the Regulations governing staff salaries and allowances.

13. In his memorandum of 9 August 1984, the Deputy Director of Administration and Finance rejected the appellant's request for payment of the allowance for dependent children on the grounds that the children concerned could not be described as legitimate, natural or adopted children nor as otherwise dependent children as defined in the aforementioned Article 5.

Reconsidering this interpretation, the Secretary General nevertheless agreed to pay the appellant the allowances for dependent children with effect from 12 January 1985, the date of his marriage.

14. In a letter of 3 October 1984, the appellant submitted an administrative complaint to the Secretary General with the aim of obtaining recognition that Mrs Gavalda Macip's children were children dependent on his household within the meaning of the regulations governing staff salaries and allowances.

15. In a letter of 10 October 1984, the Head of Establishment Division acknowledged receipt of this complaint.

16. Concurrently with the appellant's complaint procedure, the Secretary General exercised his option of referring this complaint to the Advisory Committee on Disputes in accordance with paragraph 4 of Article 59 of the Staff Regulations. In its Opinion of 21 December 1984, this committee notes "that Mr Sorinas Balfego lodged his administrative complaint on Monday 3 October 1984. Paragraph 3 of Article 59 of the Staff Regulations specifies that '*the Secretary General shall give a reasoned decision on the complaint as soon as possible and not later than sixty days from the date of its receipt and shall notify it to the complainant. The absence of a reply to the complaint within that period shall be deemed an implicit decision rejecting the complaint*'. This period expired at the latest Monday 3 December 1984. Mr Sorinas Balfego's administrative complaint having thus been implicitly rejected by the Secretary General, the committee is not competent to formulate an opinion thereon."

17. Despite the aforementioned Opinion, the Director of Administration and Finance, in a memorandum dated 18 January 1985, stated "on behalf of the Secretary General" that he could not "grant the request" of Mr Sorinas Balfego.

18. On 23 January 1985, the appellant addressed to the Secretary General a memorandum stating as follows: "I must inform you of my concern about (your) memorandum (dated 18 January 1985) which I cannot in any way consider as your reply to the complaint I submitted to you. In fact, although every act of the Secretariat is carried out '*on behalf of the Secretary General*', in the broadest sense, it would seem evident that in this case the Administration cannot make use of a general delegation of authority in order to pronounce on your behalf upon a complaint which I submitted to you personally and which precisely has to do with an act by the Administration affecting me adversely. It is not possible to be party to the case and judge at one and the same time".

19. On the same day, the appellant sent the Head of Establishment Division a copy of the certificate of his marriage with Mrs Gavalda Macip, celebrated in Strasbourg on 12 January 1985. On that occasion, he repeated his request contained in the memorandum of 15 May 1984, pointing out again that his household continued to support four children.

20. On 31 January 1985, the appellant lodged his appeal.

## **SUBMISSIONS OF THE PARTIES**

21. The appellant requests the annulment of the decision of 9 August 1984 whereby the Secretary General refused him the allowance for dependent children in respect of the children of Mrs Gavalda Macip, with whom he was living in a marital situation. He requests the payment of that allowance as from 15 May 1984.

The *appellant's* submissions may be summed up as follows:

### **A. As to non-observance of the procedure laid down in Article 59 of the Staff Regulations**

22. The appellant maintains that the Administration violated paragraph 4 of Article 59 of the Staff Regulations which provides that a complaint shall be referred to the Advisory Committee on Disputes, either on the initiative of the Secretary General or if the staff member so requests. The appellant points out that at no time did he request, referral to this committee. With reference to the Advisory Committee's Opinion, he further points out that the complaint

was submitted to that body not by the Secretary General but by the Deputy Director of Administration and Finance. He concludes that in doing so the Administration exceeded the bounds of its competence.

23. The appellant also maintains that the memorandum received on 18 January 1985, which was outside the time-limit laid down in Article 59, and which was signed by the Director of Administration and Finance, and marked “on behalf of the Secretary General”, is a denial by the Administration of the rule against being party to a case and judge at one and the same time. That memorandum also constitutes a deliberate curtailment by the Administration of the Secretary General’s “personal power” insofar as it did not inform him of the subject of the administrative complaint within the requisite time-limit.

## **B. As to the merits of the appeal**

### **1. Restrictive interpretation of the relevant provision**

24. The appellant points out that in order to reject his complaint the Administration based its submission on paragraph 1 (ii) of Article 5 of the Regulations governing staff salaries and allowances, which states:

“By dependent child is meant any legitimate, natural, adopted, or otherwise dependent child who depends on the staff member’s household or on the staff member alone for main and continuing support. An ‘otherwise dependent’ child shall be taken as meaning:

- a. a child for whom adoption procedure has been initiated;
- b. an orphan dependent on the staff member.”

25. He maintains that the Administration interpreted this provision too restrictively by requiring dependent children necessarily to fit into one of the four categories mentioned.

26. He points out in this respect that the heading of Article 5 also provides for the payment of an allowance for *other dependants* and, therefore, does not necessarily refer to children.

27. He concludes that, by not taking account of the daily obligations which he fulfilled in respect of Mrs Gavalda Macip’s children, the Administration misinterpreted the concept of “dependant” as recognised in national laws and in modern case-law.

### **2. Insistence upon a condition not required by the text**

28. The appellant emphasises that the Administration granted him the allowance in question from the day on which he contracted marriage with Mrs Gavalda Macip, although his marriage did not in any way affect the legal situation of her children, who still do not fit any of the categories laid down in the aforementioned Article 5.

29. The appellant concludes that, by making the award of the allowance subject to marriage, the Administration added an additional condition not contained in the provision under consideration.

30. He further maintains that to require the marriage of the staff member before the latter can qualify for the allowance laid down in Article 5 amounts to a violation of respect for the staff member's private life, a right which is guaranteed by Article 8 of the European Convention on Human Rights, and a violation of the principle of equality since Mrs Gavalda Macip's children, who live under the same roof as his own children, are subjected to discriminatory treatment according to whether Mr Sorinas Balfego and Mrs Gavalda Macip are married or not.

3. The Administration's interpretation is contrary to the case-law of the European Court of Human Rights

31. Referring to the decision in the Marckx case, the appellant points out that the concept of family life as laid down in Article 8 of the European Convention on Human Rights draws no distinction between a legitimate family and a natural family.

32. It is therefore wrong to look solely for a parental or legal link; what must be done is to establish that there is in fact a real and permanent life together, which is the case in this instance.

The *Secretary General*'s submissions may be summed up as follows:

**A. As to non-observance of the procedure laid down in Article 59 of the Staff Regulations**

33. The Secretary General points out that all administrative acts relating to the staff of the Council of Europe are carried out in his name and on his behalf and that, in conformity with practice in national administrations and international organisations, he can delegate his powers.

34. He also points out that any acts relating to the procedure provided for under Article 59 are conducted in his name, notwithstanding the fact that the case may have been dealt with by officials of his administration.

35. As regards the legal nature of the memorandum of 18 January 1985 sent by the Director of Administration and Finance outside the time-limit laid down in Article 59, the Secretary General states that it had the sole aim of informing the appellant of his position on the questions raised in his complaint.

**B. As to the appellant's interest in pursuing the case**

36. The Secretary General maintains that, pursuant to paragraph 1 of Article 59 of the Staff Regulations and Decision No. 79-93/1985 of the Appeals Board, the appellant no longer had any interest in taking action in the matter at the time of the submission of his appeal, i.e. 31 January 1985, as he had received the allowances for dependent children from the date of his marriage, 12 January 1985.

**C. As to the merits of the appeal**

1. Erroneous interpretation of the relevant provision

37. The Secretary General points out that the Committee of Ministers, under paragraphs 1 and 2 of the aforesaid Article 5, has listed the categories of persons who may be considered for award of the allowance for dependent children and other dependants. The provision must therefore be fully observed.

38. Consequently, any attempt to interpret the text more widely by reference to such non-legal concepts as “the daily realities of life” would be liable to be in violation of “the security and stability of the law which are the basis of all sound staff management”.

39. Even if the heading of Article 5 refers explicitly to *dependants*, it cannot be inferred therefrom that this concept can override the explicit definition of *dependent children* given in the text.

## 2. Insistence upon of a condition not required by the text

40. The Secretary General maintains that this is an unfounded complaint as the concept of “staff member’s household”, which appears in Article 5, cannot be interpreted as including de facto households.

41. He further maintains that Articles 4 and 5 read in conjunction show that the concept of “staff member’s household” must be interpreted with reference to Article 4, which assumes that the household is composed of the staff member, his or her spouse and their children.

42. As regards the regulations in force in other international organisations, the Secretary General observes that none of them confers, in the case of de facto households, entitlement to allowances in respect of the children of the person with whom the staff member is cohabiting.

Consequently, he concludes that his decision is in conformity with international legislation.

43. The appellant’s submission that the marriage of Mr Sorinas Balfego and Mrs Gavalda Macip constitutes “a condition added to the text” is unfounded. The difference in treatment between a household formed by a married couple and a de facto household results from the legal status conferred by marriage.

## 3. Alleged failure to comply with case-law of the European Court of Human Rights

44. The Marckx judgment, to which reference is made, deals with the requirement for an unmarried mother to recognise her child formally in order to establish filiation. However, what is at issue in the present appeal, and is not dealt with in the aforesaid judgment, is the staff member’s legal links not with his own children but with another person’s children who join his household later.

## **THE LAW**

### **As to the appellant's appeal**

45. The appellant has appealed against the Secretary General's decision of 9 August 1984 refusing him the allowance for dependent children in respect of the children of Mrs Gavalda Macip, with whom he was living at the time in a marital situation.

46. As regards the procedure followed, he complains that the Administration failed to comply with the procedure laid down in Article 59 of the Staff Regulations in that, firstly, the matter was referred to the Advisory Committee on Disputes (of The facts, paragraphs 22-23) not by the Secretary General but by an official of his administration who was therefore not competent to do so, and in that, secondly, Mr Hunt's letter of 18 January 1985 constituted "deliberate curtailment by the Administration of the Secretary General's personal power" insofar as it set itself up as judge of the appellant's complaint while at the same time being a party to the case.

47. As regards the merits of the disputed decision, he maintains that the refusal to award him the allowance in respect of Mrs Gavalda Macip's children for the period May 1984-January 1985 is illegal. He maintains that the Secretary General gave an *erroneous* interpretation, of the concept of "household" given in Article 5 of the Regulations governing staff salaries and allowances, thereby failing to comply with the right of respect for family life guaranteed under Article 8 of the European Convention on Human Rights.

He asks for the disputed decision to be set aside.

### **As to the Secretary General's submissions**

48. The Secretary General maintains that the procedure established under Article 59 of the Staff Regulations has been fully observed in the case as the decisions were taken on the Secretary General's behalf and in accordance with the current practice.

49. He points out that the appellant's circumstances were changed by his marriage to Mrs Gavalda Macip on 12 January 1985. The Administration accordingly agreed to pay the appellant the allowances for dependent children as from that date, this fact bringing to an end the case before the Board and thus to the appellant's interests in maintaining his appeal.

50. The Secretary General submits as to the merits that the refusal to grant the requested allowance, which is based on the interpretation of Articles 4 and 5 of said Regulations, is founded on similar provisions existing in other international organisations. He maintains that only a staff member married to the child's father or mother is entitled to receive this allowance.

### **As to non-observance of the procedure laid down in Article 59 of the Staff Regulations**

51. The appellant maintains that, the disputed decision in the case, which in his view was taken by the Administration and not by the Secretary General himself, would call into question the rule against its being judge and party to the case.

52. The Board considers this an unnatural interpretation of the rules under which these matters are handled. Only two parties are involved, the legal personality of the delegate, i.e. the official to whom the Secretary General has delegated his power, being merged with that of the delegator, i.e. the Secretary General.

Furthermore, the procedure was conducted in accordance with the principle enshrined in Article 2 of the Staff Regulations, which provides that “the staff of the Council shall be under the authority of the Secretary General and answerable to him. Any hierarchical superior shall exercise his authority in the name of the Secretary General”.

53. The Board notes that every administrative act is carried out in the name and on behalf of the Secretary General by virtue of a delegation of power. It is for the Secretary General to decide under what conditions and to which official of the administrative hierarchy he delegates his power. Such a procedure is moreover in keeping with the Council of Europe’s practice.

54. The fact that the referral to the Advisory Committee on Disputes occurred after the 60-day period specified in paragraph 3 of Article 59 of the Staff Regulations, at a time when the absence of reply to the appellant’s complaint could be deemed an implicit decision rejecting the complaint, is of no relevance to the correctness of this delegation procedure.

55. Consequently, there is nothing irregular about this procedure.

#### **As to the appellant’s interest in taking action**

56. Under paragraph 1 of Article 59 of the Staff Regulations, an interest in taking action exists in respect of any “staff member who has a direct and existing interest” in submitting a complaint against “an administrative act adversely affecting him”.

This provision which defines the aggrieved party specifies the conditions under which the person affected by the disputed act or omission is entitled to take action. The Board has stated in its case-law that “the interest which the person concerned must demonstrate must be direct, ie it must be capable of having an impact which is personal and actual, that is to say that the impact must continue to exist for so long as the case has not been determined”. (Appeals Board, Council of Europe, 79-93.1983, *Buhler and others v. Secretary General*, paragraph 69).

57. In the present case, the award of the allowance for dependent children as from the date of the appellant’s marriage did not have the effect of putting an end to his interest in taking action since the purpose of the appeal is to obtain the award of that allowance for the period prior to the marriage beginning on 15 May 1984.

#### **As to the object of the appeal**

58. The Secretary General’s refusal to grant the appellant’s request for the award of the allowance for dependent children in respect of Mrs Gavalda Macip’s children for the period 15 May 1984 - 12 January 1985 is based on his interpretation of the term *household* (in French “*ménage*”) in paragraph 1 of Article 5 of the Regulations governing staff salaries and allowances.

According to the Secretary General's submission, this term refers to the household of married staff within the meaning of Article 4.2.i of the said Regulations and cannot be interpreted as including the de facto household formed by an unmarried couple. In this interpretation, the concept of the staff member's household must be interpreted in the light of the provisions of Article 4 of said Regulations, which assumes that the *household* (in French "*foyer*") consists of the staff member, his spouse and their children and that this is the only unit taken into consideration for the purposes of the award of the "household allowance".

59. This interpretation of the term *staff member's household* no doubt reflects the literal meaning of the words. The Board cannot, however, ignore the realities which have become accepted in this field as a result of widespread socio-economic changes, it being possible in certain circumstances for the concept of "family life" contained in Article 8 of the European Convention on Human Rights to encompass bonds existing between people who are not bound by the legal bond of marriage. (*mutatis mutandis*, ECHR, *Marckx case*, decision of 13 June 1979, Series A).

60. Nevertheless, these changes do not justify the assumption that the situation of a de facto household must in all circumstances be aligned on that of a household based on marriage. It can be legitimate in some circumstances, in the interests of legal security, to grant welfare benefits only to those who form a household based on marriage bonds and to deny them to those who are not linked by such bonds.

Yet in the case of the allowance for dependent children, the purpose of which is to contribute to the actual expenses of the staff member's household, one cannot in principle treat married couples and de facto households differently.

61. The facts show that in the case in question the appellant undertook to shelter and support Mrs Gavalda Macip as from September 1982 when she was applying for permission to stay in France.

In a certificate sent to the Strasbourg Regional Social Security Authority on 24 April 1984 and confirmed by the appellant, Mrs Gavalda Macip declared on her honour that she and Mr Sorinas Balfego were living together in a marital situation at that time and that she was effectively, totally and permanently dependent on him. There is no reason to challenge this declaration.

Lastly, the Board notes that, according to the social security cards produced by the appellant, all the members of his household, including Mrs Gavalda Macip and her two children, were eligible for benefits under French social security as from 11 May 1984.

62. All these facts show that the appellant's relationship with Mrs Gavalda Macip and her children has been of a lasting and stable nature since before May 1984 up to the present time, and this is emphasised by the marriage celebrated in January 1985.

In the Board's view, the refusal to award an allowance for dependent children for the period May 1984 - January 1985 to contribute to expenses which the appellant has in fact already borne for a long time is not in keeping here with the concept of "staff member's household".

Furthermore, in the Board's view the Secretary General's submission that payment of the allowance for dependent children is subject to the entitled person's marriage cannot be based on the articles of the Regulations governing staff salaries and allowances which are at issue here. It was not until after the appellant's marriage that the Secretary General, going back on his earlier interpretation, admitted that the allowance for dependent children should be given for Mrs Gavalda Macip's children, even though they did not in fact fit any more than they had done before the marriage into any one of the categories provided for in Article 5 of the said Regulations.

63. It follows from these considerations that the appellant has the right to payment, of the allowance for dependent children in respect of Mrs Gavalda Macip's two children for the period 15 May 1984 - 12 January 1985. Having failed to recognise this right, the Secretary General's decision refusing him the award of this allowance is therefore illegal.

For these reasons,

the Appeals Board:

Declares the appeal founded;

Annuls the Secretary General's decision of 9 August 1984;

Orders payment to the appellant of the sums corresponding to the allowance for dependent children at the current rates for the period 15 May 1984 - 12 January 1985.

Decides that the Council of Europe will refund the costs incurred by the appellant up to 3,000 F.

Delivered in Strasbourg at a public hearing on 25 October 1985, the French text of the decision being authentic.

The Secretary to the  
Appeals Board

The Chairman of the  
Appeals Board

M. de SALVIA

W.J. GANSHOF VAN DER MEERSCH