

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

## COMMISSION DE RECOURS APPEALS BOARD

**Appeal No. 154/1988 (V. CANALES v. Secretary General)**

The Appeals Board, consisting of:

Mr Gunnar LAGERGREN, Chairman  
Sir Donald TEBBIT,  
Mr Emanuel DIEZ, Members

assisted by:

Mr Michele de SALVIA, Secretary  
Ms Margaret KILLERBY, Deputy Secretary

has delivered the following decision after due deliberation.

### PROCEDURE

1. The appellant lodged his appeal on 9 December 1988. It was entered in the Appeals Board's register on the same day under No. 154/1988.
2. The appellant's supplementary pleadings were filed on 28 February 1989.
3. The observations of the Secretary General were submitted to the Board on 6 April 1989.
4. The public hearing took place in Strasbourg, on 25 May 1989. There appeared at the hearing the appellant, Mr. V. CANALES, assisted by Ms M. NADAL of the Strasbourg Bar. Mr. G. BUQUICCHIO, Head of the Central Section of the Directorate of Legal Affairs, represented the Secretary General, assisted by Mr. P. DEWAGUET, Administrative Officer, Directorate of Legal Affairs.

### THE FACTS

5. The facts set out by the parties may be summarised as follows.
6. On 13 May 1972, Célia Canales, the daughter of the appellant, was born. Mr Canales had already formally recognised his daughter on 19 March 1972.
7. Mr Canales was a staff member of the Council of Europe from 1 September 1978 to 27 August 1988.

8. On 29 July 1980, the mother of Célia died.
9. On 16 March 1988, Mr Canales wrote to the Head of Establishment Division requesting the payment of an orphan's pension, as provided for by paragraph 4 of Article 25 of the Pension Scheme Rules.
10. On 11 July 1988, the Head of Establishment Division wrote to Mr Canales indicating that an orphan's pension under paragraph 4 of Article 25 of the Rules could not be granted to Célia as the appellant had not been married to her mother. The Head of Establishment Division recognised that the child was in fact dependent on the appellant.
11. On 13 July 1988, Mr Canales submitted an administrative complaint to the Secretary General and requested that the complaint should be referred to the Advisory Committee on Disputes.
12. In its opinion No. 6/1988 of 6 September 1988, by 3 votes to 1, this Committee advised the Secretary General to accept the request presented by Mr Canales for an orphan's pension for his daughter.
13. On 10 October 1988, the Director of Administration and Finance wrote to Mr Canales rejecting his complaint.
14. On 9 December 1988, Mr Canales lodged his appeal.

## **SUBMISSIONS BY THE PARTIES**

15. The appellant is seeking the annulment of the decision of 10 October 1988 whereby the Secretary General refused to grant an orphan's pension in respect of his daughter Célia. He requests payment of this pension from the date of his request (16 March 1988) until the date he left the Council of Europe (27 August 1988).
16. The appellant's submissions may be summarised as follows.
17. The appellant stated that the Administration had rejected his claim by basing its submissions on paragraph 4 of Article 25 of the Pension Scheme Rules which provides:

“The children or other dependants of a widowed staff member whose deceased spouse was not employed by one of the organisations listed in Article 1 shall each be entitled to a pension of twice the allowance for a dependent child.”
18. The appellant maintained that the Administration had interpreted this provision too restrictively and too literally by requiring that, for the daughter to qualify for a pension, the deceased mother of Célia should have been his wife.
19. He pointed out that a pension was granted to a child who had lost a parent and not to a staff member and therefore account should have only been taken of the interests of the child and not of the legal nature of the tie between her parents.
20. Furthermore, he maintained that the refusal to grant a pension in this case would introduce a discrimination between children born in wedlock and children born out of wedlock.

The fact that he had not been married to the mother of his daughter had not reduced the loss suffered by the daughter when the mother died.

21. The Secretary General's submissions may be summarised as follows.

22. The Secretary General maintained that, under paragraph 1 of Article 59 and paragraph 2 of Article 60 of the Staff Regulations the Appeals Board was required to decide only questions relating to the law. It was therefore not competent to examine the validity of the different regulations of the Council of Europe such as the Pension Scheme Rules. In addition, these Rules had been drawn up by the Co-ordinated Organisations [the Council of Europe, the Organisation for Economic Co-operation and Development (OECD), the European Space Agency (ESA), the North Atlantic Treaty Organisation (NATO), the Western European Union (WEU)] and consequently were required to be applied uniformly by these Organisations.

23. The Secretary General pointed out that before taking any decision, he had obtained the opinion of the Joint Committee on Pensions of the Co-ordinated Organisations. This Committee considered that paragraph 4 of Article 25 of the Pension Scheme Rules did not apply to the present case.

24. As regards the merits of the appeal, the Secretary General submitted that paragraph 4 of Article 25 could be applied only to those cases where the staff member and the person who died were married. The Council of Europe was bound by this Article and any other interpretation would be in breach of the rules established by the Committee of Ministers and the Co-ordinated Organisations.

25. Paragraph 4 of Article 25 did not discriminate between children as it covered all dependent children of a staff member in the case of the death of the staff member's spouse. It was only the relationship between the staff member and the deceased which gave rise to an orphan's pension; the relationship between the dependent child of the staff member and the spouse of the staff member was irrelevant.

26. The Secretary General submitted that, even if an unmarried couple could be considered equivalent to a married couple for the purpose of this paragraph, this could only apply to those cases where there had been an effective family life. In the present case this could not be claimed as the appellant had ceased to live with the mother of his child already before he became a staff member of the Council of Europe.

## **THE LAW**

27. The appellant's appeal is directed against the Secretary General's decision of 10 October 1988 refusing to grant an orphan's pension in respect of his daughter Célia, whose mother had died in 1980. The appellant considers that this decision is unlawful and accordingly seeks its annulment.

28. The Secretary General contends that no illegality has been shown, since the appellant has not proved any violation of the Staff Regulations insofar as he is concerned and accordingly cannot validly claim to have suffered any loss.

## **The competence of the Appeals Board**

29. Although he stated it was not his intention to question the competence of the Board, the Secretary General nonetheless raised what is, if not a real exception, at least a preliminary plea relating thereto.

He maintained that, under Articles 59 paragraph 1 and 60 paragraph 2 of the Staff Regulations, the Board was not competent to examine the validity of provisions in regulations adopted, as were the Pension Scheme Rules, by the Committee of Ministers.

He claimed that this was especially so because the Pension Scheme Rules were drawn up jointly by the Co-ordinated Organisations and had to be applied uniformly by them.

30. The Board accepts that the purpose of an appeal can only be to challenge an administrative act, namely any individual or general decision or measure taken by the Secretary General (Article 59 paragraph 1 of the Staff Regulations).

It points out, however, that it is an established fact, confirmed by its case-law, that its power to hear and determine disputes is not restricted by the nature of the texts on which the impugned decision of the Secretary General was based, which may be regulations, rules or even statutory provisions (see Artzet Decision of 10 April 1973 and Stevens and others Decision of 15 May 1985). The fact that the texts in issue have been agreed by several organisations cannot restrict the competence of the Board.

The Board is furthermore well aware of the distinction between the exercise of judicial functions and what must come within the functions of the legislator.

31. In exercising its powers and deciding as to the law pursuant to Article 60 paragraph 2 of the Staff Regulations, the Board is here determining an application to set aside an allegedly illegal individual measure.

## **The merits of the appeal**

32. The appellant put forward two submissions against the disputed decision.

33. He submitted firstly that the nature of the tie, matrimonial or otherwise, between the child's parents could not be a sufficient ground for depriving the child of an orphan's pension. The only criterion was the status of the child, who would after all be the true beneficiary of the pension provided for in Article 25 paragraph 4 of the Pension Scheme Rules.

34. The Secretary General maintained on the other hand that this interpretation conformed neither to the spirit nor to the letter of the aforementioned provision. The clear reference to the concept of "spouse" meant that this provision applied only to those cases where the staff member and the deceased were married. Not only was this not so in the present case but also there was no effective family life between these persons at the very least from the date the appellant was recruited (1 September 1978).

35. The appellant claimed secondly that granting an orphan's pension only to a child born in wedlock would introduce discrimination contrary to the European Convention on Human Rights between such a child and a child born out of wedlock.

36. The Secretary General denied that this could be so. He adduced as proof of this the fact

that in a great many circumstances a child entitled to a pension had no relationship by descent to the staff member's spouse. The entitlement of a staff member's dependent child to an orphan's pension was determined simply by the relationship between the staff member and the deceased, who must have been the staff member's spouse.

37. Article 25 paragraph 4 of the Pension Scheme Rules reads as follows:

"The children or other dependants of a widowed staff member whose deceased spouse was not employed by one of the organisations listed in Article 1 shall each be entitled to a pension of twice the allowance for a dependent child."

38. The principle of an orphan's pension when a serving staff member dies is enshrined in Article 25 paragraph 1 of the Pension Scheme Rules which provides that: "Where a staff member still serving or entitled to an invalidity or an immediate or deferred retirement pension dies, his children or other dependants shall be entitled to a pension under the terms of paragraphs 2 and 3 below." This provision does not require the staff member to be married.

Article 25 paragraph 4 of these Rules makes special provision for the payment of an orphan's pension in a specific contingency, namely when it is a staff member's "spouse" who dies.

In both paragraphs, the persons entitled to an orphan's pension are designated as "the children or other dependants" of the staff member.

39. The Secretary General has placed emphasis on the restrictive interpretation to be given to the word "spouse" in Article 25 paragraph 4 of these Rules. It is, however, clear to the Board that paragraph 4 has two primary purposes. The first of these is to ensure that "the children or other dependants" of a staff member will normally be entitled to an orphan's pension if their other parent dies. The second purpose is to ensure that this pension will not be duplicated, in consequence of the wording of Article 25, paragraph 1, if both parents were staff members of a Co-ordinated Organisation. In the opinion of the Board, these considerations make it difficult to place exclusive weight on the use of the word "spouse".

Having regard to the first purpose, it is not acceptable to refuse to treat on an equal footing children born in wedlock and children born out of wedlock.

40. In fact, and this is of major importance in this case, the Board has consistently held that an administrative act should be examined not only as regards the rules in force in the organisation but also as regards the general principles of law which prevail in the legal system of international organisations (cf. for example, the Artzet decision of 10 April 1973, paragraph 23).

One of the general principles of law which prevails in particular in the legal system of the Council of Europe is the rule of non-discrimination (cf. Article 14 of the European Convention on Human Rights and the Caronjot decision of 3 August 1987, paragraph 36). This rule protects individuals, placed in analogous situations, from discrimination and prohibits different treatment for which there is no objective and reasonable justification (ibid., paragraph 38).

41. The decision to refuse the request for a pension is based in this case exclusively on the fact that the parents of Célia had not married. In such circumstances, account has to be taken of the specific circumstances of the case in order to establish whether a difference of treatment of

the kind in issue here may be deemed objective and reasonable.

42. It has been established that the parents, although they no longer lived together, maintained a close and stable relationship with their daughter.

43. The Board shares the opinion of the Advisory Committee on Disputes that “the loss suffered by Célia Canales owing to the death of her mother is certainly not different from that generally suffered by children who have lost their mothers.”

44. The refusal to grant an orphan’s pension in such circumstances amounts to discrimination between children born in wedlock and children born out of wedlock. There are no objective or reasonable grounds for such discrimination in this case (cf. the INZE judgment of the European Court of Human Rights, 28 October 1987, Series A, No. 126, paragraph 41).

45. The special nature of the international civil service and the special requirements of the Council of Europe do not alter this conclusion.

46. For all these reasons the appellant’s child is entitled to the payment of the orphan’s pension provided for in Article 25 paragraph 4 of the Pension Scheme Rules. This right having been recognised, the Secretary General’s decision to refuse such a pension is accordingly illegal.

47. The Secretary General stated that, should the Board decide in favour of the appellant, the orphan’s pension to be paid to him on behalf of his daughter, should be from 16 March 1988, date of his request, until 27 August 1988 when the appellant left the Council of Europe.

48. No request for the refund of costs was made by the parties.

For these reasons,

the Appeals Board:

Declares the appeal founded;

Annuls the Secretary General’s decision of 10 October 1988;

Orders the payment of the orphan’s pension in accordance with the scales in force for the period from 16 March 1988 to 27 August 1988;

Decides that each party shall bear its own costs.

Delivered in public in Strasbourg on 21 September 1989, the French text of the decision being authentic.

The Secretary of the  
Appeals Board

M. de SALVIA

The Chairman of the  
Appeals Board

G. LAGERGREN

Read by Mr. Emmanuel DIEZ at a public hearing on 21 September 1989

E. DIEZ