

Decision of the Appeals Board of 21 September 1989
Appeal No. 155/1989 (ANDREI 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 her appeal on 18 April 1989. It was entered in the Appeals Board's register on the same day under No. 155/1989.
2. The appellant's supplementary pleadings were filed on 28 April 1989.
3. The observations of the Secretary General were submitted to the Board on 5 May 1989.
4. The public hearing took place in Strasbourg, on 25 May 1989. There appeared at the hearing the appellant, Ms D. ANDREI, 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. In March 1965 the appellant married; her daughters Florence and Bénédicte were born in 1966 and 1971.
7. On 24 August 1972 Ms Andrei commenced employment with the Council of Europe.
8. Following a judgment of divorce in November 1972 the appellant was granted custody of the two children and their father paid maintenance for them as ordered by the court.
9. On 28 July 1988 the father died.

10. On 16 September 1988 Ms Andrei wrote to the Head of Establishment Division requesting the payment of an orphan's pension. Ms Andrei indicated later (supplementary pleadings of 28 April 1989) that the pension should have been paid from the date of the death of the father of her daughters i.e. 28 July 1988.

11. On 25 October 1988 the Head of Establishment Division wrote to Ms Andrei indicating that an orphan's pension could not be granted under paragraph 4 of Article 25 of the Pension Scheme Rules as the appellant was not married to the father at the time of his death. The Head of Establishment Division recognised that the children were in fact dependent on the appellant.

12. On 27 November 1988 Ms Andrei submitted an administrative complaint to the Secretary General and requested that the complaint should be referred to the Advisory Committee on Disputes.

13. In its opinion No. 1/1989 of 18 January 1989, by 3 votes to 1, this Committee advised the Secretary General to accept the request presented by Ms Andrei for an orphan's pension for her daughters.

14. On 24 February 1989 the Director of Administration and Finance wrote to Ms Andrei rejecting her complaint.

15. On 18 April 1989 Ms Andrei lodged her appeal.

SUBMISSIONS BY THE PARTIES

16. The appellant is seeking the annulment of the decision of 24 February 1989 whereby the Secretary General refused to grant an orphan's pension in respect of her daughters Florence and Bénédicte. She requests the payment of this pension from 28 July 1988.

17. The appellant's submissions may be summarised as follows.

18. The appellant stated that the Administration had rejected her 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.”

19. The appellant maintained that the Administration had interpreted this provision too restrictively and too literally by refusing to grant the pension as she was not the wife of the father of Florence and Bénédicte at the time of his death.

20. She 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 only have been taken of the interests of the children and not of the legal nature of the ties between their parents.

21. Furthermore she maintained that the refusal to grant a pension in this case would introduce a discrimination between children of married couples and children of divorced couples. The fact that she was no longer married to the father of her daughters had not reduced

the loss suffered by them when their father died.

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

23. 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.

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.

THE LAW

26. The appellant's appeal is directed against the Secretary General's decision of 24 February 1989 refusing to grant an orphan's pension in respect of her daughters Florence and Bénédicte, whose father had died on 28 July 1988. The appellant considers that this decision is unlawful and accordingly seeks its annulment.

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

The competence of the Appeals Board

28. 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 further maintained that these Rules carried exceptional authority because they had been drawn up jointly by the Co-ordinated Organisations.

29. 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 the judicial functions and what must come within the functions of the legislator.

30. 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

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

32. She submitted firstly that Article 25 paragraph 4 of the Pension Scheme Rules was concerned with the status of the child and not that of the staff member. This provision enshrined the relationship by descent between the deceased parent and his child and was intended to offset the prejudice suffered by a child who had lost a parent, regardless of the situation of his parents. Furthermore this pension was created only in the interests of orphan children who are the beneficiaries.

33. The Secretary General contended that the concept of “spouse”, embodied in the provision in issue, related exclusively to situations in which the staff member and the person who died were married. This requirement had to be satisfied for there to be entitlement to an orphan’s pension.

34. The appellant claimed secondly that the refusal to grant an orphan’s pension to her two children amounted to a form of discrimination prohibited by the European Convention on Human Rights. This discrimination stemmed from the fact that her children were born of parents who were later divorced although the relationship by descent, which conditioned entitlement to an orphan’s pension, could not lawfully be called into question simply because of the termination of the matrimonial tie.

35. The Secretary General contended that there has been no discrimination. The only criterion determining the granting of an orphan’s pension was the relationship between the staff member and the person who died, who must have been the staff member’s spouse. The relationship between the staff member’s dependent child and the said staff member’s spouse was in this respect irrelevant.

36. 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.”

37. 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 a staff member.

38. 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 of parents who have subsequently divorced with children of parents who are still married.

39. 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).

40. The decision to refuse the request for a pension is based in this case exclusively on the fact that the parents of Florence and Bénédicte were no longer married. In such a situation 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.

41. It has been established that the father paid maintenance for his two daughters until his death. Furthermore, it has not been disputed that a close, stable relationship continued, after the parents’ divorce, between father and daughters.

42. In these circumstances, there can be no dispute either that the father’s death entailed evident material and non-material prejudice for his daughters.

43. The refusal to grant an orphan’s pension in this case amounts to discrimination between children of parents who were later divorced and children of parents who remain married. There

are no objective or reasonable grounds for such discrimination in this case.

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

44. For all these reasons the appellant's children are 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.

45. In this case the Secretary General did not contest the claim that, should the Board decide in favour of the appellant, the orphan's pension to be paid to her on behalf of her daughters, should begin from 28 July 1988.

46. 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 24 February 1989;

Orders the payment of the orphan's pension in accordance with the scales in force with effect from 28 July 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

The Chairman of the
Appeals Board

M. de SALVIA

G. LAGERGREN

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

E. DIEZ