

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 224/1996 (X v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Kåre HAUGE,
Mr José da CRUZ RODRIGUES, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Mrs Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, hereafter referred to as X, lodged her appeal on 6 September 1996. On 9 September it was registered under file No. 224/1996.
2. On 7 October 1996, X submitted a supplementary memorial.
3. On 19 November 1996, the Secretary General submitted his observations on the appeal. X submitted further observations on 6 January 1997.
4. On 13 November 1996, X's former husband, Y, asked for information about the appeal since it might affect him.

After receiving the parties' observations on 18 November and 26 December 1996, the Deputy Chair decided, in an order dated 27 January 1997, that a copy of the written submissions would be forwarded to Y and gave him ten days to apply to participate in the case (Article 10 of the Statute of the Administrative Tribunal).

5. On 6 February 1997, Y applied to participate.

In an order dated 17 February 1997, the Deputy Chair of the Tribunal, having consulted

the members of the Tribunal and acting in accordance with Rule 42 of the Tribunal's Rules of Procedure, granted the application and gave Y until 3 March 1997 to submit written observations.

Y submitted his memorial on that date.

After the Deputy Chair had informed the parties that they could present observations orally at the hearing on 12 March, X submitted written observations on Y's memorial.

6. The hearing took place in Strasbourg on 18 March 1997. X was represented by Mr J.-P. CUNY, a member of the Versailles Bar; and the Secretary General was represented by Mr R. LAMPONI, Head of the Legal Adviser's Department, Directorate of Legal Affairs.

Acceding to a request by X, the Tribunal had already decided that the hearing would be held *in camera*.

On 3 April 1997, after obtaining the Tribunal's permission, the Secretary General forwarded to the Tribunal Y's observations in reply to X's written observations of 12 March 1997 on Y's memorial. The Secretary General also drew the Tribunal's attention to a number of decisions of the French courts on allowances in cases concerning divorce of Council of Europe staff members. On 8 April 1997, X submitted her comments on these decisions to the Tribunal.

THE FACTS

7. When lodging the appeal, X, a staff member of the Council of Europe, asked that her identity be protected. Having acceded to that request, the Tribunal will not include in the present decision any factual information that might threaten her anonymity.

X maintains that she should be the recipient of the household allowance and the dependent-child allowance, which, since her divorce from Y, also a Council of Europe staff member, have been paid to Y, Y having made a declaration after the divorce that he provided continuing support for their children.

8. On 18 August 1995, X asked the Head of Human Resources to pay the household allowance and the dependent-child allowance to her. She pointed out that she had custody of the children and that they depended on her alone for main support.

9. On 16 November 1995, the Head of Human Resources, after an exchange of notes, asked X to provide him with information on the financial arrangements stipulated in the judicial decisions concerning the divorce.

X provided the information on 24 November 1995.

10. On 11 January 1996, Y submitted observations to the Head of Human Resources. He reiterated, among other things, that he was the children's main financial provider and said that his children depended on him for main and continuing support as stipulated in the Staff Regulations.

11. On 30 January 1996, X submitted further observations to the Administration and reiterated her request to be paid the allowances, with retrospective effect from August 1995.

12. On 27 February 1996, the Head of Human Resources informed X that there was no reason for the Administration to withdraw the dependent-child allowance from Y and pay it to her instead, and that she could not claim the household allowance.

13. On 26 March 1996, X lodged an administrative complaint against the decision of 27 February 1996. At X's request, her complaint was submitted to the Advisory Committee on Disputes, which gave its opinion on 5 June 1996.

Taking the view that it was not unreasonable to interpret Article 5 of the Regulations governing Staff Salaries and Allowances (Appendix IV of the Staff Regulations) as concerning the financial burden, the committee thought that place of residence and other aspects of parental responsibility might well tip the scales towards one of the parents where the financial burden borne by each was more or less comparable. In the committee's view, the Administration could not be considered to have acted unlawfully.

In conclusion, the committee recommended that the Secretary General consider adopting guidelines for cases in which a divorced couple were both Council of Europe staff members since even if the current practice was not unlawful an allowance-allocation decision which ran counter to it was not necessarily unlawful either.

14. On 8 July 1996, the Secretary General dismissed the appellant's administrative complaint.

THE LAW

15. X appealed against the decision (see paragraph 12 above) not to pay her the dependent-child allowance and the household allowance.

16. Allowances are governed by Article 4, paragraph 2, sub-paragraph ii, and Article 5, paragraph 1, sub-paragraphs ii and vi, of the Regulations governing Staff Salaries and Allowances (Appendix IV of the Staff Regulations), which read as follows:

“Article 4 – Household allowance

2. The following shall be entitled to the household allowance:

(...)

ii. widowed, divorced, legally separated or unmarried staff who have one or

more dependent children as defined in Article 5 or, if applicable, Article 12;

(...)

5. Where, in accordance with the above provisions, a husband and wife employed by the Council or by the Council and another Co-ordinated Organisation, are both entitled to the household allowance, the allowance shall be paid only to the person whose basic salary is the higher".

Article 5 – Allowance in respect of dependent children or other dependents

1. i. A monthly allowance shall be paid in respect of each dependent child under 18 years of age, in accordance with the appended scale.

ii. 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.

(...)

vi. In the case of two staff members employed by the Council (...) the allowance in respect of dependent children shall be paid to the official who receives the household allowance."

17. X alleges a breach of the Staff Regulations and disregard of general principle of law.

18. Stating that she is puzzled by inconsistencies in the grounds for dismissing her complaint – which refer to the opinion given by the Advisory Committee on Disputes but in her view fail to recognise the full implications – she sets out her views on how the relevant provisions of Article 5, paragraph 1, should be interpreted.

She objects to the Secretary General's strictly and purely financial interpretation of the word "support" ("*entretien*" in French).

She contends that, according to well-established international case-law, the interpretation rule that must be applied to international organisations' internal regulations and statutes is the same as applies in the law of treaties, and is to be found in Article 31 of the 1969 Vienna Convention on the Law of Treaties. The relevant provision reads:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

19. She believes that the Secretary General's narrow interpretation of the word "support" is not borne out by the meaning of "*entretien*" in French and "support" in English. She contends that account should also be taken of the responsibility, above all moral responsibility, involved in running a household. She points out that, under the divorce decree of the national courts, she has custody of the children. She submits, contrary to the Secretary General's contention, that her responsibilities in bringing up her children derive from the very concept of the household. It follows, she argues, that from both a legal and factual point of view her children depend on her for main and continuing support.

She further maintains that by basing its arguments on salary hypotheses, the Council of Europe is saving money and unjustifiably profiting financially.

20. She accordingly asks the Tribunal to set aside the Secretary General's decision of 8 July 1996 dismissing her administrative complaint.

21. The Secretary General says that the appeal is unfounded.

With regard to the appellant's first argument, he considers the reasons given for his decision to dismiss her administrative complaint perfectly sound. He was not able to adopt the suggestions made by the Advisory Committee on Disputes as to general practice because he risked being at variance with the courts. The present case, he says, is proof of this since the sum that Y is required to pay X was calculated on the basis of Y's monthly income, including the disputed allowances. This contention is confirmed, he says, by the fact that after March 1998 the sum will be calculated in relation to the net salary received by Y.

22. He agrees with the appellant that the main issue in the present case is the interpretation of the relevant provisions of Article 5 but his interpretation of the words "main and continuing support" differs from the appellant's (paragraph 18 above).

As to the precise meaning of the word "support", the Secretary General, who likewise relies on the general rules of interpretation laid down in the Vienna Convention, contends that the meaning is financial. In the present case, he considers it reasonable to regard the children as depending on Y for "main" support. He bases this contention on the sum Y pays to X and their respective salaries. He further argues that it is not disputed that Y pays the sum regularly.

On this basis, he takes the view that the couple's children depend on Y for main and continuing support and that the dependent-child allowance and the household allowance should be paid to him. He points out that the sum that Y pays to X was fixed by the national courts after agreement between the parties and that X was fully aware of Y's salary and its various components.

More generally, the Secretary General considers that if it were accepted that the word "support" also had a non-financial aspect, it might adversely affect Y and other staff members.

Finally, on the basis of the figures arrived at in the various hypotheses, the Secretary General challenges the appellant's allegation that the Council of Europe is unjustifiably profiting financially from the situation.

23. He also argues that Articles 4 and 5 of the Staff Regulations are drafted with the interests of the children in mind, as assessed not by Y or any other individual but by the Committee of Ministers. He therefore draws the Tribunal's attention to some of the consequences for the children if the appellant were to win her case.

First of all, the total sum paid to X (the dependent-child allowance and the household allowance plus the resultant increase in expatriation allowance) would be less than the sum that is paid to Y. Moreover, Y would no doubt be justified in putting it to the national courts that there had been a substantial change in his financial circumstances and in having them cancel, or at least considerably reduce, his obligations, which at all events, from May 1988 onwards, will be calculated according to his net salary and no longer consist in a predetermined sum.

Finally, the Secretary General points out that Council of Europe staff have an insurance scheme which provides, in the event of death, for payment of a capital sum of up to two years' salary to the staff member's dependent relatives. Even if the children are not dependent on the staff member, he/she can still have the capital sum paid to them in the event of death, though the amount is then only one year's salary. Since, therefore, the capital sum is related to the staff member's salary, it makes sense in the present case for the children to continue being considered dependent on their father, who earns the higher salary.

24. In her observations in reply, X points out that, even if the word "support" were considered to have a purely financial meaning, the children would still depend on her for "main" support since the sum she devotes to their needs is higher than that paid by Y.

Moreover, any conclusion the Secretary General draws about the children's interests with regard to the capital sum due on death is irrelevant in the present case because of a particular aspect of Y's family circumstances and because of the principle in the regulations that staff members are entirely free to designate the recipient in respect of part of the capital sum paid in the event of death.

25. The Tribunal notes that the appeal concerns the specific question of payment of household allowance and dependent-child allowance to a divorced couple both of whom are Council of Europe staff members. The problem is that Articles 4 and 5 of the Regulations governing Staff Salaries and Allowances provide that, in the case of a husband and wife employed by the Council of Europe, the allowances can only be paid to one of them (see paragraph 5 and paragraph 1, sub-paragraph vi, respectively of the aforementioned articles). In such situations, account is normally taken of which of the two salaries is the higher. However, where both the former spouses are members of staff, whether or not they have founded a new family since the divorce, it must be determined which of the parents has care of the children for the purposes of Article 5, paragraph 1, sub-paragraph ii, and consequently which of the ex-spouses is entitled to the household allowance under Article 4, paragraph 2, sub-paragraph ii.

26. Relying on financial and non-financial criteria, the parties have endeavoured to show that X and Y respectively provide "main and continuing support" for their children.

However, the Tribunal points out that, under a judgment of the Administrative Tribunal of the International Labour Organisation (ILO), confirming previous case-law, "the spouse who is granted custody should ordinarily be deemed to bear actual and lasting responsibility for the

child and should be entitled to payment of the child allowance” (Judgment No. 743 of 17 March 1986, section 3, paragraph 4, *Flick v. Eurocontrol*, delivered by MM. Grisel and Ducoux and Lord Devlin). The tribunal added: “There is no sound reason to treat a divorced official as the breadwinner simply because he or she contributes towards the support of the child to the parent who has custody” (*ibidem.*).

This case-law also provides the most practical criterion for objectively determining which of the two parents actually has care of the child without the Administration’s having to enquire into the parties’ private affairs in a manner which might be thought intrusive.

The Tribunal notes that, under the provision on which the ILO Administrative Tribunal’s judgment was based, an official’s child is considered to depend on him/her if “actually being maintained by the official” whereas Article 5, paragraph 1, sub-paragraph ii, of the Council of Europe Staff Regulations requires that the staff member provide “main and continuing support”. The difference in the wording is not, however, of any importance here.

That Y must pay X a certain sum under a decision handed down by the national courts which endorses an agreement between X and Y does not basically affect the question of custody and maintenance of the children.

The Tribunal’s view is that none of the facts as described to it allows it to depart from the case-law.

27. As regards the Secretary General’s argument concerning the implications for children’s rights in the event of a staff member’s death, according to whether or not the children depended on the staff member for support, the Tribunal observes that, on the basis of the evidence provided by the parties, the matter is governed by Article 43 of the Staff Regulations and Rule No. 883 of the Secretary General dated 22 December 1994. Article 43 requires that staff members be “properly covered” against the risk of death while Rule No. 883 lays down the sum to be paid, expressed in years of salary.

It is obviously for the Secretary General, who entered into a contract with a private insurance company, to take the appropriate steps to remedy any adverse effects on the children of divorced couples both of whom are employed by the Council of Europe.

28. As regards the household allowance, the Tribunal notes that the children depend on X within the meaning of Article 5 of the Regulations governing Salaries and Allowances; it follows that X is also entitled to the household allowance.

29. As the appeal was lodged by X, the Tribunal is not required to consider how the present decision affects the Secretary General’s position with regard to Y.

30. Having employed the services of a lawyer, the appellant claims 17 000 French francs in costs. Regard being had to the nature and importance of the dispute, the Tribunal considers this request reasonable from the point of view of Article 11, paragraph 2, of the Statute of the Administrative Tribunal.

For these reasons, the Administrative Tribunal:

Declares the appeal founded;

Annuls the decision of 27 February 1996; and

Orders that the Council of Europe reimburse X 17,000 (seventeen thousand) French francs in costs and expenses.

Delivered at Strasbourg on 30 May 1997, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

N. VALTICOS

Appendix 1

DEPUTY CHAIR'S ORDER OF 27 JANUARY 1997 in the case of Appeal N° 224/1996 - X v. Secretary General

I, DEPUTY CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Having regard to Appeal No. 224/1996, X v. Secretary General;

Having regard to Y's request of 13 November 1996 for information about the present case, which might directly affect him;

Having regard to the observations submitted by the parties on 18 November 1996 and 26 December 1996;

Having regard to Article 10 of the Statute of the Administrative Tribunal and Rule 39, paragraph 3 of its Rules of Procedure;

DECIDE

- that a copy of the appeal, together with a copy of the written observations submitted by the Secretary General and X's observations in reply, is to be forwarded to Y;

- that these documents will be forwarded to Y on the understanding that, in the interests of the parties, the general legal principle of the confidentiality of any proceedings prior to the public hearing – such confidentiality being an entitlement of the parties (see, *mutatis mutandis*, European Court of Human Rights, Lawless case (preliminary objections and procedural questions), 14 November 1960, Series A No. 1, page 14) – is to be observed with regard to all third parties;

- that Y has ten days to apply to the Administrative Tribunal to be allowed to participate in the case;

- this order being without prejudice to the admissibility of any application to participate in the case.

Done and ordered at Strasbourg on 27 January 1997, this order to be forwarded to the parties and to Y.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

N. VALTICOS

Appendix 2

DEPUTY CHAIR'S ORDER OF 17 FEBRUARY 1997 in the case of Appeal N° 224/1996 - X v. Secretary General

I, DEPUTY CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Having regard to Appeal No. 224/1996, X v. Secretary General;

Having regard to the Order of 27 January 1997;

Having regard to Y's request of 6 February 1997 to be allowed to present submissions in support of the Secretary General's;

Having regard to Article 10 of the Statute of the Administrative Tribunal and Rule 42 of its Rules of Procedure;

Having consulted the members of the Tribunal;

Considering that the request is such as to support the Secretary General's submissions,

DECIDE

- that Y's application to participate in the case is admissible;
- grant Y until 3 March 1997 to submit observations in writing.

Done and ordered at Strasbourg on 17 February 1997, the order to be forwarded to the parties and to Y.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

N. VALTICOS