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EDITO

Dear readers,

Our last newsletter before the summer holidays is devoted to the right to assistance, and to an analysis of the granting of a pension to an orphan suffering from a serious illness or invalidity, as set out in a recent judgment of the General Court.

In our "Family Law" section, we will discuss the concept of habitual residence and its impact on determining jurisdiction and/or applicable law.

Remember, this newsletter is also yours and we are open to all suggestions for future issues. Please contact us at this e-mail address: theofficial@daldewolf.com.

We wish you an excellent reading and great holidays!

The DALDEWOLF team

OUR TEAM

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FOCUS

THE RIGHT TO ASSISTANCE

Scope of the right to assistance

Under Article 24 of the Staff Regulations, officials are entitled to assistance from the European Union in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.

Article 24 protects officials against degrading treatment, including harassment, not only from third parties but also from their superiors or colleagues. Thus, Article 24 does not focus specifically on preventing or combating harassment but allows any person covered by the Staff Regulations to request the intervention of the Appointing Authority (AA) to take measures to assist the civil servant. However, it should be noted that the obligation to assist in Article 24 of the Staff Regulations does not apply to acts committed by the institution itself (Menghi / ENISA, F-2/09).

Assistance may take various forms, such as opening an administrative investigation, financial support for legal proceedings initiated by the official, or a transfer request.

The European Union is also obliged to make good any damage suffered by the staff member if they did not cause the damage intentionally or through gross negligence and was unable to obtain compensation from the person who did cause it.

Obligation of the Appointing Authority

When an official requests assistance, for example, in cases of harassment, the AA has broad discretion in choosing the measures and means to implement Article 24 of the Staff Regulations. In the presence of an incident incompatible with the order and serenity of the service, the AA must intervene with determination and act quickly and carefully, to establish the facts and take the appropriate measures in full knowledge of the facts.

Specifically, when a request for assistance is made and accompanied by sufficient evidence of the alleged facts, it is the responsibility of the competent authority to act swiftly. It must, without any absolute discretion, open an administrative investigation to clarify the facts and draw all the necessary conclusions, including the opening of disciplinary proceedings against the person in question when the Administration concludes, at the end of the administrative investigation, that there is a case of psychological harassment (DQ. and Others v. Parliament, T-730/18).

Time limit for submitting a request for assistance

Article 24 of the Staff Regulations does not lay down any specific time limit for submitting a request for assistance. However, according to legal certainty and legitimate expectations, a civil servant must submit such a request within a reasonable period. For example, five years is considered reasonable for reporting a case of psychological harassment to the Administration and requesting its assistance (Cantisani / European Commission, F-71/10).

Thus, the time limit for filing a request for assistance in a case of psychological harassment starts from the last alleged act of psychological harassment committed by the alleged perpetrator or from the moment

when the alleged perpetrator is no longer able to repeat his actions against his victim (Cantisani / European Commission, F-71/10).

CASE LAW

ORPHAN'S PENSION FOR A CHILD SUFFERING FROM A SERIOUS ILLNESS OR INVALIDITY

In a judgment of 7 June 2023 (OP / European Parliament, T-143/22), the General Court of the European Union ruled that an orphan who suffers from a serious illness or invalidity preventing him from supporting himself, and who has been dependent on and maintained by a deceased official, does not need necessarily to have completed the administrative formalities required to receive an allowance before the death of his parent, provided that these conditions existed at the time of death.

The orphan's pension is an income specially granted to children to ensure their independence and dignity in a spirit of solidarity. Orphans are independent beneficiaries and can apply to receive it from a separate bank account when they reach the age of majority.

The first paragraph of Article 80 of the Staff Regulations provides that when an official pass away, leaving no spouse entitled to a survivor's pension, the children recognized as dependents at the time of death shall be entitled to an orphan's pension.

For the first dependent child, this pension is set at 80% of the survivor's pension to which the surviving spouse of the official or former official in receipt of a retirement pension or invalidity allowance would have been entitled. The pension is increased, for each dependent child from the second one, by an amount equal to or double the dependent child allowance. The total amount of the pension and allowances is divided equally between the entitled orphans. Finally, this pension cannot be less than the minimum subsistence figure.

According to the Court, in order to be entitled to this pension, the orphan must be suffering from a serious illness or invalidity preventing him or her from providing for his or her own needs and must have been effectively maintained by the deceased official (material conditions), as well as having been dependent on the deceased official at the time of his or her death (temporal condition).

If these conditions exist at the time of death, it is not necessary to take any administrative steps beforehand.

This concept of dependent child refers to the legitimate, natural or adopted child of the official or his/her spouse, giving entitlement to payment of the dependent child allowance insofar as he/she is effectively maintained by the official and meets, in addition, one of these conditions:

- Be a minor,
- Be aged between 18 and 26 and undergoing school or vocational training,
- have a serious illness or invalidity that prevents them from supporting themselves.

In this situation, the Appointing Authority is obliged to award the orphan's pension and has no discretionary power.

As stated by the Court, the need for a procedural condition relating to the existence of a recognition decision that should have been adopted before the official's death is irrelevant. This principle also applies to the Conditions of Employment of Other Servants of the European Union (OP / European Parliament, T-143/22).

Moreover, in cases where the orphan is not a minor, the allowance is granted at the request of the official concerned (Brems / Council, T-75/89), in order to enable the Appointing Authority to check whether the conditions referred to above are met and, if necessary, grant a dependent child allowance. Any requirement that recognition by the Parliament's services should have taken place before the death is an additional condition that must be disregarded (OP / European Parliament, T-143/22).

The ratio legis of such an allowance meets a social objective justified by the expenses arising from a present and certain need connected with the child's existence and maintenance (Council / Brems, C-70/91). This objective would not be met if the appointing authority could refuse to grant an orphan's pension on grounds unrelated to the child's situation and to the material and temporal conditions (OP / Parliament, T-143/22).

THE CONCEPT OF HABITUAL RESIDENCE AND ITS IMPACT ON DETERMINING JURISDICTION AND/OR APPLICABLE LAW

A Spanish couple get married in France. They live in France and then decide to move to Belgium. Their first child was born in France, their second in Belgium. They are living in Belgium when they decide to divorce.

This case contains various foreign elements that need to be examined to find out: before which judge (i.e. in which country?) will they be entitled to have their dispute settled and which law should be applied by the competent judge?

The question of jurisdiction is governed inter alia by the Council Regulation (EU) 2019/1111 of 25 June 2019[1].

This legal instrument is designed to help international couples resolve cross-border disputes relating to divorce and child custody.

In accordance with the Brussels II ter Regulation, the criterion for determining the jurisdiction of the courts seized is the "habitual residence" of the parties concerned:

- On the one hand, the place of habitual residence of the spouses will be the basis for the jurisdiction of the country of residence in question for disputes relating to divorce, legal separation and marriage annulment (Article 3 of the Brussels II ter Regulation);
- On the other hand, the place of the child's habitual residence will be the basis for the jurisdiction of the court, which will have to rule on questions relating to parental responsibility (Article 7 of the Brussels II ter Regulation).

The concept of **habitual residence** therefore occupies a central place in family relations, particularly in matters relating to divorce and parental responsibility, but it is also the reference criterion in international instruments designed to regulate matters relating to matrimonial property regimes, maintenance obligations and succession.

In the absence of a precise definition in international instruments, this concept is interpreted autonomously and uniformly in European law. The aim is to meet an objective criterion of proximity: it favours the judge who is best placed to understand the issues to be resolved.

The meaning and scope of this concept was clarified in a judgment of 25 November 2021 by the Court of Justice (IB / FA, C-289/20), which set out two criteria to be taken into account in determining the place of habitual residence of the parties concerned. These are, firstly, the intention of the person concerned to fix the habitual centre of his or her interests in a particular place and, secondly, a sufficiently stable or regular presence on the territory of the Member State concerned.

This habitual residence must therefore be the place where the person's day-to-day interests converge, characterised by the desire to set up a permanent establishment in the country.

Thus, the Court states that although a person may have several residences in several Member States, he or she may have only one habitual residence. If a spouse has transferred his or her habitual residence to the territory of a Member State other than that of the former marital residence, he or she must (1) have manifested the will to establish the habitual centre of his or her interests in that other Member State and (2) have shown that his or her presence in that Member State demonstrates a sufficient degree of stability.

Taking into account the convergence of these factual elements and the two aforementioned criteria, the Court will determine which judge is best placed to rule on the issues to be settled.

Once the question of the court's territorial jurisdiction has been resolved, the jurisdiction must then examine the law applicable to the dispute before it. This will not necessarily be the law of the country of the court seized. Indeed, another law could apply to the dispute, in relation to the foreign elements of the case.

In this respect, the concept of residence also occupies a central place, since it is the reference criterion in many international instruments that determines the law applicable to family disputes, including those related to divorce and legal separation.To return to our first scenario, the competent court is the Belgian court, provided that the couple have established their residence there. The Belgian court will apply Belgian law or another law, depending on the issues involved (divorce, liquidation of the matrimonial property regime, accommodation of children, maintenance, etc.). The applicable law may be the law of the habitual residence but not necessarily.

In a society where foreign elements are legion, questions relating to the jurisdiction of the court seized, and ultimately to the habitual residence of the parties concerned, are bound to resurface. It is therefore essential to know the connecting factors in family matters, which are essential in resolving international disputes.

[1] *Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (also known as the Brussels II ter Regulation).*