Reports of Cases

OPINION OF ADVOCATE GENERAL
PRIIT PIKAMÄE
delivered on 21 October 2020[1]

Joined Cases C-517/19 P and C-518/19 P

María Álvarez y Bejarano,
Ana-Maria Enescu,
Lucian Micu,
Angelica Livia Salanta,
Svetla Shulga,
Soldimar Urena de Poznanski,
Angela Vakalis,
Luz Anamaria Chu,
Marli Bertolete,
María Castro Capcha,
Hassan Orfe El,
Evelyne Vandevoorde
v
European Commission (C-517/19 P),
and
Jakov Ardalic,
Liliana Bicanova,
Monica Brunetto,
Claudia Istoc,
Sylvie Jamet,
Despina Kanellou,
Christian Stouraitis,
Abdelhamid Azbair,
Abdel Bouzanih,
Bob Kitenge Ya Musenga,
El Miloud Sadiki,
Cam Tran Thi
v

Council of the European Union (C-518/19 P)

[1] Original language: French.

(Appeal – Civil service – Staff Regulations of Officials of the European Union – Reform of 1 January 2014 – Article 7 of Annex V – Articles 4, 7 and 8 of Annex VII – New provisions on the flat-rate payment of annual travel expenses from the place of employment to the place of origin and the grant of home leave – Link with expatriate or foreign resident status – Plea of illegality – Charter of Fundamental Rights of the European Union – Article 20 – Equality before the law – Intensity of judicial review)

I. Introduction

1. By the present appeals, the appellants seek to have set aside the judgments of the General Court of the European Union of 30 April 2019, *Alvarez y Bejarano and Others* v *Commission* (T-516/16 and T-536/16, not published, EU:T:2019:267), and *Ardalic and Others* v *Council* (T-523/16 and T-542/16, not published, EU:T:2019:272) (together, 'the judgments under appeal'), dismissing their actions for annulment, based on a plea of illegality in respect of Article 7 of Annex V and Article 8 of Annex VII to the Staff Regulations of Officials of the European Union, of the decisions of the European Commission and of the Council of the European Union refusing them, pursuant to those provisions and with effect from 1 January 2014, entitlement to the flat-rate payment of annual travel expenses and the grant of home leave.

2. Successive reforms of the Staff Regulations of Officials of the European Union, and the abolition or reduction of benefits that sometimes accompany them, have led to disputes between officials or members of staff, on the one hand, and the institutions employing them, on the other. Having dealt with the reduction in the number of days of annual leave granted to staff serving in non-member countries,[2] the Court is called upon to rule on the legality of provisions of the Staff Regulations, laid down in Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union,[3] restricting the reimbursement of annual travel expenses and, to give it its well-known previous name, 'travelling time'.

3. The cases before the Court present an opportunity for it to clarify, in particular, the scope of judicial review of whether equality before the law has been observed in the context of the exercise by the legislature of its discretion when adopting Staff Regulations.

II. Legal framework

4. Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community[4] ('the Staff Regulations') has been amended several times, in particular by Regulation No 1023/2013, which entered into force on 1 January 2014.

[2] See judgment of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others* (C-119/19 P and C-126/19 P, EU:C:2020:676).

[3] OJ 2013 L 287, p. 15.

[4] OJ 1962 45, p. 1385.

5. Article 7 of Annex V to the Staff Regulations provides:

'Officials who are entitled to the expatriation or foreign residence allowance shall be entitled to two and a half days of supplementary leave every year, for the purpose of visiting their home country.

The first paragraph shall apply to officials whose place of employment is within the territories of the Member States. If the place of employment is outside those territories, the duration of the home leave shall be fixed by special decision taking into account particular needs.' [5]

6. Article 4 of Annex VII to the Staff Regulations provides:

'1. An expatriation allowance equal to 16% of the total of the basic salary, household allowance and dependent child allowance paid to the official shall be paid:

(a) to officials:

– who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and

– who during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account;

(b) to officials who are or have been nationals of the State in whose territory the place where they are employed is situated but who during the ten years ending at the date of their entering the service habitually resided outside the European territory of that State for reasons other than the performance of duties in the service of a State or of an international organisation.

…

2. An official who is not and has never been a national of the State in whose territory he is employed and who does not fulfil the conditions laid down in paragraph 1 shall be entitled to a foreign residence allowance equal to one quarter of the expatriation allowance.

3. For the purposes of paragraphs 1 and 2, an official who has by marriage automatically acquired and cannot renounce the nationality of the State in whose territory he or she is employed shall be treated in the same way as an official covered by the first indent of paragraph 1 (a).' [6]

7. Article 7 of Annex VII to the Staff Regulations states:

'1. An official shall be entitled to a flat-rate payment corresponding to the cost of travel for himself, his spouse and his dependants actually living in his household:

(a) on taking up his appointment, from the place where he was recruited to the place where he is employed;

[5] Applicable by analogy to members of the contract staff under Article 91 of the Conditions of Employment of Other Servants.

[6] Both before and after the reform of the Staff Regulations, which entered into force on 1 January 2014, this provision applies by analogy to members of the contract staff under Article 92 of the Conditions of Employment of Other Servants.

(b) on termination of service within the meaning of Article 47 of the Staff Regulations, from the place where he is employed to the place of origin as defined in paragraph 4 of this Article;

(c) on any transfer involving a change in the place where he is employed.

In the event of the death of an official, the surviving spouse and the dependants shall be entitled to the flat-rate payment under the same conditions.

…

4. An official's place of origin shall be determined when he takes up his appointment, account being taken in principle of where he was recruited or, upon express and duly reasoned request, the centre of his interests. The place of origin as so determined may by special decision of the appointing authority be changed while the official is in service or when he leaves the service. While he is in the service, however, such decision shall be taken only exceptionally and on production by the official of appropriate supporting evidence.

…'

8. Article 8 of Annex VII provides:

'1. Officials entitled to the expatriation or foreign residence allowance shall be entitled, within the limit set out in paragraph 2, in each calendar year to a flat-rate payment corresponding to the cost of travel from the place of employment to the place of origin as defined in Article 7 for themselves and, if they are entitled to the household allowance, for the spouse and dependants within the meaning of Article 2.

…

2. The flat-rate payment shall be based on an allowance per kilometre of geographical distance between the official's place of employment and his place of origin.

Where the place of origin as defined in Article 7 is outside the territories of the Member States of the Union as well as outside the countries and territories listed in Annex II to the Treaty on the Functioning of the European Union and the territories of the Member States of the European Free Trade Association, the flat-rate payment shall be based on an allowance per kilometre of geographical distance between the official's place of employment and the capital city of the Member State whose nationality he holds. Officials whose place of origin is outside the territories of the Member States of the Union as well as outside the countries and territories listed in Annex II to the Treaty on the Functioning of the European Union and the territories of the Member States of the European Free Trade Association and who are not nationals of one of the Member States shall not be entitled to the flat-rate payment.

…

4. Paragraphs 1, 2 and 3 of this Article shall apply to officials whose place of employment is within the territories of the Member States …

The flat-rate payment shall be based on the cost of air travel in economy class.'[7]

III. Background to the disputes

A. Case C-517/19 P

9. Ms Alvarez y Bejarano and 11 other persons are officials or members of the contract staff of the Commission who are employed in Belgium. They all have dual nationality, including that of their place of employment. They are not in receipt of either the expatriation or the foreign residence allowance provided for in Article 4 of Annex VII to the Staff Regulations, which was not amended by Regulation No 1023/2013.

10. The place of origin of 7 of those 12 persons is in the European Union or the overseas countries and territories referred to in Annex II to the FEU Treaty, while that of the other 5 is outside the territories of the Member States of the Union, as well as the territories of the Member States of the European Free Trade Association (EFTA) and the territories referred to in Annex II to the FEU Treaty. Eleven of the officials or members of the contract staff are nationals of the State of their place of origin, while the place of origin of one of them, a Belgian-Panamanian national, is in the Autonomous Region of the Azores (Portugal).

11. Following the entry into force of Regulation No 1023/2013, the Commission adopted general implementing provisions for Article 8 of Annex VII to the Staff Regulations and a decision on leave.

12. Since the personal files of Ms Alvarez y Bejarano and the 11 other persons in question were amended as a result of the adoption of those measures, since 1 January 2014 those persons have not been entitled either to the flat-rate payment of annual travel expenses or to home leave, formerly known as 'travelling time'(together, 'the benefits at issue'), which were benefits granted before that date to officials or members of staff whose place of origin was, as in the case of the persons concerned, determined to be in a place other than the place of employment.

13. Since the complaints lodged against those amendments to the personal files were rejected by the Commission, the persons concerned brought actions before the General Court (Joined Cases T-516/16 and T-536/16).

B. Case C-518/19 P

14. The background to the dispute in Case C-518/19 P is, in essence, similar to that in Case C-517/19 P.

15. Mr Ardalic and 11 other persons are officials or members of the contract staff of the Council. All have dual nationality, including that of their place of employment, and they do not receive either the expatriation or the foreign residence allowance.

[7] Articles 7 and 8 of Annex VII to the Staff Regulations, as amended by Regulation No 1023/2013, are, as a rule, applicable by analogy to members of the contract staff under Article 92 of the Conditions of Employment of Other Servants.

16. The place of origin of six of those persons is in the European Union or the overseas countries and territories referred to in Annex II to the FEU Treaty, while the place of origin of the other six is outside the territories of the Member States of the Union, as well as the territories of the EFTA Member States and the territories referred to in Annex II to the FEU Treaty.

17. Eleven of the persons concerned are nationals of the State in which their place of origin is situated, while one member of the contract staff is Belgian-Croatian whereas his place of origin is in Serbia.

18. Like the officials and members of the contract staff in Case C-517/19 P, Mr Ardalic and the 11 other persons concerned have not been entitled to the benefits at issue since 1 January 2014, following the entry into force of Regulation No 1023/2013 and two decisions of the Secretary-General of the Council.

19. Since the complaints lodged against the amendments to their personal files were rejected by the Council, Mr Ardalic and the 11 other persons concerned brought actions before the General Court (Cases T-523/16 and T-542/16).

IV. Procedure before the General Court and the judgments under appeal

20. In their respective actions at first instance seeking annulment of the decisions adversely affecting them, Ms Alvarez y Bejarano and the 23 other officials or members of the contract staff ('the appellants') raised a plea of illegality in respect of Article 7 of Annex V and Article 8 of Annex VII to the Staff Regulations, as amended by Regulation No 1023/2013, supported by three complaints alleging (i) illegality arising from a 'reconsideration of the appellants' place of origin', (ii) illegality of the condition for the grant of the benefits at issue linked to the foreign residence or expatriation allowance, and (iii) breach of the principles of proportionality, legal certainty, acquired rights and protection of legitimate expectations, as well as breach of the right to respect for family life.

21. The General Court dismissed the actions in their entirety.

V. Forms of order sought and the procedure before the Court

A. Case C-517/19 P

22. The appellants in Case C-517/19 P claim that the Court should:

– set aside the judgment of the General Court of 30 April 2019 in Joined Cases T-516/16 and T-536/16, *Alvarez y Bejarano and Others* v *Commission*;

– annul the Commission's decision not to grant the appellants any travelling time or any reimbursement of annual travel expenses from 2014 onwards;

– order the Commission to pay the costs.

23. The Commission contends that the Court should:

– dismiss the appeal;

– order the appellants to pay the costs.

24. The European Parliament and the Council, which, as interveners at first instance, have lodged a response in accordance with Article 172 of the Rules of Procedure of the Court of Justice, also contend that the appeal should be dismissed and the appellants ordered to pay the costs.

B. Case C-518/19 P

25. The appellants in Case C-518/19 P claim that the Court should:

– set aside the judgment of the General Court of 30 April 2019 in Joined Cases T-523/16 and T-542/16, *Ardalic and Others* v *Council*;

– annul the decision of the Secretary-General of the Council of the European Union not to grant the appellants any travelling time or any reimbursement of annual travel expenses from 1 January 2014 onwards;

– order the Council to pay the costs.

26. The Council contends that the Court should:

– dismiss the appeal;

– order the appellants to pay the costs.

27. The Parliament, which, as an intervener at first instance, has lodged a response in accordance with Article 172 of the Rules of Procedure, also contends that the appeal should be dismissed and the appellants ordered to pay the costs.

28. Pursuant to Article 54(2) of the Rules of Procedure, the President of the Court decided on 1 October 2019 to join Cases C-517/19 P and C-518/19 P for the purposes of the written and oral parts of the procedure and of the judgment.

29. The parties presented oral argument at the hearing before the Court on 1 July 2020.

VI. Legal assessment

30. The appellants put forward two grounds in support of their appeals, alleging, first, an error of law by the General Court in defining the scope of its judicial review and, second, breach of the principle of equal treatment.

A. First ground of appeal

31. It is common ground that, in the two judgments under appeal, the General Court carried out a limited review of legality on the ground that the setting of the conditions and detailed rules for the reimbursement of annual travel expenses and travelling time falls within an area of legislation in which the legislature enjoys a broad discretion. In such an area, the General Court held that it was required merely to ascertain, as regards observance of the principle of equal treatment and the principle of non-discrimination, whether the institution concerned had applied a distinction which was arbitrary or manifestly inappropriate, and, as regards the principle of proportionality, whether the measure adopted was manifestly inappropriate in relation to the objective pursued by the rules.

32. In their appeals, the appellants argue that, in so doing, the General Court erred in law and that it should have carried out a comprehensive review when ascertaining whether the principle of equal treatment had been observed. They submit that the fact that the EU legislature enjoys a broad discretion has, in itself, no bearing on the question of whether the rules at issue create unequal treatment between officials.

33. In my view, that line of argument cannot succeed for the reasons set out below. After a brief reminder of the conditions under which the EU judicature is to carry out a limited review of legality, I shall examine the issue of the judicial review of observance of equality before the law and then the issue, discussed at the hearing, of the impact of possible discrimination on grounds of nationality on the scope of that review.

1. Exercise of limited judicial review

34. According to its settled case-law, the Court has acknowledged that, in the exercise of the powers conferred on it, the EU legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations. [8]

35. While the legislature has been consistently acknowledged as having that discretion in agricultural, social, commercial and environmental matters, it has also been recognised as having such discretion in the context of reforms of the Staff Regulations. The case-law thus makes plain that the legislature enjoys a broad discretion to adapt the Staff Regulations and to alter at any time, even adversely, the rights and obligations of officials, it being borne in mind that the legal link between an official and the administration is based upon the Staff Regulations and not upon a contract. [9]

36. As is emphasised by the Council, it has been held in the case-law that legislation in the field of the civil service involves political, economic and social choices and that when adopting Staff Regulations, the legislature is thus required to carry out complex assessments and evaluations in respect of which it enjoys a broad discretion.

[8] See, inter alia, judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 57), and of 30 January 2019, *Planta Tabak* (C-220/17, EU:C:2019:76, paragraph 44).

[9] See judgments of 16 October 1980, *Hochstrass* v *Court of Justice* (147/79, EU:C:1980:238, paragraph 12); of 22 December 2008, *Centeno Mediavilla and Others* v *Commission* (C-443/07 P, EU:C:2008:767, paragraphs 60 and 91); and of 4 March 2010, *Angé Serrano and Others* v *Parliament* (C-496/08 P, EU:C:2010:116, paragraphs 82, 86 and 93).

37. In addition, in a situation where the EU legislature had been required to carry out complex economic assessments, the Court stated that the intensity of the review of legality had a fortiori to be limited since 'the act concerned [was] of general application'.[10] In this instance, it is not disputed that the actions brought before the General Court were based solely on a plea of illegality in respect of Article 7 of Annex V and Article 8 of Annex VII to the Staff Regulations. The appellants do not allege that the institutions concerned made an error of assessment; they merely claim that the individual negative decisions addressed to each of them, as regards reimbursement of travel expenses and home leave, are unlawful in so far as they are based on rules which are themselves unlawful.

38. In that context, it is, in my view, beyond doubt that the legislature enjoys a broad discretion when adopting Staff Regulations, meaning that the courts have to confine themselves to a limited review of legality. The courts must restrict themselves to considering, on the merits, whether the exercise of that discretion is vitiated by a manifest error or a misuse of powers, or whether the institutions concerned manifestly exceeded the limits of their discretion.[11]

39. I note with interest that the appellants do not dispute that the legislature may exercise its discretion when adopting Staff Regulations, a factor considered by them to have no bearing on the benchmark for legality which should have been observed by the legislature and which it allegedly breached, namely the principle of equal treatment.

2. Review of observance of the principle of equal treatment

40. The principle of equal treatment is one of the general principles of EU law, the fundamental nature of which is laid down in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter'), which Article 6(1) TEU recognises as having the same legal value as the Treaties. As is apparent from Article 51(1) of the Charter, its provisions are addressed, inter alia, to the EU institutions, which are, therefore, required to respect the rights enshrined in it.[12]

41. The Court has clearly stated that, in adopting applicable rules, especially in the sphere of the EU civil service, the EU legislature is obliged to observe the general principle of equal treatment.[13] The principle of equal treatment is therefore one of the higher-ranking legal rules that bind the legislature, including in the exercise of its discretion, observance of which is verified by the Court. However, in that case, it does so by carrying out a limited review of legality.[14] I note, in that regard, that the appellants have not provided any case-law references substantiating their claim that a comprehensive judicial review of observance of the principle of equal treatment must be carried out.

[10] See judgment of 19 November 1998, *United Kingdom* v *Council* (C-150/94, EU:C:1998:547, paragraph 54).

[11] See, inter alia, judgments of 22 November 2001, *Netherlands* v *Council* (C-110/97, EU:C:2001:620, paragraph 62), and of 2 July 2009, *Bavaria and Bavaria Italia* (C-343/07, EU:C:2009:415, paragraph 82).

[12] See judgments of 19 September 2013, *Review Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 39), and of 8 September 2020, *Commission and Council* v *Carreras Sequeros and Others* (C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 110).

[13] See judgments of 22 December 2008, *Centeno Mediavilla and Others* v *Commission* (C-443/07 P, EU:C:2008:767, paragraph 78), and of 4 March 2010, *Angé Serrano and Others* v *Parliament* (C-496/08 P, EU:C:2010:116, paragraphs 99 and 100).

[14] See, inter alia, judgments of 26 March 1987, *Coopérative agricole d'approvisionnement des Avirons* (58/86, EU:C:1987:164, paragraphs 12 to 17); of 8 June 1989, *AGPB* (167/88, EU:C:1989:234, paragraphs 28 to 33); of 21 February 1990, *Wuidart and Others* (267/88 to 285/88, EU:C:1990:79, paragraphs 13 to 18); of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 59); of 12 May 2011, *Luxembourg* v *Parliament and Council* (C-176/09, EU:C:2011:290, paragraph 50); of 8 June 2010, *Vodafone and Others* (C-58/08, EU:C:2010:321, paragraph 52); of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324, paragraph 97); and of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)* (C-611/17, EU:C:2019:332, paragraph 56).

42. It cannot be denied that, owing to the use of relatively heterogeneous wording, an examination of the Court's case-law may, at first sight, yield an image reminiscent of a rather blurred photograph in which outlines appear indistinct. However, it seems to me that, with the benefit of hindsight, a consolidated reading of the Court's decisions may reveal a solid line of case-law. It is thus possible to conclude that a breach of the principle of equal treatment involves two categories of persons, whose factual and legal situations are not essentially different, being treated differently, or different situations being treated in an identical manner, without such treatment being objectively justified.[15] Where the legislature exercises its discretion when adopting Staff Regulations, it is criticised by the courts only where it makes a distinction which is arbitrary or manifestly inappropriate in relation to the objective pursued.[16] Admittedly, that somewhat imperfect wording is not always reproduced *expressis verbis* in the Court's decisions, but the exercise of a limited review of legality seems indisputable to me.

43. In my view, that definition of the intensity of the review, rightly accepted by the General Court, should be upheld for reasons pertaining to any institutional organisation of a democratic State and summed up in one phrase: the separation of powers. It must be borne in mind in that regard that the Treaties set up a system for distributing powers among the different EU institutions, assigning to each institution its own role in the institutional structure of the European Union and the accomplishment of the tasks entrusted to the European Union. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions.[17]

44. It is primarily the responsibility of the legislature to determine the rights and duties of European civil servants when adopting Staff Regulations. The Court's review must be limited in particular if, as in this instance, the legislature has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility.[18]

3. Impact of possible discrimination on grounds of nationality

45. At the hearing, discussions took place concerning the impact of possible discrimination on grounds of nationality on the intensity of the judicial review. Those discussions followed observations made not by the appellants but solely by the Council in its response, according to which if the legislature uses suspect classifications, that is to say, classifications relating to, inter alia, race, sex, ethnic origin, political or religious opinions or age, the courts must exercise a stricter (that is to say, comprehensive) review with a view to ascertaining whether there is discrimination prohibited under EU law.[19]

15 See, to that effect, judgments of 15 April 2010, *Gualtieri* v *Commission* (C-485/08 P, EU:C:2010:188, paragraph 70); of 6 September 2018, *Piessevaux* v *Council* (C-454/17 P, not published, EU:C:2018:680, paragraph 78); and of 22 December 2008, *Centeno Mediavilla and Others* v *Commission* (C-443/07 P, EU:C:2008:767, paragraph 76).

16 See judgments of 7 June 1972, *Sabbatini-Bertoni* v *Parliament* (20/71, EU:C:1972:48, paragraph 13); of 15 January 1981, *Vutera* v *Commission* (1322/79, EU:C:1981:6, paragraph 9); of 14 July 1983, *Ferrario and Others* v *Commission* (152/81, 158/81, 162/81, 166/81, 170/81, 173/81, 175/81, 177/81 to 179/81, 182/81 and 186/81, EU:C:1983:208, paragraph 13); of 17 July 2008, *Campoli* v *Commission* (C-71/07 P, EU:C:2008:424, paragraph 64); of 15 April 2010, *Gualtieri* v *Commission* (C-485/08 P, EU:C:2010:188, paragraph 72); and of 6 September 2018, *Piessevaux* v *Council* (C-454/17 P, not published, EU:C:2018:680, paragraph 69).

17 See judgments of 4 October 1991, *Parliament* v *Council* (C-70/88, EU:C:1991:373, paragraphs 21 and 22), and of 15 November 2011, *Commission* v *Germany* (C-539/09, EU:C:2011:733, paragraph 56). It should be added that making choices, that is to say, distinctions in treatment by means of categorisation, is a distinctive feature of all legislative activity.

18 See judgment of 8 February 2000, *Emesa Sugar* (C-17/98, EU:C:2000:70, paragraph 53).

19 In its submissions, the Council refers to the Opinion of Advocate General Poiares Maduro in *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:292), point 33 of which I find helpful to quote in part: 'In certain spheres, on the other hand, particularly economic and social regulation, and in cases where the legislature does not itself apply such suspect classifications, that is to say where it is only equality before the law which is at issue, the review is less intensive.'

46. It must be borne in mind in that regard that the jurisdiction of the Court of Justice in an appeal is limited to review of the findings of law on the pleas argued before the court of first instance. Consequently, the Court has jurisdiction, in such proceedings, solely to examine whether the argument within the appeal identifies an error of law vitiating the judgment under appeal. [20]

47. However, it must be noted that the appellants only accuse the General Court, in their first ground of appeal, of erring in its assessment of the intensity of its review of observance of the 'principle of equal treatment' enshrined in 'Article 20 of the Charter', and, in their second ground, of breach of that principle. Their request for a comprehensive review is in no way linked to their allegation of discrimination on grounds of nationality, and the transcript of the hearing before the Court shows that the appellants' representatives did not even mention such discrimination. They raised the issue of nationality only during the discussion of whether the categories of officials concerned were comparable and the challenge to the General Court's finding that they were not.

48. In those circumstances, a discussion of the legislature's use, when adopting Staff Regulations, of a suspect distinguishing criterion, in this instance nationality, in the legislation determining the persons to whom the benefits at issue are to be granted does not seem to me warranted when considering the first ground of appeal. Even if such a discussion were necessary, it could not lead to the judgments under appeal being set aside on the basis of that ground.

49. It is common ground that the grant to officials of the benefits at issue is conditional on their being granted entitlement to the expatriation or foreign residence allowance provided for in Article 4 of Annex VII to the Staff Regulations, which refers, in the conditions for its application, to the nationality of officials. It should be noted that the Court has held that the object of the expatriation allowance is to compensate officials for the extra expense and inconvenience of taking up employment with the EU institutions and being thereby obliged to change their residence, and that the paramount consideration in determining entitlement to that allowance is the official's habitual residence before he or she entered the service, while that official's nationality is regarded as being of only secondary importance, since it is significant only in relation to the issue of the length of residence outside the territory in which the place of employment is situated. [21]

50. In addition, the Court dismissed an application for a declaration that Article 21(2)(2) of Council Regulation (Euratom, ECSC, EEC) No 912/78 of 2 May 1978 amending the Staff Regulations of officials of the European Communities and the conditions of employment of other servants of the European Communities [22] adding the current paragraph 2 to Article 4 of Annex VII to the Staff Regulations relating to the grant of a foreign residence allowance was invalid on the ground that Article 21(2)(2) of that regulation referred solely to the criterion of nationality for the grant or refusal of that allowance, and thus infringed the general prohibition of discrimination on grounds of nationality laid down in the former Article 7 of the EEC Treaty. The Court held that, since the foreign residence allowance is intended to compensate for the disadvantages which officials undergo as a result of their status as aliens, the legislature adopting Staff Regulations was entitled, in applying its discretionary judgement to that situation, to rely on

[20] See judgment of 15 November 2012, *Council* v *Bamba* (C-417/11 P, EU:C:2012:718, paragraph 40 and the case-law cited).

[21] See judgments of 20 February 1975, *Airola* v *Commission* (21/74, EU:C:1975:24, paragraphs 6 to 8); of 16 October 1980, *Hochstrass* v *Court of Justice* (147/79, EU:C:1980:238, paragraph 12); and of 15 September 1994, *Magdalena Fernández* v *Commission* (C-452/93 P, EU:C:1994:332, paragraph 21).

[22] OJ 1978 L 119, p. 1.

the single criterion of nationality, which has the merit of being: (i) uniform, applying in an identical manner to all officials irrespective of the place in which they work; (ii) objective in nature and in its universality having regard to the average effect of the inconveniences arising from residence abroad on the personal situation of those concerned; and (iii) directly related to the purpose of the rules, which is to compensate for the difficulties and disadvantages arising from the status of an alien in the host country. [23]

51. It seems to me that the approaches adopted in those cases, in relation to texts that have remained substantially unchanged, are still relevant in that they dispel any notion of a breach of the prohibition of discrimination on grounds of nationality, set out, in particular, in Article 18 TFEU, as regards the reimbursement of annual travel expenses and the grant of home leave.

52. It follows from the foregoing considerations that the first ground of appeal must be rejected.

B. Second ground of appeal

53. The second ground of appeal alleges a breach of the principle of equal treatment. The appellants accuse the General Court of having (i) wrongly found that they were not in a situation comparable to that of officials in receipt of the expatriation or foreign residence allowance and (ii) incorrectly assessed the objective and the proportionality of the rules at issue.

1. Preliminary observations

54. None of the parties dispute that judicial review of observance of equality before the law necessarily involves an initial assessment consisting of what is known as the 'comparability test'. If the categories of persons concerned are regarded by the court as 'comparable', a second assessment must be carried out to ascertain whether or not the difference in treatment of those comparable categories is warranted. If so, there is no breach of equality before the law. The court determines during that second assessment whether there has been an 'arbitrary or manifestly inappropriate distinction'.

55. In the judgments under appeal, the General Court did indeed apply the comparability test and found that the situation of 'expatriates' and 'foreign residents' was not similar or comparable to that of the appellants, a finding which put an end to the judges' deliberation. As has been stated, in so far as the situations concerned are not comparable, a difference in the treatment of those situations is not in breach of equality before the law as enshrined in Article 20 of the Charter. [24] In those circumstances, it is surprising to say the least that the General Court concluded that the system making receipt of the benefits at issue contingent on entitlement to the expatriation or foreign residence allowance is 'neither manifestly unsuitable nor manifestly inappropriate' in the light of its objective.

56. Quite apart from the tautological wording, which departs from the wording used by the General Court at the beginning of its statement of reasons, it must be pointed out that that finding bears no relation to the preceding reasoning, which does not include an assessment of the proportionality of the rules concerned. The reasoning in the judgments under appeal thus appears

[23] See judgment of 16 October 1980, *Hochstrass* v *Court of Justice* (147/79, EU:C:1980:238, paragraphs 12 and 13).

[24] See judgments of 22 December 2008, *Centeno Mediavilla and Others* v *Commission* (C-443/07 P, EU:C:2008:767, paragraph 79); of 22 May 2014, *Glatzel*, C-356/12 (EU:C:2014:350, paragraph 84); and of 6 September 2018, *Piessevaux* v *Council* (C-454/17 P, not published, EU:C:2018:680, paragraphs 78 to 82).

to be marked by some confusion as to how to apply the method for assessing observance of the principle of equal treatment. In my view, it also results in the wrong outcome being reached as regards the comparability test.

2. Comparability of the situations concerned

57. It should be borne in mind that a breach of the principle of equal treatment involves two categories of persons, whose factual and legal situations are not essentially different, being treated differently, or different situations being treated in an identical manner, without such treatment being objectively justified. The comparability of situations must be assessed in the light of the subject matter and purpose of the EU measure which makes the distinction in question and allegedly breaches that principle. The principles and objectives of the field to which the measure in question relates must also be taken into account. [25]

58. In the judgments under appeal, having alluded to the purpose of Article 8 of Annex VII to the Staff Regulations alone, the General Court referred to the objective pursued by the legislature in Regulation No 1023/2013 as set out in recital 24 thereof. The General Court thus made reference to the legislature's desire to modernise and rationalise the rules on travelling time and payment of annual travel expenses and to link them to expatriate, or foreign resident, status in order to make their application simpler and more transparent. The General Court's subsequent demonstration that the situations are not comparable seems to me to be plainly based on consideration of that intention on the part of the legislature.

59. In my view, the General Court's reasoning reveals confusion between, on the one hand, the purpose of the provisions providing for the flat-rate payment of annual travel expenses and home leave in the sole light of which it must be ascertained whether the factual and legal situations of the officials concerned are comparable and, on the other, the objective pursued by the legislature when adopting the Staff Regulations, which may warrant a distinction between situations which were previously treated as comparable. [26] That methodological error led the General Court to reach an incorrect conclusion when assessing comparability.

60. In that regard, the appellants maintain that the officials who receive the benefits at issue are not in a substantially different situation from that of non-recipients whose place of origin, like that of recipients, differs from their place of employment but who also hold the nationality of the State in whose territory that place of employment is situated.

61. It must be pointed out that the purpose of the flat-rate payment of annual travel expenses and days of supplementary leave for travel remained completely unchanged with the entry into force of Regulation No 1023/2013, since the aim was still to enable officials to maintain family, social and cultural links with their place of origin. The change that has been made consists solely in

[25] See, inter alia, judgments of 14 June 1990, *Weiser* (C-37/89, EU:C:1990:254, paragraph 15); of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100, paragraph 29); of 6 September 2018, *Piessevaux* v *Council* (C-454/17 P, not published, EU:C:2018:680, paragraphs 78 and 79), and Opinion 1/17 *(EU-Canada CET Agreement)*, of 30 April 2019 (EU:C:2019:341, paragraph 177).

[26] This confusion is, alas, a frequent occurrence. As has been correctly stated in the legal literature, the purpose of a legal provision which consists in conferring a power on the administration can in no way be used to justify a difference in treatment resulting from the exercise of that power. Therefore, what justifies a difference in treatment is not the purpose of the law, but rather the objective pursued by the legislature, or, to put it another way, the relationship between the end and the means. Equality is contained in the instrumental relationship which the law introduces between the (legitimate) aim pursued by the legislature and the means represented by the difference in treatment. The end is indeed the criterion against which the means are to be assessed, subject to the condition of proportionality, inasmuch as not even the most noble of ends can justify each and every difference in treatment (Olivier Jouanjan 'Le Conseil constitutionnel, gardien de l'égalité?', *Jus Politicum*, No 7).

adding a condition for the grant of the benefits at issue, since, from 1 January 2014, officials whose place of origin is different from the place of employment must also be entitled to the expatriation or foreign residence allowance in order to receive the flat-rate payment of annual travel expenses and days of supplementary leave for travelling time.

62. An official's place of origin is determined when he or she takes up his or her appointment, account being taken in principle of where he or she was recruited or, upon express and duly reasoned request, the centre of his or her interests.[27] That concept of 'centre of … interests' is based on the general principle of civil service law that it must be possible for an official to retain his or her personal links with the place where his or her principal interests are situated, notwithstanding his or her entry into the service and the distance between that place and the place of employment. The centre of interests is defined as the place where the official cumulatively retains his or her main family ties, heritable interests and essential citizen's interests, whether active or passive.[28]

63. The concept of 'place of origin' continues to be used to determine whether certain pecuniary rights are to be granted. Thus, even if he or she is a national of the State in whose territory the place of employment is situated, an official whose place of origin is different from his or her place of employment is to receive reimbursement of the travel expenses of his or her spouse and dependants from the place where he or she is employed to his or her place of origin on termination of service (Article 7(1) of Annex VII to the Staff Regulations). Moreover, in the event of that official's death, the institution concerned is to reimburse the costs involved in transporting the body to his or her place of origin (Article 75 of the Staff Regulations).

64. The flat-rate payment of annual travel expenses from the place of employment to the place of origin and the grant of two and a half days of supplementary leave to travel to their home countries, like the pecuniary rights referred to in the preceding paragraph, reflect the special nature of a category of officials who, by reason of their professional activity, are far from their centres of interest, with which the legislature adopting Staff Regulations wishes to enable them to retain a link.

65. In support of its finding of a lack of comparability, the General Court alludes to the appellants' 'break' with their place of origin and the fact that they cannot claim to have a 'closer' connection with their place of origin than recipients of the expatriation or foreign residence allowance, owing to their greater integration into the society of the State where their place of employment is situated, epitomised by their possession of the nationality of that State. Is a solitary difference in the strength of the link with the State where the place of origin is situated, inferred from the existence of a relationship with another State, capable of establishing an objectively different situation which could be found to be 'not comparable'? It seems to me that that question must be answered in the negative.

66. I must point out that acquisition of the nationality of the State in whose territory the place of employment is situated does not necessarily result in a change to the decision determining the place of origin in the file of the official concerned. The place of origin remains the same throughout the official's career, unless a special decision is adopted by the administration,

[27] Article 7(4) of Annex VII to the Staff Regulations.

[28] See judgment of 2 May 1985, *De Angelis* v *Commission* (144/84, EU:C:1985:171, paragraphs 13 and 14). I note that, although in their appeals and at the hearing, the appellants referred to that judgment and to the general principle of civil service law referred to therein, breach of which was relied on before the General Court in support of the plea of illegality, the second ground of appeal relates solely to breach of the principle of equal treatment.

exceptionally and on production by the official of appropriate supporting evidence.[29] The official's family, social and property-related links with the State where his or her place of origin is situated cannot be considered to have inevitably weakened to the point of gradually disappearing. This is all the more undeniable where the official is also a national of that State, which is the case for 11 of the 24 appellants. It would be paradoxical to say the least, if not inconsistent, to regard an official's possession of the nationality of the State in which his or her place of employment is situated as a clear indication of that person's numerous close ties with the country of his or her nationality without recognising that the same holds true as regards possession of the nationality of the State where the place of origin is situated. I would add that the place of origin of a person having expatriate or foreign resident status is not necessarily the country of which the official concerned is a national, as the Council accepts.

67. In those circumstances, it is my view that the situation of the officials who receive the benefits at issue and the officials who do not – whose place of origin, like that of the first group, is different from their place of employment but who are also nationals of the State in whose territory their place of employment is situated – may be considered comparable in the light of the subject matter and purpose of the provisions of the Staff Regulations introducing those benefits, bearing in mind that the situations concerned are not required to be identical.[30]

68. Nevertheless, although the reasoning of the General Court on that point therefore appears to me erroneous, this does not mean that the judgments under appeal dismissing the actions for annulment should be set aside. It should be noted that, if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement cannot lead to the setting aside of that judgment, and a substitution of grounds must be made.[31] In this instance, the General Court's error regarding the comparability of the situations concerned cannot lead to the setting aside of the judgments under appeal since the distinction made by Article 7 of Annex V and Article 8 of Annex VII to the Staff Regulations is objectively justified.[32]

3. Justification for the difference in treatment

69. It must be recalled that Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of the rights and freedoms recognised by the Charter, as long as those limitations are provided for by law, respect the essence of those rights and freedoms, and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

70. The Court has stated that a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.[33]

[29] Article 7(4) of Annex VII to the Staff Regulations.

[30] See judgment of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraph 42).

[31] See judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 118).

[32] I note that, regardless of its finding that the categories of officials concerned were not comparable, the General Court carried out a separate assessment of the proportionality of the rules at issue. It thus considered that the measures introduced by the legislature adopting the Staff Regulations were not manifestly disproportionate in the light of its objective. The appellants criticise that assessment by the General Court in their second ground of appeal, alleging breach of the principle of equal treatment.

[33] See, inter alia, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 47 and the case-law cited).

71. It thus appears, first, that the limitation must be 'provided for by law'. In other words, the measure in question must have a legal basis, which, in this instance, does not cause any difficulty, since the benefits at issue and the conditions for granting them are provided for in Article 7 of Annex V and Article 8 of Annex VII to the Staff Regulations, read in conjunction with Article 4 of Annex VII to those regulations.

72. As regards, second, the link between the difference in treatment applied and the objectives of general interest pursued by the legislature, it should be noted that, where an EU legislative act is concerned, it is for the EU legislature to demonstrate the existence of objective criteria put forward as justification for a difference in treatment and to provide the Court with the necessary information for it to verify that those criteria do exist. [34] In that regard, the institutions concerned referred to recitals 2, 12 and 24 of Regulation No 1023/2013, recital 24 of that regulation stating that 'the rules on travelling time and annual payment of travel expenses between the place of employment and the place of origin should be modernised, rationalised and linked with expatriate status in order to make their application simpler and more transparent'.

73. The recitals of that regulation show that the specific objective referred to in the preceding paragraph was part of the legislature's broader desire to achieve cost effectiveness in respect of the EU civil service, and to ensure such cost effectiveness, against the acknowledged backdrop of economic crisis that required public expenditure to be controlled while maintaining high-quality recruitment on the broadest possible geographical basis. The Council has stated that the modernisation of the rules governing the payment of annual travel expenses to the place of origin and the grant of home leave took account of the evolution of air transport, a feature of which is regular flights to varied and affordable destinations. In addition to that objective observation, it can also be remarked that easy and free communication over the Internet also enables officials to retain a link with their place of origin.

74. I find it hard not to consider the objectives of ensuring the technically and financially viable management of the civil service thus pursued by the legislature in adopting Regulation No 1023/2013 as legitimate. Owing to their intrinsic complexity and the difficulty in implementing them, those objectives go beyond mere narrow financial considerations of budgetary savings.

75. The Council indicates that, with a view to rationalising the rules on the payment of annual travel expenses and travelling time while ensuring optimal cost effectiveness in respect of the EU civil service, in 2013 the legislature introduced a distinguishing criterion designed to target the measure as closely as possible and to limit it to those whom it considered most in need thereof, namely those with expatriate or foreign resident status, entitlement to which is a condition for the grant of those two benefits. Furthermore, according to the Court's case-law, while it is true that officials may suffer the inconveniences of their expatriation to a greater or lesser extent (and thus in a subjective way), the provisions of Article 4 of Annex VII to the Staff Regulations are based on objective, uniform criteria, [35] which refutes any allegations by the appellants as to the existence of an arbitrary distinction.

[34] See judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 48 and the case-law cited).

[35] See judgments of 20 February 1975, *Airola* v *Commission* (21/74, EU:C:1975:24, paragraph 9); of 16 October 1980, *Hochstrass* v *Court of Justice* (147/79, EU:C:1980:238, paragraphs 12 and 13); and of 15 January 1981, *Vutera* v *Commission* (1322/79, EU:C:1981:6, paragraph 9).

76. Third, as regards the proportionality of the provisions at issue, it seems to me possible to rule out any finding of a manifestly inappropriate distinction. On the contrary, confining the payment of annual travel expenses to the place of origin and home leave solely to officials whose place of origin is different from the place of employment and who are entitled to the expatriation or foreign residence allowance seems to me appropriate for the purpose of contributing towards the achievement of the legislature's objectives of modernisation and rationalisation, which aim to ensure cost effectiveness in respect of the EU civil service while maintaining recruitment on the broadest possible geographical basis and, accordingly, the attractiveness and representativeness of the EU civil service.

77. The benefits at issue are thus intended for officials who are not integrated much, or at all, into the society of the State in which their place of employment is situated because of their status as foreign nationals in the host country and/or the need to change their place of residence when they took up their duties in order to settle in the territory of that State. As the Council rightly stated at the hearing, using the criterion of expatriation or foreign residence to determine which officials are *most* in need of financial support in order to maintain links with their place of origin is completely in line with the aim of the system established by the reformed Staff Regulations. In the exercise of its broad discretion, the legislature chose, among the possible solutions, to restrict the number of recipients of the benefits at issue by excluding the category of officials represented by the appellants, whose ties with the place of origin it considered to be weaker.

78. Furthermore, while Article 7 of Annex V and Article 8 of Annex VII to the Staff Regulations must be read in conjunction with Article 4 of Annex VII to the Staff Regulations concerning the grant of the expatriation or foreign residence allowance, the last of those provisions is worded with sufficient precision and clarity to ensure the simple and transparent application of those provisions of the Staff Regulations, in accordance with the legislature's objective as referred to in recital 24 of Regulation No 1023/2013. The appellants' assertion that the old system was simpler and more transparent does not contradict that finding.

79. In support of their complaint of an arbitrary or inappropriate distinction, the appellants put forward two more examples of situations that are, in their view, significant. The first concerns a possible change in the place of employment of an appellant whose place of origin is in a non-member State, the result of which would be entitlement to the expatriation allowance and, above all, a declaration that travel expenses are to be reimbursed at a higher rate than previously under the new rules for calculating the mileage allowance set out in Article 8(2) of Annex VII to the Staff Regulations. The second envisages the situation of an official whose place of origin is in a non-member State and who is entitled to the expatriation allowance but does not receive the flat-rate reimbursement of annual travel expenses since the distance between the capital of the Member State of which he or she is a national and his or her place of employment is less than 200 km.

80. It is clear that the two scenarios envisaged by the appellants may be regarded as hypothetical or theoretical since they do not correspond in any way to their situation. It must be emphasised that an official is not entitled to act in the interests of the law or of the institutions and may put forward, in support of an action for annulment, only such claims as relate to him or her personally.[36] In support of the plea of illegality of the contested provisions of the Staff Regulations, the appellants allege that there has been a breach of the principle of equal treatment, arguing that they are in a situation comparable to that of the recipients of the benefits

[36] See, to that effect, order of 8 March 2007, *Strack* v *Commission* (C-237/06 P, EU:C:2007:156, paragraph 64).

at issue and that the difference in treatment is not justified. It therefore seems to me that the merits of the plea of illegality must be assessed solely in the light of the situation of the appellants, who are Belgian nationals serving in Brussels but whose place of origin is different from their place of employment, since the Court's review must be carried out in the specific circumstances of the cases concerned. It follows that the Court can, in my view, take account of the appellants' line of argument only in so far as that line of argument is intended to show that the contested provisions of the Staff Regulations are in breach of the principle of equal treatment in relation to them personally.

81. In any event, as regards the first situation referred to by the appellants, it must be observed that, for it to be possible to say that the legislature has acted in breach of the principle of equal treatment, the treatment in question must have entailed disadvantages for some persons as compared with others,[37] which is not the case for the example of an increase in the rate of reimbursement put forward by the appellants. As regards the second situation, it does not concern the principle of whether an official is entitled to the payment of annual travel expenses but the issue of how the mileage allowance is calculated, as no account is taken of distance between 0 and 200 kilometres. No conclusion that a manifestly inappropriate distinction was made between the recipients of that benefit and the appellants can be drawn from those considerations regarding entitlement to that benefit. Moreover, as is emphasised by the Commission, the abovementioned method of calculation does not contradict the legislature's objective of rationalisation and restriction of the payment of annual travel expenses to those who are most in need thereof.

82. The appellants have not submitted any further arguments regarding the proportionality of the rules at issue that would support a finding of an arbitrary or manifestly inappropriate distinction or infringement of the essence of equality before the law set out in Article 20 of the Charter.

83. In the light of the foregoing considerations, it must be held that the General Court incorrectly assessed the comparability of the situations concerned, but that that error cannot lead to the setting aside of the judgments under appeal, given that the difference in treatment complained of is objectively justified.

84. Therefore, the complaints made against that part of the judgments under appeal must be dismissed.

VII. Conclusion

85. In the light of the foregoing considerations, I propose that the Court dismiss the appeals and order the appellants to pay the costs.

[37] See, to that effect, judgment of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 39).