Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

12 December 2018 *

(Civil service – Officials – Remuneration – Family allowances – Third subparagraph of Article 2(2) of Annex VII to the Staff Regulations – Concept of 'dependent child' – Judgment awarding guardianship based on the legislation of a third country on the protection of minors – Refusal to confer the status of dependent child on children in guardianship – Equal treatment – Right to education – Best interests of the child)

In Case T-283/17,

SH, a contractual agent of the European Commission, represented by N. de Montigny, lawyer,

applicant,

v

European Commission, represented initially by M. Mensi, T.S. Bohr and A.-C. Simon, then by T.S. Bohr and G. Berscheid, acting as Agents,

defendant,

supported by

European Parliament, represented by J. Steele and M. Windisch, acting as Agents,

and by

Council of the European Union, represented by M. Bauer and R. Meyer, acting as Agents,

interveners,

APPLICATION under Article 270 TFEU for annulment of the Commission Decision of 13 July 2016 whereby the authority authorised to conclude contracts of employment refused to extend payment of the dependent child allowance to the applicant and also, in so far as necessary, of the Commission Decision of 3 February 2017 rejecting the applicant's complaint of 5 October 2016,

THE GENERAL COURT (Fourth Chamber),

Composed of H. Kanninen, President, L. Calvo-Sotelo Ibáñez-Martín (Rapporteur) and I. Reine, Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 13 April 2018,

* Language of the case: French.

gives the following

Judgment

I. Background to the dispute

1 The applicant, SH, is a contractual agent of the European Commission and is posted to Zimbabwe.

2 By judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi, Burundi) of 30 December 2010 ('the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi)'), two children aged 14 and 12 years respectively, of Burundian nationality, whose forenames are Joe and Claire, were placed under the applicant's guardianship on the basis of Article 300 et seq. of the Burundian Civil Code. At the time of delivery of the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi), the applicant had her habitual residence in Togo.

3 In June 2011, the applicant applied for and obtained the dependent child allowance for Joe and Claire on the basis of the third subparagraph of Article 2(2) and Article 2(3)(a) of Annex VII to the Staff Regulations of Officials of the European Union ('the Staff Regulations'), which are applicable to contractual agents pursuant to Article 21 of the Conditions of employment of other servants of the European Union ('the Conditions of Employment'). Article 2 of Annex VII to the Staff Regulations reads as follows:

'1. An official who has one or more dependent children shall, in accordance with paragraphs 2 and 3 below, receive an allowance of EUR … per month for each dependent child.

2. "Dependent child" means the legitimate, natural or adopted child of an official, or of his spouse, who is actually being maintained by the official.

The same shall apply to a child for whom an application for adoption has been lodged and the adoption procedure started.

Any child whom the official has a responsibility to maintain under a judicial decision based on Member States' legislation on the protection of minors shall be treated as a dependent child.

3. The allowance shall be granted:

(a) automatically for children under 18 years of age;

(b) on application, with supporting evidence, by the official for children between 18 and 26 who are receiving educational or vocational training.

4. Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child by special reasoned decision of the appointing authority, based on supporting documents.

…'

4 On 3 August 2014, Joe was 18 years old.

5 On 6 May 2015 the Head of Unit 'Remuneration and payment of individual financial entitlements' of the Office for 'Administration and payment of individual entitlements' ('the PMO') sent a memorandum to the applicant ('the PMO's memorandum of 6 May 2015'), explaining to her, first,

that she was no longer entitled to a dependent child allowance for Joe, as he had reached the age of 18, and, second, that payment of those allowances was to be terminated with retroactive effect to 31 August 2014. The applicant did not lodge a complaint against that memorandum.

6 Nonetheless, the dependent child allowance paid in respect of Joe for the period 1 September 2014 to 30 April 2015 was eventually not recovered.

7 On 2 May 2016, Claire was 18 years old.

8 On 17 May 2016, the applicant lodged a request with the PMO for an extension of payment of the dependent child allowance in respect of Joe and Claire. That request was based on Article 2(3)(b) of Annex VII to the Staff Regulations. In her request, the applicant claimed that the children were still in her guardianship and produced documents designed to show that they were still in full-time education. She also stated that she had not lodged a complaint against the PMO's memorandum of 6 May 2015 because she had not been informed of her rights.

9 On 13 July 2016, the PMO sent a memorandum to the applicant designed to clarify her rights under the Staff Regulations and refusing to extend payment of the allowances requested for Joe and Claire ('the contested decision'). The PMO emphasised that, under the third subparagraph of Article 2(2) of Annex VII to the Staff Regulations, a dependent child allowance may be awarded for a child placed in the guardianship of a staff member, in particular on the basis of a judicial decision based on legislation on the protection of minors. The PMO found that entitlement to allowances for the two children concerned had ceased after they had reached the age of 18. According to the PMO, entitlement to the allowances was based in the present case exclusively on guardianship, which comes to an end when the child has attained his or her majority. The PMO also explained that entitlement to the allowances could admittedly be awarded for a biological or adopted child, under Article 2(3)(b) of Annex VII to the Staff Regulations, until the child has reached the age of 26 years. However, according to the PMO, that possibility does not apply to a child in guardianship.

10 On 5 October 2016, the applicant lodged a complaint against the contested decision on the basis of Article 90(2) of the Staff Regulations, applicable to contractual agents pursuant to Article 117 of the Conditions of Employment. In support of her complaint, the applicant relied on an error of law made by the PMO and the 'manifest error of assessment of the rules on the application of Article 67 of the Staff Regulations and Article 2(3)(b) of Annex VII to the Staff Regulations'. In addition, the applicant claimed that, according to the Burundian Civil Code, an adult is a person who has reached the age of 21 years. Thus, neither of the two children concerned was considered to be an adult according to the Burundian Civil Code. Both children therefore remained under the applicant's guardianship until they reached the age of 21. The applicant concluded that, under Article 2(3)(b) of Annex VII to the Staff Regulations, she was entitled to the dependent child allowances for both children until they reached the age of 21 and the guardianship came to an end.

11 By decision of 3 February 2017 ('the decision rejecting the complaint'), the Commission authority authorised to conclude contracts of employment ('the AHCC') rejected the applicant's complaint. The AHCC recalled the case-law according to which the provisions giving entitlement to financial contributions must be interpreted strictly, referring in that regard to paragraph 90 of the judgment of 8 April 2008, *Bordini* v *Commission* (F-134/06, EU:F:2008:40). In addition, the AHCC stated that, according to the third subparagraph of Article 2(2) of Annex VII to the Staff Regulations, the children concerned could not be regarded as being in the applicant's guardianship, since under that provision the agent's responsibility to maintain the child concerned must be based on the legislation of a Member State. According to the AHCC, the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) was based on the legislation of a third country. The AHCC concluded that the applicant was not entitled to the dependent child allowances for the two children concerned and that the PMO had demonstrated goodwill by granting her those allowances until Claire and Joe reached the age of 18.

II. Procedure and forms of order sought

12 By application lodged at the Court Registry on 15 May 2017, the applicant brought the present action.

13 On 1 August 2017, the Commission lodged the defence.

14 By documents lodged at the Court Registry on 5 and 10 July 2017 respectively, the Council of the European Union and the European Parliament sought leave to intervene in the proceedings in support of the form of order sought by the Commission.

15 By decisions of 10 August and 13 September 2017, the President of the Fourth Chamber of the General Court granted the Council and the Parliament leave to intervene. The interveners lodged their respective statements in intervention on 20 and 27 October 2017 and the main parties lodged their comments on those statements within the prescribed periods.

16 By letter of 1 September 2017, the Court Registry informed the applicant that the Court had decided, in application of Article 83(1) of the Rules of Procedure of the General Court, that a second exchange of pleadings was unnecessary.

17 By document lodged at the Court Registry on 20 September 2017, the applicant requested leave to lodge a reply, in accordance with Article 83(2) of the Rules of Procedure. In particular, the applicant requested, in essence, leave to reply to the argument set out in paragraph 48 et seq. of the defence.

18 By decision of 29 September 2017, the Court granted the applicant leave to lodge a reply concerning paragraphs 48 to 59 of the defence. The applicant lodged the reply on 13 November 2017. The Commission lodged the rejoinder on 5 January 2018.

19 On a proposal by the Judge-Rapporteur, the Court (Fourth Chamber) decided, on 8 March 2018, to open the oral part of the procedure.

20 The parties presented oral argument and answered the questions put by the Court at the hearing on 13 April 2018.

21 The applicant claims that the Court should:

– declare the third subparagraph of Article 2(2) of Annex VII to the Staff Regulations unlawful;

– annul the contested decision and, so far as necessary, the decision rejecting the complaint;

– order the Commission to pay the costs.

22 The Commission and the Council contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

23 The Parliament submits that the Court should dismiss the action as inadmissible in part and, in any event, as unfounded.

III. Law

A. The admissibility of the action

24 In the rejoinder, the Commission expresses doubts as to whether the applicant complied with the pre-litigation procedure.

25 First, as regards Joe, the Commission maintains that the applicant ought to have lodged a complaint against the PMO's memorandum of 6 May 2015 instead of lodging a complaint against the contested decision. Second, as regards Claire, the Commission emphasises that payment of the allowances was interrupted in June 2016, which is apparent from the applicant's payslip for that month. Thus, the Commission submits that the applicant ought to have lodged a complaint against the June 2016 payslip and not against the contested decision.

26 The applicant contends that the Commission's plea of inadmissibility should be rejected; she maintains that the request for an extension of payment of the dependent child allowances which she submitted to the PMO on 17 May 2016 was a new application for allowances based on Article 2(3)(b) of Annex VII to the Staff Regulations.

27 The Commission's argument amounts, in essence, to asserting that the contested decision was confirmatory of, first, the PMO's memorandum of 6 May 2015 as regards the allowance paid in respect of Joe and, second, the applicant's June 2016 payslip as regards Claire.

28 According to settled case-law, an action for the annulment of a decision which merely confirms a previous decision not contested within the time limit for initiating proceedings is inadmissible (see judgment of 7 February 2001, *Inpesca* v *Commission*, T-186/98, EU:T:2001:42, paragraph 44 and the case-law cited). A measure is regarded as merely confirmatory of a previous decision if it contains no new factor by comparison with the previous measure and was not preceded by a re-examination of the circumstances of the person to whom that measure was addressed (see order of 26 October 2016, *Edeka-Handelsgesellschaft Hessenring* v *Commission*, T-611/15, not published, EU:T:2016:643, paragraph 28 and the case-law cited).

29 In the present case, first, as regards Joe, it should be stated that the PMO's memorandum of 6 May 2015 related to the cancellation of payment of the dependent child allowance for Joe pursuant to Article 2(3)(a) of Annex VII to the Staff Regulations. It must therefore be concluded that the PMO's memorandum of 6 May 2015 became final, as the applicant did not lodge a complaint against it.

30 Nonetheless, it should be emphasised that the contested decision related to the request for an extension of payment of the dependent child allowance concerning Joe and Claire submitted by the applicant to the PMO on 17 May 2016. That request was based not on Article 2(3)(a) of Annex VII to the Staff Regulations but on Article 2(3)(b) of that annex. Thus, the contested decision had a different subject matter from that of the PMO's memorandum of 6 May 2015 and is therefore not confirmatory of that memorandum.

31 Second, as regards Claire, it is sufficient to observe that it is apparent from the applicant's June 2016 payslip that payment of the allowance under Article 2(3)(a) of Annex VII to the Staff Regulations was cancelled. As pointed out in paragraph 30 above, the contested decision related to the request for an extension of payment of the dependent child allowance concerning Joe and Claire submitted to the PMO by the applicant on 17 May 2016 on the basis of Article 2(3)(b) of that annex. The contested decision therefore had a different subject matter from that of the decision reflected in the June 2016 payslip and, consequently, is not confirmatory of the latter.

32 Contrary to the Commission's assertions, it was therefore indeed against the contested decision that the applicant was required to lodge a complaint under Article 90(2) of the Staff Regulations. The applicant did in fact lodge such a complaint on 5 October 2016.

33 Accordingly, it must be concluded that the pre-litigation procedure was complied with in the present case.

34 The present action must therefore be declared admissible.

B. Substance

1. First head of claim: the Court should declare the third subparagraph of Article 2(2) of Annex VII to the Staff Regulations unlawful

35 By her first head of claim, the applicant asks the Court to declare that the third subparagraph of Article 2(2) of Annex VII to the Staff Regulations, as applied by the PMO in the contested decision, is unlawful.

36 In that regard, it must be borne in mind that it is not for the Courts of the European Union to make findings of principle (judgment of 16 December 2004, *De Nicola* v *EIB*, T-120/01 and T-300/01, EU:T:2004:367, paragraph 136). However, in the light of the application as a whole, it may be considered that, by her first head of claim, the applicant is raising, as an additional plea to her action for annulment, a plea of illegality in respect of the third subparagraph of Article 2(2) of Annex VII to the Staff Regulations ('the provision at issue').

2. Second head of claim: the Court should annul the contested decision and, so far as necessary, the decision rejecting the complaint

(a) The subject matter of the second head of claim

37 According to settled case-law, the administrative complaint and its rejection, whether express or implied, constitute an integral part of a complex procedure and are no more than a precondition for bringing the matter before the judicature (judgments of 21 September 2011, *Adjemian and Others* v *Commission*, T-325/09 P, EU:T:2011:506, paragraph 32, and of 15 September 2017, *Skareby* v *EEAS*, T-585/16, EU:T:2017:613, paragraph 18). Consequently, since, under the system laid down in the Staff Regulations, the person concerned must submit a complaint against the decision which he is contesting, the subsequent action is declared admissible, whether it is directed solely against the decision forming the subject matter of the complaint, against the decision rejecting the complaint or both, provided that the complaint and the action were lodged within the periods prescribed by Articles 90 and 91 of the Staff Regulations (judgments of 26 January 1989, *Koutchoumoff* v *Commission*, 224/87, EU:C:1989:38, paragraph 7, and of 5 November 2014, *Commission* v *Thomé*, T-669/13 P, EU:T:2014:929, paragraph 21). However, in accordance with the principle of economy of procedure, the Court may decide that it is not appropriate to rule specifically on the claims directed against the decision rejecting the complaint where it finds that those claims have no independent content and are, in reality, the same as those directed against the decision against which the complaint has been made (judgments of 17 January 1989, *Vainker* v *Parliament*, 293/87, EU:C:1989:8, paragraphs 7 and 8, and of 24 April 2017, *HF* v *Parliament*, T-584/16, EU:T:2017:282, paragraph 72). That may, in particular, be the case where it finds that the decision rejecting the complaint is purely confirmatory of the decision forming the subject matter of the complaint and that, therefore, the annulment of the rejection of the complaint would have no effect on the legal position of the person

concerned distinct from that which follows from the annulment of initial decision (see, to that effect, judgment of 21 September 2011, *Adjemian and Others* v *Commission*, T-325/09 P, EU:T:2011:506, paragraph 33).

38 Nonetheless, it is apparent from the case-law that, having regard to the developing nature of the pre-litigation procedure, the administration may find it necessary to supplement or amend, when rejecting the complaint, the grounds on which the contested measure had been adopted (see, to that effect, judgment of 9 December 2009, *Commission* v *Birkhoff*, T-377/08 P, EU:T:2009:485, paragraphs 55 to 60).

39 Thus, it is open to the administration, in order to respond to that complaint, to provide more explicit grounds during the pre-litigation procedure. Such specific grounds relating to the individual case, communicated before the initiation of the judicial action, are deemed to coincide with the refusal decision and must therefore be regarded as relevant information for the purpose of reviewing the legality of that decision (see, to that effect, judgment of 9 December 2009, *Commission* v *Birkhoff*, T-377/08 P, EU:T:2009:485, paragraphs 59 and 60).

40 In the present case, the decision rejecting the complaint confirms the rejection by the PMO in the contested decision of the extension of payment of the dependent child allowances. Nonetheless, as is apparent from paragraph 11 above, the AHCC, in the decision rejecting the complaint, supplemented the contested decision by adding that, in order to form the basis of entitlement to the dependent child allowance, the responsibility to maintain must arise under a judicial decision based on the legislation of a Member State. On the basis of that new reasoning, the AHCC concluded that the children concerned could not be considered to be dependent on the applicant in that the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) was not based on the legislation of a Member State. However, the AHCC stated that the administration had demonstrated goodwill by granting the applicant dependent child allowances until Joel and Claire reached the age of 18, even though she was not entitled to those allowances.

41 It follows from the foregoing that the decision rejecting the complaint takes account of elements of law which the PMO had not taken into account when it adopted the contested decision.

42 It is therefore, in view of the developing nature of the pre-litigation procedure, the reasoning in the decision rejecting the complaint that must be taken into consideration in the examination of the legality of the contested decision.

(b) The pleas raised in the action

43 In her application, the applicant raises five pleas in law, the first four of which are put forward in support of a plea of illegality directed against the provision at issue. The first plea alleges breach of the prohibition of discrimination on the ground of nationality or birth. The second plea alleges breach of the principle of equality and non-discrimination between officials and other servants. The third plea is inferred from the breach of the right to education and the principle of the child's best interests. The fourth plea alleges infringement of Article 52 of the Charter of Fundamental Rights of the European Union ('the Charter') and breach of the principle of proportionality and legitimacy. The fifth plea alleges an error of law and breach of the principle of sound administration, the duty to have regard for the welfare of officials and other servants and the duty to provide assistance.

44 Furthermore, in the reply, the applicant puts forward a sixth plea, alleging breach of the principles of legal certainty, foreseeability and acquired rights.

(1) First plea: discrimination on the ground of nationality or birth

45 The applicant claims that the provision at issue constitutes a breach of the prohibition of discrimination on the ground of birth or nationality laid down in Article 21 of the Charter and Article 1d of the Staff Regulations, in that it prevents a child who is not a citizen of the European Union and is in the guardianship of a citizen of the Union being recognised as a dependent child for the purposes of the grant of the allowance at issue.

46 The applicant submits that, in application of the rules of private international law, the personal status of a natural person is governed by the law of the country of nationality of that person, irrespective of the competent tribunal. It follows that, as Joe and Claire are of Burundian nationality, Burundian law is applicable to their personal status. It is therefore only on the ground of those children's nationality that the applicant was refused an extension of payment of the dependent child allowances.

47 In her reply, the applicant claims that jurisdiction in family law matters is based on the habitual residence of the child or the parent. Thus, she maintains that, since neither she nor the children concerned had their habitual residence in a Member State at the material time, the courts of the European Union were not competent to deliver a decision concerning the guardianship of those children. The applicant submits that, in the absence of a decision on the guardianship of the children, they would not have been able to leave Burundian territory with the applicant in order to submit an application for guardianship in a Member State. The applicant maintains that it follows that it was in the light of the nationality of the children in question that the Burundian authorities were competent to take the decisions relating to guardianship.

48 Next, the applicant claims that she would not have been able to submit a request for recognition of the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) in a Member State. In that regard, she maintains that, although, under Article 15 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996 ('the 1996 Hague Convention'), on measures for the protection of children, the law of the child's place of residence is to apply, that convention is not relevant in the present case, because Burundi is not a party to that convention and because it is only in so far as the habitual residence of the children is in the territory of a Contracting State that that convention would be applicable. In the present case it was impossible for the applicant to submit a request for recognition of the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) in a Member State because neither she nor the children had their habitual residence in a State of the European Union. At the hearing, the applicant confirmed that, at the time when the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) was delivered, she did not have her habitual residence in Belgium.

49 Furthermore, in her reply, the applicant stated that, in order to be prepared for the possibility that the Court would uphold the decision to exclude the children concerned from the benefit of the allowances at issue, she submitted an application to adopt them in Belgium.

50 Lastly, the applicant claims that, even if she had secured recognition of the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) in a Member State, that judgment would continue to be based on the legislation of a third country and the decision recognising it could not be considered to be a judicial decision based on the legislation of a Member State on the protection of minors.

51 The Parliament, the Council and the Commission contend that the first plea must be rejected.

52 It should be pointed out at the outset that, according to the provision at issue, it is not the nationality of the child concerned that is expressly stated to be a criterion for the grant of the dependent child allowance, but the law on which the judicial decision giving rise to the obligation to maintain the child in respect of whom that allowance is paid is based.

53 The applicant maintains, however, that that criterion has the effect of establishing discrimination based on the nationality of the child concerned. In fact, in her submission, the law on which the judicial decision giving rise to the responsibility to maintain the child is based is the law of the child's nationality.

54 In that regard, first, it should be observed that the 1996 Hague Convention, on which the Commission relies in support of its contention that the law applicable to the guardianship of minors is the law of the country of their habitual residence, is not applicable in the present case. It must be emphasised that, on the one hand, as the applicant states, Burundi is not a party to that convention and, on the other, under Article 2 thereof, that convention is to apply only to children who have not reached the age of 18 years, whereas Joe and Claire are over the age of 18.

55 Second, it must be emphasised that, in the present case, in the absence of an applicable international convention, the question of which national legislation governs the guardianship of Joe and Claire is a question in respect of which it is for the party relying on it to adduce proof. In the present case, the applicant has not even identified the provisions of national law under which the law applicable to the guardianship of the children concerned is, in her contention, the law of their nationality.

56 It follows that the applicant has not shown that the provision at issue had the effect of establishing discrimination on the ground of nationality.

57 The first plea must therefore be rejected as unfounded.

(2) Second plea: breach of the principle of equality and non-discrimination between officials and other servants

58 The applicant maintains that Article 2 of Annex VII to the Staff Regulations gives rise to discrimination between officials and other servants who request recognition of a child as a dependent child according to whether their request is based on (i) either Article 2(4) of Annex VII to the Staff Regulations or the second subparagraph of Article 2(2) of that annex, or (ii) the provision at issue. The provision at issue therefore places in a situation of inequality officials and other servants who, although in the same situation in which they must assume responsibility for a child or a close relative, are subject to different conditions for the grant of such recognition depending on the legislation on which their responsibility is based.

59 First, the applicant emphasises that Article 2(4) of Annex VII to the Staff Regulations, which allows any person whom the official has a legal responsibility to maintain, which involves heavy expenditure on the part of that official, to be treated as a dependent child, does not preclude such treatment if the law on which the legal responsibility to maintain is based is the legislation of a third country.

60 Second, the applicant submits that the second subparagraph of Article 2(2) of Annex VII to the Staff Regulations, which recognises the status of dependent child for a child who has been adopted or for whom the adoption procedure has been started, also does not preclude the recognition of that child as a dependent child if the adoption is based on the legislation of a third country.

61 The Parliament, the Council and the Commission contend that the second plea must be rejected.

62 In that regard, it must be borne in mind that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgments of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 95, and of 12 September 2006, *Eman and Sevinger*, C-300/04, EU:C:2006:545, paragraph 57). The principle of equal treatment or non-discrimination, set out in Article 1d of the Staff Regulations, is a general rule forming part of the

law applicable to the EU civil service (see, to that effect, judgments of 2 December 1982, *Micheli and Others* v *Commission*, 198/81 to 202/81, EU:C:1982:411, paragraphs 5 and 6, and of 15 April 2010, *Gualtieri* v *Commission*, C-485/08 P, EU:C:2010:188, paragraph 70).

63 In the present case, it is appropriate to compare, in the first place, the situation of officials and other servants having responsibility for a child under an adoption decision based on the legislation of a third country, covered by the first subparagraph of Article 2(2) of Annex VII to the Staff Regulations; in the second place, the situation of officials or other servants having legal responsibility based on the legislation of a third country to maintain a person whose maintenance involves heavy expenditure, covered by Article 2(4) of Annex VII to the Staff Regulations; and, in the third place, the situation of officials and servants having a responsibility to maintain resulting from a judicial decision based on the legislation of a third country, which, unlike the preceding situations, is not covered by any of the provisions of Article 2 of Annex VII to the Staff Regulations.

64 In that regard, first, it should be pointed out that the adopted children of an official or of his spouse are considered to be 'dependent children' under the first paragraph of Article 2(2) of Annex VII to the Staff Regulations on condition that they are 'actually being maintained by the official'. Second, children who are not the legitimate, natural or adoptive children of the official or of his spouse but whom the official has 'a responsibility to maintain under a judicial decision based on Member States' legislation on the protection of minors' are considered to be 'dependent children'. Third, and last, exceptionally, and by reasoned decision of the appointing authority of the institution, body or agency of the European Union concerned, any person, including an adult and a member of the official's family, other than his legitimate, natural or adopted children or those of his spouse, may be treated, under Article 2(4) of Annex VII to the Staff Regulations, as a 'dependent child' where the official has a 'legal responsibility to maintain' that person and where the 'maintenance [of that person] involves heavy expenditure' on the part of that official (judgment of 16 January 2018, *SE* v *Council*, T-231/17, not published, EU:T:2018:3, paragraph 38).

65 Thus, the first subparagraph of Article 2(2) of Annex VII to the Staff Regulations does not require that the law on which the adoption decision is based is the law of a Member State. Article 2(4) of Annex VII to the Staff Regulations, too, does not require that the law on which the responsibility to maintain is based is the law of a Member State. Conversely, the provision at issue does require that the law on which the judicial decision giving rise to the responsibility to maintain is based is the law of a Member State. It follows that, in requiring that the law on which the responsibility to maintain referred to in the provision at issue is the law of a Member State, the Staff Regulations gave less favourable treatment to the officials and other servants covered by that provision.

66 In those circumstances, it must be determined whether, as the applicant claims, the officials and other servants referred to in Article 2(4) of Annex VII to the Staff Regulations and in the second subparagraph of Article 2(2) of that annex, on the one hand, and those, such as the applicant, coming under the provision at issue, on the other hand, are in a comparable situation (see judgment of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 57 and the case-law cited).

67 In that regard, it must be pointed out that it has been held that the first subparagraph of Article 2(2) of Annex VII to the Staff Regulations, the provision at issue and Article 2(4) of Annex VII to the Staff Regulations refer, respectively, to three distinct groups of children or persons who may be recognised as 'dependent children' within the meaning of the Staff Regulations (judgment of 16 January 2018, *SE* v *Council*, T-231/17, not published, EU:T:2018:3, paragraph 37).

68 On the one hand, the provision at issue and Article 2(4) of Annex VII to the Staff Regulations are both based on the existence of responsibility to maintain persons who are not related to the official in question. By having recourse, in those provisions, to two distinct concepts of responsibility to maintain, one arising 'under a judicial decision' and the other being a 'legal' responsibility, the EU legislature meant to address two different situations (judgment of 16 January 2018, *SE* v *Council*,

T-231/17, not published, EU:T:2018:3, paragraph 39). The provision at issue requires that the 'responsibility to maintain' arises under a judicial decision based on legislation on the protection of minors. That provision is aimed, in particular, at the institution of guardianship of a minor. Article 2(4) of Annex VII to the Staff Regulations, by contrast, is aimed at a legal responsibility to maintain a parent or relative by marriage and not necessarily a minor. In addition, that provision requires that the maintenance of the person whom the official has that responsibility to maintain involves 'heavy expenditure' on his or her part and that the official produces 'supporting documents' to establish that the expenditure involved in maintaining the person concerned is out of the ordinary (see, to that effect, judgment of 20 January 2009, *Klein* v *Commission*, F-32/08, EU:F:2009:3, paragraph 45).

69 On the other hand, the situation of officials and other servants having a responsibility to maintain resulting from the provision at issue and that of officials and other servants responsible for a child under an adoption decision, referred to in the first subparagraph of Article 2(2) of Annex VII to the Staff Regulations, also cannot be regarded as comparable. There are significant differences between adoption and guardianship. First, it should be emphasised that, unlike adoption, guardianship comes to an end, in principle, when the child reaches the age of majority. Second, it should be observed that guardianship is, in principle, revocable, while adoption, which is a form of affiliation, is intended to be permanent.

70 It follows from the foregoing that the officials and other servants referred to in the first subparagraph of Article 2(2) and Article 2(4) of Annex VII to the Staff Regulations and also in the provision at issue cannot be regarded as being in the same situation; nor, therefore, can the establishment, by the Staff Regulations, of different conditions for the grant of the dependent child allowance constitute a breach of the principle of equal treatment.

71 The second plea must therefore be rejected as unfounded.

(3) Third plea: breach of the right to education and of the principle of the best interests of the child

72 The applicant claims that everyone has the right to education. However, that education comes at a cost, particularly the education of children who are the responsibility of a staff member who, such as the applicant, is posted to an EU delegation in a third country, on whose territory education equivalent to that provided in Europe is expensive. By not permitting the grant of the dependent child allowances to officials and other servants having in their guardianship children who are nationals of a third country, the provision in respect of which the plea of illegality is raised infringes Articles 14 and 24 of the Charter.

73 The Parliament, the Council and the Commission contend that the third plea must be rejected.

74 In that regard, in the first place, it is appropriate to determine whether the exclusion, by the provision at issue, from the concept of dependent child of a child placed in the guardianship of an official or other servant by a judicial decision based on the legislation of a third country must be regarded as an infringement of Article 14 of the Charter. That provision, entitled 'Right to education', provides as follows:

'Everyone has the right to education and to have access to vocational and continuing training.'

75 For the purposes of interpreting that provision, it is necessary to take into consideration the Explanations relating to the Charter (OJ 2007 C 303, p. 17), in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter (judgment of 19 September 2013, *Review Commission* v *Strack*, C-579/12 RX-II, EU:C:2013:570, paragraph 27). It is apparent from the explanations on Article 14 of the Charter that that article is based on the common constitutional

traditions of Member States and Article 2 of the first supplementary protocol to the to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which provides:

'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

76 Contrary to the impression given by the applicant's arguments, it cannot be inferred from the foregoing that the European Union is under a positive obligation, imposed by Article 14 of the Charter, to provide its officials and other servants with the financial means to allow the children for whom they are responsible to follow a particular form of education.

77 Therefore, even on the assumption that the dependent child allowance is intended to cover the education costs incurred by an official or other servant for the child for whom he or she is responsible, it cannot be considered that the right to education enshrined in Article 14 of the Charter requires that the grant of that allowance be extended to a child placed in the guardianship of an official or other servant under a judicial decision based on the legislation of a third country.

78 In the second place, it is appropriate to determine whether the exclusion by the provision at issue from the concept of dependent child of a child placed in the guardianship of an official or other servant under a judicial decision based on the legislation of a third country must be regarded as a breach of the child's best interests enshrined in Article 24(2) of the Charter, which provides:

'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

79 In that regard, it should be observed that it is apparent from the explanations on Article 24 of the Charter that that article is based on the New York Convention on the Rights of the Child signed on 20 November 1989 and ratified by all the Member States, particularly Articles 3, 9, 12 and 13 thereof. It follows from Article 1 of that convention that, 'for the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier'.

80 In the present case, as Joe and Claire are over the age of 18 years, they cannot be regarded as 'children' within the meaning of the 1989 New York Convention referred to in paragraph 79 above and Article 24 of the Charter cannot therefore be applied to them.

81 It follows that the Court cannot consider that the exclusion by the provision at issue of a certain category of children from the concept of dependent child and from payment of the dependent child allowance constitutes an infringement of Article 24 of the Charter.

82 The third plea must therefore be rejected as unfounded.

(4) Fourth plea: infringement of Article 52 of the Charter and breach of the principles of proportionality and legitimacy

83 The applicant claims that the legislature ought to have expressly explained, in the light of the principle of proportionality enshrined in Article 52 of the Charter, the reasons why it excluded the recognition as dependent children of children placed in the guardianship of an official or other servant under a judicial decision based on the legislation of a third country. She submits that, as no explanations are provided in that regard, the provision at issue infringes Article 52 of the Charter.

84 The Council and the Commission contend that the fourth plea should be rejected as unfounded, while the Parliament contends that the plea is inadmissible.

(i) The admissibility of the fourth plea

85 The Parliament submits that the fourth plea is inadmissible, as the basic matters of law on which the plea is based do not, in its view, emerge from the application itself. The Parliament maintains that the applicant does not put forward any legal argument to support her claim that there has been a breach of the principles of proportionality and legitimacy.

86 In that regard, it should be borne in mind that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, applicable to the procedure before the General Court by virtue of the first paragraph of Article 53 of that Statute, and under Article 76(d) of the Rules of Procedure, the application must, in particular, contain the subject matter of the dispute and a brief statement of the grounds on which the application is based. Those matters must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, even without further information. In order to guarantee legal certainty and sound administration of justice, it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly, in the application itself (orders of 28 April 1993, *De Hoe* v *Commission*, T-85/92, EU:T:1993:39, paragraph 20, and of 21 May 1999, *Asia Motor France and Others* v *Commission*, T-154/98, EU:T:1999:109, paragraph 49).

87 In the present case, in the first place, it should be stated that the applicant did not specify in her application what constituted the breach of the principle of legitimacy on which she relies in the title of her fourth plea. That plea must therefore be declared inadmissible in so far as it relates to the alleged breach of that principle.

88 In the second place, as regards the principle of proportionality on which the applicant relies, it must admittedly be stated that her argument is brief. However, it follows sufficiently clearly and coherently from her reasoning that she claims that there has been a breach of the principle of proportionality which, according to Article 52 of the Charter, must be observed in the limitation of the rights recognised by the Charter.

89 The fourth plea must therefore be declared admissible as regards the infringement of Article 52 of the Charter and breach of the principle of proportionality.

(ii) Substance

90 Article 52(1) of the Charter provides:

‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’

91 It follows from the explanations on Article 52 that the purpose of that article is to set the scope of the rights and principles of the Charter and to lay down rules for their interpretation. In particular, Article 52(1) defines the arrangements for the limitations.

92 However, in the present case, it should be observed that, in the context of the present plea, the applicant has not specified which right, or which freedom, recognised by the Charter was limited by the provision at issue.

93 Furthermore, it should be emphasised that, in the context of the first and third pleas raised in support of the plea of illegality against the provision at issue, the Court did not find any limitation by the provision at issue of the rights provided for in the Charter.

94 It follows that the applicant has failed to establish an infringement of Article 52(1) of the Charter.

95 The fourth plea and, consequently, the plea of illegality raised by the applicant must therefore be rejected.

(5) Fifth plea: error of law and breach of the principle of sound administration and of the duty to have regard for the welfare of officials and other servants and the duty to provide assistance

96 The applicant submits that, as the provision at issue is unlawful for the reasons set out in the context of her first to fourth pleas, the AHCC made an error of law and breached the principle of sound administration by adopting the contested decision on the basis of that provision. She emphasises that, until the time when the PMO's memorandum of 6 May 2015 was communicated, the PMO had not informed her that she was not entitled to receive dependent child allowances under the provision at issue. She also observes that payment of those allowances was interrupted suddenly.

97 In her reply, the applicant also claims that there has been a breach of the duty to have regard for the welfare of officials and other servants and of the duty to provide assistance. She maintains that the Commission failed to fulfil those duties by failing to assist and guide the applicant in the steps she took in 2011 or to allow her time to comply, with effect from 2016, with the new requirements of the PMO, according to which she ought to have produced a decision based on the legislation of a Member State. On that point, the applicant states that it was only on reading the Commission's defence that she became aware that the PMO considered that a decision recognising the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) could be regarded as a decision based on the legislation of a Member State and then be accepted by the PMO as the basis for the grant of the dependent child allowances.

98 In the first place, as regards the error of law on which the applicant relies, it should be stated that she merely refers to the grounds of illegality raised in the context of her first four pleas and that, in the context of the present plea, she does not put forward any further argument to support a finding that the provision at issue is unlawful or that the AHCC made an error of law. As her first four pleas have been rejected, there is no need to examine further the error of law relied on in support of the present plea.

99 In the second place, as regards the principle of sound administration, it is sufficient to observe that, contrary to the applicant's contention, the AHCC did not suddenly interrupt payment of the allowances in question. As stated in paragraph 5 above, the PMO had previously informed the applicant, by its memorandum of 6 May 2015, that payment of the allowances was going to be interrupted.

100 In the third place, as regards the breach of the duty to have regard for the welfare of its officials and other servants on which the applicant relies in her reply, the Commission claims that that argument is inadmissible, since she raised it out of time.

101 In that regard, it should be emphasised that, according to settled case-law, the administration's duty to have regard for the welfare of its officials and other servants, which reflects the balance of reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil service, and the principle of sound administration combine to require that when the hierarchical authority takes a decision concerning the situation of an official, it should take

into account not only the interests of the service but also those of the official concerned (judgments of 7 March 2007, *Sequeira Wandschneider* v *Commission*, T-110/04, EU:T:2007:78, paragraphs 184 and 185, and of 13 November 2014, *De Loecker* v *EEAS*, F-78/13, EU:F:2014:246, paragraph 76).

102 In her application, the applicant claimed that there had been a breach of the principle of sound administration in the context of her fifth plea. It must therefore be considered that the applicant's argument alleging breach of the duty to have regard for the welfare of officials and other servants is a development of her fifth plea. That argument must therefore be declared admissible.

103 In that regard, it should be borne in mind that the duty to have regard for the welfare of officials and other servants implies, in particular, that, when it takes a decision concerning the situation of an official, the hierarchical authority is to take into consideration all the matters that are capable of informing its decision and that, in doing so, it takes account not only of the interests of the service but also those of the official concerned (judgment of 1 June 1999, *Rodriguez Perez and Others* v *Commission*, T-114/98 and T-115/98, EU:T:1999:114, paragraph 32).

104 In the present case, it must be stated that the applicant seeks, in essence, to infer from the duty to have regard for the welfare of officials and other servants that the administration was under a positive obligation to assist and guide her at least in the steps taken by her in 2011.

105 In that regard, first, it should be observed that the duty to have regard to the welfare of officials and other servants does not, in principle, impose a wide positive obligation on the administration to assist EU officials or other servants. In particular, a diligent administration which deals with a multitude of requests for dependent child allowances cannot be reasonably expected to take the initiative to assist and guide all those requesting such allowances in the steps which they might have to take in order to obtain such allowances (see, to that effect and by analogy, judgment of 20 July 2016, *Barroso Truta and Others* v *Court of Justice of the European Union*, F-126/15, EU:F:2016:159, paragraph 74).

106 The administration may be required at most to discharge strong obligations under the duty to have regard to the welfare of its officials and other servants when particular circumstances apply, relating in particular to the applicant's situation of extreme vulnerability (see, to that effect, judgment of 28 October 2010, *U* v *Parliament*, F-92/09, EU:F:2010:140, paragraphs 65 to 67, 85 and 88). However, the applicant does not show or even claim that such circumstances apply in the present case.

107 Second, it should also be observed that every normally diligent official is deemed to be familiar with the Staff Regulations and, more particularly, with the rules governing his or her remuneration, including those relating to family allowances. According to the case-law, the normal diligence to be expected of an official or other servant must be assessed by reference to his training, his grade and his professional experience (judgment of 17 May 2017, *Piessevaux* v *Council*, T-519/16, not published, EU:T:2017:343, paragraph 96 and the case-law cited).

108 In the present case, it should be noted that the applicant entered the service of the Commission in 2007 as a contractual agent in function group IV. According to the table in Article 80(2) of the Conditions of Employment, that function group covers tasks corresponding to the following description: 'Administrative, advisory, linguistic and equivalent technical tasks, performed under the supervision of officials or temporary staff'. According to Article 82(2)(c), recruitment as a member of the contract staff is to require at least a level of education which corresponds to completed university studies of at least three years attested by a diploma, or, where justified in the interest of the service, professional training of an equivalent level. The wording of the provision at issue is clear in that it expressly makes payment of a dependent child allowance for a child whom the official has a responsibility to maintain conditional on that responsibility having arisen under a judicial decision based on Member States' legislation, so that it ought to have been obvious to a contractual agent with experience, a level of training and a grade such as the applicant's that a decision based on the legislation of a third country such as the judgment of the Tribunal de résidence Buyenzi (District

Court, Buyenzi), could not serve as the basis of the grant of the dependent child allowance. At the very least, the normal diligence that could be expected of such an agent would have required him or her to seek information in that respect from the administration. Accordingly, the applicant is not justified in claiming that the requirement consisting in producing a decision based on the legislation of a Member State is novel and that the Commission ought thereafter to have given her time to comply with that requirement as from 2016.

109 The applicant's argument alleging breach of the duty to have regard for the welfare of officials and other servants must therefore be rejected as unfounded.

110 As regards the duty to provide assistance, which is placed on the administration by Article 24 of the Staff Regulations, that duty is concerned with the defence of officials by the institution against the acts of third parties and not against the acts of the institution itself, the review of which is governed by other provisions of the Staff Regulations (judgment of 9 September 2016, *De Esteban Alonso* v *Commission*, T-557/15 P, not published, EU:T:2016:456, paragraph 45 and the case-law cited).

111 In the present case, however, the applicant's argument does not refer to the actions of third parties, but to an act or omission of the Commission. The applicant cannot therefore rely on a breach of the duty to provide assistance.

112 The present plea must therefore be rejected as unfounded.

(6) Sixth plea: breach of the principles of acquired rights, legal certainty and foreseeability

113 In her reply, the applicant claims, for the first time in the present procedure, that there has been a breach of the principle of acquired rights and also of the principles of legal certainty and foreseeability.

114 In that regard, she maintains that she was misled by the PMO until the adoption of the decision rejecting the complaint, owing to the fact that in June 2011 the PMO had accepted the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) as a judicial decision granting entitlement to the allowances in question. It was only by means of the decision rejecting the complaint that she became aware that the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) would no longer be recognised as a decision granting entitlement to the allowances. Before February 2017, moreover, she did not know that the PMO would have accepted, as a decision granting entitlement to the dependent child allowances, a decision recognising the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) adopted by a court of a Member State. It was for that reason that she submitted an application to the Belgian authorities to adopt Joe and Claire. By going back, at such a late stage and so suddenly, on its decision to recognise, between 2011 and 2016, that Burundian judicial decisions produced legal effects and by requiring the applicant to seek such a decision recognising the judgment in question, the Commission breached the applicant's acquired rights and also the principles of legal certainty and foreseeability.

115 Furthermore, the applicant maintains that a decision recognising the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) by a court in the European Union would still be based on a foreign law and could not thus be regarded as a judicial decision based on the legislation of a Member State on the protection of minors within the meaning of the provision at issue, since, according to the case-law, the provisions granting entitlement to financial contributions must be interpreted strictly.

116 The Commission contends that the applicant's complaints set out in paragraphs 113 to 115 above are inadmissible, on the grounds that they were raised out of time and that they could have been raised at the stage of the application.

117 In answer to a question put by the Court at the hearing, the applicant submitted that she had raised those complaints for the first time in her reply because she had become aware on reading the defence that the PMO would have accepted a decision recognising the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) adopted by a court of a Member State as granting entitlement to the dependent child allowances for Joe and Claire.

118 In that regard, it should be borne in mind that it follows from Article 84(1) of the Rules of Procedure that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which have come to light in the course of the procedure.

119 In the present case, first, it must be held that, as the applicant acknowledged at the hearing, the AHCC had already informed her in the decision rejecting the complaint that the reason for cancelling the allowances at issue was that the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) was not based on the legislation of a Member State.

120 Thus, it must be stated that it was not when the applicant read the defence for the first time, that she understood the reasons for the cancellation of the dependent child allowances which she received.

121 It follows that, in so far as it relates to the reasons for the cancellation of the dependent child allowances, the applicant's argument alleging breach of the principles of legal certainty, acquired rights and foreseeability is not based on matters of law or of fact which came to light in the course of the procedure before the Court. That argument must therefore be rejected as inadmissible.

122 Second, it should be stated that the applicant's argument relating to recognition of the judgment of the Tribunal de résidence Buyenzi (District Court, Buyenzi) by a court of a Member State relates to conduct on the Commission's part that is unconnected with decision-making and cannot therefore entail the annulment of the contested decision. That argument must therefore be declared ineffective, without there being any need to rule on its admissibility.

123 It follows from all of the foregoing that the action must be dismissed.

IV. Costs

124 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

125 In the present case, the applicant has been unsuccessful and the Commission has applied for costs. The applicant must therefore be ordered, in addition to bearing her own costs, to pay those incurred by the Commission.

126 Under Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Parliament and the Council shall therefore bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders SH to pay the costs;

3. Orders the European Parliament and the Council of the European Union to bear their own costs.

Kanninen Calvo-Sotelo Ibáñez-Martín Reine

Delivered in open court in Luxembourg on 12 December 2018.

[Signatures]