Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 29 July 2019[1]

Case C-460/18 P

HK
v

European Council and Commission

(Appeal — Civil service — Pensions — Survivor's pension — Article 17 of Annex VIII to the Staff Regulations — Conditions for granting — Concept of 'surviving spouse' — Condition in respect of duration of marriage — Non-marital partnerships — De facto union — Equal treatment — Proportionality — Articles 20 and 52 of the Charter of Fundamental Rights of the European Union)

1. By his appeal, the appellant seeks to have set aside the judgment of the General Court of the European Union of 3 May 2018, *HK* v *Commission* (T-574/16, not published, EU:T:2018:252, 'the judgment under appeal'), which dismissed his action for annulment, based on a plea of illegality in respect of Article 17 of Annex VIII to the Staff Regulations of Officials of the European Union ('the Staff Regulations'), of the Commission's decision refusing him, pursuant to that provision, entitlement to a survivor's pension on account of marriage with the deceased official of less than one year and failure to take account of the preceding period of cohabitation.

2. Apart from the classic problem of the grounds of the judgment of the General Court, this case provides the Court with an opportunity to rule for the first time on the compatibility of Article 17 of Annex VIII to the Staff Regulations with the general principle of equal treatment laid down in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter'), with regard, first, to the situation of cohabiting couples and, secondly, couples who have been married for less than a year when the spouse who is an official dies, and those who would reach the required length if the preceding period of cohabitation were taken into account.

3. That question, with its indisputable societal dimension, is clearly of major importance for all members of the European civil service.

1 Original language: French.

I. Legal framework

4. The Staff Regulations are annexed to 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.[2] That regulation has been amended several times, in particular in 2004 by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities.[3]

5. Under Article 1d of the Staff Regulations, in the version applicable to the dispute:

'1. In the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.

For the purposes of these Staff Regulations, non-marital partnerships shall be treated as marriage provided that all the conditions listed in Article 1(2)(c) of Annex VII are fulfilled.

…

5. Where persons covered by these Staff Regulations, who consider themselves wronged because the principle of equal treatment as set out above has not been applied to them, establish facts from which it may be presumed that there has been direct or indirect discrimination, the onus shall be on the institution to prove that there has been no breach of the principle of equal treatment. This provision shall not apply in disciplinary proceedings.

6. While respecting the principle of non-discrimination and the principle of proportionality, any limitation of their application must be justified on objective and reasonable grounds and must be aimed at legitimate objectives in the general interest in the framework of staff policy. Such objectives may in particular justify stipulating a mandatory retirement age and a minimum age for drawing a retirement pension.'

6. The first paragraph of Article 79 of the Staff Regulations states that:

'The surviving spouse of an official or of a former official shall be entitled in the manner provided in chapter 4 of Annex VIII to a survivor's pension equal to 60% of the retirement or disability pension which was paid to the deceased, or which, irrespective of length of service or of age, would have been payable to him if he had qualified for it at the time of his death.'

7. Article 1(1) and (2) of Annex VII to the Staff Regulations provides:

'1. The household allowance shall be set at a basic amount of EUR 170.52 plus 2% of an official's basic salary.

2. The household allowance shall, be granted to:

(a) a married official;

2 OJ 1962 45, p. 1385.

3 OJ 2004 L 124, p. 1.

(b) an official who is widowed, divorced, legally separated or unmarried and has one or more dependent children within the meaning of Article 2(2) and (3) below;

(c) an official who is registered as a stable non-marital partner, provided that:

(i) the couple produces a legal document recognised as such by a Member State, or any competent authority of a Member State, acknowledging their status as non-marital partners,

(ii) neither partner is in a marital relationship or in another non-marital partnership,

(iii) the partners are not related in any of the following ways: parent, child, grandparent, grandchild, brother, sister, aunt, uncle, nephew, niece, son-in-law, daughter-in-law,

(iv) the couple has no access to legal marriage in a Member State; a couple shall be considered to have access to legal marriage for the purposes of this point only where the members of the couple meet all the conditions laid down by the legislation of a Member State permitting marriage of such a couple;

(d) by special reasoned decision of the appointing authority [AA] based on supporting documents, an official who, while not fulfilling the conditions laid down in (a), (b) and (c), nevertheless actually assumes family responsibilities.'

8. With regard to the survivor's pension for the surviving spouse, Article 17 of Annex VIII to the Staff Regulations provides:

'Where an official dies having one of the administrative statuses set out in Article 35 of the Staff Regulations the surviving spouse shall be entitled, provided that the couple were married for at least one year at the time of his death and subject to the provisions of Article 1(1) and Article 22 [of Annex VIII to the Staff Regulations], to a survivor's pension equal to 60% of the retirement pension which the official would have been paid if he had qualified, irrespective of length of service or of age, for such pension at the time of death.

The duration of the marriage shall not be taken into account if there are one or more children of the marriage or of a previous marriage of the official provided that the surviving spouse maintains or has maintained those children, or if the official's death resulted either from physical disability or sickness contracted in the performance of his duties or from accident.'

II. Background to the dispute

9. HK, the appellant, and Ms N. began their life together in 1994, in Liège (Belgium).

10. Ms N. was an official of the European Commission assigned to the Joint Research Centre (JRC) in Seville (Spain) from 16 May 2005.

11. Since the appellant was prevented by type 2 diabetes from working or engaging in training, Ms N. supported the couple financially.

12. The appellant and Ms N. were married in Liège on 9 May 2014.

13. Ms N. died on 11 April 2015.

14. The appellant was informed verbally by the Commission on 14 April 2015 that he was not entitled to a survivor's pension ('the contested decision').

15. On 15 June 2015 he lodged a prior administrative complaint against the contested decision.

16. By decision of 15 September 2015, the Commission rejected that complaint on the ground that the couple had not been married for long enough — that is, for less than one year — and the preceding period of cohabitation could not be taken into account in order to reach the requisite length of time.

III. Proceedings before the General Court and the judgment under appeal

17. By application lodged at the Registry of the European Union Civil Service Tribunal on 18 February 2016, the appellant brought an action for annulment of the contested decision and compensation for the non-material damage suffered.

18. Pursuant to Article 3 of Regulation (EU, Euratom) 2016/1192,[4] that case was transferred to the General Court in the state in which it was found as at 31 August 2016.

19. The appellant based his claim for the annulment of the contested decision on the alleged illegality of Article 17 of Annex VIII to the Staff Regulations, supported by two complaints relating to, first, the 'arbitrary and inappropriate' nature of the criterion for eligibility to the survivor's pension and, secondly, discrimination on the basis of a breach of Article 21 of the Charter and Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[5]

20. The General Court dismissed the action in its entirety and ordered HK to bear his own costs and to pay those incurred by the Commission.

IV. Forms of order sought and the procedure before the Court of Justice

21. On 12 July 2018 the appellant lodged an appeal against the judgment of the General Court and claims that the Court of Justice should:

– declare the appeal admissible and well founded;

– set aside the judgment under appeal;

– dispose of the case itself by upholding the claims he made at first instance, including the claim that the defendant be ordered to pay the costs; or in the alternative

– refer the case back to the General Court for a ruling and, make an order as to the costs of the appeal in accordance with Article 184 of the Rules of Procedure of the Court of Justice.

22. The Commission contends that the Court should dismiss the appeal and order the appellant to pay all costs.

23. The Council of the European Union, intervening in support of the Commission at first instance, requested a hearing pursuant to Article 76(3) of the Rules of Procedure of the Court of Justice; that request was granted.

24. The parties presented oral argument to the Court at the hearing which took place on 8 May 2019.

4 Regulation of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137).

5 OJ 2000 L 303, p. 16.

V. Legal assessment

25. In this analysis, it seemed necessary to me, first of all, to examine the appellant's criticism of the General Court's compliance with its obligation to state reasons, which is to my mind well founded and leads me to propose that the Court set aside the judgment under appeal on that ground. In the light of that approach and the fact that the conditions for the Court of Justice to dispose of the case itself are fulfilled, this has been followed by an assessment of the admissibility and substance of the action brought by the appellant before the General Court, at the end of which it is proposed that the Commission's decision refusing to grant the appellant a survivor's pension be annulled.

A. The appeal

26. The appellant puts forward two grounds of appeal in support of his appeal, alleging, first, both an infringement of the first paragraph of Article 17 of Annex VIII to the Staff Regulations and ambiguous, inconsistent and contradictory reasoning in the judgment under appeal and, secondly, infringement of the principle of non-discrimination and an inadequate statement of reasons in the judgment under appeal.

27. It appears that the appellant's two grounds of appeal confuse criticism of the General Court in respect of, first, its duty to state the reasons on which a judgment is based and, secondly, the soundness of the reasoning in the judgment under appeal, which are two distinct questions that warrant separate examination.

28. In respect of the duty to state reasons, it should be noted that, according to settled case-law, the statement of the reasons on which the judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review. [6]

29. The question whether the grounds of a judgment of the General Court are contradictory or inadequate is a question of law which is amenable, as such, to review on appeal. [7] Furthermore, infringement of the duty to state the reasons on which judgments of the General Court are based is a matter of public policy which must be raised by the EU judicature. [8]

30. To assess the reasons on which the judgment under appeal is based, we must first of all consider the subject matter of the proceedings before the General Court, namely a principal claim for annulment of the contested decision based on the alleged illegality of Article 17 of Annex VIII to the Staff Regulations supported by two complaints alleging, first, the 'arbitrary and inappropriate' nature of the eligibility criterion for a survivor's pension and, secondly, discrimination on the basis of a breach of Article 21 of the Charter and Article 2 of Directive 2000/78.

6 See, inter alia, judgments of 11 June 2015, *EMA* v *Commission* (C-100/14 P, not published, EU:C:2015:382, paragraph 67 and the case-law cited), and of 26 May 2016, *Rose Vision* v *Commission* (C-224/15 P, EU:C:2016:358, paragraph 24).

7 See, inter alia, judgments of 8 February 2007, *Groupe Danone* v *Commission* (C-3/06 P, EU:C:2007:88, paragraph 45), and of 19 December 2012, *Planet* v *Commission* (C-314/11 P, EU:C:2012:823, paragraph 63).

8 See judgment of 11 April 2013, *Mindo* v *Commission* (C-652/11 P, EU:C:2013:229, paragraph 30).

31. Those two formally separate complaints are in reality one and the same allegation of infringement of the principle of equal treatment[9] now laid down in Article 20 of the Charter, which 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.[10]

32. A distinction between two categories of persons who are placed in comparable situations may be objectively justified by any legitimate objective, provided that the measure in question is appropriate and necessary for the attainment of that objective; this is precisely what the appellant disputes in contending that the condition that the surviving spouse must have been married to the official for at least one year at the time of the official's death to be eligible for the survivor's pension is 'arbitrary and inappropriate'.

33. However, in the judgment under appeal, the General Court merely examined the two complaints in turn without carrying out any classification whatsoever, which, in my view, was the cause of a statement of reasons that did not clearly disclose its thinking.

34. In that regard, the appellant submits that the reasoning in the judgment under appeal is 'ambiguous, inconsistent and contradictory'. He states, in particular, that the General Court interprets the term 'spouse' as relating exclusively to marital status in some paragraphs of the judgment but places the concepts of 'spouse' and 'non-marital partnership' on the same footing in others.

35. It should be noted that in its assessment of the appellant's first complaint, the General Court interpreted the concept of 'surviving spouse' in finding, in paragraph 23 of the judgment under appeal, that the provisions of the first paragraph of Article 17 of Annex VIII to the Staff Regulations were clear and precise and unambiguously conveyed the conditions that must be fulfilled in order to receive a survivor's pension, namely 'to have been married for at least one year to the deceased official'.

36. The General Court thus equates the concept of 'spouse' exclusively with 'marital status' and does so again in paragraphs 25 and 30[11] through its reference to the ordinary meaning of that concept and in paragraphs 27 to 29 in respect of the universality of the concept of marriage as a form of legal union recognised in all Member States that creates particular legal duties, in contrast with non-marital partnerships or cohabitation.

37. It is, therefore, surprising at the least to read in paragraph 32 of the judgment under appeal — which is, moreover, a concluding paragraph — that, by restricting the grant of that pension to legally married persons 'and to registered partners who do not have access to marriage', the EU legislature did not act arbitrarily.

38. It is clear from that paragraph that entitlement to the survivor's pension is therefore not reserved to a surviving spouse understood exclusively in the marital sense, contrary to what has been stated thus far, but the General Court provides no explanation that would allow a reader to understand that indication that a non-marital partnership may confer entitlement to a survivor's pension under certain conditions.

9 The complaint concerning the 'arbitrary and inappropriate' nature partly reproduces paragraph 72 of the judgment of 15 April 2010 in *Gualtieri* v *Commission* (C-485/08 P, EU:C:2010:188), referred to in paragraph 19 of the application, which relates to the Court's consideration of a plea alleging non-compliance with the principle of equal treatment. The Council (paragraph 6 of the statement in intervention) and the Commission (paragraph 2 of the observations on the Council's statement in intervention) agree with this analysis of the appellant's arguments.

10 See, inter alia, judgments of 5 June 2008, *Wood* (C-164/07, EU:C:2008:321, paragraph 13), and of 19 November 2009, *Sturgeon and Others* (C-402/07 and C-432/07, EU:C:2009:716, paragraph 48).

11 In paragraph 31 of the judgment under appeal, the General Court expressly states that the concept of 'spouse' 'exclusively' refers to a relationship based on legal marriage in the traditional sense of the term.

39. In paragraph 28 of the judgment under appeal, the General Court does state, albeit enigmatically, that 'marriage [was] not in principle comparable to cohabitation or other de facto situations', its use of the term 'in principle' suggesting that the situation may be otherwise by way of exception, but no further explanation is offered.

40. In its assessment of the appellant's second complaint alleging infringement of the principle of non-discrimination, in paragraphs 48, 51 and 53 of the judgment under appeal the General Court again links the surviving spouse exclusively with marital status, carrying out a test comparing the situation of a deceased official in an informal union and that of the same official 'who was married'.

41. However, in paragraph 47 of the judgment under appeal, the General Court states that the condition for the grant of a survivor's pension is determined by the legal nature of the ties which bound the deceased official 'to the spouse or surviving partner', but fails once more to explain the reference to partnership and the exact scope of that concept, which may cover the situation of a legal partnership with an officially registered non-marital partnership, referred to in paragraph 32 of the judgment under appeal, or a de facto union, such as the appellant's cohabitation with the deceased official before their marriage.

42. The Commission submits that paragraph 47 must be interpreted in the light of the use of the conjunction 'or', which implies a separate assessment of each situation mentioned, with only the first, where a marriage exists, conferring entitlement to a survivor's pension.

43. That interpretation is, however, contradicted by paragraph 32 of the judgment under appeal discussed above.

44. In these circumstances, it seems to me that the statement of reasons in the judgment under appeal does not disclose clearly and comprehensibly the General Court's reasoning in respect of the beneficiaries of the survivor's pension, a situation originating, to my mind, in an incomplete analysis of the provisions of the Staff Regulations regarding the grant of that pension.

45. The General Court merely cites Article 17 of Annex VIII to the Staff Regulations, omitting to mention the other relevant provisions of the Staff Regulations, namely Article 79 thereof, but also, and above all, the second subparagraph of Article 1d(1) of the Staff Regulations and Article 1(2) of Annex VII to the Staff Regulations.

46. The second subparagraph of Article 1d(1) of the Staff Regulations extends the privileges and rights granted to married officials by the Staff Regulations to all non-marital partners but, through the reference to Article 1(2)(c) of Annex VII to the Staff Regulations, only to those whose marital partnership is officially registered and who do not have access to marriage. [12]

47. Article 1(2)(c) of Annex VII to the Staff Regulations, read in conjunction with Article 17 of Annex VIII thereto, therefore extends entitlement to a survivor's pension to couples who are in an officially registered partnership and who do not have access to marriage in a number of Member States, the situation envisaged being that of same-sex couples.

48. It is thus apparent that the term 'surviving spouse' cannot be equated exclusively with marital status.

12 Article 1(2)(c) of Annex VII to the Staff Regulations also provides that neither partner must be married or in another non-marital partnership and that the partners must not be related in certain ways.

49. That combined reading of the relevant provisions of the Staff Regulations may explain the wording of paragraph 32 of the judgment under appeal, according to which the survivor's pension is to be granted only to legally married persons 'and to registered partners who do not have access to marriage', but the judgment does not say so.

50. However, the question of the personal scope of the first paragraph of Article 17 of Annex VIII to the Staff Regulations is closely linked to the question of the comparable nature of the situations weighed up for the purposes of examining the compatibility of that article with the general principle of non-discrimination.

51. Here, the General Court ascertains whether the situation of a deceased official who was in a stable, long-term informal union and who financially supported his or her partner with his or her income, is comparable to that of a deceased official who was married, with no mention of registered partners who do not have access to marriage [13] although they are mentioned in paragraph 32 of the judgment, even though the appellant compares, in particular, legally recognised unions and de facto unions in support of his allegation of a breach of the principle of non-discrimination.

52. That single classification and comparison of situations also makes it difficult to understand the General Court's reasoning in respect of the complaint relating to the 'arbitrary and inappropriate' nature of the condition of a minimum duration of one year's marriage, bearing in mind that the appellant was in fact married to the deceased official and was refused a survivor's pension on account of having been married for less than one year and a refusal to take into account the preceding period of cohabitation.

53. The General Court merely remarks, in paragraph 35 of the judgment under appeal, that the condition requiring a minimum duration of one year's marriage for 'achieving the objective of combating fraud is not inappropriate', [14] which shows that account must have been had to a legitimate objective for distinguishing between comparable situations and a review of proportionality carried out, but it is not possible to understand how the General Court came to that finding solely on the basis of the weighing up of situations which led it to assert that these were not comparable.

54. Paragraphs 35 and 36 of the judgment under appeal still further disclose the General Court's equivocal reasoning; in paragraph 35 it finds that the condition of a one-year duration is appropriate for the purposes of 'the objective of combating fraud' before concluding in paragraph 36 that the double criterion of a legal marriage of over one year in length is 'hence' neither arbitrary nor inappropriate in view of 'the objective pursued by the survivor's pension'.

55. The General Court thus refers to two distinct concepts, namely the legitimate objective justifying the distinction between comparable situations and the objective of the survivor's pension, in respect of which it must be ascertained whether the factual and legal situation of the persons concerned is comparable, but it does not explain the causal link between the two paragraphs, resulting in confusion between those two concepts.

13 That observation is made irrespective of the potential result of the comparability test after the second category of persons is included.

14 Apart from the fact that the complaint relating to the 'arbitrary and inappropriate' nature of the condition of a minimum duration of one year's marriage is inherently explicit, contrary to what the General Court states in paragraph 34 of the judgment under appeal, the appellant presents a line of argument criticising the objective pursued by the distinction in treatment in paragraphs 14 to 16 of his observations on the Council's statement in intervention.

56. Should the Court of Justice concur with this analysis, it would have to be held that the General Court had breached its duty to state reasons, since the equivocal reasons provided in the judgment under appeal do not allow the appellant to understand the General Court's reasoning in respect of the alleged breach of the principle of equal treatment on which the plea of illegality of Article 17 of Annex VIII to the Staff Regulations rests and therefore the reasons behind the dismissal of his action, nor the Court of Justice to exercise its power of review on that point.

57. Moreover, for the sake of completeness, I would point out that, in its defence, the Commission contends that the claims for annulment are inadmissible given the lack of correspondence between the complaint and the application, since the complaint does not contain a plea of illegality in respect of Article 17 of Annex VIII to the Staff Regulations.

58. However, it must be observed that that argument remains unanswered in the judgment under appeal, which does not even mention it.

59. It should be borne in mind that, in the context of an appeal, the purpose of review by the Court of Justice is, primarily, to determine whether the General Court responded to the requisite legal standard to all the arguments put forward by the appellant.[15]

60. The Court of Justice has also held that the ground of appeal that the General Court failed to rule on a plea relied on at first instance amounted essentially to relying on a breach of the obligation to state reasons which derives from Article 36 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 of that statute, and from Article 81 of the Rules of Procedure of the General Court,[16] since the ground alleging infringement of such an obligation is a matter of public policy which must be raised by the EU judicature, as has been stated above.

61. The judgment under appeal thus contains a manifest failure to state reasons as regards the complaint that the action is inadmissible.

62. Consequently, in the light of those two breaches of the General Court's obligation to state reasons and without it being necessary to examine the substantive pleas put forward by the appellant in support of his appeal, the judgment under appeal should, in my view, be set aside.

63. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, after quashing the decision of the General Court, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

64. Here, it seems to me that the Court of Justice is in a position to rule on the plea of illegality in respect of Article 17 of Annex VIII to the Staff Regulations raised by the appellant during the proceedings at first instance, in so far as, first, the account of the facts necessary for the decision appears to be complete and sufficient and is not the subject of any dispute between the parties, and, secondly, that there has been an exchange of arguments on the issues involved in the case before the General Court and the Court of Justice. Furthermore, the appellant's interest in obtaining a final decision rapidly must be taken into account, bearing in mind that his application for a survivor's pension dates back to the month of April 2015.

15 See, to that effect, judgments of 17 December 1998, *Baustahlgewebe* v *Commission* (C-185/95 P, EU:C:1998:608, paragraph 128); of 29 April 2004, *British Sugar* v *Commission* (C-359/01 P, EU:C:2004:255, paragraph 47); and of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 244).

16 See judgment of 20 May 2010, *Gogos* v *Commission* (C-583/08 P, EU:C:2010:287, paragraph 29), and order of 31 March 2011, EMC Development v Commission (C-367/10 P, not published, EU:C:2011:203, paragraph 46).

B. The action before the General Court

65. In disposing of the case at first instance, the Court must rule on the dispute as it was presented before the General Court and there is therefore no longer any need to adjudicate on the grounds of the appeal or on the inadmissibility of the first of those grounds raised by the Council at the hearing.

66. At first instance, the appellant sought the annulment of the contested decision and, 'in so far as necessary', annulment of the decision rejecting the complaint. It should be noted in that regard that, according to settled case-law, claims for annulment formally directed against a decision rejecting a complaint, where that decision has no independent content, have the effect of bringing before the General Court the act against which the complaint was submitted.[17] Since the decision rejecting the complaint lacks any independent content, the action must be regarded as being directed against the contested decision.

1. Admissibility

67. In its defence, the Commission contends that the claims for annulment are inadmissible owing to a lack of correspondence between the complaint and the application, since the complaint does not contain a plea of illegality in respect of Article 17 of Annex VIII to the Staff Regulations.

68. In that regard, it should be remembered that the rule of correspondence between a complaint under Article 91(2) of the Staff Regulations and the subsequent action requires that, for a plea before the Courts of the European Union to be admissible, it must have already been raised in the pre-litigation procedure, enabling the AA to know the criticisms made by the person concerned in respect of the contested decision.[18]

69. It follows that, in actions brought by officials, claims before the Courts of the European Union may contain only heads of claim based on the same matters as those raised in the complaint, although those heads of claim may be developed before the Courts of the European Union by the presentation of pleas in law and arguments which, while not necessarily appearing in the complaint, are closely linked to it.[19]

70. It has been noted that, first, since the pre-litigation procedure is an informal procedure and those involved at that stage are generally acting without the assistance of a lawyer, the administration must not interpret complaints restrictively but should, on the contrary, examine them with an open mind and, secondly, it is not the purpose of Article 91 of the Staff Regulations to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claims submitted at that stage change neither the legal basis nor the subject matter of the complaint.[20]

71. Here, it is common ground that the complaint was drawn up by the appellant on his own and there is no mention of a plea of illegality in respect of Article 17 of Annex VIII to the Staff Regulations since it was drafted following a straightforward verbal communication of the refusal to grant the survivor's pension on the grounds of the insufficient duration of the marriage. In his complaint, the appellant disputed the Commission's position, emphasising that he had lived together with the deceased official as a cohabiting couple for more than 20 years. In those circumstances, the plea that the abovementioned article is illegal on the ground of infringement of the principle of equal treatment must be regarded as being sufficiently closely linked to the complaint.

17 See judgment of 17 January 1989, *Vainker* v *Parliament* (293/87, EU:C:1989:8, paragraph 8).

18 See judgments of 25 October 2013, *Commission* v *Moschonaki* (T-476/11 P, EU:T:2013:557, paragraph 71), and of 4 July 2014, *Kimman* v *Commission* (T-644/11 P, EU:T:2014:613, paragraph 43).

19 See judgment of 4 July 2014, *Kimman* v *Commission* (T-644/11 P, EU:T:2014:613, paragraph 45 and the case-law cited).

20 See judgment of 25 October 2013, *Commission* v *Moschonaki* (T-476/11 P, EU:T:2013:557, paragraph 76 and the case-law cited).

72. In any event, it has been held that a plea of illegality raised for the first time at the stage of a legal action is admissible by way of derogation from the rule of correspondence.[21]

2. Application for annulment of the Commission's decision refusing to grant the survivor's pension

73. It is common ground that the action brought before the General Court rests solely on a plea of illegality in respect of Article 17 of Annex VIII to the Staff Regulations, the admissibility of which is not in doubt since the contested decision is based essentially on that provision.

74. As stated above, Article 17 of Annex VIII to the Staff Regulations is one of the provisions of the Staff Regulations which lay out the legal rules governing the survivor's pension.

75. Article 79 of the Staff Regulations provides that the surviving spouse of the official is entitled to receive such a pension and the amount thereof subject to the conditions laid down in Chapter 4 of Annex VIII to the Staff Regulations, which includes Article 17, under which the surviving spouse must have been married to the deceased official for at least a year.

76. Moreover, subparagraph 2 of Article 1d(1) of the Staff Regulations specifies that non-marital partnerships are to be treated as marriage provided that all the conditions listed in Article 1(2) of Annex VII are fulfilled, two conditions of which specify an officially registered partnership and a lack of access to legal marriage for the couple concerned.

77. When applying those provisions in assessing the appellant's application for a survivor's pension, the Commission considered that although the appellant did have the status of surviving spouse in view of his marriage to the deceased official, the condition relating to the length of that marriage was not satisfied. Furthermore, the fact of living together as a cohabiting couple for more than 20 years could not be taken into account since the condition for a non-marital partnership to be treated as marriage laid down in Article 1(2)(c)(iv) of Annex VII to the Staff Regulations relating to the absence of access to legal marriage in a Member State was not met.

78. It is important to point out, in respect of the scope of the review by the Court of Justice, that the appellant is not complaining that the Commission committed an error of assessment in this case. He is merely claiming that the Commission's individual negative decision is illegal since it was taken on the basis of a provision that is itself illegal.

79. Under the guise of two formally separate complaints, the appellant claims, in essence, that Article 17 of Annex VIII to the Staff Regulations is illegal because it breaches the principle of equal treatment or non-discrimination, the application referring, in that regard, to Article 21 of the Charter and Article 2 of Directive 2000/78.

80. Article 21(1) of the Charter provides:

'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

81. The appellant has not specified which ground of discrimination is in question here but it may be inferred from his pleadings that the ground is constituted by the legal nature of the link between the members of a couple, a concept which is not mentioned in the abovementioned list, which, it is true, is not exhaustive, as the use of 'such as' confirms.

21 Judgment of 27 October 2016, *ECB* v *Cerafogli* (T-787/14 P, EU:T:2016:633).

82. In any event, it is clear from the arguments set out in the application, and from the observations on the Council's statement in intervention, that the appellant is clearly calling into question the compatibility of Article 17 of Annex VIII to the Staff Regulations with the general principle of equal treatment. The Commission and the Council likewise set their defence in the more general context of equal treatment.

83. Compliance with 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, which Article 6(1) TEU recognises as having the same legal value as the Treaties. According to Article 51(1) of the Charter, its provisions are addressed, inter alia, to EU institutions, which are, therefore, required to comply with the rights enshrined in it. [22]

84. Here, the appellant claims that there has been a breach of the principle of equal treatment, laid down in Article 20 of the Charter, in two respects.

(a) The difference in treatment of cohabiting partners

85. It should be noted at the outset that the comparability of situations must be assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. [23]

86. The subject matter and purpose of the survivor's pension provided for in the first paragraph of Article 17 of Annex VIII to the Staff Regulations is to grant the surviving spouse a replacement income to offset partly the loss of the income of the deceased spouse. [24]

87. The appellant submits that a cohabiting couple in a stable and long-standing relationship where one partner financially supports the other and a couple who are married or have entered into a non-marital partnership are in comparable situations, and it breaches the principle of equal treatment to deny the survivor's pension to the surviving cohabiting partner.

88. In that respect, the appellant takes an approach to the purpose of the survivor's pension that rests on an *ex post facto* analysis of the couple, not *ex ante facto* as propounded by the other parties, which makes it possible to find that on the day when one of the partner dies, the surviving cohabiting partner is in exactly the same situation as that of a surviving spouse, namely of a person who has been provided for financially by his or her partner for years and has suddenly lost that financial support.

89. That reductive interpretation of the purpose of the survivor's pension, which deliberately takes an exclusively material approach to the situation evaluated only on the date of the official's death, does not reflect the precise *ratio legis* of the first paragraph of Article 17 of Annex VIII to the Staff Regulations.

90. It is clear from that provision, read in conjunction with the other relevant provisions of the Staff Regulations, that the grant of a survivor's pension is not subject to conditions of resources and/or assets which should characterise the surviving spouse's inability to meet his needs and thereby demonstrate his past financial dependence on the deceased.

22 See judgment of 19 September 2013, *Review of Commission* v *Strack* (C-579/12 RX-II, EU:C:2013:570, paragraph 39). It should be added that the reference made by the appellant to Directive 2000/78, which lays down the general principle of equal treatment in employment and occupation, is irrelevant in the present case, which is a dispute concerning the legality of a provision of the Staff Regulations.

23 See judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100, paragraph 29).

24 See judgments of 21 October 2009, *Ramaekers-Jørgensen* v *Commission* (F-74/08, EU:F:2009:142, paragraph 53), and of 1 July 2010, *Mandt* v *Parliament* (F-45/07, EU:F:2010:72, paragraph 88).

91. That pension compensates for the loss of the interdependence that derives from the legal obligations which bind the members of a couple from when they enter their union and which continue over time. It should be noted in that regard that Article 26 of Annex VIII to the Staff Regulations provides that, where the surviving spouse re-marries, he or she ceases to be entitled to his or her survivor's pension, which is not the case if that spouse enters into a cohabiting relationship (or a registered partnership), however long and stable.

92. That interdependence clearly exists in marriage, which is the only form of legal relationship which is common to all EU Member States [25] and is to an extent universal as regards its content [26] since the main purpose of marriage is to organise the spouses' personal, material and financial obligations throughout their union. To that end, it confers rights and obligations on spouses towards each other, which are reflected in particular in the duty to support each other and/or to contribute to the costs of married life, and which also impose joint and several liability towards third parties in respect of household debts. Moreover, marriage is subject to strict formal registration requirements.

93. Although national legal systems differ greatly when it comes to the recognition of registered non-marital partnerships, it can be said that those partnerships likewise provide legal frameworks for couples' lives together, are subject to genuine formal requirements and involve rights and obligations for the partners, which establishes an undeniable parallel with marriage.

94. By contrast, de facto or informal unions, which include cohabitation [27] by definition do not provide any binding legal framework for those who have chosen that type of civil union and do not therefore entail any legal — property-related — consequences for the relationship between the cohabiting couple. The nature of those consequences, which may reflect the interdependence of the cohabiting partners as a matter of fact, is determined solely by the wishes and choices of the partners in a relationship which is not subject to any formal requirements.

95. The appellant refers to academic writings and decisions of Belgian courts recognising the existence of natural obligations between cohabiting partners that may become civil-law obligations. Apart from the fact that, in assessing the comparability of the situations of the persons concerned, the Courts of the European Union must take account of prevailing perceptions throughout the European Union and not in a single Member State, [28] the example of the case-law provided by the appellant clearly shows that the transformation of natural obligations, which only compel a person's conscience, into civil-law and legal obligations, requires a free, unilateral undertaking by one of the cohabiting partners.

96. Nor does the reference to the judgment of 1 April 2008 in *Maruko* (C-267/06, EU:C:2008:179) — relating to the interpretation of Articles 1 and 2 of Directive 2000/78 in the light of German law granting a widower's pension to couples who have entered into a registered non-marital partnership of an amount which is lower than the pension paid to married couples — seem to me any more relevant. The comparison related to, on the one hand, the situation of two persons of the same sex who did not have access to marriage and had entered into a registered non-marital partnership, and, on the other hand, that of a married couple, whereas the present case involves a comparison between the situation of two people in an informal union and that of a couple who are married or who do not have access to marriage but have entered into an officially registered partnership.

25 See judgment of 6 May 2014, *Forget* v *Commission* (F-153/12, EU:F:2014:61, paragraph 29).

26 See, to that effect, judgment of 5 October 2009, *Commission* v *Roodhuijzen* (T-58/08 P, EU:T:2009:385, paragraph 75).

27 Article 515-8 of the French Civil Code provides that cohabitation is a de facto union, characterised by a stable, continuous shared life, between two people, of the same or different sex, who live together as a couple.

28 See, to that effect, judgment of 31 May 2001, *D and Sweden* v *Council* (C-122/99 P and C-125/99 P, EU:C:2001:304, paragraph 49).

97. It should be noted that, in paragraph 75 of its judgment of 15 April 2010, *Gualtieri* v *Commission* (C-485/08 P, EU:C:2010:188), the Court stated that although de facto unions and legally recognised unions, such as marriage, may have displayed similarities, those similarities do not necessarily mean that those two types of union must be treated in the same way.

98. Moreover, the judgment of the ECtHR of 3 April 2012, *Van der Heijden v. the Netherlands* (CE:ECHR:2012:0403JUD004285705, § 69) stated 'marriage confers a special status on those who enter into it; the right to marry is protected by Article 12 of the [Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950] and gives rise to social, personal and legal consequences. (see, *mutatis mutandis*, judgments of the ECtHR of 29 April 2008, *Burden v. the United Kingdom*, CE:ECHR:2008:0429JUD001337805, § 63, and of 2 November 2010, *Şerife Yiğit v. Turkey*, CE:ECHR:2010:1102JUD000397605, § 72). Likewise, the legal consequences of a registered partnership set it apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature'.

99. In those circumstances, in view of the purpose of the survivor's pension as referred to and discussed above, it seems to me that the situations weighed up by the appellant are not comparable, since de facto unions and legally recognised unions, whether marriage or registered non-marital partnerships, display a legal difference that cannot be overlooked. A difference in treatment cannot therefore establish a breach of the principle of equal treatment.

100. That finding does not, however, conclude the discussion of the ground of appeal regarding a plea of illegality in respect of Article 17 of Annex VIII to the Staff Regulations in view of a breach of the principle of equal treatment.

(b) The difference in treatment of couples who have been married for less than a year

101. In his application, the appellant expressed a criticism concerning the condition of the length of the personal relationship required for the grant of the survivor's pension, arguing that the criterion of marriage or non-marital partnership which has lasted for more than one year was 'arbitrary and inappropriate'.

102. That argument must be placed in the factual and legal context of the dispute, namely that the appellant had been married to the deceased official for more than 11 months, and that the Commission's decision to reject the application for the survivor's pension was based on the insufficient length of the marriage, namely less than one year, and on the refusal to take account of the preceding period of cohabitation.

103. In this case, the situation of a couple who have been married for more than one year and that of a couple who have been married for less than one year, whether or not preceded by a period of living together as a cohabiting couple, may be regarded as comparable with regard to the objective of the survivor's pension, since it is not necessary for the situations concerned to be identical.[29]

104. In both cases, the couples have entered into a public undertaking conferring on each spouse, *on the day of their marriage*, a body of specific rights and obligations towards each other and in respect of third parties, giving rise to their joint and several liability, which establishes a sufficient similarity between the situations in respect of the benefit in question.

105. Can a distinction between those two categories of persons who are in comparable situations be objectively justified?

29 See, to that effect, judgment of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraph 42).

106. It is appropriate to point out in that respect that Article 52(1) of the Charter accepts that limitations may be made 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 European Union or the need to protect the rights and freedoms of others.

107. It follows from that article that, in order to be held to comply with EU law, a limitation on the exercise of the right to equal treatment must, in any event, satisfy three conditions:[30] (1) the limitation must be provided for by law, (2) the limitation must pursue an objective of general interest and not be excessive, in the sense that it must be necessary and proportionate to the aim pursued, and (3) the 'essence', that is to say the substance, of the right or freedom at issue must not be affected.

(1) Legal basis

108. The limitation must be 'provided for by law'. In other words, the measure in question must have a legal basis,[31] which, in this case does not present any difficulty, since the condition for the grant of the survivor's pension relating to the fact that the surviving spouse must have been married to the deceased official for one year at the time of his death is provided for in the first paragraph of Article 17 of Annex VIII to the Staff Regulations. Furthermore, that provision fulfils the requirements of accessibility, clarity and foreseeability, identified by case-law of the European Court of Human Rights, in order to enable the persons concerned to adjust their conduct in the knowledge of the facts.[32]

(2) Objective in the general interest

109. It should be recalled that, in the case of an EU legislative act, 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 exist.[33]

110. The Staff Regulations, as such, provide no detail or indication of the underlying objective of Article 17 of Annex VIII. Article 1d(6) of the Staff Regulations generally provides that 'while respecting the principle of non-discrimination and the principle of proportionality, any limitation of their application must be justified on objective and reasonable grounds and must be aimed at legitimate objectives in the general interest in the framework of staff policy'.[34]

30 See judgment of 9 November 2010, *Volker und Markus Schecke and Eifert* (C-92/09 and C-93/09, EU:C:2010:662, paragraphs 56 to 72).

31 See, to that effect, judgments of 1 July 2010, *Knauf Gips* v *Commission* (C-407/08 P, EU:C:2010:389, paragraph 91), and of 17 October 2013, *Schwarz* (C-291/12, EU:C:2013:670, paragraph 35).

32 See, to that effect, judgment of 20 May 2003, *Österreichischer Rundfunk and Others* (C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 77); Opinion of Advocate General Cruz Villalón in *Scarlet Extended* (C-70/10, EU:C:2011:255, points 93 to 100), and Opinion of Advocate General Mengozzi in *Schwarz* (C-291/12, EU:C:2013:401, point 43).

33 See judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 47), and of 17 October 2013, *Schaible* (C-101/12, EU:C:2013:661, paragraph 78).

34 It is possible to cite recital 31 of Regulation No 723/2004, which states, rather ambiguously to say the least, that 'the conditions underlying the current provisions on invalidity pensions and survivor's pensions have changed since they were first adopted and should therefore be updated and simplified'. Echoing that recital, I would point out that recital 7 provides that 'compliance should be observed with the principle of non-discrimination as enshrined in the EC Treaty, which thus necessitates the further development of a staff policy ensuring equal opportunities for all, regardless of sex, physical capacity, age, racial or ethnic identity, sexual orientation and marital status', which are considerations given a more tangible form in recital 8, according to which 'officials in a non-marital relationship recognised by a Member State as a stable partnership who do not have legal access to marriage should be granted the same range of benefits as married couples'.

111. However, that fact does not rule out the possibility that such an objective may be identified from the general context of the measure at issue for the purpose of judicial review of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary. [35]

112. In their pleadings and at the hearing, the Commission and the Council referred, on that point, to the need to avoid fraud characterised by marriages of convenience and thus preserve the equilibrium of the pension scheme, avoid placing an undue burden on the administration in dealing with case files that are contrary to the principle of sound administration, particularly in respect of the assessment of factual evidence, and thereby ensure the equal treatment of officials.

113. Those different aspirations may be considered to be objectives of general interest, that is to say legitimate and recognised by the European Union, and they must therefore be subject to review of proportionality by the Court, as provided for in Article 52 of the Charter.

(3) Review of proportionality

114. According to settled case-law, the principle of proportionality is among the general principles of EU law. It requires that measures be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives; [36] when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [37]

(i) Whether appropriate

115. It must be ascertained whether the provision at issue is appropriate for the purpose of contributing to the achievement of the objectives in the general interest referred to above.

116. In the context of that assessment, the Commission and the Council point out that regard must be had to the fact that the legislature enjoys a broad discretion as regards developing the system of social protection for EU officials. [38] Recognition of such discretion implies the need to determine that the means chosen for attaining the objective pursued are not manifestly inappropriate or unreasonable. [39]

35 See, to that effect, with regard to the principle of non-discrimination on grounds of age, judgments of 16 October 2007, *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraphs 56 and 57); of 12 January 2010, *Petersen* (C-341/08, EU:C:2010:4, paragraph 49); and of 6 November 2012, *Commission* v *Hungary* (C-286/12, EU:C:2012:687, paragraph 58).

36 See judgments of 18 November 1987, *Maizena and Others* (137/85, EU:C:1987:493, paragraph 15); of 12 November 1996, *United Kingdom* v *Council* (C-84/94, EU:C:1996:431, paragraph 57); of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 122); of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 46); and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 67).

37 See judgments of 11 July 1989, *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 21); of 12 July 2001, *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 81); and of 9 March 2010, *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86); see, also, to that effect, judgment of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 91).

38 See judgment of 29 November 2006, *Campoli* v *Commission* (T-135/05, EU:T:2006:366, paragraph 72). Moreover, interpreting Article 6(1) of Directive 2000/78 in preliminary rulings, the Court has stated that the Member States enjoy a broad discretion in their choice of the means capable of achieving their objectives in the field of social policy.

39 See judgments of 26 September 2013, *Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 58), and of 15 April 2010, *Gualtieri* v *Commission* (C-485/08 P, EU:C:2010:188, paragraph 72). In a similar factual context concerning discrimination in connection with the payment of a social security benefit, it is true that the European Court of Human Rights held, in its judgment of 11 June 2002, *Willis v. the United Kingdom* (CE:ECHR:2002:0611JUD003604297), that the Contracting States enjoyed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justified a different treatment, but it did ascertain whether, in the case submitted, the difference in treatment lacked 'objective and reasonable justification', that is to say, whether it pursued a 'legitimate aim' and whether there was a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.

117. However, the Court has stated that that margin of discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination, [40] which necessarily holds for the principle of equal treatment. It has also taken the view that legislation was appropriate for ensuring attainment of the objective pursued only if it genuinely reflected a concern to attain that objective in a consistent and systematic manner. [41]

118. In that regard, the present case may raise doubts if we consider the situation where one of the spouses in a couple who have been married for 11 months and 29 days dies unexpectedly, inter alia following an accident, and the surviving spouse is refused a survivor's pension while on the other hand, the partner of a seriously ill official who eventually dies twelve months after their legal marriage receives it.

119. That comparison of situations reveals the weakness of a rule based solely on a criterion *ratione temporis* that applies a cut-off date and operates automatically and blindly.

120. Furthermore, doubts may also be expressed following an analysis *in concreto* of the objectives advanced for the different treatment, in particular the first, relating to the prevention of fraud, to which the other three are closely linked or derive from.

121. It is important to define the concept of 'fraud' referred to by the Commission and the Council, which employ the expressions 'agreements on future inheritance' — a concept which presumably concerns only the rules on inheritance — and more pointedly, 'marriage of convenience'. The idea is to use the length of the marriage to prevent the risk that it might be entered into more with the aim of receiving financial benefits than with a 'plan for sharing a life together'.

122. It may be wondered what situation the Commission and the Council envisage. The expression 'marriage of convenience' echoes that of 'sham marriage', which is normally used to mean a fictitious union solely motivated by the opportunity for one spouse to acquire the other spouse's coveted nationality through marriage. That limited association of the interests of two individuals, with no real emotional bond, is not relevant to the case at hand.

123. The only situation that may be envisaged in practice is that of a couple, whether they have entered into a marriage contract or not, who decided to marry after a significant deterioration in the health of the partner who is an official.

124. The idea that it is possible to classify such a union as a marriage of convenience seems to me highly debatable and to a certain extent out of place since it denies the essence of marriage. That scenario does indeed relate to two people who are already in a relationship as a couple and who choose to strengthen their commitment by getting married, thereby merely responding to the strong inducement to that effect in the provisions of the Staff Regulations, which clearly favour marital status. In that scenario, the fear of a marriage that is not really motivated by a 'plan for sharing a life together' is groundless since the couple shared a life before their legal union.

40 See judgment of 5 March 2009, *Age Concern England* (C-388/07, EU:C:2009:128, paragraph 51).

41 See, also, as regards the requirement of consistency, the seminal judgments of 10 March 2009, *Hartlauer* (C-169/07, EU:C:2009:141, paragraph 55), and of 23 December 2015, *Hiebler* (C-293/14, EU:C:2015:843, paragraph 65). See, particularly with regard to Directive 2000/78, judgments of 12 January 2010, *Petersen* (C-341/08, EU:C:2010:4, paragraph 53), and of 26 September 2013, *HK Danmark* (C-476/11, EU:C:2013:590, paragraph 67).

125. The choice of marital status always and inevitably has a property-related dimension, and relates to a desire for legal certainty and the maximum protection for the partners during the union and at its end. The fact that that choice may be made following worrying news about a partner's state of health does not establish fraud but confirms the strength of a bond between two people who undertake a commitment whose end date can never be known in advance with certainty, however serious the illness affecting the partner, now spouse. To my mind, this is not an abuse of marriage as alleged by the Commission and the Council.

126. Moreover, 'the delayed effect' created in a manner of speaking by the requirement of one year's marriage for entitlement to a survivor's pension is fundamentally incompatible with the legal nature of a marriage, which takes effect from the moment that the undertaking is made. The Commission and the Council have forcefully emphasised that the difference in treatment under the Staff Regulations between married persons and cohabiting partners was based on a 'difference in family situation resulting from a deliberate choice of those involved', marital status with its legal and financial obligations on the spouses necessarily being distinguished from a mere informal union in view of the purpose of the survivor's pension.

127. On 9 May 2014, the appellant and Ms N. elected that marital status, which immediately created the legal framework referred to by those institutions as a criterion for objective distinction. If it were not for the painful human reality of this type of case, which the appellant's situation throws into sharp relief, it would be tempting to dwell on the irony of seeing the Commission and the Council taking refuge behind the concept of a marriage of convenience to reject the application for a survivor's pension after having criticised the appellant's failure to opt for marital status in the comparability test in view of the aforementioned pension's objective.

128. In those circumstances, the measure at issue seems to me manifestly inappropriate for the purposes of attaining an objective relating to the prevention of fraud, and the same conclusion must be drawn for the other reasons, which are merely its corollaries.

129. Even assuming that the reason for legitimacy relating to protecting the financial equilibrium of the pension scheme could be the subject of a separate assessment, it must be held that the risk of that equilibrium being undermined if not for the difference in treatment complained of is not established, or even explained by the Commission or the Council. Moreover, it is clear from the Court's case-law that purely financial, budgetary considerations cannot in themselves constitute a legitimate objective capable of justifying a derogation from the general principle of equal treatment and non-discrimination.[42]

(ii) Necessity

130. If the Court were to regard the condition of one year of marriage as manifestly appropriate, it would be necessary to ask whether a rule such as that at issue here were necessary in order to attain the objectives pursued. A measure is necessary where the legitimate aim pursued cannot be achieved by an equally suitable but more benign means.[43] In the present case, we need to examine whether there are less drastic solutions to avoid risks of fraud and thus preserve the financial equilibrium of the pension scheme, avoid placing excessive burdens on the administration in dealing with case files contrary to the principle of sound administration and thereby ensure equal treatment for officials.

42 See judgments of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-41/12, EU:C:2014:2005, paragraph 77), and of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359, paragraph 41); see, to the same effect, with regard to equal treatment for men and women, judgments of 17 June 1998, *Hill and Stapleton* (C-243/95, EU:C:1998:298, paragraph 40); of 6 April 2000, *Jørgensen* (C-226/98, EU:C:2000:191, paragraph 39); of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583, paragraph 85); and of 21 July 2011, *Fuchs and Köhler* (C-159/10 and C-160/10, EU:C:2011:508, paragraph 74).

43 See, to that effect, judgment of 26 September 2013, *Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 69).

131. It should be noted that, in the present case, the solution adopted is drastic to say the least, since any death of an official within the twelve months following marriage will be treated as if it established an irrebuttable presumption of fraud and will deprive the surviving spouse of a survivor's pension.

132. The least onerous approach for the persons concerned would be to offer them the opportunity to prove that theirs was not a marriage of convenience by providing documents proving previous cohabitation, the length of which would enable them to reach the crucial twelve-month threshold. It must be emphasised that such a solution would in no way be contrary to the approach adopted in determining the comparable nature of the situations weighed up — legally recognised unions on the one hand and de facto unions on the other — in so far as it does not affect the link between marriage and a survivor's pension.

133. That less onerous approach would not be inappropriate.

134. As regards the objective of avoiding an undue administrative burden, it must be observed that this allegation by the Commission and the Council is by no means supported by the relevant figures. In its statement in intervention, the Council refers to a European civil service consisting of more than 58 000 officials and other staff, and more than 20 000 beneficiaries of the pension scheme. Those data are clearly insufficient with regard to the question raised by the present case, which concerns only marriages that lasted for less than a year, which can reasonably be expected to represent only a small volume of case files to be dealt with, it being observed that the proceedings before us are, to my knowledge, the first relating to that specific issue.

135. Nor is there any question of requesting the administration to carry out an inquiry into the situation of the couple concerned involving an assessment of the legal issues relating to the civil status of the persons concerned, since the only verification to be carried out relates to the length of pre-marital cohabitation, which is easily shown in the case of a registered non-marital partnership, and which presents scarcely any difficulty in the case of cohabitation, as the instant case shows. That purely practical assessment is not such as to lead to unequal treatment of officials.

136. It should also be noted that, although as might be expected the legislature proceeded by way of a categorisation, it did not rule out individual assessment *in concreto*, as shown by Article 1(1)(d) of Annex VII to the Staff Regulations, which provides that an official who does not satisfy the conditions for the grant of the household allowance may, by 'special reasoned decision of the [Appointing Authority] based on supporting documents' receive that allowance if he or she actually assumes family responsibilities.

137. Lastly, in view of the above estimation of a very reasonable number of case files relating to marriages lasting less than one year, the less onerous solution proposed does not seem to me to undermine the financial equilibrium of the pension scheme, in respect of which the Commission and the Council have provided no precise information apart from the fact that the number of contributors greatly outnumbers that of beneficiaries.

138. It must be recalled that Article 17 of Annex VIII to the Staff Regulations governs the grant of the survivor's pension to the surviving spouse of an official who died in active service. It is not unreasonable to think that the situations concerned are mostly those, as shown by the appellant's example, in which the official's death occurs after long years of service, and therefore of contributions to the pension scheme, which will not result in the payment of a retirement pension. In that situation, the grant to a surviving spouse who has proved the existence of pre-marital cohabitation of a length that allows the requisite twelve months to be reached, of a survivor's pension equivalent to 60% of the retirement pension which his or her spouse who was an official would have drawn is, on the face of it, not capable of jeopardising the financial equilibrium of the pension scheme.

139. It follows from the foregoing that, even taking into account the broad discretion and practical necessities associated with the administration of the pension scheme, the required minimum length of twelve months' marriage is a measure which goes beyond what is necessary to achieve the objectives of general interest pursued by the legislature.

(iii) Undue prejudice to the rights of officials

140. Should the Court consider that the required minimum length of twelve months' marriage constitutes an appropriate and necessary measure for achieving the objectives which it pursues, there is still the question of whether that measure is proportionate *sensu stricto*. According to that principle, measures may not, even if they are appropriate and necessary for achieving legitimate objectives, give rise to any disadvantages which are disproportionate to the objectives pursued. In other words, it must be ensured that a rule such as that at issue does not have the effect of unduly prejudicing the legitimate interests of officials.[44] Ultimately, that means that a fair balance must be struck between the conflicting interests of officials and their surviving spouses, such as the appellant, and those of the European Union in the administration of the pension scheme.

141. It is, admittedly, undisputed that any additional benefit paid out under that scheme increases overall expenditure and thereby the burden placed by that scheme on the EU budget. However, that argument must be heavily qualified by the observations set out in the present Opinion with regard to the purpose of Article 17 of Annex VIII to the Staff Regulations, namely the grant of a survivor's pension to the surviving spouse of an official who died in active service, and therefore without receiving a retirement pension for which that official regularly paid contributions.

142. The requirement of one year's marriage automatically excludes an entire category of surviving spouses from entitlement under the provisions of the Staff Regulations, even though they may have cohabited for several decades with the deceased official, as is shown by the appellant's example, which reflects indirect but real participation in the effort of contributing to the pension scheme. Such serious prejudice to the interests of an entire group is entirely disproportionate to the objective pursued by the minimum length of marriage, which is intended primarily to prevent abusive behaviour by some individuals in respect of a social benefit, which is clearly a rare situation.

143. There is hence undue prejudice to the legitimate interests of officials and their surviving spouses that compels a finding of a breach of the principle of equal treatment laid down in Article 20 of the Charter.

144. Since, in my view, the limitation concerned is neither necessary nor proportionate to the aims pursued, there is no need to ask whether the 'essence', that is to say the substance, of the right in question is adversely affected.

145. It follows that the condition requiring the surviving spouse to have been married to the deceased official for one year at the time of the official's death, on which the first paragraph of Article 17 of Annex VIII to the Staff Regulations makes the grant of the survivor's pension contingent, must be declared inapplicable in this case.

146. Since the complaint alleging the illegality of the first paragraph of Article 17 of Annex VIII to the Staff Regulations is well founded in the sense indicated above, the contested decision must be annulled.

44 See to that effect, concerning a case of discrimination on grounds of age in the context of Directive 2000/78, judgments of 16 October 2007, *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 73), and of 12 October 2010, *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600, paragraph 47); see also judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 123), and the Opinion of Advocate General Kokott in that case (EU:C:2015:170, point 131), and in *Belov* (C-394/11, EU:C:2013:48, point 117), both of which concern Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

147. It should also be recalled that, pursuant to Article 266 TFEU, the institution whose act has been declared void then has the task of taking the necessary measures to comply with the Court's judgment.

3. The claim for compensation

148. Settled case-law has it that for the European Union to be held liable, a set of conditions must be satisfied as regards the illegality of the allegedly wrongful act committed by the institutions, the actual harm suffered and the existence of a causal link between the act and the damage alleged to have been suffered, and the burden of proving that all those conditions have been met falls to the applicant. [45]

149. In the present case, the appellant seeks an award of EUR 5 000 in compensation for the non-material damage resulting from the illegal decision as discriminatory in refusing him a survivor's pension in an extremely painful situation. The appellant thus relies on the same illegality in support of his claim for compensation as in his application for annulment.

150. Since it was submitted that Article 17 of Annex VIII to the Staff Regulations was illegal owing to a breach of the principle of equal treatment laid down in Article 20 of the Charter, it is suggested that the claim for compensation should be granted by stating that the annulment of the contested decision constitutes appropriate reparation for any non-material damage which the appellant may have suffered in the present case.

VI. Costs

151. Under Article 184(2) of the Rules of Procedure of the Court, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs.

152. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

153. In the present case, the appellant has requested the Court of Justice, after ruling on the case, to uphold his claims made at first instance, including an order for costs against the defendant, in this case the Commission. He has not therefore requested that the Council or the Commission be ordered to pay the costs which he has incurred in the appeal proceedings.

154. Since the Commission has been unsuccessful, it must be ordered to bear, in addition to its own costs relating to the two sets of proceedings and in accordance with the appellant's pleadings, those incurred by the appellant relating to the proceedings at first instance, and the appellant is to bear his costs relating to the appeal proceedings. The Council is to bear all its own costs.

VII. Conclusion

155. In the light of the foregoing considerations, I propose that the Court:

(1) set aside the judgment of the General Court of the European Union of 3 May 2018, *HK* v *Commission*, (T-574/16, not published, EU:T:2018:252);

45 See judgments of 1 June 1994, *Commission* v *Brazzelli Lualdi and Others* (C-136/92 P, EU:C:1994:211, paragraph 42), and of 12 July 2011, *Commission* v *Q* (T-80/09 P, EU:T:2011:347, paragraph 42).

(2) declare the first paragraph of Article 17 of Annex VIII to the Staff Regulations invalid in so far as it provides that the surviving spouse must have been married to the deceased official for at least one year in order to be eligible for the survivor's pension, in breach of the principle of equality before the law laid down in Article 20 of the Charter of Fundamental Rights of the European Union;

(3) annul the European Commission's decision refusing to grant the survivor's pension to the appellant;

(4) order the Commission to bear, in addition to its own costs in relation to the two sets of proceedings, those incurred by the appellant in relation to the proceedings at first instance, the appellant to bear his costs relating to the appeal proceedings, and state that the Council of the European Union is to bear all its own costs.