Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 6 July 2023 [1]

Case C-173/22 P

MG
v

Banque européenne d'investissement

(Appeal – Civil service – Staff of the European Investment Bank (EIB) – Charter of Fundamental Rights of the European Union – Article 41(2)(a) – Right to be heard – EIB Staff Rules – Remuneration – Family allowances – Allowances paid to the custodial parent– Action for annulment and for damages – Plea of illegality)

I. Introduction

1. When two members of staff working for the same institution separate, how is that institution to decide on the distribution of family allowances? Does it need to hear both parents before reaching such a decision and, if it has not heard them, what are the consequences?

2. Those are the matters central to the present appeal lodged against judgment of 21 December 2021, *MG* v *EIB* (T-573/20, not published, EU:T:2021:915; 'the judgment under appeal').

II. Background to the dispute and the judgment under appeal

3. Both the appellant, MG, and his ex-wife, A, are agents of the European Investment Bank (EIB). MG has been employed by the EIB since 1 February 1998 and, on 12 September 2003, he married A, who has been an EIB agent since 2002. They have five children.

4. The present case concerns the administrative procedure in the EIB relating to the adoption of a decision to withdraw family allowances from MG following his divorce from A.

[1] Original language: English.

5. It follows from the facts as explained in the judgment under appeal,[2] that that procedure was parallel to a judicial procedure before Luxembourg courts which led to a divorce. In order to make it easier to understand the context of the present proceedings, I shall present the procedure before the Luxemburg courts separately from the internal procedures that took place before the EIB.

A. The procedure before the Luxembourg courts

6. On 22 August 2017, A filed for divorce against MG before the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg).

7. On 14 November 2017, the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) adopted an interim order by which it granted provisional custody of the children to A. It also ordered MG to leave the marital home, which he did in December 2017.

8. By a second interim order of 20 July 2018, the Luxembourg judge ordered MG to pay maintenance to A in the amount of EUR 1 500 per month (EUR 300 for each of their children), excluding family allowances, as well as the cost of childcare at the Early Childhood Centre (CPE) for three children and half of all extraordinary costs incurred in the interests of all five children. In addition, the interim judge ordered the EIB to pay A the dependent child allowance and the education allowance.

9. On 9 January 2019, the Cour supérieure de justice (High Court of Justice, Luxembourg), sitting as an appellate court, dismissed MG's appeal against the interim order of 14 November 2017 in so far as it fixed the residence of the minor children at A's address, but granted him visiting and accommodation rights every second weekend and during half of the school holidays.

10. On 21 March 2019, the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) granted the divorce between MG and A.

11. On 10 July 2019, the Cour supérieure de justice (High Court of Justice), sitting as an appellate court, delivered a judgment on appeal against the second interim order of 20 July 2018 in which it confirmed A's right to receive maintenance from MG in the amount of EUR 300 per month per child. However, it amended that order by relieving MG of the payment of certain expenses, in particular childcare costs, incurred in the interests of the children.

B. The internal procedures before the EIB

12. On 24 November 2017, MG was informed by the EIB that, following the interim order of the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) of 14 November 2017 (granting provisional custody of the children to A), dependent child allowance and education allowance would be paid to A.

13. On 28 December 2017, A lodged a request for conciliation under Article 41 of the EIB's Staff Regulations, as applicable in the present case. She requested that the EIB recognise the five children as her dependents, in accordance with the interim order of the tribunal

[2] Judgment under appeal, paragraphs 1 to 25.

d'arrondissement de Luxembourg (District Court, Luxembourg) of 14 November 2017, and consequently also recognise her entitlement to payment of the family allowances and derived financial entitlements provided for in those regulations ('the first conciliation procedure').

14. On 12 September 2018, the President of the EIB decided that, as from October 2018, A and MG's children are to be considered as dependent on A ('the decision of 12 September 2018'). The result of that decision gave rise to the recognition of A's right to family allowances and derived financial entitlements.

15. It follows from the judgment under appeal that MG was not party to the first conciliation procedure.[3] The EIB explained in its observations and at the hearing that a conciliation procedure cannot allow other parties to partake, except for the person who initiated the procedure. Therefore, MG could not intervene in the procedure initiated by A.

16. By letter of 11 October 2018, the EIB informed MG of its decision ('the decision of 11 October 2018') that, as from October 2018, he is no longer entitled to the family allowance, the dependent child allowance or the education allowance (together, 'the family allowances'), or to the derived financial entitlements provided for by the Staff Rules of the EIB ('the EIB Staff Rules'). That letter explained that those allowances were allocated to A by decision of 12 September 2018.

17. The rules which the EIB applied in deciding on the allocation of family allowances, applicable at the relevant time, were Articles 2.2.1 and 2.2.2 of the EIB Staff Rules. Those rules read as follows:

'2.2.1. Family allowance

The following members of staff shall be entitled to family allowance amounting to 5% of the monthly basic salary:

(a) married employees;

(b) employees who are legally separated or divorced and who are obliged by a court order to provide chief maintenance;

(c) employees who are unmarried, legally separated, divorced or widowed, where they are entitled to dependent child allowance …

…

Where two spouses are Bank employees, the allowance shall be paid to the spouse with the higher monthly basic salary. Where one of the spouses is employed by the Bank and the other by another international organisation, the official employed by the Bank shall draw the allowance provided that the other organisation is not paying a similar allowance to his/her spouse.

…

2.2.2. Dependent child

[3] Paragraph 73 of that judgment.

A child whose maintenance is effectively being provided for by a member of staff and who is his or her legitimate, legitimised, recognised natural or adopted child, or stepchild shall be deemed a dependent child of this staff member, provided that the Bank or another institution of the European Union does not deem the child to be the dependent child of another staff member, official or servant, and that the child is not gainfully employed.

Subject to the same conditions, the Bank may also deem a child given a home by a member of staff to be a dependent child.

When the child is living in the same household as the member of staff or where the latter is contributing to the child's maintenance to the extent of an amount at least 50% greater than the dependent child allowance … it shall be considered that the staff member is effectively providing for the child's maintenance.'

18. Reacting to the decision of 11 October 2018, MG informed the EIB, by letter of 29 October 2018, that he objected to the measures announced in that decision. He also stated that his letter of 29 October 2018 should be regarded as a request for conciliation within the meaning of Article 41 of the Staff Regulations.

19. Having received no reply from the EIB, MG renewed his request by letter of 10 December 2018.

20. By letter of 7 January 2019, the EIB rejected MG's objections, without addressing the issue of the initiation of the conciliation procedure ('the decision of 7 January 2019').

21. MG reacted by email on 11 January 2019, in which he submitted a new request for conciliation under Article 41 of the Staff Regulations. That request also sought to challenge the decision of 11 October 2018 and, where necessary, the decision of 7 January 2019.

22. On 14 January 2019, the EIB acknowledged receipt of MG's request for conciliation.

23. After MG submitted the renewed request for the initiation of the conciliation procedure, the Conciliation Board met on several occasions in 2019 and 2020. Between 9 March and 4 June 2020, its three members exchanged a series of emails seeking to comment on and amend the content of the minutes of the conciliation proceedings. By email of 4 June 2020, the Chairman of the Conciliation Board submitted those minutes to the President of the EIB, in which he noted, inter alia, the failure of the conciliation procedure and the impossibility of agreeing on a report on the closure of that procedure.

24. By letter of 30 July 2020, ('the decision of 30 July 2020') forwarded to the appellant by email of 31 July 2020, the President of the EIB informed him that he had received the conclusions of the Conciliation Board and indicated that he took note of the failure of the conciliation procedure. The minutes of the conciliation procedure were attached to that letter.

C. Action before the General Court

25. On 14 September 2020, MG brought an action before the General Court in which he claimed that it should:

– annul the decision of 11 October 2018, by which he was deprived of the benefit of family allowances (including, in particular, the childcare and CPE costs wrongly deducted by the EIB from his salary until November 2019) and derived financial entitlements (including, in particular, tax allowances and the reimbursement of the children's medical costs borne by him);

– in so far as necessary, annul the decisions of 7 January 2019 and 30 July 2020;

– order the EIB to compensate him in the amount of EUR 10 000 for the non-material damage suffered;

– order the EIB to pay the costs.

26. In the judgment under appeal, concerning the claims for annulment, the General Court rejected all those pleas and, consequently, dismissed that part of his application.

27. However, in relation to the claim for compensation, the General Court acknowledged that the EIB's response to MG's request for the opening of the conciliation procedure following the decision of 7 January 2019 was unreasonably delayed by more than three months and that the EIB failed to respond to the first request for conciliation contained in the letter of 29 October 2018. The General Court further held that the EIB had kept MG in a state of protracted uncertainty as a result of that unjustified delay and had therefore caused him non-material damage. Accordingly, the General Court ordered the EIB to pay MG damages assessed ex aequo et bono for the sum of EUR 500 and dismissed the claims for compensation for the remainder. The General Court also decided that each party should bear its own costs.

III. The appeal

28. By application lodged at the Registry of the Court of Justice on 7 March 2022, MG claims that the Court should:

– declare the present appeal admissible and well founded;

– annul the judgment under appeal;

– consequently, grant him the benefit of his submissions at first instance and annul the EIB's decision of 11 October 2018 by which he was deprived of the benefit of family allowances (including, in particular, the childcare and CPE costs wrongly deducted by the EIB from his salary until November 2019) and the financial rights derived therefrom (including, in particular, the tax allowances and the reimbursement of the children's medical expenses borne by him), and, so far as necessary, annul the decision of 7 January 2019 rejecting his claims in their entirety, and, so far as necessary, annul the EIB's decision of 30 July 2020 noting the absence of conciliation and confirming the decision of 11 October 2018, to compensate MG for the material and non-material damage suffered by him; and

– order the EIB to pay the costs of the two proceedings.

29. The EIB contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs of the present proceedings and those at first instance.

30. A hearing, at which the appellant and the EIB attended, took place on 17 May 2023.

IV. Analysis

31. The appeal includes five grounds.

32. At the request of the Court, however, the present Opinion is limited to the analysis of two issues raised by the appeal: whether the General Court erred in concluding that the right to be heard was not breached (first ground of appeal) and whether it wrongly assessed the plea of illegality of the EIB Staff Rules concerning family allowances (second part of the third ground of appeal and fourth ground of appeal).

A. The right to be heard

33. The first ground of appeal concerns only the first decision, that is, the decision of 11 October 2018, by which the EIB informed MG that he would no longer be entitled, as from October 2018, to the family allowances and the derived financial entitlements granted on the basis of the EIB Staff Rules, as they had been granted to A by decision of 12 September 2018.

34. The appellant contends that he was not heard by the EIB before that decision was taken, which represents a breach of the right to be heard. That breach, it is claimed, leads to the invalidity of the decision of 11 October 2018.

35. In paragraphs 73 and 74 of the judgment under appeal, the General Court considered the following:

‘73. In that regard, … it is common ground that, by the [decision] of 11 October 2018, [MG] was sent a communication from the EIB by which he was informed that he would no longer receive payment of the family allowance, dependent child allowance and education allowance. The purpose of that [decision] was therefore to inform [him] of the outcome of a conciliation procedure initiated by A, without him having been invited to be heard in that procedure.

74. On the other hand, … it should be noted that the [decision] of 7 January 2019, which confirmed the [decision] of 11 October 2018 while clarifying and developing the reasoning contained therein, was adopted following the observations made by [MG] in his letters of 29 October and 10 December 2018. Thus, it should be noted that [MG] was able to comment on the reasoning set out by the EIB in its initial [decision] of 11 October 2018 and to submit his observations on the grounds contained therein, which were taken into account before the position expressed by the EIB in its [decision] of 7 January 2019.’

36. Thus, the General Court ruled that the right to be heard was not breached because MG had the opportunity to submit his observations about the decision after it was adopted and the EIB took them into consideration.

1. Was MG's right to be heard breached?

37. Article 41(2)(a) of the Charter of Fundamental Rights of the European Union ('the Charter') provides for 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'.

38. The Court has already explained the purpose of the right to be heard. In its words, 'the right to be heard is intended, inter alia, to guarantee that any decision adversely affecting a person is adopted in full knowledge of the facts, and its purpose is to enable the competent authority to correct an error or to enable the person concerned to submit such information relating to his [or her] personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content'. [4]

39. Thus, the right to be heard benefits both the administration, by enabling it to reach a correct decision, and the person whose rights are affected. Its first objective is to enable the case to be examined and the facts to be established in as precise and correct a manner as possible, while its second objective is to ensure that the person concerned can state his or her case.

40. In order for such a dual purpose to be achieved, it is clear that a person has to be given the opportunity to make his or her views known during an administrative procedure, that is to say, *before* the adoption of a decision liable to affect adversely the interests of the person at issue. [5]

41. In the present case, it is not disputed that MG was adversely affected by the decision of 11 October 2018. The case-law has indeed already established that a reduction in remuneration, such as a reduction of the family allowances, constitutes a measure adversely affecting the person concerned. [6]

42. It is also clear that MG was not invited to state his position before the decision affecting him was adopted.

43. In that respect, I wish to point out that Article 41(2)(a) of the Charter does not require that a formal hearing be organised. [7]

4 Judgments of 4 June 2020, *EEAS* v *De Loecker* (C-187/19 P, EU:C:2020:444, paragraph 69 and the case-law cited), and of 21 October 2021, *Parliament* v *UZ* (C-894/19 P, EU:C:2021:863, paragraph 90).

5 Judgments of 4 June 2020, *EEAS* v *De Loecker* (C-187/19 P, EU:C:2020:444, paragraph 68 and the case-law cited), and of 21 October 2021, *Parliament* v *UZ* (C-894/19 P, EU:C:2021:863, paragraph 89) (emphasis added).

6 Judgment of 10 March 2021, *AM* v *EIB* (T-134/19, EU:T:2021:119, paragraph 41 and the case-law cited).

7 Judgment of 9 February 2023, *Boshab* v *Council* (C-708/21 P, not published, EU:C:2023:84, paragraph 54 and the case-law cited).

44. However, the right to be heard implies that the person concerned must have the possibility of influencing the decision-making process at issue before that decision is reached. [8]

45. I am aware that, in everyday life, administrations do not hear every person when a change in his or her personal status leads to adverse changes in their rights. That, however, does not mean that such a practice conforms to the requirements of Article 41(2)(a) of the Charter.

46. Today, communicating is no longer difficult. That is especially so within an administration. Every member of staff usually has an email address which is known to the different bodies with decision-making powers. Indeed, the COVID-19 crisis demonstrated that electronic communication can often easily replace meeting face to face.

47. It is, therefore, difficult to try to justify an administrative practice which does not give a person the opportunity to state his or her position on a decision which will affect him or her (based on reasons such as time constraints, lack of personnel or similar).

48. Sending an email to MG, in which he would have been given the opportunity to comment on the proposed decision and its reasoning within a reasonable deadline, would have satisfied the requirement of the right to be heard.

49. MG did not have such a possibility during the process leading to the adoption of the decision of 11 October 2018. He was not party to the conciliation procedure initiated by A, and he was not heard at any point before the adoption of the decision depriving him of family allowances that he had been receiving up until that moment. He was, thus, not offered the possibility to react to the proposed decision and its reasoning.

50. Contrary to the position of the General Court, I am of the opinion that the fact that MG was able to comment on the decision of 11 October 2018 after it was adopted, and that his observations were integrated into the decision of 7 January 2019, does not alter the conclusion that his right to be heard was breached. Indeed, the first letter was not a preparatory act embodied in a later decision. Rather, that was the decision, and the second letter only confirmed that initial decision. Therefore, the decision by which MG was divested of his entitlement to family allowances was the letter of 11 October 2018.

51. That was confirmed by the EIB at the hearing when it explained that the decision of 11 October 2018 was indeed final, and not merely an interim decision, even though the EIB confirmed it by letter of 7 January 2019.

52. MG was not invited to state his position at any moment before the adoption of the decision of 11 October 2018.

53. For the above reasons, I am of the view that the General Court erred in law when it found that MG's right to be heard was not breached.

[8] See, to that effect, judgments of 23 September 2020, *UE* v *Commission* (T-338/19, EU:T:2020:430, paragraph 60 and the case-law cited), and of 30 September 2021, *Court of Auditors* v *Pinxten* (C-130/19, EU:C:2021:782, paragraph 167). That of course does not mean that the administration's course of action should *always* be obstructed. The case-law does recognise that there can be specific situations, such as inspections, for which the hearing can happen at a subsequent stage (see, to that effect, judgments of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 41; of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraphs 54 and 55 and the case-law cited; and of 20 December 2017, *Prequ' Italia*, C-276/16, EU:C:2017:1010, paragraphs 50 and 51 and the case-law cited). However, it has not been argued that that was the case in the present dispute.

2. Consequences of a breach of the right to be heard

54. The second issue raised by the present appeal concerns the consequences of a breach of the right to be heard. Does such a breach automatically lead to the invalidity of the decision adopted at the end of the process in which a subject was not heard?

55. On that matter, the Court of Justice has repeatedly ruled that a breach of the rights of the defence, in particular of the right to be heard, results in the annulment of the decision only if, had it not been for such an irregularity, the outcome of the procedure might have been different. [9]

56. However, the requirement that the outcome 'might have been different' does not mean that it has to be established with certainty that the decision would have been different. In order to hold such a decision invalid, it suffices that the *possibility* that a decision would have been different cannot be ruled out completely, if a person affected by that decision had been able to state his or her position. [10]

57. That leads me to the next question: could a different outcome have been possible in the circumstances of the present case?

58. In that respect, a difference can be made between situations in which an administration enjoys discretion on how to decide an individual case and those in which it does not.

59. In the event that an administration enjoys discretion on how to resolve an individual situation, failure to hear a person affected leads to the invalidity of a decision enacted in breach of the right to be heard. In applying that reasoning to the present case, if, in order to decide who is entitled to family allowances, the EIB had had the possibility to assess freely all the relevant facts, for example how A and MG share the costs of maintenance of their children after their divorce in practice and how they decide about the distribution of family allowances, hearing MG's position may indeed have influenced the decision.

60. On the other hand, if the EIB was deciding on the basis of the clear rules from which it had no liberty to depart, the answer to the question whether the breach of the right to be heard leads to invalidity of the decision might be different.

61. In that respect, the EIB claims that, in the present case, it did not enjoy any discretion on how to resolve the question of distribution of family allowances after A and MG's divorce. Rather, it had to apply the EIB Staff Rules applicable to the allocation of family allowances, which left it with only limited powers. In other words, even if MG had been heard, the EIB would have had no choice but to decide as it did, and to allocate the family allowances to A.

62. Is that the end of the story? If we accept that the applicable EIB Staff Rules left no possibility for a different decision, are there no consequences of the breach of the right to be heard, even if established?

[9] See, for instance, judgments of 14 February 1990, *France* v *Commission* (C-301/87, EU:C:1990:67, paragraph 31); of 25 June 2020, *HF* v *Parliament* (C-570/18 P, EU:C:2020:490, paragraph 72 and the case-law cited); and of 14 July 2022, *SGI Studio Galli Ingegneria* v *Commission* (C-371/21 P, not published, EU:C:2022:566, paragraph 82).

[10] Judgments of 10 July 1980, *Distillers Company* v *Commission* (30/78, EU:C:1980:186, paragraph 26); of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council* (C-141/08 P, EU:C:2009:598, paragraphs 88 and 94); and of 1 December 2022, *EUIPO* v *Vincenti* (C-653/20 P, not published, EU:C:2022:945, paragraph 48).

63. I would propose a different answer. There are at least two ways in which a person in a situation similar to that of MG could have influenced the final decision if given the opportunity to express his or her position.

64. First, in the present case, MG could have claimed that the EIB erroneously interpreted its Staff Rules. Thus, even if those rules did not leave any discretion in deciding how to allocate family allowances, it might have reached a different outcome than the one proposed by the EIB here.

65. At the hearing, the EIB explained that it originally continued (from the end of 2017 to September 2018) to pay the family allowances to MG. As those allowances were being paid in reference to the wages earned, and given that MG's wages were higher than those of A, the amount *in fine* given for the benefit of the children through their parents would not be reduced. Later, it changed its understanding and concluded that the applicable rules require the EIB to allocate family allowances to the person who has custody of the child or children. In the EIB's view, that was the result of a combined reading of Articles 2.2.2. and 2.2.1. of its Staff Rules, which allocate family allowances to the person on whom the children are dependent.

66. The foregoing demonstrates that even the EIB is unsure about the proper meaning of its Staff Rules when applied to a divorce between two of its members of staff. As it claimed at the hearing, application of those rules to such a situation was new for the EIB at that time. Consequently, giving MG the opportunity to submit his point of view concerning the proper interpretation of those provisions might have led to a different decision.

67. Second, even if the applicable EIB Staff Rules which oblige the administration to reach a certain decision are indeed clear enough that they leave no room for interpretation, they could still possibly be legally invalid, and, for that reason, inapplicable. In the context of the present case, MG could have raised the issue of the legal validity of the applicable EIB Staff Rules had he been given the opportunity to express his position. In fact, he did raise that issue before the General Court, claiming that those Staff Rules as interpreted and applied by the EIB breach the principle of equal treatment.

68. Had he been given the opportunity to raise that issue during the administrative procedure, the administration of the EIB would have been obliged to decide on the claim of invalidity. In the same way as a national administration is empowered and bound by the principle of primacy of EU law to set aside inconsistent national rules,[11] the EU administration must be empowered and bound to set aside internal rules when they conflict with EU rules. Thus, had it found the Staff Rules to be invalid, the EIB would not have been entitled to apply it. Had the EIB considered the rules to be valid, however, MG could have accepted its explanation or decided to challenge that finding before the General Court. Importantly, had he been given the opportunity to state his position before the adoption of the decision of 11 October 2018, that decision might have been different, even if the applicable EIB Staff Rules did not leave any discretion to the administration on how to resolve the individual case.

69. What I am trying to emphasise by the foregoing is that it is difficult to conclude *in abstracto* that involving a person whom a decision adversely affects in a process leading to the adoption of such a decision could not have affected that decision.

[11] Judgments of 22 June 1989, *Costanzo* (103/88, EU:C:1989:256), and of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána* (C-378/17, EU:C:2018:979).

70. For that reason, I suggest that the Court of Justice take the position that the failure of an administration to give the opportunity to a person, who could be adversely affected by its decision, to express their point of view leads to the invalidity of the decision in principle, and triggers the need to initiate a new procedure in which the person at issue would be heard.

71. An example of an administrative procedure which would respect the right to be heard in the present case could be the following. After ending the conciliation procedure initiated by A, the EIB could have invited MG to state his position before deciding to allocate family allowances to A. If MG raised the claim of invalidity of a rule that leads to a result according to which only A is entitled to family allowances, the EIB would need to explain its position as to why it considered that rule to be valid. Only after that could the EIB adopt a decision allocating the family allowances to A. MG would then have the possibility to challenge the EIB's decision before the General Court, claiming, inter alia, that the EIB Staff Rules are legally invalid.

72. MG did in fact claim before the General Court that the EIB Staff Rules were themselves legally invalid. I will explore that claim under the following heading.

73. I am, however, of the opinion that the decision of 11 October 2018 should be annulled already on the basis of the first claim that it was enacted in breach of MG's right to be heard.

B. Plea of illegality of Articles 2.2.1 and 2.2.2 of the EIB Staff Rules

74. In the second part of his third ground of appeal, MG claims, in substance, that the General Court wrongly rejected his plea of illegality of the aforementioned EIB Staff Rules on family allowances. More specifically, the appellant asserts that the General Court wrongly concluded that those provisions do not breach the principles of equal treatment and non-discrimination.

75. As the EIB explained at the hearing, the two applicable Staff Rules are interpreted to mean that, after the divorce of two persons who are both members of staff working for the EIB, family allowances are granted to the parent who has custody of the children. Those rules, in the version applicable at the time as well as in the new version, only allow the family allowances to be shared in the event of shared custody. As the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) decided to assign full custody to A, the rules required that family allowances be allocated to her.

76. In the judgment under appeal, the General Court considered that those Staff Rules do not breach the principle of equal treatment as 'the situation of a custodial parent and that of a non-custodial parent are different and therefore Staff Rules may provide for a different treatment of each situation'. [12]

77. The appellant disagrees. In his view, divorced parents are in a comparable situation when it comes to the maintenance of their children, as they both share that obligation. They should, therefore, enjoy the same rights in relation to family allowances, which serve as an aid in covering the costs related to that maintenance. MG claims that the fact that one parent has full custody of the children does not distinguish that parent from a parent who does not have such custody, when the criterion taken into consideration is the obligation to provide for the maintenance of children.

[12] Paragraph 107 of the judgment under appeal.

78. Conversely, the EIB claims that custody is the only accurate criterion to ascertain whether one does or does not 'effectively maintain' a child. As family allowances are granted for the benefit of the maintenance of a child, the EIB Staff Rules considering custody as a determining factor are not discriminatory.

79. It is worth outlining that the principle of equal treatment requires that persons in comparable situations [13] are treated equally. If, on the contrary, the two persons are not in a comparable situation, the same principle requires that they be treated differently, unless there are objective reasons to treat them in the same way. [14]

80. Is a divorced parent who has custody of their children in a comparable situation to a divorced parent who does not have custody, but only the right to weekend and holidays visits?

81. One's first reaction might be that such parents are not in a comparable situation. After all, a parent who has full custody has to take care of the everyday life of children and their own time is constrained by that daily need. However, for the parent who does not have full custody, that time is only marginally affected (for example, every second weekend and half of the holidays). By way of a simple example, a parent who does not have full custody can easily decide to go to the cinema in the evening, whereas the other parent would have to plan, and possibly find and pay for someone to babysit the children, in order to be able to do so. I believe that most people would consider that those two persons are not in a comparable situation.

82. However, when it comes to assessing whether two persons are in a comparable situation in relation to certain legal entitlements, the comparability must be assessed in the context of a rule granting such entitlements and its purpose. [15]

83. Family allowances contribute to alleviating the financial burden which arises in relation to the maintenance of children. They thus have a social purpose justified by expenses arising from a present and definite need, linked to a child's existence and effective maintenance. [16]

84. Such an understanding is supported by the case-law concerning Regulation (EC) No 883/2004. [17] The Court has specified that the notion of family allowances includes all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments

[13] The case-law does not require that the situations be identical, only that they be comparable. See, for instance, to that effect, judgments of 27 October 1993, *Enderby* (C-127/92, EU:C:1993:859, paragraph 16), and of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraph 25).

[14] Judgments of 13 December 1984, *Sermide* (106/83, EU:C:1984:394, paragraph 28), and of 4 May 2023, *Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (Night work)* (C-529/21 to C-536/21 and C-732/21 to C-738/21, EU:C:2023:374, paragraph 52 and the case-law cited).

[15] On that matter, see, for instance, in civil service law, judgment of 14 July 2022, *Commission* v *VW and Others* (C-116/21 P to C-118/21 P, C-138/21 P and C-139/21 P, EU:C:2022:557, paragraph 127 and the case-law cited); and, more generally in the field of freedoms of movement, judgments of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraphs 36 and 38), and of 17 March 2022, *AllianzGI-Fonds AEVN* (C-545/19, EU:C:2022:193, paragraphs 51 and 59 and the case-law cited).

[16] The General Court was of the same opinion in the judgment under appeal about the purpose of family allowances (see paragraph 102 of that judgment). More generally, see previous judgments of 27 November 1980, *Sorasio-Allo and Others* v *Commission* (81/79, 82/79 and 146/79, EU:C:1980:270, paragraphs 15 and 16), and of 28 November 1991, *Schwedler* v *Parliament* (C-132/90 P, EU:C:1991:452, paragraph 14).

[17] Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as well as the case-law on Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

and special childbirth and adoption allowances. Thus, 'to meet family expenses' is to be understood as referring in particular to a contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children. [18]

85. The EU Ombudsman offered a similar reasoning, adding, in a 2017 decision, that 'the dependent child allowance, although being a part of a staff member's remuneration, is not intended for that staff member's upkeep, but is intended, exclusively, for the upkeep of his child/children'. [19]

86. In short, even if family allowances are not granted as a benefit for parents, but to contribute to the development and education of their children, they serve to alleviate the financial burden of parents who maintain children.

87. Given such a purpose of family allowances, the criterion, upon which one may decide whether a parent who has full custody of children is comparable to a parent who does not have such custody, is whether both parents financially contribute to the maintenance of their children. One should therefore conclude, as the appellant correctly claims in my view, that both parents who effectively contribute to their children's maintenance are in a comparable situation.

88. Additionally, the case-law has already indicated that there is nothing to prevent a child from being regarded as being actually maintained by a number of persons at the same time. Accordingly, the child of two divorced EU officials may be regarded as actually being maintained by those two officials at the same time and therefore as being dependent on them simultaneously. [20]

89. Such an assessment cannot depend on who has legal custody of the children, as legal custody allocated to one parent does not excuse the other parent from participating in the costs of the maintenance of those children. It also does not mean that both parents do not continue contributing financially to raising their children. On the contrary, a decision on whether two divorced parents are in a comparable situation in relation to family allowances is both a legal and a factual assessment. It begs the answer to the question whether both parents effectively contribute to their children's maintenance needs.

90. A divorced parent who has full custody of their children and the other divorced parent who does not have full custody are thus in a comparable situation in relation to the entitlement to family allowances, if they both effectively (financially) maintain their children.

91. Therefore, a rule which automatically allocates family allowances to a parent who has full custody of the children, although both parents (financially) participate in the maintenance of their children, breaches the principle of equal treatment.

[18] See, to that effect, judgment of 2 April 2020, *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (C-802/18, EU:C:2020:269, paragraph 38 and the case-law cited).

[19] *Recommendation of the European Ombudsman in complaint 374/2014/DR against the European Investment Bank concerning the payment of a child allowance*, point 19. Available at https://www.ombudsman.europa.eu/fr/recommendation/en/69347

[20] See, to that effect, judgment of 28 November 1991, *Schwedler* v *Parliament* (C-132/90 P, EU:C:1991:452, paragraph 17), and repeated in judgments of 3 March 1993, *Peroulakis* v *Commission* (T-69/91, EU:T:1993:16, paragraph 32); of 12 November 2002, *López Cejudo* v *Commission* (T-271/01, EU:T:2002:272, paragraph 33); and of 10 October 2006, *Arranz Benitez* v *Parliament* (T-87/04, EU:T:2006:297, paragraph 37).

92. Claiming that, for the purpose of family allowances, the situation of both parents is comparable does not diminish the particular difficulties and additional burdens faced by the custodial parent. That parent might indeed have additional financial charges arising from the fact that the children live under their roof (for example, the costs of a babysitter to be able to go to the cinema, as already mentioned previously as an example). There are, however, other legal means to specifically address the possible remaining disparities between parents, such as through maintenance or even alimony payments. However, maintenance payments and family allowances are two separate things. [21]

93. Therefore, even if the General Court correctly recognised those characteristics and purposes of the family allowances, it drew the wrong conclusion that the situation of both parents, when it comes to being entitled to family allowances, is not comparable.

94. Thus, the General Court erred in law when it rejected the plea of illegality introduced by the applicant on the ground that the EIB Staff Rules do not breach the principle of equal treatment.

95. I therefore propose that the Court of Justice declare the first ground of appeal, the second part of the third ground of appeal and the fourth ground of appeal as being well founded, and annul point 2 of the operative part of the judgment under appeal.

V. Final decision on the merits of the action

96. Under Article 61 of the Statute of the Court of Justice of the European Union, the Court may, if it quashes the decision of the General Court, give final judgment in the matter where the state of the proceedings so permits.

97. I consider that to be the case here. There is therefore no need for the Court of Justice to refer the case back to the General Court.

98. I propose that the Court of Justice annul the decisions of 11 October 2018 and of 7 January 2019, as well as any subsequent decisions, by which MG was deprived of half the benefit of family allowances and derived financial entitlements. The decision of 11 October 2018 is invalid on two grounds: it was adopted in breach of the right to be heard and it breaches the principle of equal treatment. The decision of 7 January 2019 did not breach the right to be heard, as MG had the possibility to state his position before its adoption, but it is invalid as it breaches the principle of equal treatment.

VI. Conclusion

99. In the light of all the foregoing, I am of the opinion that:

– the first ground of appeal, the second part of the third ground of appeal, and the fourth ground of appeal should be upheld;

– the Court of Justice should annul point 2 of the operative part of the judgment of 21 December 2021, *MG* v *EIB* (T-573/20, not published, EU:T:2021:915);

[21] See, to that effect, judgment of 2 April 2020, *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)* (C-802/18, EU:C:2020:269, paragraph 38 and the case-law cited).

– the Court should annul the decisions of 11 October 2018 and of 7 January 2019, and any subsequent decisions, by which MG was deprived of half the benefit of family allowances (including, in particular, the childcare and CPE costs that were wrongly deducted by the European Investment Bank from his salary until November 2019) and derived financial entitlements (including, in particular, tax benefits).