

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeals Nos. 619/2019, 620/2019 and 621/2019
(Ana GOREY (IV) and (V), Merete BJERREGAARD
v. Secretary General of the Council of Europe)**

The Administrative Tribunal, composed of:

Mr András BAKA, Deputy Chair,
Ms Françoise TULKENS,
Mr Christos VASSILOPOULOS, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellants, Ms Ana Gorey and Ms Merete Bjerregaard, lodged their appeals on 14 and 16 July 2019 respectively. On 15 and 16 July 2019 respectively, the appeals were registered under Nos. 619/2019, 620/2019 and 621/2019.
2. On 23 September 2019, the Secretary General submitted her observations on the appellants' appeals. The appellants filed their common submissions in reply on 24 October 2019.
3. The public hearing took place in the Tribunal's hearing room in Strasbourg on 11 December 2019. The appellants were represented by Mr Manuel Barca QC, barrister in London. The Secretary General was represented by Mr. Jörg Polakiewicz, Director, Directorate of Legal Advice and Public International Law, assisted by Ms Sania Ivedi and Ms Ine De Coninck, legal officers in the Legal Advice Division of the Directorate of Legal Advice and Public International Law.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

Appeals Nos. 619/2019 and 620/2019

4. The appellant (hereinafter “the first appellant”) is a permanent staff member of British nationality who holds the grade B3.

5. In March 2009, the appellant’s daughter G. was diagnosed with Lyme’s disease and has never really recovered her fully energy levels, despite the prescribed antibiotic treatment. Her health condition worsened in the summer of 2016 when she suffered chronic recurring cycles of relapse, leading to problems with concentration, insomnia, severe fatigue, pain and anxiety to the point where she required support for her special educational needs. She has been studying mechanical engineering at the University of Cardiff since September 2014. Cardiff University recognised her special educational needs and provided the necessary support, putting special provisions in place for her as of August 2016.

6. The appellant’s son M. has special educational needs resulting from his medically certified condition due to his dyslexia. His needs have been continuously supported throughout his primary and secondary schooling at the European School in Karlsruhe, enabling him to successfully pass his Baccalaureate and secure a place on an architectural engineering course at Cardiff University in the academic year 2017/2018. He chose Cardiff University as he was aware through his sister G. that this institution offered good student support services.

7. The annual tuition fees at Cardiff University were £9,000 or €10,085 which was the maximum limit for university fees set by the British government at the relevant time. In respect of her daughter, the appellant paid these fees in 2014/2015 and 2015/2016, and reduced fees in 2016/2017 when her daughter repeated her second year. She paid the same fees in respect of her son in 2017/2018 and in 2018/2019.

8. The appellant was awarded an education allowance in respect of her daughter G. and also in respect of her son M. at the rate reserved for expatriated children being educated in a country of which one of their parents is a national, as provided for in Article 7, paragraph 6 b), of the Staff Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations – hereinafter “Appendix IV”). At this rate, 70% of educational costs are reimbursed, up to a ceiling of three times the annual amount of the dependent child allowance, which for 2017/2018 was £3,079.68, thus giving ceiling of £9,239.08 or €10,353.03. According to the appellant, her son’s disabilities had not been central to his choice of the European School in Karlsruhe, as they were identified later. During the period that the child attended school, moreover, the appellant was reimbursed in respect of her son at the increased rate during the school years 2004/2005, 2005/2006 and 2006/2007 and, subsequently, following the Secretary General’s decision of 25 April 2008, at the exceptional rate (see also paragraph 42 below).

9. At the beginning of the academic year 2018/2019, the appellant’s son M. had a meeting with the Cardiff University Disability and Dyslexia Service (hereinafter “the DDS”) which confirmed his special educational needs and informed his department and other professional services within the university about the relevant Individual Support Arrangement

Notification (hereinafter “the ISAN”). They also offered confidential advice and guidance and put in place a Student Mentor Scheme for him. In addition, because of many concurrent issues the appellant’s son has due to his condition, he was also registered with the Cardiff University Counselling and Wellbeing Service, which among other essential services offers learning workshops, support groups and daily walk-in services.

10. On 29 June 2018, the appellant applied to the Directorate of Human Resources (hereinafter “DHR”) for the education allowance in respect of her daughter G. for the academic year 2017/2018 at the exceptional rate stipulated in Article 7, paragraph 6, d) of Appendix IV. At the exceptional rate, up to 90% of total educational costs are reimbursed, up to a ceiling of six times the annual dependent child allowance, thus giving a ceiling of £18,478.08 or €20,706.06. The appellant justified her request citing the fact that her daughter had been suffering from Lyme’s disease since 2009 but that the symptoms were worsening and currently affecting her studies. In this respect, the appellant explained that since August 2016, Cardiff University had granted her daughter specific provisions applicable to her during examinations and class tests in order to allow for her state of health (see also paragraph 5 above).

11. On 6 July 2018, she received the following reply from a staff member in DHR:

“... The education allowance exceptional rate applies when educational costs are exceptional, unavoidable and excessively high and such costs are incurred for imperative educational reasons. I do not see the relationship between the costs incurred (9000£) and the imperative educational reasons: was the choice of Cardiff related to [G.]’s medical reasons?”

12. On 10 July 2018, the appellant explained that:

“... In accordance with Article 5 of Rule 1277,

‘the educational costs shall be reimbursed at the exceptional rate within the meaning of Article 7 paragraph 6 d) of the Regulations when incurred:

a. for children with special educational needs from their medically certified physical, developmental or behavioural condition’

I am sure you agree the [G.]’s condition falls under a medically certified physical condition. The 90% rate will only apply to [G.]’s university tuition fees, in accordance with the regulations (5.b.). As [G.] would not be able to continue her studies if she did not receive the support services of Cardiff University, the existence of imperative educational reasons should thus be clear.

Cardiff University has different services and support options for students who have a long-term disability, mental health conditions – Student Support Centres, a Wellbeing and Counselling Team as well as dedicated mental health advisers.

...

Considering that [G.] started at Cardiff before her symptoms became evident and progressively worse, I cannot see how she would have specifically chosen Cardiff over any other university at the time. The fact that they have a very good support programme is thankfully why [G.] was able to stay on and continue her studies ...”

13. On 6 August 2018 the DHR staff member replied as follows:

“... [my colleague] and I spent some time analysing your request for the exceptional rate. As mentioned in my previous email, we still miss the link between the tuition fees at Cardiff University and the medical condition.

The exceptional rate is applied when educational costs are incurred for medical reasons. We understood from the explanation you gave below that Cardiff University does not charge any cost for the support services it offers. ...”

14. In her reply of the same day, the appellant submitted further explanations:

“Clearly [G.]’s university fees are incurred for imperative educational reasons as, had Cardiff not been able to provide the necessary help, she would have had to go to another university competent to meet her special needs due to her worsened medical condition. [G.] is fortunate that she was able to continue to study at Cardiff University with the educational support she required once her condition worsened. Please also note, that we only requested the exceptional rate once her circumstances changed and only for academic year 2017-18 when fees were ‘exceptional, unavoidable and excessively high’.

You state in your e-mail below that ‘The exceptional rate is applied when educational costs are incurred for medical reasons’ and that you fail to see ‘the link between the tuition fees at Cardiff University and the medical condition’.

According to Article 7.d of the Regulation, no such link exists. The exceptional rate only applies when ‘costs are incurred for imperative educational reasons’ and according to Rule No. 1329 of 16 February 2011, that is to say, ‘for children with special educational needs resulting from their medically certified physical developmental or behavioural condition’. The wording is very clear: the child needs to have special educational needs resulting from a medically certified condition, and the educational costs need to be incurred for that child. This is the case of [G.].

I would add that, by decision of the Secretary General of 25 April 2008, my son [M.] was granted the exceptional rate. As in the case of Cardiff University, the fees at the European School in Karlsruhe were also based on certain criteria (irrespective of his condition) and did not specify extra costs for the support he received at the school for his special educational needs.

From your mail, I understand that Dr. [M.] has agreed that [G.] has a medical condition, therefore I kindly request that you apply the exceptional rate for [G.] according to Article 5 of Rule No. 1277, and in conformity with Rule No. 1329 and with precedent.”

15. On 9 August 2018, the appellant was informed by the DHR staff member that they would seek legal advice and get back to her afterwards. In an email sent the following day, the appellant was told by the same staff member:

“... After consulting our Legal Advisors, we can confirm that the exceptional rate does not apply as educational costs are not incurred for imperative educational reasons. ...”

16. On 13 August 2018, the appellant responded as follows:

“... This interpretation of the regulation is not in line with previous decisions, where it is clear that, in such cases where the costs of fees in certain educational establishments are regulated by other criteria not linked to the various educational services provided for children with special needs, the exceptional rate has been granted if the child had special needs and profited from these services.

I am also surprised that the Council of Europe is so insensitive to the efforts being made to include children with special needs in mainstream schools rather than going to special schools.

However, if this is the case, I would very much appreciate your suggestions for where [G.] might go to continue her studies in Mechanical Engineering (now Masters level) with the appropriate educational support she needs and how much it would cost. ...

Aside from that, I will now need to seek my own legal advice.”

17. On 7 September 2018, the appellant submitted an administrative complaint to the then Secretary General in respect of her daughter. One of her arguments was as follows:

“As [G.] would not be able to continue her studies if she did not receive the support services of Cardiff University, the existence of imperative educational reasons should be clear. Considering the [she] started at Cardiff before her symptoms became evident and progressively worse, she could not have specifically chosen Cardiff over any other university at the time. The fact that Cardiff has a very good support programme is thankfully why [G.] was able to stay on and continue her studies, which as mechanical engineering student are considerable. Had Cardiff not been able to provide the necessary help, she would have had to go to another university competent to meet her special needs due to her worsened medical condition, or would have had to give up on her studies altogether, as there is no university exclusively catering to students with special educational needs in the United Kingdom.”

18. On 19 October 2018, the appellant applied to DHR for the education allowance in respect of her son M. for the academic year 2018/2019 at the exceptional rate under Article 7, paragraph 6 d), of Appendix IV. The appellant justified her request citing the fact that her son had special educational needs resulting from dyslexia and that Cardiff University had put in place adjustment and support provisions since September 2018 to enable him to participate in the programme of study.

19. On 13 November 2018, DHR informed the appellant that the education allowance in respect of her son M. would be paid at the rate reserved for expatriated children who were being educated in a country of which one of their parents was a national.

20. On 11 December 2018, the appellant was further informed by DHR that:

“... The exceptional rate cannot be applied on grounds of continuity since the education allowance for the academic year 2017-2018 had already been calculated on the basis of rate 3 [the country of nationality rate]. ...

... [A]ccording to Article 7.6d of Appendix IV to the Staff Regulations, three criteria must be met in order to qualify for the exceptional rate:

1. the costs for school or university fees and/or general fees are exceptional, unavoidable and excessively high;
2. such costs refer either to education up to completion of the secondary cycle or for the post-secondary cycle;
3. such costs are incurred for imperative educational reasons as defined in Article 5 of Rule 1277.

The university fees for your son apply to all students of British or other European nationality. Therefore, these costs would be the same for any child of a Council of Europe staff member choosing to study in the U.K. There is no indication that the costs incurred are exceptional, unavoidable or excessively high due to special educational needs of your son or the specific provisions that the university will put in place in this respect. We are therefore of the opinion that [the country of nationality rate] should continue to apply.”

21. On 12 December 2018, the appellant lodged an administrative complaint in respect of her son to the then Secretary General.

22. Both administrative complaints had been submitted, at the appellant's request, to the Advisory Committee on Disputes which delivered its opinion on 15 April 2019 stating, *inter alia*:

“16. In the case of [the appellant’s children], the Secretary General was not satisfied that a causal link existed between their special educational needs and the costs incurred and this was the principal reason for his refusal to reimburse the cost of their university education at the exceptional rate. The complainant, however, does not believe that the Staff Regulations require such a causal link to be established.

17. Article 7(6)(d)(iii) of Appendix IV to the Staff Regulations states that in order to be reimbursed at the exceptional rate, educational costs for children with special educational needs resulting from a medically certified condition must be ‘incurred for imperative educational reasons’. In the Committee’s opinion, this clearly requires a causal link to exist between the child’s medical condition and the costs incurred. This causal link may exist where additional costs are incurred on account of a child’s special educational needs. In addition, the Administration has accepted that such a link could also be established where the special needs resulting from a medical condition are central to the choice of educational establishment.

18. [In the appellant’s son’s] case, the Committee notes that his educational costs were being reimbursed at the exceptional rate while he was attending the European School in Karlsruhe. The complainant argues that there was no causal link between his medical condition and the costs incurred at this school, as his condition neither influenced the choice of school nor affected the cost of his education there. However, this does not appear to have been the understanding of the Secretary General who, according to the submissions of the Administration, appears to have believed that [the appellant’s son]’s special needs were central to the choice of school and that there was therefore an established link between those needs and the fees incurred.

19. In any case, it does not necessarily follow from the fact that [M.]’s educational costs at the European School in Karlsruhe were reimbursed at the exceptional rate that his university fees should be reimbursed at the same rate. On the contrary, it remains the case that the requirement of Article 7(6)(d)(iii) and Article 5 of Rule 1277 must be met in order for his university costs to be reimbursed.

20. Although the Administration argue that there is no connection between [M.]’s special educational needs and either the cost of his university education or his choice of university, according to the complainant, the University of Cardiff’s ability to provide specific measures for children with imperative educational needs was central to [the appellant’s son]’s choice to pursue his studies there. The Administration are correct in stating that this was not particular to the University of Cardiff, since all universities in the United Kingdom are under a statutory duty to provide services to students with special educational needs at no extra costs. However, in the Committee’s view, it is arguable that even if [M.]’s special educational needs did not influence his specific choice of university, they may nevertheless have influenced his choice to pursue his higher education in the United Kingdom, despite the fact that it has the highest university tuition fees in Europe, with an upper limit of GBP 9,250 per year. The Committee would, on balance, accept that [his] university fees were ‘incurred for imperative educational reasons’ and should, therefore, be reimbursed at the exceptional rate.

21. In the case of [the appellant’s daughter], the Committee agrees with the Administration that no causal link has been demonstrated. No additional costs have been incurred on account of [her daughter]’s special educational needs, and those needs were not central to her choice of the University of Cardiff.”

23. By two decisions of 15 May 2019, the then Secretary General dismissed both of the appellant’s administrative complaints as ill-founded. In respect of the appellant’s daughter, he stated, in particular:

“You claim that the only requirement is that the costs are incurred in relation to a child who has a medically certified condition. You claim that the phrase ‘for children with special educational needs’ does not create a requirement to establish a causal link between the fees payable and the medically certified condition of the child. However, such a reading is unjustifiably superficial, does not take into account the requirement to read the Rule in conjunction with the Staff Regulations, and furthermore ignores the context of the provision as well as its reasonable purpose.

The Staff Regulations clearly state that the costs to be reimbursed at the exceptional rate must be 'incurred for imperative educational reasons'. This phrase cannot and should not be interpreted to mean anything other than that the costs must be imperative for the appropriate and effective education of that child. In other words, the costs must be expended to pay for the means of meeting the special educational needs of the child. When read in the light of the Staff Regulations, Rule 1277 cannot reasonably be considered to create a wider right to reimbursement of all funds expected for the education of a child who happens to have special educational needs. The consistent interpretation of the Human Resources Directorate has been to allow reimbursement at the exceptional rate in cases where the choice of school is directly related to the special educational needs of the child, thus only where the fees are for that reason exceptional, unavoidable and excessively high.

...

Furthermore, the Staff Regulations clearly state that 'each case [shall be] treated individually' (Appendix IV, Article 7 paragraph 6). There is therefore no foundation for any 'legitimate expectation' that the same result would be achieved for a child throughout his or her studies especially when he or she attends a completely different educational establishment. The application of the same criteria to the individual case based on logical and consistent interpretation of the rules, as occurred in respect of [the appellant's daughter], may always come to a different conclusion.

You go to argue that the fees are connected to the medical condition of your daughter. However, your logic is flawed in this regard. You submitted evidence which demonstrates that [she] suffers since 2016 from Lyme's disease, which can lead to problems of concentration, severe fatigue, pain and anxiety. In 2017/18, the University of Cardiff granted [her] 'specific provision' in Examinations and Class Tests for the duration of her studies, on the basis of her '[m]ental health condition – Anxiety & Depression'. These specific provisions entailed additional writing time, rest breaks, and permission to sit exams in a smaller venue. No other assistance was explicitly granted. At no point is there any mention of the cost of such specific provision, and nor was any change made to the fees payable by [G.] for her studies. There is no established link between the cost of the university fees and the specific provisions made in [G.]'s medical condition.

You argue that the support services of Cardiff University were integral to [G.]'s continued capacity to attend university. The Secretary General notes that these support services are available to any student suffering from a mental or physical condition. They are also free of charge. Both the specific provision granted, and the support services provided are put in place by the university as part of a general policy to promote student well-being. You refer to the requirements incumbent on the university under the Equalities Act 2010. In particular, it is notable that universities are not allowed to charge higher fees to students with a disability, as this would be considered discriminatory.

... As accepted by you (Memorandum of 7 September 2018, page 5), there is no link between the medical condition and the choice of university. While the continuity of place of studies was clearly assisted by the availability of support service, no evidence is presented to demonstrate that [G.] would have interrupted or terminated her studies due to her condition in the absence of special provision or support services. In any case, she would have had access to such services in any British university. There is therefore no established link between her medical condition and the decision to continue her studies and incur the £9,000 fees for the 2017/18 school year.

You claim that 'the new requirement invented by Administration for children with special educational needs to incur extra costs for the support services they are benefitting from in order for their general tuition fees to be reimbursed at the exceptional rate is discriminatory'. On the contrary, the Secretary General considers that it would be unfair to pay a higher educational allowance in respect of children with medical conditions than to children who do not have such medical conditions, where those children are in fact in an equal situation with regard to the cost of their education.

... [G.] was able to receive adequate support services and special measures at no extra cost to herself. There is therefore no reason to suggest that you should receive a different rate of educational allowance than other parents of children attending university in one of their parents' countries of nationality.

...”

24. With regard to the appellant's son, the Secretary General dismissed the appellant's administrative complaint for reasons similar to those cited in the case of the daughter, stating, in particular:

"... The Secretary General notes that there is no established link between the cost of the university fees and the specific provisions made in respect of [M.]'s condition by the University of Cardiff.

... Your accusations concerning the insensitiveness of the Council of Europe to the efforts being made to include children with special needs in mainstream schools are completely unjustified. As illustrated by your son's case, universities in the United Kingdom are perfectly suited for students with special needs. Students with such needs are in no way excluded from the mainstream system and incur no additional costs that would be necessary to cover their special educational needs. Therefore, there is no justification for applying the exceptional rate to your son's situation. If the exceptional rate were to be applied to the present case, you would receive unjustified favourable treatment and the principle of equality between staff members would be breached. The Secretary General considers indeed that it would be unfair to pay a higher education allowance in respect of children with medical conditions than to children who do not have such medical conditions, where those children are in fact in an equal situation with regard to the cost of their education. ..."

25. The appellant went on to seek further information regarding the reimbursement of educational costs. On 11 July 2019, in reply to her email of 26 June 2019, the staff member who had previously been involved in her case explained:

"... [The appellant's question:] *Fees at the European School, Karlsruhe (ESK) are general ones and all pupils attending pay the same. All staff's children attending ESK received/receive the 'increase rate' and a few the 'exceptional rate' even though they pay the same fees with no extra costs.*

The decision to grant those rates for pupils attending the European School of Karlsruhe was taken in a particular context in which the international schooling offer in Strasbourg was very limited. The situation has changed over the last years with the opening of international schools.

[The appellant's question:] *Reasons for the choice of school/educational establishment are not always provided prior to start of studies or identification of medical condition. The rate of reimbursement is decided on an annual basis and changes are possible from one year to the next in the light of any new conditions or circumstances.*

The rate of reimbursement can change at any moment if, for pedagogical or other justified reasons, the staff member incurs additional costs that would justify that change."

26. On 12 July 2019, the same staff member made some additional comments in response to the appellant's questions:

"... [The appellant:] ... You rightly acknowledge that 'particularly expensive fees' can be found in many European countries; however, you fail to mention if there any 'Council of Europe staff's children attending paying schools/educational establishments around Europe, some as a third country option.' With staff receiving an educational allowance. Please can you confirm if this is the case not.

I confirm that our rules foresee that possibility if duly justified by the staff member.

'In respect of children at post-secondary level of education for studies carried out in the country of which the staff member or the child's other parent is a national or in the duty country. If duly justified by the staff member, for reasons of continuity in following an educational cycle or if educational costs are lower in third country, an exception to this rule can be granted by the Secretary General.'

... The level of reimbursement granted to [M.] corresponded to an *ad hoc* decision taken by the Secretary General. According to our practice and in line with our interpretation of the rules a change

in the rate of reimbursement would only be justified if the new conditions or circumstances lead to additional costs being incurred by the staff member.”

Appeal No. 621/2019

27. The appellant (hereinafter “the second appellant”) is a Danish national employed at the Council of Europe on a permanent A3 post. She is a single mother of two children whom she has brought up on her own.

28. In the summer of 2005, the appellant enrolled her son O. in the primary French section of the European School in Karlsruhe. By the end of the first term, O. was already having difficulties learning to read and write in French. The appellant was advised to transfer her son to the English section, which she duly did. At the end of the third school year, O. was diagnosed as suffering from dyslexia, which was confirmed in a medical certificate.

29. During the period that her son was in primary and secondary education at the European School, the appellant was receiving an education allowance with reimbursement of educational costs at the exceptional rate.

30. After obtaining the European Baccalaureate Diploma in July 2018, in the academic year 2018/2019 the appellant’s son embarked on a 3-year degree course in Development Studies and Economics at the School of Oriental and African Studies in London (hereinafter “the SOAS”). The annual school fees were £9,250 or €10,289, which was the maximum limit for university fees set by the British government at that time. The appellant’s son also opted for this school because it offers better special educational needs support, which is essential if he is to achieve his full potential.

31. On 6 September 2018, the appellant applied for an education allowance in respect of her son for 2018/2019.

32. In an email dated 8 November 2018, the appellant was informed by DHR that her application could not be granted for the following reasons:

“Our Staff Regulations (article 7, appendix IV) state that education expenses in respect of children at post-secondary level of education are reimbursed for studies carried out in the country of which the staff member or the child’s other parent is a national (**Denmark**) or in the duty country (**Strasbourg**).

The only exceptions are:

- for reasons of continuity in following an education cycle as your son is entering University and starting a new education cycle, there is no continuity;

- If educational costs are lower in a third country. The educational fees at the University of London are 9,250 GBP. There are several educational establishments in France or in Denmark (Higher education in Denmark is free for EU students) which deliver programmes in English. The American University of Paris cannot be the only reference. ...”

33. On 26 November 2018, the appellant asked DHR whether she would have received the education allowance for her son had he taken up his place at the American University in Paris (hereinafter “the AUP”) to study International Comparative Politics which was almost identical to the course offered by London University. She also inquired as to where in France

or Denmark one could study International Comparative Politics with a focus on geopolitics/development issues in English.

34. On 7 December 2018, the appellant submitted an administrative complaint to the Secretary General against the decision denying her eligibility for the education allowance. She also asked to be awarded the education allowance in respect of her son O. for the academic year 2018/2019 at the exceptional rate under Article 7, paragraph 6 d), of Appendix IV.

35. At the appellant's request, her administrative complaint was referred to the Advisory Committee on Disputes which delivered its opinion on 15 April 2019, stating in particular:

“... 12. According to Article 7(1)(b) of Appendix IV ..., as a general rule staff member may only claim reimbursement for a child's post-secondary education if those studies are carried out in the country of which the staff member or the child's other parent is a national or in the duty country. The staff member may only request reimbursement of the cost of studies carried out in a third country if he or she can demonstrate that the Secretary General should grant an exception to this general rule 'for reasons of continuity in following an educational cycle or if educational costs are lower in a third country'.

13. The claimant does not agree with the way in which this provision is interpreted and applied by the Administration. However, the Committee does not consider that the Administration's interpretation is unreasonable. As regards the concept of 'continuity in following an educational cycle', it is clear from other provisions of Article 7, which has to be read consistently as a whole, that three distinct 'educational cycles' are foreseen: primary, secondary and post-secondary (see, for example, Article 7(6)(d)(ii)). It follows, therefore, that 'continuity' in Article 7(1)(b) means continuity within one of these three educational cycles, rather than throughout a person's life as a student. As regards the phrase 'if educational costs are lower in a third country', the Administration's approach that this is to be assessed with reference to the fees normally payable for higher education in the country of nationality or duty station, rather than with reference to one particular institution, again appears reasonable to the Committee. It is clearly open to any student to select the university course that best meets his or her interests. However, it does not follow that the Organisation is required to pay the education allowance if the Administration is unable to establish that an exactly identical course is available at a lower cost in the country of the parent's nationality or duty station.

15. In conclusion, the Committee agrees that the complainant cannot demonstrate that an exception should be granted, either for reasons of continuity or because educational costs are lower in the third country.

16. That being said, it considers that there must be some room for flexibility here a child has special educational needs that would make access to higher education dependent upon his or her ability to access a course in a particular language. In such a case, a strict interpretation of the Staff Regulations could result in the loss of the education allowance for children who, on account of their special educational needs, have no choice but to study in a third country.

17. In the present case, the complainant has submitted no evidence to substantiate her claim that [her son] would be unable to study in another language (for example, Danish) or that other comparable (albeit not identical) courses would not be available to him in France or Denmark. The granting of an education allowance for studies in a third country is at the discretion of the Secretary General and, in the absence of such evidence, his exercise of that discretion in this instance cannot be impugned.”

36. In a memorandum dated 29 April 2019 to the Director of DHR, the appellant submitted evidence of her administrative claim in the light of the decision of the Advisory Committee on Disputes. She stated in particular:

“1. With reference to paragraphs 16 and 17 of the Decision of the Advisory Committee on Disputes, I hereby submit evidence to substantiate my claim of:

- [O.]’s inability to study in another language than English (see below I.)
- Non-availability of other comparable courses for [O.] in France or Denmark (see below II.)

2. Those familiar with dyslexia immediately understand the consequences of suffering from a language-based learning disability, hence my assumption that, in the light of [O.]’s dyslexia diagnosis, it was sufficient to just state [O.]’s situation, namely the difficulty of studying in another language than English, his main learning language throughout his primary and secondary education, rather than provide additional information. ...

I. Evidence of [O.]’s inability to study in another language than English

5. ... I now hereby submit a statement from Dr [S.], Chartered Psychologist and Neuropsychologist, who has regularly assessed [O.]’s special educational needs throughout his childhood schooling ... This statement confirms that [O.] needs continued specific learning support and that he needs a course taught in English ..., in order to avoid the serious risk of him failing his studies, which already is a hard struggle for him due to his learning disability.

II. Evidence of the non-availability of other comparable courses in France and Denmark

6. [O.] looked into various options before choosing to read ‘Development Studies’ at SOAS. Attached is a table of search results on studies in Denmark and France ..., which clearly show that there are no comparable course taught in English available either in Denmark or France, other than “International Comparative Politics at [the] AUP.

Conclusion

7. I would be grateful to receive a reply from the [DHR] to my questions ... as to:

- whether [O.] would have received an education allowance for studies at [the] AUP ... which offers a comparable course taught in English
- which other university in France or Denmark offers a comparable course, as referred to by the [DHR], because [O.] as not able to find a comparable course taught in English un Denmark or France, except for the one offered at [the] AUP

8. My request for an education allowance ..., was according to the Staff Regulations Article 7, explicitly its wording and practical application. Other expatriate colleagues whose children either attend or attended private educational establishments similar to [the] AUP but in other European countries (including Austria and Spain) or referenced them when requesting an education allowance for studies in a third country, do receive the education allowance. In addition, a colleague whose son studied at the European School Karlsruhe in the English section, as did [O.], later received an education allowance for studies in a third country (UK) on the basis of the non-availability of a similar course in Croatia or France and because of the child’s need for continuing education in English. Thus, a reasonable expectation of being granted an education allowance in respect of my son’s studies in a third country seems justified in view of the fact that several colleagues have been granted the education allowance in similar or identical situations.

9. When other expatriate colleagues in a similar situation have been granted an education allowance while my request for [O.], who so very clearly has special educational needs that make access to higher education dependant on his ability to access a course in English, his previous language of education, is rejected, I cannot help wondering whether this rejection is not discriminatory on the ground of disability. ...”

37. On 19 May 2019, the appellant raised the following issues with DHR:

“In the light of the Advisory Committee’s decision of 15 April 2019, I submitted supplementary evidence on 29 April regarding my administrative complaint. **Could you please let me know whether the submitted evidence will be taken into consideration by the DHR or not.**

I also kindly request a reply to the two questions asked in my email of 26 November 2018 and also in my memo of 29 April (**notably whether [O.] would have received an education allowance for studies at the American University of Paris** and which alternative universities in France or Denmark [he] could study at) which to date have remained without response ...”

38. On the same day, the appellant was informed by a staff member in DHR:

“I can confirm that supplementary evidence that you submitted on 29 April has been received by the legal service and will be taken into account, where appropriate, in the answer to your administrative complaint.

Concerning the perception of the education allowance for your son for studies in France or Denmark, since those countries correspond respectively to your country of nationality and the country of your duty station, the education allowance would be granted. However, the DHR is not in a position to provide you with a list of universities in France or Denmark where your son could study. ...”

39. On 15 May 2019, the then Secretary General rejected the second appellant’s administrative complaint as ill-founded. He stated in particular:

“a) Continuity

There can be no suggestion that the requirement of ‘continuity in following an educational cycle’ is met. Education cycles are split into primary, secondary and post-secondary. ... It does not apply to the situation where one is in any case liable to change educational establishment at the end of an educational cycle, in particular the natural caesura of commencing university. ...

The only link you claim is the language of instruction. However, this is not relevant for the purposes of the rule. As outlined above, the assumption is that the child will be educated in the host country or in the country of either of their parent’s nationality. In this case, [O.] could study in his mother tongue in Denmark and you would receive reimbursement.

Alternatively, he has the option to study in France and receive reimbursement. It is not unreasonable to treat him exactly as any other expatriated child; i.e. giving him the choice to be reimbursed to study in France or in Denmark. ...

b) Lower educational costs

The option to study in a third country and nevertheless receive reimbursement by means of the education allowance is foreseen as a discretionary decision of the Secretary General in cases where the cost to the Organisation would not theoretically be higher than if the child were to pursue their studies in the host country or parent’s country.

It is clearly in the interest of the Organisation from a financial and administrative point of view to ensure that these rules are correctly and narrowly applied, and that the Secretary General considers all relevant facts when making his decision.

The Secretary General submits that the only correct interpretation of the term ‘educational costs’ in the second sentence of Annex IV Article 7 paragraph 1.b. is to mean ‘general (or public) educational costs’. In relation to the current case, the Secretary General notes that tuition costs for EU citizens in France are between €170 and €300 per year and in Denmark they are free. Estimated living costs for the UK and Denmark are similar, whereas they are slightly lower for France. It is therefore impossible to conclude that the United Kingdom, with fees of £9,250 (€10,289.55), represents lower cost.

The American University of Paris (AUP) is a private university offering a very specific course of education. It is not representative of the usual educational offer available in the host country. It is clearly not an appropriate comparator within France. France is home to some of the most highly respected schools of political studies in the world – comparable to the courses attended by [O.] in SOAS – ranging from the *Grandes Ecoles* and *Sciences Po* to faculties providing an extraordinary mix of political, economic, legal and sociological programmes. While in France it is normal to provide one class within post-secondary education courses in a second language, many universities go beyond this and offer a wide range of courses in English. ...

It is therefore entirely unreasonable to claim that the education costs are less in the United Kingdom (country with the most expensive tuition fees in Europe) by basing this on an exceptional and unrepresentative university based in France.

The discretionary power of the Secretary General

As is demonstrated above, the Secretary General cannot grant an exception to the Rule under Article 7 paragraph 1.b since the two conditions of continuity in an educational cycle and lower educational costs in a third country are not met. Nevertheless, the Secretary General has carefully considered all of the circumstances, including your residence and nationality and those of your child, his educational needs, the excessively high cost of education in the United Kingdom, the availability of other courses of similar level and subject matter of other countries, in particular in France and Denmark, and the overall education allowance policy. ...

Should an exception be granted in the present case, it would set a clear precedent for further claims for children to be educated in third countries where the educational costs are excessively or disproportionately high, and in fact are higher than average costs of education in the host country or country of nationality.

... Estimated combined tuition and living costs at the AUP amount to 48,000 euros per year. ... thus it is not frivolous to state that using such a comparator would allow students to pick almost any university in the world and nevertheless receive the maximum reimbursement of fees each year, thus a ceiling ranging from 3 to 6 times the annual rate of the dependent child allowance (2018/2019: €10,353.03 - €20,706.06) depending on the circumstances, representing a potentially ruinous burden on the Council's budget.

... Staff members who choose to have their child educated in a language that is neither their mother tongue nor that of the host country must assume the consequence that they will not be eligible for the education allowance if the child chooses to study in a country that is neither the country of nationality nor the host country. It should be noted in this respect that the European School in Karlsruhe offers a language section in French.

An *ad hoc* decision to make an exception in your case to the provisions of Article 7 paragraph 1.b. would pose a severe risk of costly misappropriation of the Staff Regulations concerning education allowance, as the Secretary General considers the present case to be. ...

The rate of education allowance

... the university fees are not exceptional for a child in [O.]'s position. All children of British or European nationality are required to pay the same university fees of £9,250 to study in the United Kingdom as of the school year 2018/2019 ... The choice to study in the United Kingdom necessarily incurs the cost of similar tuition fees for any child of a Council of Europe employee.

Article 5 of Rule 1277 describes the circumstances in which Article 7.6.d of [Annexe IV] shall be applied. Its effect is to define the scope of 'imperative educational reasons', essentially restricting it to situations where the costs relate to the special educational needs of a child with a medically certified condition. It is instructive to note that this definition is more restrictive than the scope defined in Article 4 of the rule relating to Article 7, paragraph 6 c) iii) of [Annexe IV], which provides for the 'increased rate' available only for education 'up to completion of the secondary cycle'. The main difference is that 'learning difficulties', such as dyslexia, and 'specific family situations' are not included in the more restricted definition, meaning that the reimbursement must be related to special

educational needs for a situation of medically certified disablement. The Secretary General was clear when introducing Rule 1277 that he intended to 'limit the application of the exceptional rate' ...

When read together, the interpretation of these rules requires that the only costs which are subject to reimbursement at the exceptional rate shall be those excessively high costs which are incurred on an exceptional and unavoidable basis in order to meet the special educational needs incurred in relation to the child of a staff member, which arise as a result of a medically certified condition.

The consistent interpretation of the [DHR] has been to allow reimbursement at the exceptional rate in cases where the choice of school is directly related to the special educational needs of the child, thus only where the fees are for that reason exceptional, unavoidable and excessively high.

The secretary General notes that there is no established link between the cost of the university fees and the specific provisions made in respect of [O.]'s condition by SOAS. The support services of SOAS are available to any student suffering from a disability or a mental or physical health condition. They are also free of charge. ..."

II. RELEVANT LAW

40. The relevant provisions on education allowance are contained in Article 7 (Education allowance) of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations). The provisions, insofar as they are relevant, read as follows:

"1. Staff members entitled to the expatriation allowance with dependent children as defined according to the Staff Regulations, regularly attending on a full-time basis an educational establishment, may request the reimbursement of educational costs under the following conditions:

- a. in respect of children in compulsory education up to completion of secondary level of education;
- b. in respect of children at post-secondary level of education for studies carried out in the country of which the staff member or the child's other parent is a national or in the country of which the staff member or the child's other parent is a national or in the duty country. If duly justified by the staff member, for reasons of continuity in following an educational cycle or if educational costs are lower in a third country, an exception to this rule can be granted by the Secretary General.

...

5. The following items of expenditure shall be taken into account for the reimbursement of educational costs:

- a. school or university registration fees;
- b. general fees for schooling and education charged by the educational establishment; Expenses of special courses and activities (including equipment) that are not normally part of the child's basic course of studies shall not be taken into account;
- c. examination fees;
- d. tuition fees for private lessons on condition that:
 - tuition is given in subjects which are not contained in the child's syllabus but are part of the compulsory national education program of the country of which the staff member is a national;
 - or
 - tuition is required to enable the child to adjust to the educational curriculum of the institution attended, or to enable the child to become familiar with the language spoken in the area in which the child lives if the education is given in another language;

In all these cases, tuition fees may be taken into account for an adjustment period of not more than two years;

- e. daily expenses on travel between the educational institution and home, by public transport or school bus. Reduced fares shall be used where possible. Where a private car is used or when no public transport or school bus is available, an amount equal to 10% of the annual dependent child allowance shall be taken into account;
- f. where the child does not live at the staff member's home, expenditure on board and lodging;
- g. purchase of school books as required by the curriculum, and compulsory school uniforms.

6. Reimbursement of educational costs mentioned in paragraph 5 above shall be made according to the rates, ceilings and conditions below, each case being treated individually:

- a. standard rate: 70% of the educational costs up to a ceiling of 2.5 times the annual amount of the dependent child allowance;
- b. Country of nationality rate (if different from country of duty): 70% of educational costs up to a ceiling of 3 times the annual amount of the dependent child allowance if the child is educated in a country of which the staff member or the other parent is a national;
- c. Increased rate: 70% of educational costs up to a ceiling of 4 times the annual amount of the dependent child allowance provided that:
 - i) educational expenditure as defined in paragraph 5 a. and b. is excessively high;
 - ii) such costs are for education up to completion of the secondary cycle;
 - iii) are incurred for imperative educational reasons;
- d. Exceptional rate: up to 90% of total educational costs up to a ceiling of 6 times the annual rate of the dependent child allowance provided that:
 - i) educational costs as defined in paragraph 5 a. and b. are exceptional, unavoidable and excessively high, according to the judgement of the Secretary General;
 - ii) such costs refer either to education up to completion of the secondary cycle or are costs as defined in paragraph 5 a. and b. for the post-secondary cycle;
 - iii) costs are incurred for imperative educational reasons.

...

13. The Secretary General shall establish instructions for implementation of the provisions of this Article.”

41. On 25 June 2007, the Secretary General, pursuant to the aforementioned paragraph 13, adopted Rule No. 1277 on the education allowance which was subsequently amended by Rule No. 1329 of 16 February 2011 and Rule No. 1380 of 15 December 2016. The relevant provisions read as follows:

Article 1

“Where a staff member claims an exception based on educational costs being lower in a third country, pursuant to Article 7 paragraph 1 b) of the Regulations, the comparison shall be made between, registration fees and general fees for schooling and education applicable for the first year in the educational cycle in either the duty country or the country of which the official or the child's other parent is national (the staff member concerned having the choice).”

Article 3

“Educational expenditure/costs shall be considered excessively high for the purpose of Article 7, paragraph 6 c) i) and d) i) of the Regulations when it (they) exceed(s) 2,5 times the annual amount of the dependent child allowance.”

Article 4

“Reasons for claiming the existence of imperative educational reasons for the purpose of Article 7, paragraph 2, and 6 c) iii) of the Regulations may include medical problems, learning difficulties (including language-related difficulties), behavioural problems or specific family situations. In every case the staff member claiming an imperative educational reason shall provide the Directorate of Human Resources of the Directorate General of Administration and Logistics with a detailed explanation and supporting documentation.”

Article 5

“The educational costs shall be reimbursed at the exceptional rate within the meaning of Article 7, paragraph d) of the Regulations when incurred:

- a. for children with special educational needs resulting from their medically certified physical, developmental or behavioural condition; or
- b. for children who live with a staff member attached to an external duty station, provided that no other adequate educational establishment corresponding to the child’s educational cycle is available within reasonable distance from this duty station.”

THE LAW

I. JOINDER OF THE APPEALS

42. As the three appeals are closely interconnected, the Administrative Tribunal orders their joinder under Rule 14 of its Rules of Procedure.

II. PROCEDURAL BACKGROUND TO THE PRESENT LEGAL ISSUE

43. The question concerning the reimbursement of educational costs at the exceptional rate under Article 7 of Annex IV was previously considered by the Tribunal in the case of *Gorey v. Secretary General* (see ATCE, No. 401/2017, decision of 19 December 2008). At that time, this matter was governed both by Article 7 of Appendix IV and by Rule No. 1277 of 25 June 2007 in its original terms.

44. In the course of the proceedings before the Tribunal, on 25 April 2008, the Secretary General agreed to reimburse at the exceptional rate the costs relating to the first appellant’s son M. but not those relating to the other three children (including the appellant’s daughter G.). The Tribunal decided to strike out the case in respect of M. and to dismiss it as to the remainder.

45. On 25 May 2008, the Tribunal examined appeal No. 403/2007 in which the appellant requested the annulment of the decision not to grant reimbursement of her son’s educational costs at the exceptional rate under Article 7, paragraph d., of Appendix IV, giving two grounds for her appeal: violation of Article 7 of Appendix IV, and violation of the general principles of law: respect for legitimate expectation, good faith and prohibition of all forms of discrimination. In this case, DHR acknowledged that the appellant was entitled to the increased rate of reimbursement, but not at the exceptional rate. Following the decision taken by the Secretary General on 27 May 2008 to fully accede to the appellant’s request for reimbursement of educational costs at the exceptional rate, the Tribunal decided to strike the appeal out of its list of cases (see ATCE, No. 403/2007, *Stojisavljevic v. Secretary General*, decision of 19 December 2008).

46. On 16 February 2011, the Committee of Ministers adopted Resolution CM/Res(2011)4 amending Articles 7, 9 and 11 of Appendix IV. On the same day, the Secretary General adopted Rule No. 1329 amending Rule No. 1277 of 25 June 2007 in order to bring it into line with the changes made by the Committee of Ministers to Article 7 of Appendix IV. Rule No. 1329 also introduced a change with regard to the reimbursement of educational costs at the exceptional rate, adding the current letter b.

47. The first appellant challenged Rule No. 1329 before the Tribunal claiming, *inter alia*, that it was discriminatory, arbitrary in substance and unreasoned. She asked that the relevant decision by DHR be annulled and that DHR be ordered to reconsider her request to be awarded the education allowance at the exceptional rate for her children, including G., in the event that a new Rule widening the scope of Rule No. 1277 should be issued. The Tribunal found that it could not rule on the appellant's request asking it to hold that the condition in Article 2 of Rule No. 1329 making the exceptional rate of the education allowance subject to the relevant conditions (currently Article 5 b. of Rule No. 1277) was discriminatory. It also found that the appellant had not been subjected to discriminatory treatment (see ATCE, Gorey v. Secretary General (III), No. 503/2011, judgment of 25 April 2012).

III. EXAMINATION OF THE PRESENT APPEALS

48. The first appellant in appeals Nos. 619/2019 and 620/2019 asks the Tribunal to annul the refusal to award her the education allowance at the exceptional rate in respect of her daughter (No. 619/2019) and her son (No. 620/2019). The second appellant in appeal No. 621/2019 asks the Tribunal to annul the refusal to award her the education allowance at the exceptional rate in respect of her son O. for studies in a third country.

1. *The appellants*

49. The appellants first allege a violation of precedent and the principle of legitimate expectation. They maintain that the award of the exceptional rate for a child in post-secondary education is dependent upon satisfying three conditions: (i) that the educational costs as defined in 5 a) and b) of Article 7 of Appendix IV are exceptional, unavoidable and excessively high, (ii) that such costs relate either to education up to completion of the secondary cycle or are costs as defined in paragraph 5 a) and b) for the post-secondary cycle, and (iii) that the costs are incurred for imperative educational reasons – for children with special educational needs resulting from their medically certified physical, developmental or behavioural condition.

50. The appellants allege that in all three cases before the Tribunal, the three aforementioned conditions have been met. They point out that in April 2008 the then Secretary General did award the education allowance at the exceptional rate to the first appellant's son M., recognising the Secretary General's obligation to be consistent in decisions on the payment of the education allowance at the exceptional rate and acknowledging that it was in the interest of staff to be fully informed about the circumstances on which those decisions would be based, which was the reason for adopting Rule No. 1277.

51. According to the appellants, the 2008 decision was not an *ad hoc* decision but one reached in consequence of a consistent policy to grant the exceptional rate to children who fulfilled the requirements laid down in Rule No. 1277, so without the need to demonstrate either that (i) the educational costs were incurred as a consequence of a child's special needs resulting from a medically certified physical, developmental or behavioural condition, or (ii) that these needs were a determining factor in the choice of educational establishment or accounted for the high costs incurred. In other words, there is precedent to the effect that there is no causal link between expenses incurred on account of a child's special needs and the educational establishment. Indeed, in the case of the first appellant's son, the exceptional rate was awarded despite the fact that all pupils paid the same fees, no extra costs were incurred and her son's special needs had not been central to the decision to send him there.

52. The appellants maintain that this policy was thereafter applied by DHR at least until April 2017. They underline that both of them did demonstrate that their children's needs were indeed a determining factor in the choice of educational establishment, or the choice to continue at the particular educational establishment, despite the fact that no such criterion is included in Rule No. 1277.

53. The appellants argue that the Secretary General cannot simply decide to disregard the precedent he agreed to set by now refusing to follow a policy which has been consistently applied to other children suffering from medically certified conditions. Such a reversal of policy manifestly breaches the principle of legitimate expectation. Indeed, the Secretary General does not contest the medically certified conditions of the appellants' children, their need for special needs support, the ability of their respective universities to provide the necessary services and the actual educational costs incurred for each of them. His current main argument is that the educational costs must be additional or extra and, therefore, necessarily incurred for reasons outside the ambit of educational costs as defined in Article 7, paragraph 5, of Annex IV.

54. It is interesting to note, however, that the first appellant is having to lodge an appeal for the second time in order to obtain satisfaction for her son M., whose medically certified condition has not changed, and whose sole change in circumstances is to have transferred from secondary to post-secondary education. The second appellant's son O. is in the same position. In this respect, the appellants rely on the position of the Advisory Committee on Disputes in respect of the first appellant's son.

55. In respect of the arguments put forward by the Secretary General concerning the discriminatory treatment of their children, the appellants argue that the Secretary General has disregarded the fact that the situation of children with medical conditions is different from that of children without such conditions. All three children concerned suffer from medically certified conditions which have an impact on their abilities in education. They require not only special education support, but also other support services which cannot be covered by the education allowance itself as they are not general fees for schooling and education charged by the educational establishment and are thus not eligible for reimbursement.

56. The appellants further maintain that the reimbursement of educational costs is effected according to the rates, ceilings and conditions specified, and on a case-by-case basis, independent of comparisons between costs or between members of staff or children or schools, even when the fees or choices of school or circumstances were the same for all the children.

57. The first appellant states that the choice of school for several children was made before any special educational needs were identified. The child's special educational needs were clearly not central, therefore, to the choice of school and, consequently, the decision to reimburse at the exceptional rate could not have been either. According to the first appellant, the fact of paying the same fees has never been relevant to the rate at which educational costs are reimbursed. For example, despite paying the same fees for a UK university, a UK national receives 3 times the annual amount of the dependent child allowance whereas a non-UK national receives only 2.5 times.

58. In addition, entitlement and the rate of reimbursement are determined on the basis of the individual, current conditions and circumstances as submitted every academic year. The decision is made on a case-by-case basis and is independent of comparisons between costs from one year to the next or between members of staff or children. The fact that the first appellant's children paid the same fees in previous academic years is immaterial and erroneous, therefore.

59. The appellants argue that there has never been a causal/established link between the costs incurred and choice of educational establishment before.

60. The first appellant argues that the education allowance is clearly meant to be of financial/material help as it is evident that there is no entitlement to medical costs incurred or any overlap or confusion with the disabled child allowance. Reference is made to the dependent child allowance, not to the disabled child allowance. According to the appellant, DHR has discriminated against her children by according them less favourable treatment than that accorded other staff members' children in similar situations. By not applying the common or established practice, and failing to correctly interpret the regulations in a manner consistent with previous cases, DHR conducted an arbitrary and unequal decision-making process which is unjust and prejudicial, all the more so as it appears to arise solely from the wish to save money at the expense of a vulnerable child, contrary to the spirit of the rule as originally envisaged, i.e. to ensure that families with children with medically certified conditions qualify for the exceptional rate.

61. The first appellant further maintains that fair and transparent procedures for evaluating applications for the education allowance should be put in place and staff members properly informed, which was not the case in this instance. The second appellant similarly argues that it is to be expected that when the staff member duly shows that the conditions have been met, he or she may have legitimate and reasonable expectations that all circumstances in the individual case will be taken into account when the Secretary General makes his decision on whether or not to award the education allowance.

62. The second appellant states that when exercising his discretionary power, the Secretary General has to take into account all the circumstances of the case, which, according to her, he failed to do, disregarding the educational needs of her son. She also states that a strict application of the regulations in respect of her son O., who has a medically certified disability, would clearly put him in a disadvantaged position. O. suffers from dyslexia, a language-related learning disability which has a negative impact on his reading and writing abilities. His language of instruction has been English throughout his primary and secondary education and it would place too heavy a burden on him were he now to have to study in a language other than English.

63. Both appellants conclude that the refusal to grant the exceptional rate envisaged for children with special educational needs was based on a manifest error of appreciation, is an infringement of Article 7, paragraph 6.d of Appendix IV, constitutes a breach of precedent, infringes the principle of legal certainty and legitimate expectation, misinterprets past practice and misleads regarding the existence of a common practice, is contrary to good administrative principles and the need for any applicable legal provisions to be sufficiently accessible, precise and foreseeable, and is discriminatory and contrary to the principle of equal treatment.

2. *The Secretary General*

Appeals Nos. 619/2019 and 620/2019

64. In respect of the first criterion set out in Article 7, paragraph d) i) of Appendix IV, the Secretary General notes that the university fees are not exceptional in the case of the appellant's two children. All children having British nationality, or the nationality of another EU country, are required to pay the same university fees of £9,000 to study in the United Kingdom. The fact that the appellant's children are expatriated has no bearing on the cost of their education at the University of Cardiff and does not put them in a different position compared to other British students studying in Wales. Currently, all universities in Wales and the overwhelming majority of universities in the United Kingdom charge the maximum fees. Any child of a Council of Europe employee who chose to study in the United Kingdom would necessarily incur similar tuition fees.

65. The Secretary General observes that the appellant's daughter was required to pay the same university fees in 2014/2015 and 2015/2016 and reduced fees in 2016/2017, prior to the certification of her medical condition. As to the appellant's son, the Secretary General notes that M. was required to pay the same university fees in 2017/2018 without any objection by the appellant regarding the application of the country of nationality rate to his situation. Hence, the appellant in both cases failed to demonstrate any difference in the cost of university between previous years and the year for which the exceptional rate was claimed. There was therefore no change in her situation which would justify these costs being classified as "exceptional".

66. The second and third criteria set out in Article 7, paragraph 6 d) iii) of Annexe IV and in Article 5 of Rule No. 1277 should, according to the Secretary General, be read together, as the former sets out the requirement that the costs in question must be incurred for "imperative educational reasons", while the latter determines and limits the scope of those "imperative educational reasons". More precisely, regarding what is to be understood by "imperative educational reasons", these are restricted by Article 5 of Rule No. 1277 to cases concerning "children with special educational needs resulting from their medically certified physical, developmental or behavioural condition".

67. When read together, it follows from the provisions in question that the only costs which are subject to reimbursement at the exceptional rate are those excessively high costs which are incurred on an exceptional and unavoidable basis in order to meet the special educational needs incurred in relation to the child of a staff member, which arise as a result of a medically certified condition. The Secretary General underlines that he only reimburses such costs at the exceptional rate where they are incurred as a direct result of the special educational needs of the child. There has been no change in the application of the rules which would constitute a "novel interpretation" of Rule No. 1277 or the Staff Regulations, as alleged by the appellant.

68. The Secretary General submits that as a result of the consistent interpretation of the relevant provisions by DHR, only an extremely limited number of staff members are in receipt of the exceptional rate. In the years 2014/15, 2015/16, 2016/17 and 2017/18, only three children have been considered to qualify for the exceptional rate. One of those children was the appellant's son [M.], who attended the European School in Karlsruhe. All of the children concerned had a certified medical condition or a disability which required special

educational measures and therefore, they attended [this] school, which offers specific provision for children in such situations. At the material time, there was no equivalent institution in Strasbourg or the surrounding region. The costs, amounting to over €11,000 per year, were very high but taking into account the specific educational provision offered by the school, these costs were assessed as meeting the criterion of being exceptional, unavoidable and excessively high. By contrast, this is clearly not the case for the appellant's children's post-secondary studies in the United Kingdom, where education costs are the same regardless of the university chosen – and hence not exceptional – and all universities offer the same level of support to students with special educational needs.

69. The Secretary General argues that the educational fees incurred for the appellant's two children are not connected to their medical condition. The Cardiff University support services integral to her daughter's continued ability to attend university are free of charge and available to any student suffering from a mental or physical health condition. Also, none of the adjustments or services offered to the appellant's children resulted in any additional cost being incurred as a result of their respective medical conditions. The children did not suffer discrimination of any kind, therefore.

70. For the reasons stated above, the Secretary General invites the Tribunal to find both appeals unfounded and to dismiss them.

Appeal No. 621/2019

71. The Secretary General first considers that there can be no suggestion that the requirement of "continuity in following an educational cycle" is met in the present case. Education cycles being split into primary, secondary and post-secondary, continuity is clearly intended to be interpreted as within an educational cycle and thus time-limited to the end of that educational cycle. Hence, it is not possible to claim that the criterion of continuity applies to the choice of university. In any case, the chosen university has no geographical or institutional link with the son O.'s secondary school, the European School in Karlsruhe. The Secretary General recognises that the annual school fees in this school are over €11,000 and that the appellant was reimbursed at the exceptional rate. He explains that at the relevant time, the European School in Karlsruhe offered adaptive and intensive support to all children according to their special needs, and that there was no equivalent institution in Strasbourg or the surrounding region. In these circumstances, the cost of the special educational provision offered by this school was assessed as meeting the criterion of being exceptional, unavoidable and excessively high.

72. The Secretary General concedes that the only link claimed by the appellant is the language of instruction. However, this is not relevant for the purposes of the applicable provision. The assumption is that the child will be educated in the host country or in the country of nationality of either of their parents. The appellant's son O. could thus study in his mother tongue in Denmark, or alternatively in France, and the appellant would receive reimbursement. The Organisation, furthermore, has not deprived him of the opportunity to study in England, but has simply applied the relevant rules regarding whether or not the Organisation will undertake to pay for it. It is merely less financially advantageous to study in London, despite the fact that the appellant will continue to receive the dependent child allowance to cover some of the costs of providing for her son O.

73. The Secretary General adds that the psychologist's statement provided by the appellant indicating that it would be easier for O. to study in English does not automatically imply that he must imperatively study in the United Kingdom. It also does not prove that it would be impossible for him to study in French or Danish or to follow a curriculum that would be partially in English.

74. Regarding the issue of lower educational costs raised by the appellant, the Secretary General maintains that the option to study in a third country and nevertheless receive reimbursement by means of the education allowance is foreseen as a discretionary decision of the Secretary General in cases where the cost to the Organisation would not theoretically be higher than if the child were to pursue their studies in the host country or parent's country.

75. The Secretary General, applying the relevant rules correctly and narrowly, submits that the only correct interpretation of the term "educational costs" in the second sentence of Article 7, paragraph 1 b), of Annex IV is as meaning "general (or public) educational costs". In relation to the current case, the Secretary General notes that tuition costs for EU citizens in France are between €170 and €300 per year and in Denmark they are free. Estimated living costs for the UK and Denmark are similar, whereas they are slightly lower for France. It is therefore impossible to conclude that the United Kingdom, with fees of £9,250 (€10,289.55), represents a lower cost. The Secretary General refers also to certain possibilities for the appellant's son O. to study in France. She therefore concludes that it is unreasonable to claim that the education costs are less in the United Kingdom by basing this argument on an exceptional and unrepresentative university based in France.

76. Relying on her discretionary power in the matter, the Secretary General underlines that while an exception to the rule under Article 7, paragraph 1 b), of Annex IV could not be granted, since two conditions, namely continuity in an educational cycle and lower educational costs in a third country, were not met, all the relevant circumstances of the situation in which the appellant's son O. found himself were carefully considered. However, granting an exception would be prejudicial to the interests of the Organisation, setting a clear precedent for further similar claims. Moreover, an *ad hoc* decision to make an exception would pose a severe risk of costly misappropriation of the relevant rules.

77. In respect of the appellant's request to reimburse her son's educational costs at the exceptional rate, the Secretary General argues that the education fees incurred for O. are not connected to his medically certified condition. The support services of the School of Oriental and African Studies in London are free of charge and available to any student suffering from a disability or a mental or physical health condition.

78. The Secretary General concludes that the decision to refuse the second appellant an education allowance in respect of her son on the basis that she is ineligible was made in conformity with the ordinary practice of the Organisation, the applicable regulations and the general principles of law. He therefore invites the Tribunal to reject her appeal as ill-founded.

3. *Tribunal's assessment*

79. The first appellant asks the Tribunal to annul the refusal to award her the education allowance at the exceptional rate in respect of her daughter G. (Appeal No. 619/2019) and her son M. (Appeal No. 620/2019). The second appellant asks the Tribunal to annul the refusal to continue granting her son O. the education allowance for studies in a third country

and reimbursement at the exceptional rate foreseen for children with special educational needs. Both appellants maintain that the refusal to accord the exceptional rate foreseen for children with special educational needs was based on a manifest error of appreciation, is an infringement of Article 7, paragraph 6.d of Appendix IV, constitutes a breach of precedent, infringes the principle of legal certainty and legitimate expectation, misinterprets past practice and misleads regarding the existence of a common practice, is contrary to good administrative principles and the need for any applicable legal provisions to be sufficiently accessible, precise and foreseeable, and is discriminatory and contrary to the principle of equal treatment.

80. The Tribunal recognises that families with a disabled member are one of the most vulnerable groups in our society today. This is even more significant when that disabled family member is a child even if he or she has reached the age of academic study. Parents of children with medical and/or learning difficulties inevitably need more internal strength than other parents. They not only have to contend with the particular difficulties that the daily care of a child inevitably entails but also have to deal with situations which for them pose everyday challenges that parents of healthy children cannot even conceive of.

81. The Tribunal is also mindful that not all parents live in the same conditions and environments. Parents who live in a positive environment and possess the appropriate skills and are sufficiently resilient to face everyday problems are most likely to be able to create within their families a sense of protection and security for their affected children. In any case, the costs of caring for a disabled child would be less burdensome for all families if they were financially assisted by their employers.

82. The Tribunal observes in this respect that the system of social protection within the Co-ordinated Organisations, including the Council of Europe, has been developed with the necessary detailed consideration in such a way as to provide broad financial support for staff and, at the same time, to protect the interests of the Organisation as such (see for example ATCE, No. 401/2007, *Gorey v. Secretary General*, paragraph 25, judgment of 19 December 2008). The Tribunal emphasises that any financial support is not unlimited and to an appropriate extent constrained by conditions and requirements which have to be respected both by the Organisation and by its staff members.

83. The Tribunal notes that all provisions governing the system of granting social benefits or reimbursement of different costs and expenses must be formulated in a clear, precise and transparent manner so that all staff members of the Organisation can understand them in order to act accordingly. Last but not least, the Tribunal underlines that even the best system of awarding different benefits or reimbursement of diverse costs can only function properly when all the individual provisions are applied properly and transparently, in a way that respects good administrative principles and therefore establishes a consistent practice.

Appeals Nos. 619/2019 and 620/2019

84. Turning to the present case, the Tribunal notes that the appellants plead, referring to the decision adopted in April 2008 in respect of the first appellant's son M., that this decision was not an *ad hoc* decision but one reached in consequence of a consistent policy to grant the exceptional rate to children who fulfilled the requirements in Rule No. 1277 without the need to demonstrate either that the educational costs are incurred as a consequence of a child's special needs due to a medical condition, or that these needs were a determining factor in the

choice of educational establishment (see paragraph 51 above). In other words, there has never been a causal/established link between the costs incurred and the choice of educational establishment before (see paragraph 59 above). According them, this policy was applied at least until April 2017 (see paragraph 52 above). The first appellant adds that the education allowance is clearly meant to be of financial/material help as there is no entitlement to medical costs incurred or any overlap or confusion with the disabled child allowance (see paragraph 60 above).

85. The Secretary General, relying on the joint applicability of Article 7 of Appendix IV and Rule No. 1277, maintains that the only costs which are subject to reimbursement at the exceptional rate are those excessively high costs which are incurred on an exceptional and unavoidable basis in order to meet the special educational needs incurred in relation to the child, which arise as a result of a medically certified condition or accounted for the high costs incurred (see paragraph 67 above).

86. The Tribunal considers that the key issue in this case is whether the annual educational costs of £9,000, obligatory for all students, paid by the appellant to the University of Cardiff for her two children were exceptional, unavoidable and excessively high and incurred for imperative educational reasons, as provided for in paragraph 6 d. of Article 7 of Appendix IV, and hence due to their special educational needs resulting from their medically certified physical, developmental condition as specified in Article 5 a. of Rule No. 1277.

87. In other words, the question arises as to whether there is in fact a requisite causal link between the appellant's children's special educational needs (resulting from their medically certified condition) and the educational costs incurred which could be subject to reimbursement at the exceptional rate.

88. The Tribunal notes that paragraph 6 of Article 7 of Appendix IV provides for four different rates in respect of the reimbursement of educational costs mentioned in paragraph 5: standard rate, country of nationality rate, increased rate and the exceptional rate (see paragraph 40 above), assuming that each case is treated individually. The Tribunal observes in this respect that when introducing the possibility of reimbursement of educational costs at the exceptional rate, the then Secretary General stated before the Committee of Ministers that in the secondary instrument, he intended to limit the application of the exceptional rate to cases where the educational costs were incurred for children with special educational needs resulting from their medically certified physical, developmental or behavioural condition. The Secretary General also expressly announced that those cases in which the exceptional rate would be applied would be specified in Article 5 of Rule No. 1277 (see ATCE, Gorey v. Secretary General, cited above, paragraphs 25-26). Under paragraph 13 of Article 7 of Appendix IV, moreover, the Secretary General is expressly empowered to "establish instructions for implementation of the provisions of this Article" (see paragraph 40 above).

89. The Tribunal considers that it is clear from this historical development that Article 7 of Appendix IV and Rule No. 1277 are intertwined issues. The fact that both legal acts are interconnected also flows from their own content which the Tribunal finds generally clear, but which has not entirely managed to escape a broader interpretation by DHR.

90. From the overall wording of the relevant parts of these provisions, the Tribunal concludes that the exceptional rate applies if all three of the following conditions are met: (i) costs for school or university fees and/or general fees for the child's schooling charged by the

educational establishment (paragraph 5 a. and b., of Appendix IV) which are exceptional, unavoidable and excessively high (paragraph 6 d) i), of Appendix IV), (ii) such costs are defined for the post-secondary cycle (paragraph 5 a. and b., of Appendix IV), and (iii) they are incurred for imperative educational reasons (paragraph 6 d) iii), of Appendix IV), i.e. for children with special educational needs resulting from their medically certified physical, developmental or behavioural condition (Article 5 a., of Rule No. 1277).

91. The Tribunal observes that the principal reasons for the refusal to grant the appellant's requests for reimbursement at the exceptional rate of the educational costs incurred in respect of her two children was the absence of a causal link between her children's special educational needs/imperative educational reasons and the costs incurred (see paragraphs 22-24 above).

92. The Tribunal notes that the appellant's children started their studies at the University of Cardiff in 2014 and 2017 respectively, both with a certified medical diagnosis – Lyme's disease and dyslexia, respectively (see paragraphs 5 and 6 above). The Tribunal further observes that while the health condition of the appellant's daughter was not originally the main reason for her choice of this academic institution, it ultimately became so after her medical condition worsened in 2016 (see paragraphs 5 and 17 above). Unlike his sister, according to the appellant, the appellant's son opted for the University of Cardiff because it was known to have a good student support service, which his sister experienced at first hand in 2016 when her state of health worsened and Cardiff University put special provisions in place for her (see paragraph 6 above).

93. The Tribunal finds that the appellant's daughter's special educational needs resulting from her worsened medically certified condition in 2016 influenced her choice to remain at Cardiff University. However, the Tribunal finds that no causal link can be established between the university fees and the appellant's daughter's special educational needs resulting from her medically certified condition. As far as the appellant's son is concerned, the Tribunal notes that his choice to go to Cardiff University was certainly influenced by his sister who was already familiar with the local situation and the service offered by this university. Familiarity with the place, the standard of tuition offered by the university, the requirements and its special services, the atmosphere, and the possibility to maintain family ties are all important factors to consider when choosing a university. Even if his medical condition played an important role in M.'s decision to opt for Cardiff University, the Tribunal is not convinced that this in itself establishes the required clear causal link between his medically certified condition and the choice to attend Cardiff University. This finding is further reinforced by the fact that all universities in the UK have a statutory obligation to make provision for students with special needs at no extra cost.

94. The Tribunal further notes that the annual tuition fees at Cardiff University were and continue to be unavoidable for the appellant's children, as they constitute the basic condition for their post-secondary study at this academic establishment. Moreover, it is not disputed between the parties that they were excessively high, which could be justified by the fact that these annual fees paid by all student also serve to finance special educational support for those of them with medical conditions like the appellant's children. The Secretary General recognises, furthermore, that at present, all universities in Wales and the overwhelming majority of universities in the United Kingdom charge the maximum fees (see paragraph 64 above).

95. The Tribunal is not convinced, however, that the annual tuition fees which the appellant pays for her daughter and her son could be considered exceptional. In effect, as has already been pointed out, the annual tuition fees of £9,000 are paid by all students attending the University of Cardiff independently of their medical conditions and their related special needs.

96. In this context, the Tribunal has already noted that both of the appellant's children had a medical condition or history either when they embarked on their studies (case of the appellant's son M.) or during their studies due to the health condition becoming worse (case of the appellant's daughter). It does not appear from the information submitted to the Tribunal, however, that the appellant's children were charged extra for the special support service provided to them by the university. Indeed, the Tribunal understands that all support and special provisions for students with medical conditions were organised by Cardiff University and financed by it using its own resources.

97. The Tribunal is conscious of the fact that in case of the appellant's son M., the Secretary General previously assessed the annual fees of over €11,000 charged by the European School in Karlsruhe as meeting the criteria for reimbursement at the increased or exceptional rate (see paragraphs 6 and 8 above). However, the Tribunal considers as plausible the explanation given by the Secretary General in this respect (see paragraph 68 above) and the special granting of reimbursement at the increased or even exceptional rate connected to his explanation (see also paragraph 25 above). Indeed, the Tribunal observes that at the relevant time, it appears there was no equivalent educational institution in Strasbourg or the surrounding area capable of offering similar special support to children with special needs, thus rendering the fees of over €11,000 per year charged by the European School in Karlsruhe "exceptional, unavoidable and excessively high", as required under Article 7, paragraph d) i), of Annexe IV (see paragraph 40 above).

98. In the light of these considerations, the Tribunal concludes that this part of the case is unfounded and must be dismissed.

Appeal No. 621/2019

99. The Tribunal notes at the outset that the second appellant's son completed the overwhelming majority of his primary and secondary education in English. At the end of the third school year, he was diagnosed as suffering from dyslexia which was confirmed in a medical certificate. During this period when he was attending the European School, the appellant was receiving an education allowance with reimbursement of educational costs at the exceptional rate (see paragraphs 28-29 and 71 above). In this respect, the Tribunal refers to its assessment regarding the situation of the first appellant's son M. (see paragraph 97 above).

100. Having obtained the European Baccalaureate Diploma in July 2018, the appellant's son went on to study at the School of Oriental and African Studies in London during the academic year 2018/2019. The appellant's son also opted for this university because it offers better special educational needs support, which is essential if he is to achieve his full potential (see paragraph 30 above).

101. The appellant applied for the education allowance in respect of her son for the academic year 2018/2019, but was refused because her son had opted for a school in London,

which does not comply with the requirements of Article 7 of Appendix IV and neither of the two possible exceptions applied (see paragraphs 31-32 above).

102. In respect of both exceptions – continuity in following an educational cycle and lower educational costs in a third country within the meaning of paragraph 1 b. of Article 7 of Appendix IV - the Tribunal concurs with both the Advisory Committee on Disputes and the Secretary General regarding the interpretation of these provisions (see paragraphs 35 and 39 above).

103. The Tribunal welcomes the fact that the then Secretary General evaluated the appellant's claims within the ambit of his discretionary power entitling him to adopt an *ad hoc* decision (see paragraph 39 above). With all due respect to the scope and extent of his discretionary power and the decision taken, the Tribunal would nevertheless point out that it is not clearly apparent from the reasoning regarding the Secretary General's assessment of the appellant's case that all the evidence, in particular the materials submitted by the appellant on 29 April 2019 (see paragraph 36 above), which the Tribunal itself would consider as relevant, was actually taken into account.

104. The foregoing does not alter, however, the Tribunal's conclusion that this part of the case is unfounded and must be dismissed.

105. In respect of the second appellant's complaint which is similar or even identical to the one submitted by the first appellant concerning the reimbursement of educational costs at the exceptional rate, the Tribunal refers, insofar as it is relevant, to its assessment and findings as presented in the first case. Accordingly, it considers that this part of the second case is also unfounded and must be dismissed.

IV. CONCLUSION

106. In conclusion, the present appeals are unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares appeals Nos. 619/2019, 620/2019 and 621/2019 unfounded and dismisses them;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg on 29 January 2020 and delivered in writing on 27 February 2020 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the English text being authentic.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

A. BAKA