Decision of the European Ombudsman on complaint 747/98/OV against the European Commission

Decision
Case 747/98/OV - **Opened on** 15/09/1998 - **Decision on** 28/09/2000

Strasbourg, 28 September 2000 Dear Mr P., On 14 July 1998, you made a complaint to the European Ombudsman concerning the refusal of DG IX of the Commission to award you an installation allowance as well as the reimbursement of your removal expenses. On 15 September 1998, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 13 November 1998 and I forwarded it to you with an invitation to make observations, if you so wished. On 7 December 1998, I received your observations on the Commission's opinion. I am writing now to let you know the result of the inquiries that have been made.

THE COMPLAINT

According to the complainant, the relevant facts were as follows: The complainant had been a French national expert on secondment in the Commission from 1 September 1993 until 30 November 1994. In September 1993 the complainant and his family came to live in Brussels. On 1 December 1994 the complainant was recruited as a temporary agent in the Commission (UCLAF). By note of 5 December 1994 he asked to receive the allowances provided for temporary agents who had to move to Brussels. On 6 January 1995 the Administration of Individual Rights' Unit of DG IX informed the complainant that his recruitment place was Brussels and that he was not entitled to receive an installation allowance and the reimbursement of removal expenses because he was already living in Brussels and had not to change his residence in order to start working as a temporary agent. On 23 February 1995, the complainant received the details of this decision. By notes of 3 April and 8 September 1995 the complainant asked for the reimbursement of his removal expenses. By note of 8 November 1995, the Commission confirmed its decision of 6 January 1995. The complainant however observed that some of his colleagues who where in exactly the same situation (ex - national experts on secondment with a residence in Brussels, later recruited as temporary agents) had received an installation allowance and the reimbursement of the removal expenses. On 16 April 1997, the complainant asked for the re-examination of his case, referring to 4 judgements of the Court of First Instance of 12 December 1996 (T-74/95, T-33/95, T-132/95, T-137/95). According to those judgements, the situation of having been a national expert on secondment before becoming a temporary agent does not lead to the automatic fixation of Brussels as the recruitment place. For this reason, the recruitment of temporary agents, ex-national experts on secondment, should be accompanied by the benefit of the installation allowances and the

reimbursement removal expenses. On basis of those judgements the complainant asked the Commission to change his recruitment place to Paris, seat of his ex-employer, and to grant him the installation allowance and the reimbursement of removal expenses. On 2 June 1997, the Commission replied to the complainant that the judgements of the Court of justice cannot have retroactive effect, unless an appeal against the decision is made within the deadline specified in Article 90 of the Staff Regulations. The complainant's request could not be taken into consideration, because de did not make an appeal within 3 months against the decision of 23 February 1995 fixing the complainant's rights. On 25 September 1997 the complainant then submitted an appeal under Article 90 of the Staff Regulations against the Commission's refusal to change his recruitment place to Paris and to award him an installation allowance and the reimbursement of the removal expenses. On 30 January 1998, the Commission rejected the appeal as inadmissible, because it was not made within the deadline of 3 months specified in Article 90.2 of the Staff Regulations: the Commission's decision concerning the complainant's recruitment place was taken on 23 February 1995 and the complaint was made on 25 September 1997. The Commission also observed that a judgement of the Court of First Instance can be considered as a new fact, but only with regard to the persons directly concerned by the annulled act. The complainant was however not concerned by the four judgements which concerned the legal situation of the parties. Finally, the Commission stated that, even if other temporary agents in the same situation as the complainant had would have received allowances, this was a mistake. The Commission added that, according to the case-law, a person cannot invoke to his benefit an illegality committed in favour of another person. On 7 April 1998 the complainant's lawyer sent a letter to the European Commission stating that the complainant's file should be re-examined in the light of the Court of First Instance's decisions and in the light of the principle of equality. The principle was violated because the Commission, on basis of the case-law of the Court of First Instance, re-examined the files and granted the installation allowance and the reimbursement of the removal expenses to some ex-national experts on secondment who were in the same situation as the complainant. The Commission replied by confirming its decision of 30 January 1998. The complainant therefore complained to the Ombudsman alleging 1) that he had been refused the installation allowance and the reimbursement of his removal expenses and 2) that the principle of equality of treatment had been violated, because other temporary agents in the same situation as him had been granted those allowances.

THE INQUIRY

The Commission's opinion The Commission in its opinion indicated that, at the time of the complainant's recruitment as a temporary agent, the administration considered that national experts on secondment who had worked in Brussels, had fixed their residence in Brussels. Therefore their recruitment place when starting to work as temporary agents was fixed in Brussels and the payment of an installation allowance and the removal expenses was not justified because they had not to change their place of residence. The Commission observed that at that point the complainant was treated exactly the same as any other person being in the same situation and that this approach was maintained by the administration until the Court of First Instance's judgements of 12 December 1996 which obliged the Commission to change its interpretation. From then on, the administrative and financial position of the national experts on secondment, recruited as temporary agents, was re-examined case by base in the light of this

case-law. However, the Commission indicated that the four judgements only concerned the four applicants in question and that, according to established case-law, complaints which are not made within the deadline are inadmissible. The Commission also referred to Article 90.1 and 91 of the Staff Regulations and to the principle of legal certainty and stated that complaints should be made within the deadline, otherwise the decision becomes definite. Only the existence of new facts could justify a request for re-examination of a decision. The Commission denied however that the Court of First Instance's judgements of 12 December 1996 could be seen as a new fact for the complainant, because they can only be considered as new facts for the persons directly concerned by the annulled act. As for the allegation of the complainant that there were other temporary agents in the same situation who received an installation allowance despite the fact that they were ex-national experts on secondment living already in Brussels, the Commission observed the following. Further to the publication of the judgements of 12 December 1996, the administration firstly considered that the situation of officials and agents who had introduced requests and complaints against the initial decisions within the deadline and before the judgements of 12 December 1996 could be re-examined case by case in the light of this case-law. This approach was later abandoned because of the compulsory character of the deadline provided in the articles 90 and 91 of the Staff Regulations. In the present case, the decisions concerning the recruitment place and place of origin of the complainant were taken on 23 February 1995. The complainant lodged a complaint on 25 September 1997, that is more than three months after the decision and after the Court of First Instance's judgements. Therefore, his complaint was considered overdue. At this stage, all officials and agents in the same situation were treated equally with the complainant. Finally, the Commission stated that, even if other temporary agents in the same situation as the complainant would have received allowances, this was a mistake. The Commission added that, according to the case-law, a person cannot invoke the principle of equality of treatment in order to benefit from a practice which is contrary to the Staff regulations, because nobody can invoke to his profit an illegality committed in favour of someone else. **The complainant's observations** The complainant observed that the Commission's statement that he was treated equally with everyone in the same situation as him was not true. He mentioned that there are two of his colleagues, ex-national experts on secondment, recruited later as temporary agents who obtained the reimbursement of their removal expenses. Neither was it true that all agents were treated equally with regard to deadline for submitting complaints. He mentioned the example of one of his colleagues who, without having introduced a complaint under Article 90 of the Staff Regulations, obtained satisfaction. The complainant enclosed with his observations the file of this colleague as a proof of the fact that the Commission had granted an installation allowance to someone in exactly the same situation as the complainant who had not made a complaint under Article 90 of the Staff Regulations. The complainant asked for the confidentiality of these documents.

THE DECISION

1 The alleged refusal of the Commission to pay an installation allowance and the reimbursement of the removal expenses 1.1 The complainant alleged that the Commission had refused to pay him an installation allowance and the reimbursement of his removal expenses. The complainant observed that the four judgements of the Court of First Instance of 12 December 1996 constituted a new fact which justified the re-examination of his situation. The

Commission observed that, at the time of the complainant's recruitment, the administration considered that national experts on secondment who had worked in Brussels, fixed their residence there. It also stated that the four judgements of the Court of First Instance only concerned the relevant applicants, and that according to Article 90 and 91 of the Staff Regulations, the complainant should have respected the deadlines for complaining against the Commission's decision. 1.2 The Ombudsman notes that the decision whereby the Commission fixed the complainant's recruitment place in Brussels and refused to grant an installation allowance and the reimbursement of the removal expenses was taken on 23 February 1995. On 12 December 1996, the Court of First Instance pronounced four judgements in cases T-74/95, T-33/95, T-132/95, T-137/95 concerning ex-national experts on secondment. The Court stated that Article 5, 1, par. 1 of Annex VII of the Staff Regulations foresees that, in order to be entitled to an installation allowance, the official shall fulfil one of the two alternative conditions, that is qualify for expatriation allowance or furnish evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations. Therefore, when the applicant benefits from the expatriation allowance, he is entitled to an installation allowance (1) . 1.3 Article 90.2 of the Staff Regulations provides that a complaint against a negative decision must be lodged within three months from the date of the notification of the decision. According to the case-law of the Court of First Instance, the time-limits under Articles 90 and 91 of the Staff Regulations for bringing complaints and appeals, laid down with a view of ensuring clarity and legal certainly, are a matter of public policy (2) . Only the emergence of a new fact is capable of reopening the limitation period provided for in Article 91 of the Staff Regulations. However, according to the Court of First Instance, a judgement annulling an act can constitute a new fact only in relation to the persons concerned by the legal effects of such a judgement, i.e. apart from the parties, the persons to whom the annulled act itself is of direct concern (3) . In the present case therefore, the judgements of the Court of First Instance of 12 December 1996 could not be regarded as a new fact in the light of which the procedure for review may be re-opened. The complainant has lodged his formal complaint under Article 90 of the Staff Regulations only on 25 September 1997, i.e. more than two years after the negative decision of 23 February 1995. The complainant therefore failed to make a formal complaint within the imperative deadline of three months prescribed by the Staff Regulations. No instance of maladministration was thus found with regard to this aspect of the case. **2 The alleged violation of the principle of equality of treatment** 2.1 The complainant alleged that the Commission has violated the principle of equality by granting installation allowance and removal expenses to other temporary agents who were in exactly the same situation as the complainant. He attached as proof documents concerning one of his colleagues who had not lodged a formal complaint under Article 90 Staff Regulations but obtained the installation allowance. The Commission observed that, even if other temporary agents in the same situation as the complainant would have received allowances, this was a mistake. The Commission added that, according to the case-law, a person cannot invoke the principle of equality of treatment in order to benefit from a practice which is contrary to the Staff regulations, because nobody can invoke to his profit an illegality committed in favour of someone else. 2.2 The Ombudsman notes that, according to the case law of the Court of First Instance, an official cannot rely on the principle of equality of treatment to claim the benefit of a practice contrary to the provisions of the Staff Regulations since no person may plead in his own cause an unlawful act committed in favour of anotherTherefore, as the granting of the installation allowance to the complainant's colleague

who was in the same situation appeared to be a mistake, the complainant could not claim the benefit of it. No instance of maladministration was thus found with regard to this aspect of the case (4) . Therefore, as the granting of the installation allowance to the complainant's colleague who was in the same situation appeared to be a mistake, the complainant could not claim the benefit of it. No instance of maladministration was thus found with regard to this aspect of the case. 2.3 The Ombudsman however deplores that persons who were in the same situation with regard to the claim for installation allowances have been treated differently by the Commission and hopes that the Commission will take steps in order to avoid these kind of differences in treatment in the future. **3 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman has therefore decided to close the case. The President of the European Commission will also be informed of this decision. Yours sincerely, Jacob SÖDERMAN

(1) Case T-33/95, *Lozano Palacios v. Commission* , [1996] ECR Staff Cases IA-575, II-1535, par. 57-61.

(2) Case T-506/93, *Moat v. Commission* , [1995] ECR Staff Cases IA-43, II-147.

(3) Case T-131/95, *Progoulis v. Commission* , [1995] ECR Staff Cases, IA-297, II-907.

(4) Case T-30/90, *Zoder v. Parliament* , [1991] ECR, II-207.