Decision of the European Ombudsman closing his inquiry into complaint 3126/2009/ELB against the Economic and Social Committee

Decision
Case 3126/2009/ELB - **Opened on** 22/03/2010 - **Decision on** 29/11/2011

The background to the complaint

1. The complaint concerns the refusal of a request for an expatriation allowance. EU officials can apply for an expatriation allowance to compensate them for leaving their home country to work for the EU institutions. The applicable rule, found in Annex VII to the Staff Regulations, reads as follows:

" *An expatriation allowance ... shall be paid:*

(a) to officials:

— who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and

— who during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State...

(b) to officials who are or have been nationals of the State in whose territory the place where they are employed is situated but who during the ten years ending at the date of their entering the service habitually resided outside the European territory of that State for reasons other than the performance of duties in the service of a State or of an international organisation."

2. The complainant, a Greek citizen, lived in Belgium until May 1982, when he moved to Greece. In December 1984, he moved back to Belgium. In July 1989, he was recruited by the European Economic and Social Committee ('the Committee') in Brussels. He requested the expatriation allowance. His request was refused.

3. On 3 September 1998, the complainant requested a revision of the Committee's decision not to grant him an expatriation allowance. He based his request on a then recent ruling of the

Court of First Instance [1] , which had altered the interpretation of the rules concerning expatriation allowances. The complainant was of the view that this development in the case-law implied that he should be granted the expatriation allowance. On 23 September 1998, the Committee rejected this new request. On 25 March 2009, the complainant submitted a new request under Article 90(1) of the Staff Regulations, in which he requested payment of the expatriation allowance. On 12 May 2009, the Committee rejected his request, referring to previous notes dated 23 September 1998 and 27 March 2008. On 5 August 2009, the complainant lodged a complaint under Article 90(2) of the Staff Regulations. On 30 November 2009, the Committee rejected the complaint. The complainant then turned to the Ombudsman.

The subject matter of the inquiry

4. The Ombudsman opened an inquiry into the following allegation and claim:

Allegation:

The complainant alleged that the Committee was wrong to refuse his request for a new decision that would take account of the evolution of the case-law since the original decision was made in 1990.

Claim:

The complainant claimed that the Committee should review its decision and grant him the expatriation allowance for the future.

5. The Ombudsman also informed the Committee that he had opened an own-initiative inquiry into the general question of how the Commission, Parliament and the Council deal with requests, made by officials and agents under Article 90(1) of the Staff Regulations, concerning how decisions are to be reviewed in the light of evolving case-law [2] . He asked the Committee to reply to the following general questions which he raised in his own-initiative inquiry:

1) Does the Committee consider that, as a general principle, it can replace previously adopted administrative acts to ensure that it acts in compliance with evolving case-law concerning the interpretation of existing rules and regulations?

2) If the answer to the first question is yes, does the Committee agree that an official or agent is entitled to request the Committee, under an Article 90(1) procedure, to adopt a new decision to replace an earlier decision which has become definitive, in order to take account of case-law evolution which has taken place since the original decision was made?

The inquiry

6. On 21 December 2009, the complainant submitted his complaint to the Ombudsman. On 22 March 2010, the Ombudsman opened an inquiry and forwarded the complaint to the Committee, which sent its opinion to the Ombudsman on 5 July 2010. The opinion was forwarded to the complainant, who submitted his observations on 19 July 2010.

7. On 18 April 2011, the Ombudsman addressed a proposal for a friendly solution to the Committee. On 31 May and 30 June 2011, the Committee replied to the friendly solution proposal. Its reply was forwarded to the complainant, who did not submit observations.

The Ombudsman's analysis and conclusions

A. The Committee's replies to the general questions included in own-initiative inquiry OI/4/2010

Arguments presented to the Ombudsman

8. In its opinion, the Committee stated that, according to established case-law of the Union courts, an official cannot disregard the time limits laid down in Articles 90 and 91 of the Staff Regulations and, once those time limits have expired, he or she cannot challenge any decision made, unless new and substantial facts come to light [3] . The Committee stated that the purpose of the time limits for complaints and appeals, as laid down by Articles 90 and 91 of the Staff Regulations, is a matter of public order and that the time limits are not subject to the discretion of the parties involved, or that of a court. They provide for legal certainty, the avoidance of discrimination or arbitrary treatment in the administration of justice, and the indefinite questioning of EU acts that have legal consequences. The Committee stated that the Court takes a very restrictive view on this matter and that it considers the legal effects of a judgment, whereby an act is annulled, to apply only to the parties and persons directly concerned by the annulled act, and that a judgment constitutes a new fact only with regard to those persons [4] .

9. The Committee stated that it considers that an Appointing Authority's final decision cannot be challenged or reviewed, and that subsequent judgments concerning other matters only apply to future cases. It therefore concluded that there was no general principle which would compel the administration to replace administrative acts that had become final in order to take the evolution of case-law into account.

10. The Committee stated that, while it is clear that the time limits for lodging appeals laid down by Article 90 are a matter of public order, and could under no circumstances be used to open a debate in the absence of any new fact, specific circumstances could, nonetheless, justify a request to review a previous administrative decision which was not contested within the time limits. In other words, the Appointing Authority cannot disregard the expiry of the time limits laid

down by law for lodging appeals, but it can, using its extensive powers of discretion, decide, at any time, to review a request and its effects for the future. In all cases, respect for the principle of legal certainty must take precedence, and, for this reason, the retroactive nature of acts or their effects can, under no circumstances, be taken into account. Finally, the fact of not granting a request for review should not be considered as constituting an infringement of the principle of equal treatment, since the administration is in no way obliged to re-examine its previous decisions which were not contested within the applicable time limits.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

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11. The Ombudsman fully acknowledged that a decision which has not been challenged within the legal deadlines for a judicial review becomes definitive, that is, that the "legality" of that decision cannot be challenged.

12. The fact that the **legality** of the decision can no longer be challenged before a Court, in other words, that an interested party cannot seek the annulment of the decision, does not, in and of itself, imply that the administration cannot at any time decide to replace that decision with another decision, which will apply in future.

13. The Ombudsman underlined that, while the institutions are not **legally** obliged to adopt new decisions replacing existing decisions, with a view to taking into account, for future purposes, of the evolving case-law of the Union Courts, they are certainly not legally prevented from doing so. It is, in sum, within their margin of discretion to do so [6] .

14. By way of example, the Ombudsman noted that, as regards the application of Article 12(3) of Annex XIII to the Staff Regulations, the Commission stated on 20 July 2005 that it would replace grading decisions concerning all its staff on the basis of a future judgment of the General Court, despite the fact that staff might not have appealed the decision in relation to them. The Commission stated the following: "In order to avoid the proliferation of complaints and appeals, the Appointing Authority has decided to extend the effects of a possible future judgment by the [Court of First Instance] to all of the colleagues concerned, regardless of whether they have or have not contested their grading by lodging a complaint pursuant to Article 90(2) of the [Staff Regulations] and/or appeal to the [Court of First Instance]" [7] . The Council took a similar position [8] .

15. By way of a further example, in a case concerning the award of an expatriation allowance, the Commission chose to replace an earlier decision with another decision, taken almost four years after the initial decision had been adopted [9] .

16. The existence of a margin of discretion may imply that the administration can also choose not to replace an administrative decision with another such decision. The Ombudsman did not exclude that the exercise of this margin of discretion might be influenced by diverse considerations, such as those relating to respect for fundamental rights, fairness, stable staff

relations and the financial stability of an institution. If an institution decides to replace an existing decision with a new one, it is within its margin of discretion to decide that the new decision will only take effect from the moment it enters into effect. An institution is under no obligation to give any retroactive effect to a new decision.

17. The Ombudsman welcomed the Committee's statement that, in principle, using its extensive powers of discretion, it may **choose** , at any time, to review a request. The Ombudsman was of the view that, in accordance with principles of good administration, the Committee, when exercising such extensive powers of discretion, should take into consideration all relevant factors, including the interest it has as an institution in drawing all reasonable conclusions from Union Court rulings [10] .

B. Allegation of wrongful refusal of a request to take a new decision

Arguments presented to the Ombudsman

18. In its opinion to the Ombudsman, the Committee emphasised that the complaint concerned the Appointing Authority's refusal to "re-open" the file, and not the refusal to award the complainant the expatriation allowance. In the present case, it argued, the complainant was not directly concerned by the Commission's act which was annulled by the General Court in Case T-72/94 *Diamantaras* . Therefore, the case referred to did not constitute a new and substantial fact which would justify re-opening the time limit for the complainant to lodge an appeal. Consequently, the decision taken by the Committee concerning the complainant's expatriation allowance was final.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

19. The Ombudsman took the view that, if an Article 90(2) [11] complaint is made against an administrative decision, and the complaint is rejected, the administrative decision becomes definitive if it is not challenged before a court within the statutory deadline. However, the fact that the initial decision cannot be annulled does not imply that the Committee cannot choose to take a new decision which would replace the initial decision and would take effect only in the future.

20. The Ombudsman noted that the Committee based its refusal to re-examine the complainant's case on the fact (a) that the complainant was not directly concerned by the Commission's act which was annulled by the General Court in Case T-72/94 *Diamantaras* and, therefore, (b) that the facts of that case did not represent a new substantial fact for him. The Ombudsman underlined, however, that, in accordance with principles of good administration, an institution should draw all reasonable conclusions from Union Court rulings. The Committee

could use its discretionary power and choose to re-examine the complainant's case.

C. Claim that the expatriation allowance should be granted

Arguments presented to the Ombudsman

21. The complainant pointed out that the expatriation allowance is paid to officials who, during the five years ending six months before they entered the service of a European institution, did not habitually reside or carry on their main occupation within the Member State where the institution is located. He added that, during the reference period, he had lived in Greece for 12 months. The complainant argued that, on the basis of Case T-72/94 *Diamantaras* [12] , he should be granted the expatriation allowance. According to the complainant, the Committee's decision is based on a wrong reference period, and its arguments are not clear. In its original decision, the Committee had put forward the fact that he was married to a Belgian citizen and that he had a child who was born in Belgium, in 1987. The complainant argued that these were not relevant facts.

22. In its opinion to the Ombudsman, the Committee explained that the complainant's request is based on the interpretation that the Court of Justice gave in 1995 concerning Article 4 of Annex VII to the Staff Regulations. After that judgment was handed down, the Committee corrected its restrictive interpretation of Article 4. The Committee concluded by stating that it did not consider that the circumstances quoted justify a review of the complainant's file on the basis of the evolution of the case-law.

23. In his observations, the complainant explained that his intention was to request the Committee to examine his situation on the basis of the fairness principle. He referred to the fact that, although the Committee admits that, as a result of the Court's ruling in Case T-72/94 *Diamantaras* , it corrected its restrictive interpretation of Article 4 of Annex VII to the Staff Regulations, it continues to refuse to re-examine his particular case.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

24. The Ombudsman carried out a careful examination of the complainant's case, and of Case T-72/94 *Diamantaras* . As a result of that examination, he took the view that it could be argued that, given that the complainant was not resident in Belgium during the entirety of the reference period prior to his recruitment, he falls within the category of persons who would benefit from the expatriation allowance.

25. The Ombudsman noted above [13] that, given that its decision refusing the expatriation allowance in this instance has become definitive, the Committee has no legal obligation to review the said decision.

26. The Ombudsman also took the view that the financial interests of the institution could potentially be destabilised if the complainant, or others in a similar situation, were to claim, and obtain, the benefit of the expatriation allowance backdated to the date of recruitment.

27. However, while there is no question as regards the legality of the position adopted by the Committee, namely, not to accept the complainant's claim, the fairness of that position could be called into doubt, at least as regards the award of the expatriation allowance *ex nunc* [14] .

28. In light of the above, the Ombudsman made the preliminary finding that the Committee should consider using its margin of discretion in the present case in order to decide whether it would be fair to award the complainant the expatriation allowance. He therefore made the following proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman:

" *Taking into account the Ombudsman's findings, the Economic and Social Committee could consider using its margin of discretion in order to decide whether it would be fair to award the complainant the expatriation allowance.* **"**

The arguments presented to the Ombudsman after his friendly solution proposal

29. In its reply to the Ombudsman's friendly solution proposal, the Committee stated that the judgment in Case T-72/94 *Diamantaras* should be read in the context of the broader settled case-law of the Court of Justice, which has constantly held that "the purpose of the expatriation allowance ... is to compensate officials for the extra expense and inconvenience of taking up employment with the Communities if they have been thereby obliged to change their residence and move to the country of employment and to integrate themselves in a new environment" [15] . Therefore, the concept of expatriation also depends on the personal position of an official, that is to say, on the extent to which he or she is integrated in his new environment.

30. The Committee noted that the Ombudsman's proposal referred to the very recent judgment in Case F-28/10 Mioni v Commission [16] , in which the Civil Service Tribunal considered that, in light of the objective of the expatriation allowance, the Commission rightly decided to suspend payment of the expatriation allowance to an agent of French nationality who had lived in Belgium for most of his life, but who had spent 15 months abroad during the five-year reference period. In that case, the Tribunal noted that a period of 15 months, with respect to a period of five years, or even 17 years, if one considers the place of residence before the reference period, would not be sufficient to make the applicant lose his level of integration in the country where he spent his childhood, was educated and had his first contacts with the job market. Indeed, his level of integration in Belgium, where the applicant had lived from the age of six, could be no other than very high [17] .

31. According to the information provided by the complainant, before taking up employment

with the Committee, he had lived in Belgium for at least 22 years, he had been educated in Belgian schools, and had worked in Belgium for several years. All these elements confirm his very high level of integration in Belgium, which could not possibly be lost because of eight months spent abroad during the five-year reference period, or, if one considers the time before the reference period, 26 months abroad after more than 22 years in Belgium.

32. Furthermore, according to the case-law of the Court of Justice, the provisions of EU law which create financial benefits should be interpreted strictly [18] . This is all the more so when an institution is called upon to make use of its discretion in order to consider awarding an allowance as a friendly solution to a dispute after a final administrative decision refusing that allowance. The Committee also noted that the complainant already received the foreign residence allowance, which is intended to compensate for the disadvantages which officials suffer as a result of their status as aliens. Against this background, the Committee considered it fair that the complainant should continue receiving only his foreign residence allowance.

The Ombudsman's assessment after his friendly solution proposal

33. The Ombudsman welcomes the fact that the Committee reacted positively to his proposal for a friendly solution. The Committee re-examined the complainant's entitlement to an expatriation allowance. It reconsidered the facts of the case and arrived at a decision concerning the complainant. Hence, the Committee used its margin of discretion to review the complainant's case, despite the fact that its initial decision had become definitive.

34. After its review, the Committee concluded that the complainant was not entitled to the expatriation allowance. The Committee took due account of the case-law on the expatriation allowance. The Ombudsman takes the view that the Committee's reasons for refusing to grant the expatriation allowance to the complainant seem reasonable. He further notes that the complainant did not contest those reasons.

35. In light of the above, the Ombudsman concludes that no further inquiries are justified.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

No further inquiries are justified.

The complainant and the Committee will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 29 November 2011

[1] Case T-72/94 *Diamantaras v Commission* [1995] ECR-SC I-A-285, II-865.

[2] See Own Initiative Inquiry OI/4/2010/ELB.

[3] Case 231/84 *Valentini v Commission* [1985] ECR 3027 and Case T-58/89 *Williams v Court of Auditors* [1991] ECR II-77.

[4] Case 125/87 *Brown v Court of Justice* [1988] ECR 1619.

[5] The Ombudsman here presents the analysis he put forward in his friendly solution proposal to the Committee. A thorough analysis is made in his decision on his own-initiative inquiry OI/4/2010/ELB.

[6] See Decision of the Ombudsman on complaint 1953/2008/MF.

[7] Administrative Notice No 59-2005 of 20 July 2005.

[8] Note from the Secretariat-General of the Council No 83-05 dated 18 May 2005.

[9] See Judgment of the Civil Service Tribunal of 15 March 2011 in Case F-28/10 *Gaëtan Barthélémy Maxence Mioni v Commission* , not yet published in the ECR, paragraph 10.

[10] A thorough analysis of the questions at issue can be found in the Ombudsman's decision on his own-initiative inquiry OI/4/2010/ELB.

[11] Article 90(2) of the Staff Regulations states the following: " *Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act affecting him adversely, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations.* "

[12] Case T-72/94 *Diamantaras v Commission* , cited above. Paragraph 48 states the following in French: "[L] *a raison d'être de l'indemnité de dépaysement est de compenser les charges et désavantages particuliers résultant de l'exercice permanent de fonctions dans un pays avec lequel le fonctionnaire n'a pas établi de liens durables avant son entrée en fonctions. Toute interprétation qui exclurait du bénéfice de ladite indemnité le fonctionnaire qui n'a eu dans ce pays sa résidence habituelle ou n'y a exercé son activité professionnelle principale que pendant une partie de la période de référence de cinq ans expirant six mois avant l'entrée en fonctions méconnaîtrait donc la raison d'être de l'indemnité de dépaysement telle qu'elle a été déterminée par la jurisprudence.* " Paragraph 51 goes on to state the following: " *Une absence sporadique et de brève durée du pays d'affectation ne saurait nécessairement être considérée comme suffisante pour faire perdre à la résidence du fonctionnaire dans l'État d'affectation son*

caractère habituel. "

[13] See paragraphs 19-20.

[14] In other words, that the decision takes effect from the moment it enters into force.

[15] Case C-7/06/ P *Salvador Garcia v Commission* [2007] ECR I-10265, paragraph 43.

[16] Case F-28/10 *Mioni v Commission* , cited above.

[17] Case F-28/10 *Mioni v Commission* , cite above, paragraph 36.

[18] Case F-145/07 *Bosman v Council* , judgment of 25 November 2008, not yet published in the ECR, paragraph 32.