

Decision of the European Ombudsman on complaint 579/99/JMA against the Council of the European Union

Decision

Case 579/99/JMA - Opened on 18/06/1999 - Decision on 05/09/2001

Strasbourg, 5 September 2001

Dear Mr X,

On 26 May 1999, you sent a complaint to the European Ombudsman, alleging that you have been discriminated against by Council Decision 1999/307/EC concerning the integration into its services of the members of the Schengen secretariat. You had not been eligible to take part in this process since the relevant Decision only applied to Schengen staff employed before 2 October 1997.

On 18 June 1999, I forwarded the complaint to the Secretary General of the Council. I received the Council's opinion on 14 October 1999. I forwarded the Council's opinion to you on 5 November 1999, with an invitation to make observations, in particular as regards the fact pointed out by the Council that the Court of First Instance was dealing at that time with two cases, the subject-matter of which appeared to be closely related to that of your complaint (cases T-164/99 and T-166/99). On 6 December 1999, I received your observations.

On 6 January 2000, I informed you of the decision to suspend my inquiries into the complaint until the Court of First Instance had ruled upon the two related cases. On 27 June 2001, the Court of First Instance delivered its judgement in both cases.

I am writing now to let you know the result of the inquiries that have been made.

THE COMPLAINT

On 13 January 2000, the complainant lodged a complaint with the Ombudsman which was registered under complaint number 534/99/JMA. He argued that Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council [henceforth the Council Decision] was arbitrary and discriminatory, since its Art. 3 (e)(i) limited the integration of staff to those who had been employed with the Schengen Secretariat on 2 October 1997. The complainant put forward several arguments in support of his claim.



In the light of the information submitted by the complainant in his letter, it appeared that no previous administrative approaches had been made towards the responsible institution. As required by Article 2 (4) of the Statute of the European Ombudsman, the complaint was declared inadmissible and the Ombudsman decided to close the case.

The complainant forwarded additional information on 25 May 1999 which showed that he had had in fact several exchanges with the Secretariat-General of the Council, concerning the discriminatory nature of the Council Decision. In the light of this new information, the Ombudsman decided to open a new complaint (579/99/JMA), and to start an inquiry into the matter. The new information furnished by the complainant described his written correspondence with the Permanent Representations of several Member States, as well as with the Secretary General of the Council, and included copies of these letters.

In summary, the complainant requested that the Council reassess its position not to consider him eligible for integration into the Council's Secretariat-General, even though he had joined the Schengen Secretariat after 2 October 1997.

THE INQUIRY

The opinion of the Council of the European Union

The Council first submitted that in its view the complaint did not fall within the powers of the European Ombudsman. It explained that the complainant had invoked the illegality of a Council Decision and, thus, of an act of general effect adopted by the Council in its capacity as legislature, not as Appointing Authority. Furthermore, the Council pointed out that the illegality of this Decision had been claimed by several direct actions currently pending before the Court of First Instance (case T-164/99 and case T-166/99).

The institution indicated that, after 1 May 1999, all related decisions taken by the Council's Secretariat General in its capacity as Appointing Authority had sought to implement the contested Council Decision of 1 May 1999. The Council concluded that it believed the outcome of the Court proceedings to be an essential element in determining whether any further action on the side of the General Secretariat of the Council was to be necessary in this matter.

The complainant's observations

In his observations, the complainant restated arguments already put forward in his complaint.

As regards the pending cases before the Court of First Instance, the complainant explained that he had been aware of the lodging of these cases, and indeed had been in contact with one of the plaintiffs. He was uncertain, however, as to implications which the rulings in the two pending cases might have on his particular situation.

FURTHER INQUIRIES

Decision of the European Ombudsman to suspend consideration of the complaint

On the basis of the Ombudsman's inquiries, there appeared to be two different cases against



the Council of the European Union before the Court of First Instance (Cases T-164/99 and T-166/99). These cases involved similar legal allegations as the ones made in the complaint to the European Ombudsman.

Although the applicants in the cases before the Court of First Instance and the complainant in the case lodged with the Ombudsman were not the same parties, both raised identical legal issues. In the light of these circumstances, the Ombudsman decided on 6 January 2000 to suspend his inquiries into the complaint until the Court of First Instance had ruled on the two pending cases.

Rulings by the Court of First Instance on the two related cases

On 27 June 2001, the Court of First Instance passed judgement in cases T-164/99 and T-166/99.

Case T-164/99, jointly decided with cases T-37/00 and T-38/00, had been brought, among others, by a Council official and a successful candidate in an open competition organised by the Council. The applicants claimed that Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council was unlawful, and that it should thus be annulled. They supported their claims on the following grounds: (i) that it was adopted in breach of the Protocol to the Amsterdam Treaty integrating the Schengen acquis into the framework of the European Union (Art. 7: integration of the functions of the Schengen Secretariat), certain provisions of the Staff Regulations (Arts. 7, 10, 27 and 29: recruitment of Community officials by means of competitions), the hierarchy of legal rules and the principle of non-discrimination, and, (ii) that it was vitiated by an error of law. Having reviewed the arguments of the parties the Court rejected all the pleas in support of the claims for annulment, and dismissed the actions.

Case T-166/99 had been brought by former staff members of the Schengen Secretariat. They also requested the annulment of Council Decision 1999/307/EC. The Council, however, raised a plea of inadmissibility and asked the Court to dismiss the action without considering the substantive arguments put forward by the applicants. The Court of First Instance concluded that the applicants could not be regarded as individually concerned by the contested decision, and therefore dismissed the action.

THE DECISION

1. Ombudsman's competence to declare the case admissible

1.1 According to the Council, the Ombudsman is not competent to deal with the complaint because it questions the legality of a Council Decision which is an act of general effect adopted by the Council in its capacity as legislature, not appointing authority.

1.2 The Ombudsman points out that under Art 195 of the EC Treaty he is competent to inquire into possible maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. The Ombudsman recalls that the definition of maladministration, accepted by a resolution of the European Parliament, is that it occurs when a public body fails to act in accordance with a rule



or principle which is binding upon it.

In the present case, the complainant alleges that the Council has breached the general principle of Community law excluding arbitrary discrimination. The Ombudsman therefore considers that he is competent to deal with the complaint as an allegation of maladministration.

2. Date set for the integration of the Schengen Secretariat

2.1 The complainant argued that Council Decision 1999/307/EC of 1 May 1999 laying down the detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council was arbitrary and discriminatory, since its Art. 3 (e)(i) limited the integration of the Schengen staff only to those employed on 2 October 1997.

2.2 The Council explained that all decisions by its Secretariat General concerning former staff from the Schengen Secretariat had been taken in implementation of Council Decision 1999/307/EC. It pointed out that the illegality of this Decision had been claimed by several direct actions before the Court of First Instance (cases T-164/99 and T-166/99). Accordingly, the Council concluded that it believed the outcome of the Court proceedings to be an essential element in determining the subject matter of the complaint.

2.3 On the basis of the Ombudsman's inquiries, there appeared to be two pending cases against the Council of the European Union before the Court of First Instance (Cases T-164/99 and T-166/99), which involved legal allegations similar to the ones made in the complaint to the European Ombudsman.

Although the applicants in the cases before the Court of First Instance and the complainant in the case lodged with the Ombudsman were not the same parties, both raised identical legal issues. In the light of these circumstances and on the basis of Art. 2 (7) of his Statute, the Ombudsman decided on 6 January 2000 to suspend his inquiries into the complaint until the Court of First Instance had ruled on the related cases.

2.4 On 27 June 2001, the Court of First Instance rendered its judgement in cases T-164/99 and T-166/99. In its ruling in case T-164/99, jointly decided with cases T-37/00 and T-38/00, the Court specifically addressed whether the choice of the date of 2 October 1997, as the time at which staff to be integrated into the Council's Secretariat General ought to have been employed by the Schengen Secretariat, was arbitrary and discriminatory. The Court made the following considerations:

74. "The date of 2 October 1997 is that of the signature of the Treaty of Amsterdam, which includes the Protocol. On that date it thus became clear that, subject to the subsequent ratification of that Treaty, the staff of the Schengen Secretariat would be integrated into the General Secretariat of the Council, the detailed arrangements for which would be adopted by the Council.

75. In those circumstances, the Council cannot be criticised for having, in the autonomous recruitment scheme introduced by Decision 1999/307, determined the class of persons eligible for such integration by fixing at 2 October 1997 the beginning of the period during which those



persons had to have been employed in the Schengen Secretariat. Since the Council was authorised to determine the detailed arrangements for integration independently of the Staff Regulations and the Conditions of Employment by taking account of the position of the persons employed in the Schengen Secretariat, it was entitled to avert an artificial increase in the number of those persons after the principle of integration had become public knowledge on 2 October 1997. The choice of the date of 2 October 1997 cannot thus be regarded as arbitrary."

2.5 In the light of the above judgement, the Ombudsman considers that the choice of the date of 2 October 1997, as set out in Art. 3 (e)(i) of Council Decision 1999/307/EC, cannot be regarded as arbitrary and/or discriminatory. The Ombudsman has therefore concluded that there appears to be no maladministration as regards this aspect of the case.

3. Conclusion

On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Council of the European Union. The Ombudsman therefore closes the case.

The Secretary-General of the Council of the European Union will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN