



## Decision in case 1106/2020/MDC on the European Commission's refusal to grant the complainant an expatriation allowance

Decision

**Case 1106/2020/MDC - Opened on 25/08/2020 - Decision on 25/08/2020 - Institution concerned** European Commission ( No maladministration found ) |

Background

- 1.** The complainant has Belgian nationality but he moved to France with his family at the age of four. He lived, studied and worked in France until 2013.
- 2.** On 1 May 2013, he took up a position (contract agent) at the European Commission in Brussels. He was granted an expatriation allowance under Article 4(1)(b) of Annex VII to the Staff Regulations [1] , which he kept receiving for the following six years until April 2019, when his contract ended.
- 3.** On 7 June 2019, he received an official offer for a post at the Research Executive Agency (REA), starting from 1 September 2019. He thus decided to remain in Brussels with his wife and children (who attended school and day care in Brussels [2] ) until the starting date of his new position, without returning to France or applying for a resettlement allowance.
- 4.** In September 2019, when he took up his new position at REA, the Paymaster Office (PMO) informed him that his financial entitlements would be amended and his place of origin would be changed to Belgium as of 11 September 2019. Consequently, the complainant lost his right to an expatriation allowance.
- 5.** After seeking explanations, he was told that when he started working at REA, his place of origin was set as his place of recruitment, which was the place of his habitual residence at the time (Brussels). He was told that he was not entitled to the expatriation allowance because he is a Belgian national and he had not been habitually resident outside Belgium for an entire period of 10 years prior to his entry into service, in accordance with Article 4(1)(b) of Annex VII to the Staff Regulations. He was also informed that he could request a rectification of the place of origin. However, in any event, this would not allow him to receive the expatriation allowance or any other financial benefit related to expatriation because, according to the PMO, it would not change the fact that he had not habitually resided outside Belgium for " *the whole period of 10 years* " prior to his entry into service.  
The administrative complaint to the European Commission
- 6.** On 9 December 2019, the complainant challenged the decision of the PMO, and lodged an administrative complaint under Article 90(2) of the Staff Regulations.



**7.** He contended, among other things, that:

- **i.** the provision in the Staff regulations concerning the expatriation allowance lays down that a period of 10 years must be taken into consideration to determine the 'habitual' character of residing in a particular territory and therefore it should not be determined with reference to one's residence at the "*specific time of recruitment*";
- **ii.** when he applied for the post at REA in January 2019, he was entitled to the expatriation allowance because his places of recruitment and origin were France;
- **iii.** it should be considered that there was 'legal continuity' between his contract with REA and his previous contract with the Commission;
- **iv.** in order to keep his expatriation allowance, he would have had to apply for a resettlement allowance and to resettle in France during the months prior to the new contract but he considered this to amount to a waste of public money;
- **v.** during the four months of unemployment in between contracts, he did not work in Belgium or have any Belgian unemployment or social security cover [3] , proving that Belgium was not the country of his habitual residence.

**8.** Finally, he considered that the PMO had violated his right to have his affairs handled impartially, fairly and in a timely manner. He contended that the PMO did not take into consideration his arguments before taking a formal decision on his expatriation allowance which affected him financially. He called for greater transparency in the way the PMO takes this kind of decisions and more understanding towards those who are not lawyers and who have to defend themselves. He also alleged that he had been discriminated against on the ground of nationality. In conclusion, he asked for compensation.

The Commission's response to the complainant

**9.** On 8 April 2020, the Authority Empowered to Conclude Contracts of Employment (AECE) of the Commission replied to the complainant's complaint.

**10.** The AECE referred to case-law on the application of Article 4 of Annex VII to the Staff Regulations. The General Court has stated that settled case-law defines the purpose of the expatriation allowance as "*to compensate officials for the extra expense and inconvenience of taking up employment with the European Union if they have been thereby obliged to change their residence and move to the State of employment and to integrate themselves in a new environment*" [4] . Furthermore, the Court of Justice has held that the "*concept of expatriation also depends on the personal position of an official, that is to say, on the extent to which he is integrated in his new environment, which is demonstrated, for example, by habitual residence or by the main occupation pursued*" . [5]

**11.** With regard to the 10-year period, the EU courts have stated that "*for officials with the nationality of their country of employment, the fact that they kept or established their habitual residence there, albeit for a very short time in the 10-year reference period, is sufficient to result in the loss or refusal of the grant of the expatriation allowance*" [6] . In addition, actual residence, professional activity and personal links are the main criteria in establishing in the place of habitual residence. [7]

**12.** Moreover, citing case-law, the AECE stated that Article 4(1)(b) of Annex VII to the Staff



Regulations should be interpreted to mean that, where a person applying for the expatriation allowance has worked for several separate institutions, the date on which the reference period expires is that of the entry into service of that person with the institution concerned, regardless of the professional career that the person has had since then. [8]

**13.** The AECE also referred to case-law that lays down that the provisions of EU law giving rise to financial benefits should be interpreted strictly. [9] It underscored the exceptional nature of an expatriation allowance for a national of the country of employment. It added that, contrary to what the complainant maintained, the PMO had correctly assessed the end date of the reference period by setting it at the date of the complainant's new contract with REA, which had a legal personality separate from that of the Commission.

**14.** According to the AECE, the fact that the complainant had worked for the Commission for six years prior to the commencement of his contract with REA on 1 September 2019 cannot justify disregarding that period within the 10-year period. The AECE referred to the interpretation of the General Court according to which, "*in the context of Article 4(1)(b) of Annex VII to the Staff Regulations, the only periods that can justifiably be disregarded are those during which the individual concerned has performed duties in the service of a State or of an international organisation situated 'outside' the State of employment. Consequently, ... it is unnecessary to disregard the periods during which the applicant performed duties in the service of an international organisation situated in the State of employment of which he is a national ... By contrast, it is necessary, in the present case, to take into account the performance of duties in an international organisation when determining the applicant's habitual residence, to the extent that that is presumed to hinder the creation of a lasting tie between him and the country of employment*" [10].

**15.** According to the AECE, having regard to the criteria for habitual residence set out in the case-law referred to above, in particular the complainant's professional and personal ties, these were situated in Belgium during the reference period. Therefore, his ties with France "*cannot call into question the reality of his habitual residence in Belgium*". The complainant, in fact, "*lived in Belgium for reasons other than the performance of duties in a State or international organisation during the 10 years*", that is, during his four months of unemployment in which he kept his residence in Belgium. [11] This period must be taken into account by the administration in the assessment of the expatriation allowance despite its brevity. [12]

**16.** The AECE found that the administration "*correctly held that the expatriation allowance could not be granted*" to the complainant since "*during the four months preceding his entry into service, the complainant's residence was in Belgium*" and he "*did not carry out any duties for the Commission*". [13]

**17.** The AECE rejected the allegations of discrimination and of lack of impartiality of the decision, because the PMO followed the applicable EU law and relied on objective data, such as the complainant's nationality and his stay in the territory of the country of employment. In addition, it rejected the request for compensation because the complainant had failed to show that he had sustained any damages.



**18.** The complainant was not satisfied with the AECE's response and therefore turned to the Ombudsman arguing, among other things, that: (i) if he had not had the opportunity to work for the European institutions, he would have continued his career in France; (ii) not all the case-law mentioned by the AECE corresponded to his specific case and the judgment of the General Court in case T-72/94 [14] should be taken into consideration; (iii) he had not been advised that if he stayed in Belgium during a period of unemployment, he would lose his expatriation allowance and that he should have asked for the resettlement allowance; and (iv) four months of unemployment could not be enough to "*transfer the habitual nature*" of his residence.

**19.** He also argued that in 2013, the Commission had asked him to submit additional documents in order to establish his entitlements. However, in 2019, the decision on his expatriation allowance was decided in an "*arbitrary manner*" that led him to try to settle the matter "*in cumbersome and costly procedures*".

The European Ombudsman's findings

**20.** The European Ombudsman finds that the AECE's reply to the Article 90(2) complaint is reasonable and is in line with the applicable case-law.

**21.** Specifically, the main judgment on which the AECE based its reply (the judgment in case T-273/17) not only refers to a very similar situation to that of the complainant [15] but it is also based on extensive settled case-law. In that case, the Court referred to case-law which lays down that for officials with the nationality of their country of employment, the fact that they kept or established their habitual residence there, albeit for a very short time in the 10-year reference period, is sufficient to result in the loss or refusal of the grant of the expatriation allowance. Moreover, the Court noted that the applicant had failed to show that, during the 10-year reference period, his residence had been in Belgium for reasons relating solely to the performance of duties in the service of a State or of an international organisation. It also agreed with the Commission's argument that the applicant had not shown that he had a habitual residence outside Belgium during the month when he was unemployed. [16]

**22.** Similarly, in the case under consideration here, the AECE was right to consider that during the complainant's four months of unemployment in which he kept his residence in Belgium, the complainant lived in Belgium for reasons other than the performance of duties in a State or international organisation and that his ties with France could not call into question the reality of his habitual residence in Belgium. Consequently, the AECE was right to conclude that the complainant could not be granted the expatriation allowance.

**23.** In its judgment in case T-273/17, the Court also confirmed that the actual reasons which caused the applicant to remain in the country of employment of which he is a national must not be taken into account for the purposes of the grant of the expatriation allowance. Thus, the subjective reasons which led the complainant to remain in Belgium during the months of unemployment "*are irrelevant when examining the conditions for granting the expatriation allowance*" [17].

**24.** Therefore, contrary to the complainant's statement, the reasons why he decided to



remain in Belgium cannot be taken into account, as the conditions for granting the expatriation allowance under Article 4(1)(b) of Annex VII to the Staff Regulations do not allow for an assessment of a subjective nature [18] . When taking its decision, the PMO could rely only on the objective fact that the complainant could not show that he was residing outside Belgium during the months of unemployment immediately prior to his entry into service with REA. Thus, it cannot be concluded that the decision was taken in an arbitrary manner, because it was based on the information that was available to the PMO at the time of the complainant's entry into service with REA.

**25.** With regard the judgment of the General Court in case T-72/94, cited by the complainant in his defence, it should be noted that this judgment relates to the interpretation of the provisions of Article 4(1)(a) of Annex VII to the Staff Regulations [19] , which is not applicable to the complainant's case. This is because he is an official who is a national of the State in whose territory he is employed. Therefore, it is Article 4(1)(b) and not Article 4(1)(a) of Annex VII to the Staff Regulations that applies to the complainant. In any event, the facts described in the case are significantly different and cannot be applied by analogy to the complainant's situation [20] .

**26.** With regard to the argument that the complainant should have been advised to ask for the resettlement allowance and about the potential loss of the expatriation allowance, the complainant himself acknowledged that he knew that when his contract with the Commission ended, he was entitled to a resettlement allowance. Moreover, EU staff members are expected to be familiar with the Staff Regulations and to be aware of the rights and obligations stemming therefrom. Therefore, the Ombudsman does not consider that the administration committed any errors in this regard.

**27.** In conclusion, based on the information provided by the complainant, the complaint appears not to reveal maladministration. [21].

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[1] Article 4(1) of Annex VII to the Staff Regulations states: " *An expatriation allowance equal to 16 % of the total of the basic salary, household allowance and dependent child allowance paid to the Established Official shall be paid: ...*

*(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 "*. Staff Regulations available at:



<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501>

[2] The complainant stated that he remained in Brussels to allow his daughter to end the school year there and to keep his son in the Commission's day care centre in Brussels, in the hope that he would eventually continue attending the same section of that day care centre.

[3] His unemployment benefits for the period of four months of unemployment were paid by the Commission, and he fell under the social security scheme of the Commission.

[4] Judgment of the General Court of 13 July 2018, *Alessandro Quadri di Cardano v European Commission*, T-273/17, paragraph 44, available at:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=7BEC7314BD0368F4ED7833F5AC6C700B>

[5] Judgment of the Court of Justice of 24 January 2008, *Herta Adam v European Commission*, C-211/06 P, paragraph 38, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=69920&pageIndex=0&doclang=FR&...>

[6] Judgment of the General Court in case T-273/17, cited above, paragraph 47; Judgment of the General Court of 27 February 2015, *European Economic and Social Committee (EESC) v Mohammed Achab*, T-430/13 P, paragraph 54, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=162576&pageIndex=0&doclang=FR&...>

; and Judgment of the Civil Service Tribunal of 11 July 2007, *B v Commission*, F-7/06, paragraph 38, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=62715&pageIndex=0&doclang=FR&...>

[7] Judgment of the General Court in case T-273/17, cited above, paragraph 88.

[8] Judgment of the Civil Service Tribunal of 5 December 2012, *Diana Grazyte v European Commission*, F-76/11, paragraphs 46-47, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=131384&pageIndex=0&doclang=FR&...>

[9] Judgment of the (then) Court of First Instance of 18 September 2003, *Giorgio Lebedef and Others v Commission of the European Communities*, T-221/02, paragraph 38, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=48599&pageIndex=0&doclang=FR&...>

[10] Judgment of the General Court in case T-273/17, cited above, paragraphs 62-63.

[11] Judgment in case T-273/17, paragraph 85: " *during the 10-year reference period, the applicant, first, had established his home in Belgium, secondly, had pursued private employment in Brussels as a temporary agent and, thirdly, had not shown that he had a habitual residence outside Belgium during the month when he was unemployed*".

[12] Judgments in cases T-273/17, cited above, paragraphs 47 and 83 and F-7/06, cited above, paragraph 38.

[13] The AECE referred to case-law (the judgment in case T-273/17 paragraph 90 and the



case-law cited therein) which lays down that the actual reasons which would have caused an applicant to remain in the country of employment of which he is a national must not be taken into account for the purposes of the grant of the expatriation allowance.

[14] Judgment of the General Court of 14 December 1995, *Diamantaras v Commission*, T-72/94, paragraph 52, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994TJ0072\\_SUM&from=HR](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994TJ0072_SUM&from=HR)

[15] The applicant, a Belgian national, who had been residing in Italy until 2006, started to work for the EU institutions in Brussels in 2009. In 2013, he had a temporary employment contract with an agency in Brussels and spent one month in Brussels unemployed. Afterwards, he continued to work for EU institutions and agencies. In 2016, he signed a contract with the INEA and was not granted the expatriation allowance. The AECE found that during the 10-year period, *“running from 15 July 2006 to 15 July 2016, the applicant had made his home in Brussels, where he had married and had three children. What is more, for 6 months and 2 weeks, between February and September 2013, the applicant carried out a private occupation in Brussels as an interim member of staff and that period of work could not be regarded as duties carried out in the service of an international organisation. Furthermore, for the period covering August 2013, during which the applicant was unemployed, he failed to show that his habitual residence was outside Belgium”*. Judgment in case T-273/17, cited above, paragraph 28.

[16] Judgment of the General Court in case T-273/17, cited above, paragraphs 47, 83, 85, 88, 91.

[17] Judgment of the General Court in case T-273/17, cited above, paragraph 90.

[18] *Ibid.*

[19] Article 4(1) of Annex VII to the Staff Regulations states: *“ An expatriation allowance ... shall be paid:*

*(a) to officials:*

...

*— 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. For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account. ”*

[20] The applicant, a Greek national, was working and habitually residing in Greece for two years ending six months prior to taking up a post with the Commission. He therefore fulfilled the *“ condition required by Article 4(1)(a) of Annex VII to the Staff Regulations, namely that he did not habitually reside or carry on his main occupation within the State of employment for the entire reference period of five years ”*. Judgment in case T-72/94, cited above, paragraph 60.



[21] This complaint has been dealt with under delegated case handling, in accordance with Article 11 of the Decision of the European Ombudsman adopting Implementing Provisions