

Decision of the European Ombudsman on complaint 1367/2003/OV against the European Commission

Decision

Case 1367/2003/OV - Opened on 09/09/2003 - Decision on 18/11/2004

Summary of decision on complaint 1367/2003/OV against the European Commission

A citizen with a double French/Bulgarian nationality had applied in May 2003 for a local agent post "adviser for pre-accession and political reporting" which was vacant in the Commission Delegation in Sofia, Bulgaria. The complainant's application was however rejected, because of his double nationality. With this regard, the Commission Delegation invoked the Vienna Convention of Diplomatic Relations of 18 April 1961. The complainant wrote to the Commission to ask for clarifications, but received no reply.

In July 2003, the complainant lodged a complaint with the European Ombudsman, alleging that there had been a lack of transparency in the recruitment procedure, and that, by excluding his candidature on the grounds of his double French-Bulgarian nationality and the Vienna Convention of 1961, the Commission had infringed the principle of non-discrimination.

In its opinion on the complaint, the Commission observed that the vacant post in question was for an "ALAT" ("agent local d'assistance administrative et technique") task manager, the status of which implies the application of Article 37.2 of the Vienna Convention of 1961. "ALAT" contracts are reserved to candidates who do not have the nationality of the country where they will perform their duties and are not permanent residents in that country. In his observations, the complainant maintained that the Commission had infringed the principle of non-discrimination, as well as the principle of non-discrimination on the grounds of nationality.

In his decision, the Ombudsman firstly pointed out that the complainant's candidature had been rejected because of his Bulgarian nationality and not because of his French nationality. The principle of non-discrimination on the basis of nationality contained in Article 12 of the EC Treaty appeared thus irrelevant in this case, as there was no discrimination between nationals of EU Member States. The Ombudsman however observed that none of the texts applicable to local agents mentioned the "ALAT" category or contained provisions according to which persons with Bulgarian nationality would be excluded from local agent contracts. The Ombudsman concluded that the Commission had failed to provide an objective justification for its decision to reject the complainant's application because of his Bulgarian nationality, and had thus infringed the principle of non-discrimination or equal treatment. He also found that the vacancy notice for the



post in question did not provide the candidates with all the necessary information on the recruitment procedure. The Ombudsman thus made critical remarks.

As the post in question had been filled in the meantime, it was not appropriate for the Ombudsman to pursue a friendly solution of the matter.

Strasbourg, 18 November 2004

Dear Mr I.,

On 24 July 2003, you made a complaint to the European Ombudsman against the Commission concerning your exclusion from a recruitment procedure for a post of adviser for pre-accession and political reporting at the Commission Delegation in Sofia, Bulgaria.

On 9 September 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 11 December 2003. I forwarded it to you with an invitation to make observations, which you sent on 23 January 2004.

On 8 October 2004, my services contacted the Commission Delegation in Sofia by telephone concerning the post in question.

I am writing now to let you know the results of the inquiries that have been made. I apologise for the length of time it has taken to deal with your complaint.

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

In May 2003, the Commission Delegation in Sofia published on its website a vacancy for a post of "Adviser for pre-accession and political reporting", based in Sofia. Only candidates having the nationality of a Member State could apply.

The complainant, who has a double French/Bulgarian nationality and the required profile for the post, applied on 8 May 2003. Given the lack of information in the vacancy on the procedure for filling the post, the complainant wrote on 18 May 2003 asking for clarifications on various points. As he received no reply, he reiterated his request on 26 May 2003. The complainant also contacted the European Personnel Selection Office (EPSO) to obtain more information on the recruitment procedures in the Delegations of the Commission. EPSO informed the complainant that the Delegations cannot organise competitions and that all recruitment procedures go through EPSO. The complainant notes that, apparently, this procedure has not been followed by the Delegation in Bulgaria.

On 27 May 2003, the Commission Delegation in Sofia informed the complainant that, because of his double French-Bulgarian nationality, his application for the post was not eligible. The Commission Delegation invoked the Vienna Convention on Diplomatic Relations of 18 April



1961. In a telephone conversation on 28 May 2003, the complainant was informed by the Commission Delegation that the practice of the Commission's DG External Relations was never to recruit to the Delegations nationals of the State in question in order to prevent eventual pressure by the national authorities. The complainant observes that this is an absolutely unjustified presumption, and that a double nationality (of a Member State and Bulgarian) would rather represent an advantage for the post.

On 3 June 2003, DG External Relations confirmed the complainant's ineligibility for the post concerned because of his double nationality. On the same day, the complainant wrote to express his disagreement with the reasons invoked. Having received no reply, he addressed a request for reconsideration to DG External Relations on 26 June 2003. The complainant received no reply.

On 24 July 2003, the complainant therefore made the present complaint to the European Ombudsman. In his complaint, the complainant alleges that:

1. There was a lack of transparency in the recruitment procedure followed by the Commission Delegation in Bulgaria, as well as by DG External Relations.
2. By excluding his candidature on the grounds of his double French-Bulgarian nationality and the Vienna Convention of 1961, the Commission infringed the principle of non-discrimination.

The complainant claims that the Delegation should take his application for the post into account.

THE INQUIRY

The Commission's opinion

The Commission recalled the facts of the case. It observed that the complainant's application had been rejected in the pre-selection phase because of his Bulgarian nationality and the fact that he was a permanent resident in Bulgaria. As mentioned in the vacancy notice, the vacant post was for an "ALAT" ("agent local d'assistance administrative et technique") Task Manager local agent. The status of an ALAT post implies the application of Article 37.2 of the Vienna Convention of 18 April 1961 on Diplomatic Relations. Such a local agent is, in conformity with the provisions of Article 79 of the Conditions of employment of other servants of the European Communities, recruited in accordance with the current rules and practice in the place where the agent is to perform his or her duties. The rights and obligations of local staff are set out in the framework regulation applicable to local staff.

"ALAT" contracts are reserved to candidates who do not have the nationality of the country where they will perform their duties and are not permanent residents in that country (Article 37.2 of the Vienna Convention). It was thus in conformity with the applicable rules for this kind of post that the complainant's candidature could not be retained.

As regards the alleged lack of transparency, the Commission observed that the information which EPSO gave to the complainant were merely explanations concerning the organisation of



competitions on behalf of the different Community institutions. As regards the complainant's request concerning the procedures applied for posts in the delegations, EPSO transferred it to the competent Commission services.

The Commission accepts that certain formal aspects of the selection procedure followed by the Delegation could have been improved such as making the vacancy notice more explicit as regards the exclusion criteria and communicating the decision taken with regard to the non selected candidates.

The complainant's observations

As regards his second allegation, the complainant referred to Article 17 of the EC Treaty on citizenship of the Union, which, in his case, he has on the basis of his French nationality. This is the only factor that the Commission and its Delegation in Bulgaria had to take into account in order to guarantee a non discriminatory treatment of his candidature. In its opinion, the Commission however persisted in referring to the complainant as a Bulgarian national. The complainant also points out that the Commission incorrectly indicated that he was a permanent resident in Bulgaria, whereas his address and residence have always been in France.

The complainant refers to Article 12 of the EC Treaty which provides that any discrimination on grounds of nationality shall be prohibited. The complainant in particular refers to a Court judgement according to which, if the law of a Member State authorises double nationality, the Community nationality should prevail for the application of Community law (1) . According to the case-law of the Court, the sole circumstance that a national of the Member State also has the nationality of a third country in which he resides, which is not the complainant's case, does not impede him or her from invoking, as a national of a Member State, the prohibition of discrimination on the basis of nationality (2) .

In the present case, the complainant has been discriminated against as a Community national. This discrimination cannot be considered as justified and proportional to the aim pursued. The complainant in particular rejected the explanation by the Commission Delegation in Bulgaria that the purpose of the practice not to recruit nationals of the State in question was to prevent eventual pressure by the national authorities. The complainant pointed out that the Commission Delegation in Bulgaria counted Bulgarians among its staff.

The complainant also pointed out that the "ALAT" status does not figure in the Staff Regulations or in the Conditions of employment of other servants of the European Communities, both of which prohibit discrimination in recruitment (Article 27 and Article 12 respectively).

The Commission Delegation in Bulgaria also infringed the general principle of equal treatment of candidates, as the complainant was in exactly the same situation as the other candidates for the post.

Finally, the complainant finds it very difficult to understand that his candidature as a Franco-Bulgarian citizen for a post of pre-accession advisor was ineligible, as this post requires thorough knowledge of the Bulgarian language and legal and political structure. One would thus think that double nationality in this case would be an advantage for a candidate.



The complainant thus maintained his complaint and hoped that a friendly solution could be found.

FURTHER INQUIRIES

On 8 and 11 October 2004, the Ombudsman's office contacted by phone Mr Ricardo Oriol, Head of Administration of the Commission Delegation in Sofia, in order to know what had happened with the post to which the complainant had applied. The Head of Administration informed the Ombudsman's office that the post had been filled.

The Ombudsman's office also requested a copy of the Framework Rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries and of the Rules laying down the Specific Conditions of Employment of Local Staff serving in Bulgaria. These were sent to the Ombudsman on 11 and 12 October 2004.

THE DECISION

1 The alleged lack of transparency in the recruitment procedure

1.1 The complainant alleges that there was a lack of transparency in the recruitment procedure followed by the Commission Delegation in Bulgaria, as well as by DG External Relations.

1.2 The Commission accepted that certain formal aspects of the selection procedure followed by the Delegation could have been improved, such as making the vacancy notice more explicit as regards the exclusion criteria and communicating the decision taken with regard to the non selected candidates.

1.3 The Ombudsman notes that the vacancy notice for the post of the ALAT Task manager - adviser for pre-accession and political reporting" (Post Sof TM/02/03) was extremely brief as regards the selection criteria and requirements for candidates. In fact, the vacancy notice contained a description of the tasks and merely pointed out that: *"excellent communication skills, in oral as well as in written, are inalienable. Excellent command of English in oral and written is also necessary. The ALAT will follow instructions by Delegation's senior staff; he/she will be integrated in the team dealing with the overall monitoring of the European integration process and consequently he/she will be supported by other Delegation activities and will contribute to them"* .

1.4 The vacancy notice did not, however, contain any information to candidates concerning special selection criteria, or ineligibility on the basis of double nationality or a reference to article 37.2 of the Vienna Convention on Diplomatic Relations of 18 April 1961 (hereafter "the Vienna Convention), which the Delegation invoked against the complainant's candidature.

1.5 The Ombudsman further notes that, because of the lack of information in the vacancy



notice, the complainant wrote on 18 and 26 May 2003 to the Commission Delegation in order to obtain more detailed information on various points of the recruitment procedure (recruitment calendar, pre-selection criteria). The complainant received no reply from the Commission Delegation, but was merely informed on 27 May 2003 that his candidature had been rejected because of his double nationality.

1.6 Principles of good administration require that members of the public are provided with the information they request and that this information is clear and understandable (3) . In the present case, it appears that the vacancy notice for the post of pre-accession advisor did not provide the candidates with all the necessary information on the recruitment procedure. The Commission also failed to provide the complainant with clear information on the recruitment procedure further to his requests of 18 and 26 May 2003. These constitute instances of maladministration and the Ombudsman will therefore make a critical remark below.

2 The alleged infringement of the principle of non-discrimination

2.1 The complainant alleges that, by excluding his candidature on the grounds of his double French-Bulgarian nationality and the Vienna Convention of 1961, the Commission infringed the principle of non-discrimination.

2.2 The Commission observes that the vacant post was a local agent post, and more particularly an "ALAT" Task Manager, which implies the application of Article 37.2 of the Vienna Convention. "ALAT" contracts are reserved to candidates who do not have the nationality of the country where they will perform their duties and are not permanent residents in that country.

2.3 The Ombudsman first points out that the complainant's candidature was rejected because of his Bulgarian nationality. His French nationality was not decisive for that rejection, and it appears that any other candidate with both the nationality of another EU Member State and Bulgarian nationality would also have been rejected for the same reason. There appears therefore to be no discrimination between nationals of EU Member States. The principle of non-discrimination on the basis of nationality contained in Article 12 of the EC Treaty does not therefore appear relevant in the present case. Nor does the Ombudsman consider that the case-law of the Court of Justice in case C-122/96 (4) , mentioned by the complainant in his observations, applies to the circumstances of the present case.

2.4 As regards the general principle of non-discrimination, the Ombudsman recalls that according to the established case law, this principle applies when comparable situations are treated in an unequal way and the discrimination is not objectively justified.

2.5 The Ombudsman shall thus seek to verify whether the Commission has provided an objective justification for its decision to reject the complainant's application because of his Bulgarian nationality.

2.6 In its opinion, the Commission refers to Article 37.2 of the Vienna Convention on Diplomatic Relations of 18 April 1961. This Article reads as follows:

"Members of the administrative and technical staff of the mission, together with members of



their families forming part of their respective households, shall, if they are not nationals or permanently resident in the receiving State, enjoy the privileges and immunities specified in Article 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation."

The Ombudsman does not understand how this provision could be considered to justify the exclusion of Bulgarian nationals from eligibility for the post in question. On the contrary, it appears to foresee the possibility that administrative and technical staff may have the nationality of the host state, in this case Bulgaria.

2.7 Furthermore, the Ombudsman notes that the rules applicable to the local staff employed by the Commission Delegation in Bulgaria are contained in three texts, namely in 1) Articles 79 to 81 of the Conditions of Employment of Other Servants of the European Communities, 2) the "Framework Rules laying down the conditions of employment of local staff of the Commission of the European Communities serving in non-member countries" (hereafter the "Framework Rules"), and 3) the "Rules laying down the Specific Conditions of Employment of Local Staff serving in Bulgaria" (the "Specific Conditions") which were adopted on 26 June 1996 by the Director General for Personnel and Administration.

2.8 None of these texts mentions the category of local agents referred to in the Delegation's vacancy notice as "ALAT Task Manager" or contains nationality requirements for local agents. Nor do the "Conditions of Engagement" in the Framework Rules (Articles 2-3) or in the Specific Conditions (i.e. Chapter II, Articles 2-4) contain any provision according to which persons with Bulgarian nationality would be excluded from local agent contracts.

2.9 In the light of the above, the Ombudsman concludes that the Commission has failed to provide an objective justification for its decision to reject the complainant's application because of his Bulgarian nationality. The Commission thus infringed the principle of non-discrimination or equal treatment, which applies when comparable situations are treated in an unequal way and the discrimination is not objectively justified. This constitutes an instance of maladministration. The Ombudsman will therefore make a critical remark below.

3 The claim to be admitted to the recruitment procedure

3.1 The complainant claims that the Delegation should take his application for the post into account.

3.2 With this regard, the Ombudsman notes from the further inquiries that the post in question has been filled and that the selection procedure has thus been terminated. It is therefore no longer possible for the Commission to meet the complainant's claim to take his application for the post into account. For the same reason, it is not appropriate for the Ombudsman to pursue a friendly solution.

3.3 In the light of the Ombudsman's findings, the complainant has however the possibility to seek redress directly from the Commission, and to make a further complaint to the Ombudsman



if he is dissatisfied with the Commission's response.

4 Conclusion

On the basis of the Ombudsman's inquiries into parts 1 and 2 of this complaint, it is necessary to make the following critical remarks:

Principles of good administration require that members of the public are provided with the information they request and that this information is clear and understandable (5) . In the present case, it appears that the vacancy notice for the post of pre-accession advisor did not provide the candidates with all the necessary information on the recruitment procedure. The Commission also failed to provide the complainant with clear information on the recruitment procedure further to his requests of 18 and 26 May 2003. These constitute instances of maladministration.

The Commission has failed to provide an objective justification for its decision to reject the complainant's application because of his Bulgarian nationality. The Commission thus infringed the principle of non-discrimination or equal treatment, which applies when comparable situations are treated in an unequal way and the discrimination is not objectively justified. This constitutes an instance of maladministration.

Given that these aspects of the case concern procedures relating to specific events in the past and that, more particularly, the post in question has been filled and the selection procedure has been terminated, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Case C-369/90, *Micheletti/Delegación del Gobierno en Cantabria* , [1992] ECR, I-4239.

(2) Case C-122/96, *Saldanha and MTS/Hiross* , [1997] ECR, I-5325.

(3) Article 22.1 of the European Code of Good Administrative Behaviour.

(4) Case C-122/96, *Saldanha and MTS/Hiross* , [1997] ECR, I-5325, paragraph 15. This case concerned discrimination by a Member State (Austria) of a national of another Member State (UK) who also possessed the nationality of a non-member country (US). The Court held that *"the mere fact that a national of a Member State is also a national of a non-member country, in which he is resident, does not deprive him of the right, as a national of that Member State, to rely on the prohibition of discrimination on grounds of nationality"* .



(5) Article 22.1 of the European Code of Good Administrative Behaviour.