



Decision of the European Ombudsman closing his inquiry into complaint 1092/2010/MHZ against the European Commission

Decision

Case 1092/2010/MHZ - **Opened on** 07/06/2010 - **Decision on** 20/12/2010 - **Institution concerned** European Commission (Settled by the institution) |

The complainant is a divorced Polish citizen living in Poland with her children. Her former husband applied for family allowances in Austria, where he lived and worked. Given that the complainant and her children were unlikely to receive the allowances from the father, she asked the Austrian authorities to pay her the allowances directly. However, the latter refused on the ground that the children were not entitled to allowances since they did not live with their father under the same roof. The complainant then complained to the Commission that Austria had infringed Regulation (EC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the European Union. The Commission informed her that her case would be clarified by the Court of Justice's preliminary ruling on a question in a similar case. However, the Commission failed to contact the complainant after the Court issued its ruling. By that time, almost three years had passed without any results. The complainant thus complained to the Ombudsman.

In its opinion, the Commission outlined all the procedural steps it had taken during the above period of time. These related to the infringement procedure under Article 258 TFEU, the mechanism established by the above Regulation, the mediation between the relevant Polish and Austrian Authorities, and the referral to the Administrative Commission on Social Security for Migrant Workers. In addition, the Commission stated that the Austrian authorities had finally made the relevant payment to the complainant. Subsequently, the complainant informed the Ombudsman that she was fully satisfied with the outcome of the Commission's actions.

Given that the Commission's action in the complainant's case was effective, the Ombudsman closed the case as settled by the Commission. He recognised that the Commission did its utmost in order to assist the complainant and praised the institution for its constructive approach to his inquiry.

The background to the complaint

1. The complainant, a divorced Polish citizen, lives in Poland with her children. She is their legal representative. At the relevant time, the complainant was employed in Poland but was not entitled to family benefits under Polish law because her income per family member was



above the national ceiling. The complainant's former husband and father of the above children lived and worked in Austria. In 2005, he applied for family benefits under Austrian law.

2. Given that the complainant and her children were unlikely to receive the family allowances from the father, in 2005, she approached the Austrian authorities. She did this via the competent Polish institution with a view to receiving the Austrian allowances directly in Poland. Consequently the Austrian authorities forwarded to the complainant family benefits for the year 2005. However, these authorities subsequently decided that the aforementioned payment was made by mistake and that the complainant's former husband and father of her children did not meet the necessary eligibility conditions. They took the view that the father, who does not live with his children, could not be regarded as a family member under Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community ('the Regulation') [1] and in accordance with Austrian law (*Familienlastenausgleichsgesetz* of 1967).

3. The complainant then turned to both the Austrian and Polish SOLVIT centres, but both centres closed the case as unresolved on 6 November 2007. They advised the complainant to turn to the Commission.

4. In 2007, the complainant sent a complaint to the Commission. The Commission referred her case back to the Austrian authorities and informed the complainant accordingly. It also informed the competent Polish authorities.

5. Subsequently, the complainant submitted her first complaint to the Ombudsman (1664/2008/(AW)MHZ). Given that the complaint was directed against the Austrian authorities, it fell outside of the Ombudsman's mandate. The Ombudsman therefore closed the case and advised the complainant to approach the Commission again. On 24 November 2008, he also wrote a letter to the Commission informing it of the complaint.

6. Subsequently, the complainant complained to the Commission again. The Commission forwarded her complaint to the Austrian member of the Administrative Commission on Social Security for Migrant Workers, with a request to examine the case and to reply directly to the complainant and to the Commission in copy.

7. Following an official request from the Polish authorities, the Administrative Commission then proceeded to discuss the issue of who should be regarded as a "*family member*" under the definition contained in the Regulation. Austria maintained its earlier view, whilst the Commission and the remaining present Member States were against the Austrian position. The Commission appealed to the Polish and Austrian authorities to resolve the complainant's case through bilateral contacts. However, the ensuing bilateral discussions were not successful, since Austria still refused to pay.

8. As a result, at the end of 2008, the Commission registered the complainant's complaint as an infringement complaint. The Commission considered (i) that the Regulation was



applicable to the complainant's situation and that (ii) Austria should pay the allowances under European law. In light of Austria's refusal to do so, the Commission intended to launch an infringement procedure against it. On 6 November 2008, in the context of its reply to his letter concerning the complainant's complaint 1664/2008/(AW)MHZ, the Commission informed the Ombudsman of its intention to proceed with the infringement procedure. It also provided exhaustive information on the complainant's case and offered to send a translation of its letter into Polish. The Ombudsman forwarded the translation to the complainant.

9. On 25 August 2009, in reply to the complainant's letter dated 15 June 2009, the Commission informed her that:

(a) it was taking formal procedural steps to resolve the legal issues involved in her case and;

(b) it would provide her with further information as soon as (i) the information on the Commission's formal steps against Austria became public; or (ii) if the procedure required action on the complainant's part or had a significant outcome;

(c) her case could be clarified by the Court of Justice's preliminary ruling on a question submitted by the Austrian Supreme Administrative Court in a similar case (Case C-363/08 *Slanina*).

10. On 26 November 2009, the Court of Justice issued its preliminary ruling on the above-mentioned case [2] . Given that the complainant did not receive any information from the Commission, she sent it a reminder on 15 January 2010. The Commission did not reply to her reminder and did not inform her whether it had reached a substantive decision on her infringement complaint. At that time, the Austrian authorities were still not paying her the family allowances.

11. Given the above circumstances, the complainant turned to the Ombudsman again. In this case, her complaint was directed against the Commission.

The subject matter of the inquiry

12. The Ombudsman decided to open the present inquiry into the following allegations and claim.

Allegations:

(1) The Commission failed to decide on the complainant's complaint against Austria within a reasonable time.

(2) The Commission failed to reply to her letter dated 15 January 2010.

Claim:

The Commission should take effective action in relation to her case.

The inquiry



13. The complaint was sent to the Ombudsman on 9 May 2010. On 7 June 2010, the Ombudsman opened an inquiry and sent the complaint to the Commission, with a request for an opinion by 30 September 2010. On 25 August 2010, the Commission sent its opinion. Subsequently, it sent the translation of the opinion into Polish, which was forwarded to the complainant with an invitation to submit observations. On 19 September 2010, the complainant submitted her observations.

The Ombudsman's analysis and conclusions

A. Alleged failure to (i) reply to the letter dated 15 January 2010 and (ii) decide on the complainant's complaint against Austria within a reasonable time, and related claim

Arguments presented to the Ombudsman

14. The complainant argued that, although the Commission announced that her case could be clarified by the Court of Justice's preliminary ruling on a similar case, which the Court issued in November 2009, the Commission failed to provide her with the relevant information before she submitted her complaint to the Ombudsman.

15. The Commission also ignored her reminder of 15 January 2010.

16. In its opinion, the Commission emphasised that it is for the national competent institutions to establish and decide whether the conditions laid down in their respective national legislations, if necessary in conjunction with the Regulation, are met in each individual case. Even if such a decision is negative, the Commission cannot intervene in individual cases in national administrative and/or judicial procedures.

17. Given that the complainant's case involved a significant legal issue, the Commission did its utmost to investigate the factual situation and the relevant national legislation. The Commission concluded that Austria should pay the benefits to the complainant. Consequently, it decided to open an infringement procedure against Austria in order to clarify the complex legal issue. On 9 October 2009, it thus sent a letter of formal notice to Austria [3], to which Austria replied on 9 December 2009 [4]. In their reply, the Austrian authorities referred to the Court of Justice's judgment of 26 November 2009 in *Slanina*. They requested the Commission to suspend the infringement procedure until the Austrian Supreme Administrative Court delivered its ruling following the Court of Justice's referral of the matter back to it. As a result of the Court of Justice's referral [5], the said national court must decide on the conditions required for a person not living in a common household to be recognised as a family member. The Austrian Supreme Administrative Court has not yet decided on this issue.

18. Nevertheless, the judgment in *Slanina* included other interpretative elements that helped to clarify the complainant's situation. As a result, the Commission's services had been



in regular informal contact with the competent Austrian authorities in this regard. The Commission apologised for not replying to the complainant's letter dated 15 January 2010, and explained that this oversight was due to the lack of a significant development in her case.

19. On 27 May 2010, the relevant Austrian Ministry informed the Commission that, in May 2010, the competent Austrian institution had paid the complainant the sum of EUR 17 939.40 in arrears dating from January 2006. The Ministry also informed the Commission that in the future it would make regular payments of the due family benefits to the complainant. On the same day, the Austrian Ministry informed the relevant Ministry in Poland ("*Instituacja łącznikowa*") of the development in the complainant's case.

20. The Commission concluded that the case had been settled in full. The Commission was at that stage awaiting (i) the written confirmation from the Austrian authorities of the payment and (ii) the change of their position following the Court of Justice's ruling in *Slanina*. As soon as these happened, the Commission would be able to close the infringement procedure against Austria. The Commission also noted that the complaint to the Ombudsman was made before the relevant payment had been made by the Austrian authorities.

21. In her observations, the complainant confirmed that she had received the above payment from the Austrian institution and that this latter institution assured her that she would receive the family benefits from Austria every two months. In light of the above, the complainant confirmed that she was fully satisfied with the outcome of her case and no longer "*complaining about anything*".

The Ombudsman's assessment

22. In light of the complainant's observations, and the fact that the Commission's actions in relation to her case have proven effective, the Ombudsman closes the case as settled by the Commission.

23. He notes that, although the Commission's handling of the complainant's case lasted for approximately three years, it, nevertheless, made certain to take action at all possible levels during this time (the infringement procedure under Article 258 TFEU, the use of the mechanism established by the Regulation, the mediation between the relevant Polish and Austrian Authorities, the referral to the Administrative Commission on Social Security for Migrant Workers [6] and the informal contacts with the Austrian authorities.) The Ombudsman recognises that the Commission did its utmost in order to assist the complainant and many others who may be in a similar situation. By doing so, it clearly demonstrated how it can be helpful towards citizens when ensuring that Member States comply with EU law.

24. In addition, the Ombudsman notes with approval the Commission's constructive approach to the present inquiry. The Commission not only sent an opinion on the complaint



one month before the deadline set by the Ombudsman had expired, but also provided him with exhaustive explanations and copies of all the relevant documents supporting its views.

B. Conclusions

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

The complaint has been settled by the Institution to the satisfaction of the complainant.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 20 December 2010

[1] OJ 1971 L 149, p.2. The Regulation was repealed by Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

[2] See Case C-363/08 *Romana Slanina v Unabhängiger Finanzsenat Aussenstelle Wien*, judgment of 26 November 2009, not yet published in the ECR.

[3] The Commission attached to the opinion a copy of that letter of formal notice.

[4] The Commission attached to the opinion a copy of Austria's reply to the letter of formal notice.

[5] Paragraph 27 of the judgment in *Slanina* reads as follows: "*... it is for the referring court to establish whether the condition laid down in article 1(f)(i) of Regulation Nr 1408/71 is met in the present case, that is to say, whether the child, although not having lived with her father during the period at issue in the main proceedings, could be regarded for the purposes of national law as a 'member of the family' of her father and, if that is not the case, whether she could be regarded being 'mainly dependent on' him.*"

[6] The Administrative Commission on Social Security for Migrant Workers was established on the basis of Article 80 of the Regulation. It is made up of a government representative from each Member State. Its duties are to deal with all administrative questions and questions of interpretation arising from the Regulation and to foster and develop cooperation between Member States in social security matters by modernising procedures for information exchange. The European Commission takes part in the deliberations, as an advisor.

