European Ombudsman

Proposal of the European Ombudsman for a friendly solution in complaint 1977/2013/JN against the European Commission

Solution - 07/11/2013
Case 1977/2013/MDC - **Opened on** 07/11/2013 - **Decision on** 25/09/2015 - **Institution concerned** European Commission (No maladministration found) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complainant, a Luxembourgish national, became aware of a vacancy notice issued by the United Nations High Commissioner for Refugees ('UNHCR') advertising the position of 'consultant' [2] who would be a representative of the UNHCR at the French national asylum Court (*la Cour nationale du droit d'asile*). According to the job description, the representative was to participate in a "formation" of the court [3] and to assess the appeals [4] submitted by asylum seekers against first instance decisions. Moreover, candidates had to possess French nationality [5] . The selection process was carried out by the UNHCR.

2. On 21 October 2012, before submitting her application, the complainant enquired with the UNHCR whether the vacancy was open to citizens of other EU Member States. In its reply, the UNHCR stated that French citizenship was required because the position in question involved judicial activities to be carried out within a French court. Nevertheless, the complainant decided to apply for the position.

3. On 31 October 2012, her application was rejected. The UNHCR reiterated that the position was that of a non-presiding judge ('juge assesseur') for which French nationality was required.

4. On 2 November 2012, the complainant wrote to the Vice-President of the Commission who at the time was Ms Reding. She requested the Commission's opinion on whether the requirement of French nationality for the specific post in question complied with EU law. She pointed out that the post did not form an integral part of the French civil service but depended on the UNHCR. One of the duties of the jobholder was to supervise the correct application of an international agreement (the Geneva Refugee Convention) by France. The complainant also stated that she had approached SOLVIT on the matter, which informed her that judicial activities were reserved

to French nationals and that the position advertised by the UNHCR appeared to be similar to that of a judge.

5. On 11 February 2013, the Commission sent a holding reply to the complainant informing her that her request would be handled by the Cabinet of the Commissioner for Employment, Social Affairs and Inclusion. Since she received no reply, on 15 March 2013, the complainant sent a reminder to the Commission about her request. She referred to the European Code of Good Administrative Behaviour.

6. On the same day, the complainant received the Commission's reply dated 12 March 2013. In its reply, the Commission stated that, according to Article 45 of the Treaty on the Functioning of the European Union ('TFEU'), EU citizens have the right to work and live freely in other EU Member States. However, Article 45(4) TFEU [6] provides for an exception in respect of employment in the public service. It added that in this respect, the Court of Justice has held that Article 45(4) TFEU covers " *posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality* " [7] . The Commission noted that compliance with these criteria must be assessed on a case-by-case basis. It further stated that the complainant could find more detailed explanations in a Commission document entitled *Free movement of workers in the public sector* [8] , which was available on its website. In the Commission's view, the exception provided in Article 45(4) TFEU covers the position of magistrate. As regards the complainant's case, the Commission pointed out that only a concrete assessment of the nature of the tasks and responsibilities carried out by the non-presiding judge at the French asylum Court could reveal whether the conditions of Article 45(4) TFEU were fulfilled. The fact that the position in question was advertised by the UNHCR had no bearing on the assessment that the non-presiding judge would carry out judicial activities within a French court.

7. In her reply of 15 March 2013, the complainant pointed out that the tasks of a non-presiding judge involve assessing the appeals submitted by asylum seekers. This assessment is made on the basis of international conventions and, in particular, the Geneva Refugee Convention. The complainant wondered why the Commission had not requested the French authorities to provide a detailed description of the nature of the post in question. Also on 15 March 2013, the complainant sent a second e-mail in which she noted that it had taken the Commission more than four months to reply to her request. She also expressed astonishment at the fact that the Commission had not referred to more recent case-law than the above-mentioned 1980 case *Commission v Belgium* and that, since 1980, there has been no development in the direction of liberalisation. She contended that the Commission had failed to carry out a thorough, individual assessment of the post in question.

8. Having received no reply, on 5 April 2013, the complainant wrote to the Secretariat-General of the Commission and reiterated her infringement complaint. She made reference to some new facts and expressed the view that it was hardly justifiable that the task of ensuring France's

compliance with international obligations in the field of asylum be entrusted to a person who should be loyal to France and preserve its interests. In addition, Article 45(4) TFEU concerned merely the public sector. Yet, the position in question did not concern the public sector of a Member State but an international organisation.

9. Since she received no reply, the complainant turned, on 17 October 2013, to the European Ombudsman who opened a simplified inquiry on 11 November 2013, urging the Commission to reply to the complainant's correspondence and to address her concerns. On 20 December 2013, the Commission forwarded to the Ombudsman the reply it had sent to the complainant on 4 June 2013. The reply informed the complainant that her complaint had been registered on 12 April 2013. The Commission then referred to its reply of 12 March 2013 in which it informed the complainant of the public service exception and of the relevant case-law of the Court. The Commission added that subsequent case-law confirms the Court's initial position formulated in *Commission v Belgium* (Case C-149/79). Referring to other judgments of the Court [9] , it pointed out that the Court considers that safeguarding the general interests of the Member State concerned cannot be imperilled in situations where rights under powers conferred by public law are exercised only sporadically, even exceptionally, by nationals of other Member States. The Commission said that it applies this approach both to the private and public sectors although the Court's case-law concerns only jobs in the private sector.

10. As regards the complainant's reference to the judgments relating to notaries [10] , the Commission stated that these concern the freedom of establishment (Article 49 TFEU) and the exception in Article 51 TFEU and not the freedom of movement of workers. Consequently, those judgments are not applicable to the position in question.

11. The Commission also referred to its document entitled *Free movement of workers in the public sector* , in which it expressed the view that the exception contained in Article 45(4) TFEU covers magistrates too. It also considered that it could cover persons working in national tribunals. It reiterated that the fact that the position was advertised by the UNHCR was irrelevant since the duties were to be carried out in a national court.

12. In the Commission's view, the criteria laid down in the case-law, regarding the application of Article 45(4) TFEU, were fulfilled in this case. According to the description in the vacancy notice, the chosen candidate was to " *siéger au sein d´une formation de jugement et (...) évaluer les recours introduits auprès de la Cour nationale du droit d´asile par des demandeurs d´asile dont la demande a été rejetée en première instance* " [11] . The UNHCR explained to the complainant that the non-presiding judge would carry out judicial activities in a French court. This was confirmed by SOLVIT, which explained that his/her functions would be similar to those of a judge. The Commission's services were of the view that those activities involved direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State. In the Commission's view, the exercise of powers conferred by public law would occur on a regular basis and would not represent a very minor part of the activities. The fact that the condition of nationality was introduced retroactively had no bearing on this assessment.

13. Consequently, the Commission took the view that the condition of nationality did not breach the provisions of EU law on the free movement of workers. It added that if the complainant disagreed, she was free to have recourse to the legal avenues available in the French system. It also informed the complainant that the Commission had recently taken several steps to encourage Member States to make more posts in the public sector available to the nationals of other Member States. The Commission concluded by explaining that its Code of Good Administrative Behaviour allows 15 working days for a reply to correspondence. Given that its services had already been preparing a reply when the complainant's letter of 5 April 2013 reached them (11 working days following receipt of the two e-mails of 18 March 2013), the Commission considered that that time limit had been respected.

The inquiry

14. On 18 March 2014, the Ombudsman asked the Commission for an opinion on the following allegation and claim:

The Commission failed to examine the complainant's infringement complaint thoroughly. The Commission should review its substantive assessment of the complainant's infringement complaint.

15. The Ombudsman also invited the Commission to address the following points arising from the complaint:

1) The UNHCR representative appears to have a very specific mission, that is, to ensure that France complies with its obligations under international law and, in particular, respects the fundamental rights of asylum seekers. Given that these rights and interests are often at odds with the Member States' (economic and political) interests, it might be inappropriate to require the jobholder to be a French national and thus to owe allegiance to the French State. This could be in conflict with the UNHCR representative's very duties and responsibilities. It appears that the UNHCR representative may be required to owe allegiance to the UNHCR and the rule of law only.

2) In its replies to the complainant, the Commission relied on case-law dating back to 1980 but did not take into account the developments in EU integration in the area of justice and asylum since then.

3) The UNHCR representative's contract appears to be governed by private law.

4) It appears that French law currently lays down a nationality requirement in respect of the UNHCR representative but not of other members of the court (qualified persons appointed by the President of the *Conseil d'Etat* on the proposal of one of the Ministers represented in the French migration office ('OFPRA')) [12] .

5) While the nationality requirement is imposed at present, it appears that France did not deem

it necessary to include such a requirement for more than fifty years between 27 July 1952 and 1 January 2004.

6) Historically, it appears that the nationality requirement was introduced due to considerations of French constitutional law, not because the French legislator considered that the specific duties and responsibilities of the UNHCR representative would make it necessary to protect the State's interests by entrusting them to a French national.

16. Moreover, the Ombudsman informed the Commission that she had identified the following procedural shortcomings in the handling of the complainant's correspondence and infringement complaint, for which the Commission could consider apologising to the complainant:

1) The complainant wrote to Commissioner Reding on 2 November 2012 and received a holding reply on 11 February 2013, that is more than three months later. A substantive reply was not sent until 12 March 2013. Yet, according to the Commission's Code of Good Administrative Behaviour, a reply should have been sent within 15 working days of receipt.

2) It appears that no acknowledgement of receipt was ever sent to the complainant. Yet, according to the Commission's 2012 Communication Updating the handling of relations with the complainant in respect of the application of Union law [13] , an acknowledgement of receipt should have been sent within 15 working days.

3) The complainant's e-mails of 15 March 2013 were not answered until 4 June 2013. Yet, once again, the applicable time limit for replying was 15 working days.

17. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint, which included a reply to the Ombudsman's questions and, subsequently, the comments of the complainant in response to the Commission's opinion. The Ombudsman's friendly solution proposal takes into account the arguments and opinions put forward by the parties.

Alleged failure to thoroughly examine the complainant's infringement complaint and the corresponding claim

Arguments presented to the Ombudsman

18. The complainant submitted to the Ombudsman the following main arguments.

1) The Commission did not base its conclusion on sufficient evidence. In fact, it merely relied on the very limited information provided in the vacancy notice and additional information provided to the complainant by the UNHCR and SOLVIT France.

2) The Commission did not take any further steps to verify this information, in particular in order to check (i) what the duties and responsibilities of the jobholder would be precisely, (ii) whether he or she would be a mere 'consultant' as indicated by the title of the post or whether he or she would be entrusted with decision-making powers, and (iii) what impact on the outcome of judicial proceedings he or she could have.

3) The Commission failed to take into account the specific post in question, and in particular the fact that the UNHCR representative in the French asylum court owes allegiance to the UNHCR whose mission is apolitical, and the specific conditions of employment of the UNHCR representative.

19. In its opinion, the Commission declared its readiness to apologise to the complainant for having failed to reply to her within the applicable deadlines (point 16 above). It took the view however that its assessment had been based on sufficient evidence and information. The vacancy notice and other publicly available information [14] made it clear that, although the jobholder is employed temporarily as a 'consultant', he/she is a member of the judicial panel deciding on refugee status. The vacancy notice explicitly stated that the consultant would pursue activities of a judicial nature and would be part of the court's composition. The UNHCR confirmed that the consultant would pursue activities of a judicial nature. Thus, the Commission considered that the jobholder would participate in the exercise of judicial powers.

20. In this respect, the Commission emphasised two points. First, the French National Asylum Court decides on appeals against OFPRA decisions concerning asylum (refugee status). Such decisions clearly constitute " *the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of the other public authorities* ". Second, decisions of the Asylum Court on individual cases are handed down by chambers composed of three members, one of whom is the UNHCR representative. He or she is called an "assesseur", is a member of the chamber in each individual case and is appointed as a qualified specialist by the UNHCR with the assent of the vice-president of the Council of State. Participation in judicial decision-making is therefore a key function of the jobholder. His/her right to vote is equal to that of the two other members of the chamber.

21. The Commission relied on the information provided by the complainant, the text of the vacancy notice, the UNHCR's confirmation to the complainant and publicly available information which all clearly confirmed the judicial nature of the tasks of the occupier of the post. Therefore, it had sufficient information to assess whether Article 45(4) TFEU applied and further verification was unnecessary.

22. The Commission challenged the argument that the UNHCR representative owes allegiance to the UNHCR since he or she enjoys independence in the exercise of the "judicial or quasi-judicial" function. The Commission also disagreed that the nationality requirement could be inappropriate taking into account the specific nature of the UNHCR representative's mission and duties. It accepted that the UNHCR representative's mission is focused on the interpretation and application of asylum law and on the protection of the rights of the applicants for refugee status. However, his or her function is essentially judicial or quasi-judicial, since he or she is a

member of a judicial panel, with a right to vote equal to that of other members of the panel. The fact that a judge possesses the nationality of a State cannot be considered to be contrary to judicial independence.

23. The Commission went on to state that its reply refers to the correct case-law of the Court. The fact that it has not been overruled since 1980 cannot alter this fact. Moreover, in the Commission's view, the nature of the UNHCR representative's contract is irrelevant for the purposes of Article 45(4) TFEU [15] .

24. As regards the lack of a nationality requirement with respect to other members of the chamber, the Commission took the view that Article 45(4) TFEU provides Members States with the possibility of restricting some public service posts to their nationals but it does not require them to impose the same restrictions on similar posts. The Member States therefore have discretion to decide to which posts they will apply the exception, as long as they fulfil the conditions imposed by Article 45(4) TFEU. The Commission frequently calls upon Member States not to exercise their right to apply the exception and to open up their public sectors to citizens of other Member States as much as possible.

25. As regards the legislative developments in French law and the fact that there was no nationality requirement before 2004, the Commission pointed out that the legislative reform of 2003 extended the competences of the Asylum Court and modified the role and method of appointment of the UNHCR representative. Consequently, the French authorities may consider that the representative now has more powers conferred by public law and duties designed to safeguard the general interests of the State [16] . In any event, the Commission must restrict itself to the assessment of the facts relevant to the assessment of the requirements of Article 45(4) TFEU. In this regard, in the relevant case-law, the Court has never given weight to the drafting history of the relevant national provisions. That case-law does not prevent Member States from applying the nationality requirement in situations where it did not exist in the past.

26. In her observations, the complainant pointed out that the Commission had failed to explain why it never registered her infringement complaint as such. Given that the Commission did not take issue with the French decision to introduce the nationality requirement, the Commission's statement that it frequently encourages Member States not to apply the exception in Article 45(4) TFEU sounds hollow. The complainant developed her arguments and insisted, in particular, that the Commission had failed to take into account the specific characteristics of the post in question.

27. Moreover, the Commission's argument that the UNHCR representative does not owe allegiance to the UNHCR was contradicted by the parliamentary *travaux préparatoires* (preparatory materials) to which the Commission itself referred. Also, the Commission argued that the jobholder is independent and therefore his/her French nationality cannot constitute an obstacle to his/her ability to supervise France's compliance with its international obligations in an independent manner. However, if there is nothing to justify the assumption that a French person will be less objective, there is also nothing to justify the opposite assumption that a national of another country would be less loyal.

28. According to the UNHCR's website, a UNHCR representative participates in the adjudication process also in Italy and Spain. It would have been interesting for the Commission to check whether these countries also reserve such posts to their nationals.

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

29. As regards the procedural shortcomings identified in point 16 above, the Commission has acknowledged these shortcomings and has declared its readiness to apologise for them. Therefore, no further inquiries into this aspect of the complaint are justified. As regards the alleged failure to register the infringement complaint, the Ombudsman understands that the Commission's apology also covers this procedural point. In addition, the Ombudsman notes that the complainant's initial correspondence of 2 November 2012 was not clearly formulated as an infringement complaint but was rather an enquiry seeking the Commission's opinion. Therefore, it is understandable that the Commission may have interpreted it as such. Only the later submissions of 15 March and 5 April 2013 indicated that the complainant intended to lodge an infringement complaint. The Commission registered the correspondence of 5 April 2013 as an infringement complaint on 12 April 2013. Regrettably, it was not until 4 June 2013 that the complainant was informed of this in the substantive reply [17] . For these reasons, the Ombudsman does not find it fruitful to pursue the inquiry in this respect either.

30. As regards the assessment of the complainant's infringement complaint, the Ombudsman stresses that she respects the Commission's discretionary powers as the guardian of the Treaties. However, principles of good administration require the Commission to examine infringement complaints thoroughly and to base its conclusions on sufficient and convincing grounds. In this case, the Ombudsman is of the view that, so far, the Commission has not complied with these requirements.

31. The Commission explained in its opinion that its decision was based on publicly available information and, in particular, on the information provided by the complainant, the text of the vacancy notice, the UNHCR's communication to the complainant and the Asylum Court's website. In the Ombudsman's view however, a proper assessment of the compatibility with EU law of the nationality requirement for the specific post in question called for a more thorough review.

32. The Ombudsman agrees with the Commission that, according to the information available, the post in question is comparable to that of judge to the extent that the jobholder forms part of a chamber within a national court and, crucially, takes part in its deliberations and has a say in the decisions made. His/her voting rights appear to be equal to those of the two other members of the chamber. [18]

33. Nonetheless, these considerations are insufficient to conclude that the nationality requirement does not infringe EU law. In fact, the Commission itself has pointed out that the

applicability of the public service exception enshrined in Article 45(4) TFEU must be examined on a " *case-by-case basis with regard to the* **nature of the tasks and responsibilities** *involved* " [19] . It cannot be assessed merely on a sector basis but a 'functional approach' needs to be followed. In the Commission's words, it is " *important to always bear in mind the purpose of the exception, i.e. whether the post* **requires 'a special relationship of allegiance '** " [20] . In addition, since Article 45(4) TFEU constitutes " *an exception to the general rule of free movement of workers* [it] *must ... be interpreted restrictively* " [21] . This is also what the Commission's reply of 12 March 2013 suggested and the Ombudsman fully agrees with this interpretation given by the Commission. It is noteworthy that the Court has pointed out that the " *derogation must be construed in such a way as to limit its scope to what is* **strictly necessary** *for safeguarding the interests which it allows the Member States to protect* " [22] (emphasis added).

34. In this case, it is thus essential to take into account that while the jobholder has duties comparable to those of a judge, he/she also has a very specific mission, which is borne out by the various titles of the post ("UNHCR representative", "consultant", "juge *assesseur* "). It appears that the UNHCR representative may be regarded as a guest judge selected by an international organisation whose mission is to assist the Asylum Court and to help ensure that the asylum seekers' individual rights guaranteed under international law are observed by France. In this context, while the UNHCR representative's tasks certainly involve the exercise of powers conferred by public law, it is not clear why the exercise of the corresponding duties should require any special relationship of allegiance *vis-à-vis* France. In other words, the condition laid down in the Court's case-law that the posts falling under the derogation provided for in Article 45(4) TFEU have to involve duties (i) designed to safeguard the general interests of the State (ii) such as to justify their being reserved to the Member State's nationals [23] is not necessarily fulfilled.

35. Contrary to the Commission's view, the Ombudsman considers that the legislative developments need to be taken into account if the Commission is to properly assess whether, in the opinion of the French legislator, the specific duties and responsibilities of the post are such as to require it to be reserved for French nationals only. The Commission did not provide information showing that this requirement was introduced precisely because the post in question requires a special relationship of allegiance *vis-à-vis* France. It appears that the nationality requirement was introduced merely due to considerations of French constitutional law [24] . It does not seem that this requirement was introduced because, taking into account the specific duties and responsibilities of the post, it was considered necessary to protect the State's interests by entrusting them to a French national.

36. Furthermore, even assuming that the French legislator wanted to safeguard France's interests by introducing the nationality requirement, it is not clear how this purpose could be achieved in practice. In fact, the UNHCR representative is only one of three voting members of a chamber. Therefore, he/she merely has a minority vote and cannot, on his/her own, determine the outcome of any case [25] .

37. The view that the post could legitimately require a special relationship of allegiance appears

to be even weaker when one takes into account the following considerations. *First* , the condition of nationality is currently not imposed by French law in respect of another member of the Asylum Court (a qualified person appointed by the vice-president of the Conseil d'Etat on the proposal of one of the Ministers represented in OFPRA) [26] . *Second* , while French nationality is required at present, it appears that France did not deem it necessary to impose such a requirement for more than fifty years between 27 July 1952 and 1 January 2004 [27] . The Commission did not provide a convincing explanation as to why it accepts that it is **strictly necessary** to reserve the post of the UNHCR representative to French nationals while (i) France does not deem it necessary to reserve the post of another member of the French Asylum Court for French nationals and (ii) France did not subject the post of the UNHCR representative post to such a requirement for some 50 years. The publicly available *travaux préparatoires* to which the Commission referred in its opinion do not contain sufficient information to enable the Commission to conclude that the nationality requirement is in fact strictly necessary.

38. It is not the Ombudsman's role to take a position on the legislation of a Member State or to substitute her views for those of the Commission. However, in this case, the Ombudsman is of the view that the Commission has, so far, not demonstrated that it assessed the complainant's infringement complaint in accordance with the principles of good administration because it has not given due weight to the specificity of the post in question. In particular, it has not provided sufficient information demonstrating that the nationality requirement is justified in light of the specific duties and responsibilities of the post. In fact, as Advocate General Wahl has recently stated, the key question, which the Commission has so far not answered, is " *whether there are* **objective** *reasons for which a State can take the view that only persons who are bound to it by a bond of nationality would, in all likelihood, be more willing or able to fulfil the duties which* [the] *given post entails.* " [28]

39. The Ombudsman notes that the Commission's conclusion is based on a rather sectoral approach according to which, any person participating as a member of a court panel is automatically and necessarily covered by the public service exception enshrined in Article 45(4) TFEU. This may be a correct assumption with respect to a large majority of judicial posts within the Member States' judiciaries. This case however shows the limits of such an approach. In fact, it appears that certain judicial posts could be so specific that it may not be justified to limit them to the nationals of one Member State.

40. The Ombudsman is of the view that the Commission would have been in a better position to assess this issue had it consulted the French authorities. They could have provided more information regarding the *travaux préparatoires* of the relevant French law and further clarifications as regards the specific duties and responsibilities of the UNHCR representative, as well as his/her ability, in practice, to influence the outcome of cases submitted to the Asylum Court. However, the evidence available does not show that the Commission approached the French authorities in order to obtain full information on the case.

41. In light of the above, the Ombudsman makes the preliminary finding that the Commission may not have complied with the principles of good administration when assessing the

complainant's infringement complaint. She therefore makes a corresponding proposal for a friendly solution below, in accordance with Article 3(5) of the Statute of the European Ombudsman.

The proposal for a friendly solution

In light of her findings, the Ombudsman proposes that the Commission review its assessment of the infringement complaint. The Commission could take into account the considerations outlined by the Ombudsman and, in particular, the very specific characteristics of the post in question. The Ombudsman suggests that, as a first step, the Commission contact the French authorities on the matter.

Emily O'Reilly European Ombudsman Strasbourg, 12/02/2015

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The vacancy notice was published in French. The term " *consultant* " was used therein.

[3] " *siéger au sein d'une formation de jugement* ".

[4] " *évaluer les recours* ".

[5] The website of the French Asylum Court (*Cour nationale du droit d'asile*) refers to " *assesseurs* " who are appointed by the UNHCR with the agreement of the Vice-President of the French Conseil d'Etat. They form part of a three-member chamber and have a right to vote.

See: http://www.cnda.fr/La-CNDA/organisation-de-la-cour/ [Link] and http://www.cnda.fr/La-CNDA/formations-de-jugement/ [Link]

[6] Article 45 TFEU concerns the free movement of workers. Article 45(4) TFEU reads as follows: " *The provisions of this Article shall not apply to employment in the public service.* "

[7] Case 149/79 *Commission v Belgium* [1980] ECR 3881, paragraph 10.

[8] SEC(2010) 1609 final, 14.12.2010.

[9] Case C-405/01 *Colegio de Oficiales de la Marina Mercante Espanola v Administracion del Estado* [2003] ECR I-10391; C-47/02 *Anker and others v Germany* [2003] ECR I-10447.

[10] Cases C-47/08 *Commission v Belgium* [2011] ECR I-4105; C-50/08 *Commission v France* [2011] ECR I-4195; C-51/08 *Commission v Luxembourg* [2011] ECR I-4231; C-52/08

Commission v Portugal [2011] ECR I-4275; C-53/08 *Commission v Austria* [2011] ECR I-4309; C-54/08 *Commission v Germany* [2011] ECR I-4355 and C-61/08 *Commission v Greece* [2011] ECR I-4399 .

[11] In English: " *participate in a judicial formation and [...] assess the appeals submitted to the National Asylum Court by asylum seekers whose request was rejected at first instance* ".

[12] See Article L732-1 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* .

[13] COM(2012) 154 final.

[14] The Commission referred to the website of the French National Asylum Court:

http://www.cnda.fr/La-CNDA/organisation-de-la-cour/ [Link]

[15] Case 152/73 *Sotgiu* [1974] ECR 153.

[16] http://www.senat.fr/rap/a03-029/a03-0294.html [Link]

[17] The Commission's 2012 Communication updating the handling of relations with the complainant in respect of the application of Union law provides for a 15-working day time limit (the Communication is cited in footnote 12 above).

[18] See: http://www.cnda.fr/La-CNDA/organisation-de-la-cour/ [Link] and

http://www.cnda.fr/La-CNDA/formations-de-jugement/ [Link]

See also Articles L732-1 and R733-26 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* .

[19] See page 12 of the Commission's publication *Free movement of workers in the public sector* (emphasis added). This publication is cited in footnote 8 above.

[20] See page 12 of the Commission's publication *Free movement of workers in the public sector* (emphasis added). This publication is cited in footnote 8 above.

[21] See page 11 of the Commission's publication *Free movement of workers in the public sector* . This publication is cited in footnote 8 above.

[22] Case C-270/13 *Iraklis Haralambidis v Calogero Casilli* , judgment of 10 September 2014, not yet published in the ECR, paragraph 43 (emphasis added).

[23] See, for example, Case C-270/13 *Iraklis Haralambidis v Calogero* Casilli, cited in footnote 21 above, paragraphs 44 and 46.

[24] See http://www.senat.fr/rap/a03-029/a03-0294.html [Link]

[25] See Article R733-26 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* . In this respect, it is noteworthy that even the French *Conseil constitutionnel* , in its judgment 98-399 of 5 May 1998 in which it validated the presence of a UNHCR representative not having French nationality in the then *Commission des recours des réfugiés* (predecessor of the Asylum Court), gave much weight to the fact that the UNHCR representative was only one of three members/judges within the formation of the court. See point 17 of the judgment, available at:
http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1
[Link]

[26] See Article L732-1 of the French *Code de l'entrée et du séjour des étrangers et du droit d'asile* .

[27] For the legislative developments see:

http://legifrance.gouv.fr/affichTexteArticle.do;jsessionid=190CCF8345C7C6B4158FCD51FDBDB93F.tpdjo10v_2?id
[Link]

The nationality requirement was introduced by Act 2003-1176 of 10/12/2003 which entered into force on 01/01/2004. Article 5 of Act 52-893 of 25/07/1952, which entered into force on 27/07/1952 and whose relevant part remained in force until 01/01/2004, did not include the nationality requirement.

[28] Opinion of Advocate General Wahl of 5 June 2014 in *Iraklis Haralambidis v Calogero Casilli* , point 57, emphasis added.