

Decision in case 1977/2013/MDC on the European Commission's assessment of an infringement complaint concerning restrictions to freedom of movement within the EU internal market

Decision

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

The complainant in this case, a Luxembourgish citizen, was excluded from competing for a post in France on the grounds that she is not a French national. The post in question was that of a non-presiding judge who was to represent the United Nations High Commissioner for Refugees at the French asylum Court. The complainant put it to the European Commission that the limiting of the post to French nationals appeared to be a breach of the provisions of EU law on the free movement of workers. When the Commission took the view that there was no infringement of EU law, the complainant contacted the Ombudsman.

The Commission took the view that an exception to the right of free movement of workers applied. This exception applies in the case of employment in the public service and is provided for in Article 45(4) of the Treaty on the Functioning of the European Union. The Commission acknowledged that a decision in this issue required a concrete assessment of the nature of the tasks and responsibilities of the non-presiding judge and it argued that it had made such an assessment. The Ombudsman noted that, as part of this assessment, the Commission had not contacted the French authorities in order to obtain further information about the post in question. The Ombudsman's initial proposal, therefore, was that the Commission should review its assessment of the infringement complaint and she suggested that the Commission should consult the French authorities. In replying to this proposal, the Commission maintained that it had sufficient information available to it when deciding the issue and that it was therefore unnecessary to contact the French authorities. Having considered its detailed reply to the proposal, the Ombudsman accepted that in this case the Commission did have sufficient information on which to base its decision. She therefore closed the inquiry with a finding of no maladministration on the part of the Commission.

The background

1. The complainant, a Luxembourgish citizen, applied for the position of 'consultant' advertised



by the United Nations High Commissioner for Refugees ('UNHCR'). The selected candidate was to be a representative of the UNHCR and to perform the duties of a non-presiding judge at the French national asylum Court. S/he was to participate in a "formation" of the court and was to assess the appeals submitted by asylum seekers against first instance decisions. The complainant's application was rejected by the UNHCR since she was not a French citizen.

2. On 2 November 2012, the complainant contacted the European Commission in order to ask whether the requirement of French nationality for the specific post in question complied with EU law. In its reply dated 12 March 2013, the Commission stated that Article 45(4) of the Treaty on the Functioning of the European Union ('TFEU'), envisages an exception to the right of EU citizens to work in other EU Member States in the case of employment in the public service. It added that the Court of Justice of the EU ('CJEU') 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*" [1]. The Commission noted that compliance with these criteria must be assessed on a case-by-case basis. It considered that this exception covers the position of magistrate but that only a concrete assessment of the nature of the tasks and responsibilities to be carried out by the judge at the French asylum Court could establish whether the conditions of Article 45(4) TFEU were fulfilled. In this instance, the Commission said that its assessment was that the Article 45(4) exception did apply.

3. In her reply dated 15 March 2013, 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. She contended that the Commission had failed to carry out a thorough, individual assessment of the post.

4. Having received no reply, on 5 April 2013, the complainant wrote to the Secretariat-General of the Commission. She contended 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. Moreover, the position in question did not concern the public sector of a Member State but an international organisation.

5. On 4 June 2013, the Commission replied to the complainant. Among other things, the Commission observed that the case-law of the CJEU acknowledges that safeguarding the general interests of a Member State is not put at risk in situations where rights, under powers conferred by public law, are exercised either sporadically or exceptionally by nationals of other Member States. However, after referring to the UNHCR's explanation that the non-presiding judge would carry out judicial activities in a French court, the Commission took 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. 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. Consequently, the Commission considered that the French nationality requirement in this case did not breach the provisions of EU law on the free



movement of workers.

6. The complainant contacted the Ombudsman who opened an inquiry into (1) the allegation that the Commission had failed to examine the complainant's infringement complaint thoroughly and (2) the claim that the Commission should review its substantive assessment of the complainant's infringement complaint. The Ombudsman informed the Commission that she had identified a number of procedural shortcomings in the handling of the complainant's correspondence and infringement complaint [2]. In its opinion on the complaint, the Commission acknowledged the procedural shortcomings that had occurred and declared its readiness to apologise for them. The Ombudsman therefore considered that no further inquiries into this aspect of the complaint were justified. Thus, this decision concerns only the allegation and claim mentioned above.

7. In conducting the inquiry, the Ombudsman has taken 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

The Ombudsman's proposal for a solution

8. Based on her initial assessment, the Ombudsman proposed a solution in this case to the Commission. The Ombudsman's initial assessment was that the Commission had not examined the infringement complaint thoroughly and had not based its conclusions on sufficient and convincing grounds.

9. The Ombudsman made the following proposal for a 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. "

10. In its reply to the Ombudsman's proposal, the **Commission** maintained the position that it had, in fact, assessed the case on a specific, individual basis and that it had sufficient information available to it when deciding that the exception, provided for at Article 45(4) TFEU, applied. In this reply, the Commission elaborated further on the explanations it had given in its first response to the complaint.

11. The Commission stated that it had considered two factors to be important when formulating its position. First, the French asylum court rules on appeals against the decisions of the OFPRA



(French Office for the Protection of Refugees and Stateless Persons), granting or refusing the benefit of asylum (refugee status), terminating the enjoyment of asylum and deciding on applications for review of previous decisions. The Commission stated that 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, the French asylum court makes decisions in individual cases by sections composed of three members, one of the members being designated by the UNHCR. He or she is called an " *assesseur* ", is a member of the section in each individual case and is appointed as a qualified specialist by the UNHCR with the assent of the vice-president of the *Conseil d'Etat* . Participation in judicial decision-making is therefore a key function of the UNHCR representative. This UNHCR representative/" *assesseur* " has the right to vote equal to that of the two other members of the judicial formation.

12. The Commission noted that all these considerations concern specific characteristics of the post in question. It therefore contended that it was beyond any doubt that the Commission had conducted its analysis 'on a case-by-case' basis. It also stated that it had based its decision on sufficient information.

13. In reply to the argument that the Commission did not give due weight to the specificity of the post in question, the Commission stated that as a full member of the national court, the holder of the post participates directly in the exercise of sovereignty by France and of its jurisdiction over refugees and asylum applicants, directly determining rights and obligations of individuals under French and international law.

14. As regards the argument that France does not deem it necessary to reserve the post of other members of the French Asylum Court for French nationals, the Commission stated that as long as the conditions under Article 45(4) are met, Member States have discretion in determining to which posts they apply the exception. There may be different practical reasons behind a decision on which posts to reserve for nationals and which not, but it is not the Commission's task to interpret Member States' choices in that respect.

15. In reply to the argument that the nationality requirement had not been imposed for some 50 years prior to 2004, the Commission maintained its position that there is nothing in the relevant case-law to prevent a Member State from applying the nationality requirement in situations where such a requirement did not exist in the past, as long as the particular post meets the conditions of Article 45(4) TFEU.

16. Overall, the Commission contended that its analysis had addressed the complainant's arguments in detail and that its decision was based on sufficient evidence. It therefore found it unnecessary to approach the French authorities and was therefore not in a position to accept the Ombudsman's proposal to review its assessment of the infringement complaint.

17. In her observations on the Commission's reply to the Ombudsman's proposal for a solution, the complainant maintained her complaint.



The Ombudsman's assessment after the proposal for a solution

18. In the normal course, the Ombudsman reviews her initial assessment in a case in the light of whatever response is received from the institution in question. Based on the points made by the Commission in its response to her proposal - which elaborated on points made earlier - the Ombudsman accepts that no useful purpose would now be served were the Commission to contact the French authorities.

19. The Commission is clearly right in considering that it is logical to assume that the exercise of the functions of a judge in a national court involves direct or indirect participation in the exercise of public powers and that a Member State is therefore entitled, on the basis of Article 45(4) TFEU, to decide that the persons holding such positions should be nationals of that Member State.

20. Had the Commission contacted the French authorities in the course of its assessment of the infringement complaint, it would have had a more complete basis on which to ground its decision that the exception at Article 45(4) TFEU applied. However, the Ombudsman accepts that the material available to the Commission, and on which it based its decision, was sufficient to meet the test of having undertaken a case-specific assessment of the particular infringement complaint.

Conclusion

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

The Ombudsman finds that there was no maladministration by the Commission in its handling of the complainant's infringement complaint.

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

Emily O'Reilly Strasbourg, 25/09/15

[1] Judgment of the Court of Justice of 17 December 1980, *Commission v Belgium*, 149/79, ECLI:EU:C:1980:297, paragraph 10.

[2] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's proposal for a solution available at:



<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/60983/html.bookmark> [Link]