Defensor del Pueblo Europeo

Decisión en el asunto 1087/2009/(JMA)MHZ - Falta de respuesta de la Comisión en un caso de no reconocimiento por un Estado miembro del apellido compuesto otorgado a un ciudadano de la UE

Decisión
Caso 1087/2009/(JMA)MHZ - **Abierto el** 04/06/2009 - **Decisión de** 11/11/2009

El hijo del demandante es un ciudadano italiano nacido en los Países Bajos. En su partida de nacimiento, expedida por las autoridades neerlandesas, figuraba con apellido compuesto. Las autoridades italianas le expidieron un pasaporte, pero no aceptaban el apellido compuesto. El demandante consideró que las autoridades italianas violaron la legislación comunitaria al rechazar el apellido de su hijo. En mayo de 2007, envió a la Comisión un formulario de reclamación conforme al artículo 226. La Comisión no registró la reclamación. En febrero de 2009, el demandante volvió a presentar la reclamación, y la Comisión tampoco la registró. En consecuencia, recurrió al Defensor del Pueblo, denunciando que la Comisión no había registrado su reclamación ni abierto una investigación, y solicitando que así lo hiciese.

El Defensor del Pueblo investigó los hechos y, en su decisión, indicó que la Comisión no había registrado como reclamación la carta recibida del demandante en mayo de 2007. En su lugar, había pedido más información, que el demandante aportó en febrero de 2008. Sobre la base de su investigación, el Defensor del Pueblo consideró que la Comisión debería haber sabido que la reclamación cumplía, en principio, todas las condiciones previstas en el punto 3 de su Comunicación sobre relaciones con el demandante de 2002 en relación con infracciones de la legislación comunitaria. Por tanto, la correspondencia del demandante debería haberse registrado como reclamación. Si la Comisión hubiese considerado lo contrario, debería habérselo comunicado al demandante, pero no lo hizo. Dado que la Comisión corrigió su actuación cuando el demandante envió su reclamación por segunda vez, el Defensor del Pueblo estimó que no era necesario continuar investigando ese aspecto del caso.

El Defensor del Pueblo comprobó que, en mayo de 2009, la Comisión notificó al demandante su disposición de llevar el caso ante las autoridades italianas si así lo deseaba. Dado que, según reconoció la Comisión, el demandante aceptó dicha propuesta de actuación, el Defensor del Pueblo formuló un comentario adicional en el que expresaba su confianza en que la Comisión se dirigiera sin demora a las autoridades italianas para encontrar una solución al problema del demandante.

THE BACKGROUND TO THE COMPLAINT

1. The complainant is an EU citizen, whose son acquired the nationality of another EU Member State (country X). The child was born in a third EU Member State (country Y). The authorities of Y issued him with a birth certificate, registering him with a double-barrelled surname. In 2006, the complainant applied to the General Consulate of X for a passport of that country to be issued to his son, based on the Y birth certificate. The passport issued by the consulate, however, did not respect the content of the official Y certificate and changed the original double-barrelled surname given to the child.

2. The complainant wrote the Commission on several occasions to complain that, in his opinion, the authorities of X had not respected his son's rights as an EU citizen, and that they had breached Article 18 of the EC Treaty on the freedom of movement.

3. On 15 May 2007, the complainant sent a letter to the Commission, using the Commission's Article 226 complaint form. The Commission did not register this letter as a complaint.

4. In February 2009, the complainant sent another letter of complaint to the Commission concerning the same subject-matter.

5. In reply to his second letter of complaint, the complainant received an acknowledgment of receipt from the Secretary-General of the Commission, dated 20 February 2009 (reference number SG/CDC(2009)A/1501), but this did not lead to the registration of the correspondence as a complaint.

6. Since the Commission did not register his complaint, the complainant submitted the present complaint to the Ombudsman.

THE COMPLAINT

7. In the complaint, the Ombudsman identified the following allegation and claim:

The complainant alleges that the Commission failed (i) to register his correspondence as an infringement complaint, and (ii) to start an inquiry into his complaint that the authorities of country X violated Article 18 EC by changing his son's double-barrelled surname.

The complainant claims that the Commission should register his complaint and open an inquiry into it.

THE INQUIRY

8. On 4 June 2009, the Ombudsman opened an inquiry and sent the complaint to the

Commission with a request for an opinion. On 4 September 2009, the Commission sent its opinion, which was then forwarded to the complainant with an invitation to submit observations. On 15 and 17 September 2009, the complainant sent his observations on the Commission's opinion.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Commission's alleged failure to register a complaint and start an inquiry

Arguments presented to the Ombudsman

9. The complainant argued that, as a consequence of the actions of the authorities of X, his son, a European citizen, was not accorded the rights to which he is entitled under Article 18 of the EC Treaty. Accordingly, the complainant considered that the authorities of X imposed a surname on his son different from that registered in the Member State of birth and residence. In his view, such practice impedes the right of a citizen to move and reside freely within the EU, as recognized by the Court of Justice in its rulings in cases C-353/06 *Grunkin-Paul* [1] and C-148/02 *Garcia-Avello* [2] . In these cases, the Court found that nationals of one Member State, who are lawfully resident in the territory of another Member State, may rely on the right set out in Articles 12 EC and 17 EC, not to suffer discrimination on grounds of nationality with regard to the rules governing their surname. Accordingly, Articles 12 EC and 17 EC must be construed as precluding the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of a minor child resident in that State, when the child has the dual nationality of that State and another Member State, and the purpose of the application is to enable the child to bear the surname to which she or he is entitled, according to the law and tradition of the second Member State.

10. The complainant further noted that, despite the clear breach of Community law by the authorities of X, the Commission failed to register the complaint. In his view, if there had been insufficient grounds to start an inquiry, the Commission could, after examining his complaint, have rejected it and given him reasons for its decision.

11. In its opinion, the Commission explained that, by e-mail dated 15 May 2007, the complainant sent the Commission a first complaint against the authorities of X. On 22 June 2007, having reviewed the case, the Commission wrote to the complainant. From the available information, it appeared that the complainant's son also held the nationality of a non-EU country (country Z). The Commission asked the complainant to provide it with further information for a possible inquiry into whether his son had relinquished his original non-EU nationality, or whether he held dual Z-X nationality. The Commission considered that this information was necessary in order to take a decision on whether this complaint was founded in fact and in law. The Commission received no reply to its request for information.

12. On 22 January 2008, the complainant wrote to the Commission to ask about his complaint. On 22 February 2008, realising that he may not have received its reply dated 22 June 2007, the Commission sent another copy of its letter to the complainant's new e-mail address. On the same date, the complainant replied to the Commission. He apologized for his late reply, stating he had moved outside the EU. He also explained that it was unclear whether his son still possessed the citizenship of Z, but that the child had acquired X citizenship by birth.

13. The Commission noted that, in the course of its general investigation into Member States' implementation of the ECJ's ruling in the *Garcia Avello* case [3] , the Commission became aware of a circular issued by the Ministry of the Interior of Country X, in 2008. All authorities were instructed to observe the above ruling. They were provided with detailed instructions on how to do so. Accordingly, in cases where a child possesses dual nationality, and has been assigned a surname in accordance with another country's legislation, the authorities of X were instructed to alter their practice which, until then, had provided for automatic correction of the surname.

14. The Commission explained that the complainant submitted his complaint again on 19 February and 30 April 2009, and that its services replied on 29 May 2009. In its letter, the Commission informed the complainant that the circular of X, referred to above, was proof that the responsible authorities had been instructed to comply with the relevant ECJ case law on this matter. For that reason, the Commission did not consider that it needed to take any further action. The Commission noted that it was in the complainant's interest to make use of the means of redress available at national level. Furthermore, in light of the recent developments referred to above, it appeared likely that the authorities of X would be able to remedy his particular case.

15. The Commission concluded that, in its first reply to the complainant, it had requested further essential information from him which it did not receive. The Commission pointed out that, in order to decide whether any correspondence is to be registered as a complaint, it needs to form a clear picture of the facts of the case.

16. In his observations, the complainant underlined that the Commission had not provided any valid reasons for not registering his complaint and carrying out an inquiry. He acknowledged that he did not reply immediately to the Commission's letter of 22 June 2007, but stated that he did so after being made aware of it, but no reaction was received from the Commission.

The Ombudsman's assessment

17. One of the fundamental tasks of the Commission in its role as "Guardian of the Treaty" under Article 211 EC, is to ensure that Community law is correctly applied in all Member States. In carrying out its duty, the Commission investigates possible infringements of Community law which come to its attention, largely as a result of citizens' complaints.

18. If the Commission considers that a Member State failed to fulfil its obligations, Article 226 EC gives it the power to start infringement proceedings against the Member State concerned

and, if necessary, bring the matter before the European Court of Justice.

19. The serious implications of this course of action mean that it must be implemented, in strict compliance with the applicable substantive and procedural rules, so that the rights of all the parties are protected.

20. As regards the procedural rules to be followed by the Commission in handling citizens' complaints, the Ombudsman notes that the relevant criteria have been set out in a document entitled "Communication to the European Parliament and the European Ombudsman on Relations with the Complainant in respect of infringements of Community law" [4] ('the Communication'), and in the annex attached to its standard complaint form [5] .

21. Point 3 of the above Communication establishes that any correspondence likely to be investigated as a complaint shall be recorded in the central registry of complaints kept by the Secretary-General of the Commission. The registration of a letter as a complaint ensures that the ensuing inquiry is carried out with a number of procedural safeguards for the benefit of the complainant, laid down in both the Communication and the annex attached to its standard complaint form [6] .

22. According to point 3 of the Communication, the only circumstance in which correspondence will not be registered as a complaint is if one of the exceptions in point 3 of the Communication applies. These exceptions include the following: anonymous correspondence; correspondence which fails to show an address; correspondence which does not name the Member State to which the measure is to be attributed; correspondence which fails to set out a grievance falling within the scope of Community law; correspondence which denounces the acts or omissions of a private person or body (unless the measure or complaint reveals the involvement of public authorities or alleges their failure to act in response to those acts or omissions) [7] .

23. As laid down in point 4 of the Communication, however, if a letter is not considered a complaint, the Commission must inform the author to that effect, setting out one or more of the reasons listed in point 3.

24. In light of the above, the Ombudsman notes that the complainant submitted basically the same correspondence to the Commission on two occasions: first, in May 2007, and again in February 2009. Although on each occasion the same complaint was made, the Commission's reaction differed.

25. In responding to the complainant's correspondence of 15 May 2007, the Commission did not proceed to register it as a complaint, but asked instead whether the complainant's son was an EU Member State national. This request appears reasonable since the information requested was not disclosed in the original complaint, and was needed in order to assess whether the facts of the case constituted a grievance falling within the scope of Community law, thereby meriting registration as a complaint [8] .

25. Nevertheless, it is undisputed that, on 22 February 2008, the complainant replied to the

Commission's request, explaining that his son had acquired X nationality by birth and was, therefore, an EU national.

26. On the basis of this additional information, the Commission should have been aware that the complaint appeared to meet all the conditions laid down in point 3 of the Communication and that the complainant's correspondence of 15 May 2007, therefore, ought to have been registered as a complaint. Furthermore, if the Commission considered otherwise, it should have informed the complainant that his correspondence would not be registered as a complaint, and of the reasons for the non-registration. The Commission did not do so. The Ombudsman, therefore, takes the view that there appeared to be *prima facie* evidence of maladministration in this instance.

27. The Ombudsman, however, notes that, when the complainant submitted his complaint to the Commission again on 19 February and 30 April 2009, the Commission corrected its handling of the complaint. The Ombudsman understands that, on 29 May 2009, when the Commission replied to the renewed complaint, it explained that it had not registered the renewed complaint because it considered that, following the relevant ECJ judgment, the Italian authorities had corrected their behaviour regarding similar grievances. The Commission informed the complainant in detail about the measures which the authorities of X had already adopted to correct the problem.

28. The Commission gave valid reasons for not registering the complaint and for not opening an infringement proceeding against X.

29. In view of the above, the Ombudsman considers that no further inquiries are justified regarding this aspect of the case.

B. Claim that the Commission should register the complainant's complaint

Arguments presented to the Ombudsman

30. The complainant claims that that the Commission should register his complaint, which he submitted again in 2009, and open an inquiry into it.

31. The Commission argues that its services carried out an inquiry into the existing situation in X. It concluded that, following the entry into force of the circular issued by the Ministry of the Interior of X in 2008, the legal system of X now provides a remedy for the complainant's problem. In the Commission's view, it would be more appropriate for the complainant to address the responsible local authority. The Commission stated that there was no reason to believe that the authorities of X would refuse the complainant's request now that the new legislation has entered into force.

32. The Commission also expressed its willingness to pursue the matter with the responsible

national authorities if the complainant agreed to disclose his identity. The Commission acknowledged that, in fact, the complainant clearly agreed to this when he made his second complaint.

33. In his observations, the complainant underlined that his complaint was about a clear breach of Community law on the part of the authorities of X. He, therefore, insisted that the Commission, in its role as Guardian of the Treaty, ought to register his complaint. He considered that the Member State concerned lacked the political will to redress the matter, and that only the Commission could force it to do so. The complainant, therefore, repeated his claim that his complaint should be registered and investigated.

The Ombudsman's assessment

34. In light of his findings in points 27 and 28 above, the Ombudsman considers that the complainant's claim cannot be sustained.

35. The Ombudsman, however, notes that, in its letter to the complainant dated 29 May 2009, the Commission expressed its willingness " *to pursue* [the complainant's] *particular case with the* [...] *authorities* [of X]". The Ombudsman, therefore, understands that, as regards the complainant's specific case, the Commission was concerned as to whether the legislative measures of X referred to above had been properly implemented. The Ombudsman finds it relevant to note that the complainant's renewed complaint was submitted to the Commission after the relevant measures had been introduced by the authorities of X.

36. Since the Commission acknowledged in its opinion that, in his complaint submitted on 19 February and 30 April 2009, the complainant agreed to disclose his identity, the Ombudsman is confident that the Commission will act promptly to contact the authorities of X in order to seek a solution to the complainant's problem. If the Commission fails to act as anticipated and his son's problem is not adequately solved, the complainant may consider submitting a new complaint to the Ombudsman.

37. In view of the above the Ombudsman will make a further remark below.

C. Conclusion

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

In view of the Commission's corrective action, the Ombudsman does not consider it necessary to pursue further inquiries regarding this case.

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

FURTHER REMARK

Since the Commission acknowledged in its opinion that, in his complaint submitted on 19 February and 30 April 2009, the complainant agreed to disclose his identity, the Ombudsman is confident that the Commission will act promptly to contact the authorities of X in order to seek a solution to the complainant's problem. If the Commission fails to act as anticipated and his son's problem is not adequately solved, the complainant may consider submitting a new complaint to the Ombudsman.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 11 November 2009

[1] Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* ECR [2008] Page I-07639.

[2] Case C-148/02 *Carlos Garcia Avello v Belgian State* ECR [2003] Page I-11613.

[3] See supra footnote 2.

[4] COM(2002) 141 final of 20 March 2002, 2002 OJ C 244/5.

[5] Failure by a Member State to comply with community law: standard form for complaints to be submitted to the European Commission; OJ C 119, 30.04.1999, p.5.

[6] These guarantees include the following:

* The Secretariat-General of the Commission shall issue an initial acknowledgement of all correspondence within fifteen working days of receipt.

* Correspondence registered as a complaint shall be acknowledged again by the Secretariat-General within one month from the date of dispatch of the initial acknowledgement. This acknowledgement shall state the case number of the complaint.

* The Commission services will contact complainants and inform them in writing, after each Commission decision, of the steps taken in response to their complaint.

* The Commission services will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint.

* If the Commission services intend to propose that no further action be taken on a complaint,

the Commission will give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within a period of four weeks.

[7] Annex to the Commission Communication, point 3 ("Recording of complaints").

[8] Case C-148/02 *Carlos Garcia Avello* pp.22-28.