Ombudsman
Ewropew

Deċiżjoni fil-każ 495/2003/ELB - Trattament mhux ġust ta' esperti nazzjonali sekondati

Deċiżjoni
Każ 495/2003/ELB - **Miftuħa fil-** 27/03/2003 - **Deċiżjoni fil-** 13/12/2006

L-ilmentaturi kienu koppja miżżewġa li t-tnejn kienu jaħdmu bħala Esperti Nazzjonali Sekondati fil-Kummissjoni. L-ilment tagħhom kien dwar id-dritt tal-mara għal konċessjonijiet. Il-Kummissjoni tatha konċessjonijiet ta' sussistenza mnaqqsin minħabba li l-post li fih kienet meqjusa li kellha r-residenza tagħha kien il-post fejn kienet sekondata (Brussell). Skond l-ilmentaturi, il-post tar-reklutaġġ kien Pariġi u, għaldaqstant, kien messha rċeviet l-konċessjonijiet kollha ta' sussistenza.

Fl-opinjoni tagħha l-Kummissjoni fissret li, skond l-Artikolu 20 tad-Deċiżjoni tal-Kummissjoni tat-30 ta' April, 2002, li kienet tirregola konċessjonijiet bħal dawk, ir-residenza prinċipali tar-raġel kienet fi Brussell. Il-post fejn il-mara kienet meqjusa li kellha r-residenza tagħha kien, għalhekk, Brussell u hija kienet intitolata biss għal konċessjonijiet imnaqqsin.

Wara li tqabblu l-verżjonijiet Franċiżi u Ingliżi tad-Deċiżjoni tal-Kummissjoni, l-Ombudsman ippropona soluzzjoni bonarja. Issuġġerixxa li l-Kummissjoni setgħet tikkunsidra tħallas lill-mara (i) l-konċessjonijiet kollha ta' sussistenza ta' kuljum li għalihom dehret li kienet intitolata skond il-verżjoni Franċiża ta' l-Artikolu 17, u (ii) l-konċessjoni minima addizzjonali li għaliha dehret li kienet intitolata kemm skond il-verżjoni Ingliża, kif ukoll dik Franċiża ta' l-Artikolu 18.

Il-Kummissjoni ma laqgħetx il-proposta. Qieset li l-intenzjoni ta' l-awtur tad-Deċiżjoni kienet li jeskludi pagament tal-konċessjoni b'rata ogħla meta l-espert kien ikun sekondat f'post fejn ir-raġel tagħha jew il-mara tiegħu kienu diġà stabbiliti. Il-Kummissjoni ammettiet li kien hemm żball fit-traduzzjoni tal-verżjoni Franċiża tad-Deċiżjoni, iżda qieset li żball bħal dak ma setax joħloq dritt legali u ma kienx jikkostitwixxi każ ta' amministrazzjoni ħażina.

Fi Frar ta' l-2004, il-Kummissjoni adottat Deċiżjoni ġdida li emendat kemm it-test Franċiż, kif ukoll dak Ingliż, u dan biex iġġib fis-seħħ dak li hija kienet tqis li kienet l-intenzjoni tagħha fid-Deċiżjoni ta' l-2002.

F'Diċembru ta' l-2005, l-Ombudsman indirizza ittra lill-Kummissarju responsabbli fejn fiha talbu jidħol huwa personalment biex tinstab soluzzjoni sodisfaċenti għall-ilment, u ta indikazzjoni din setgħet tieħu l-forma ta' ħlas *ex gratia* lill-ilmentaturi. Ir-risposta tal-Kummissarju kienet fis-sens li l-Kummissjoni kienet interpretat sewwa r-regoli applikabbli u ma laqgħetx il-proposta ta'

l-Ombudsman.

L-Ombudsman kien tal-fehma li l-Kummissjoni ma kinitx imxiet b'mod ġust meta, fil-verità, ittrattat lill-ilmentaturi bħallikieku kien hemm fis-seħħ id-Deċiżjoni l-ġdida u mhux ta' qabilha fid-data rilevanti. Dan kien każ ta' amministrazzjoni ħażina u l-Ombudsman għamel rimarka ta' kritika. Aktar minn hekk, wera dispjaċir li l-Kummissjoni kienet naqset li tieħu l-opportunità biex turi l-impenn tagħha għal prinċipji ta' amministrazzjoni tajba. L-Ombudsman ħabbar l-intenzjoni tiegħu li jeżamina, mal-Kummissarju responsabbli, kif l-aħjar tinġieb 'il quddiem kultura ta' servizz fid-Direttorat-Ġenerali konċernat.

Strasbourg, 13 December 2006
Dear Mrs P. and Mr D.,

On 6 March 2003, you made a complaint to the European Ombudsman against the Commission concerning Mrs P.'s place of deemed residence as a national expert on secondment in accordance with Commission Decision C(2002)1559 of 30 April 2002.

On 27 March 2003, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 30 June 2003. I forwarded it to you with an invitation to make observations, which you sent on 10 September 2003. On 20 November 2003, I requested further information from the Commission. The Commission sent its complementary comments on 19 December 2003. I forwarded them to you with an invitation to make observations, which you sent on 24 February 2004 and 16 March 2004.

On 26 October 2004, I wrote to the President of the Commission seeking a friendly solution to your complaint. The Commission sent its reply on 6 January 2005. I forwarded it to you with an invitation to make observations, which you sent on 21 February 2005.

On 24 May 2005, I requested further information from the Commission and informed you accordingly on the same date. On 8 July 2005, the Commission replied to my request. I forwarded to you the Commission's reply and invited you to make observations, which you sent on 18 August 2005.

On 15 December 2005, I wrote to Commissioner Kallas about your complaint. Commissioner Kallas' reply was received on 5 April 2006. I invited you to make observations on this reply, which you did on 22 June 2006.

You contacted my services by phone on the following dates: 18 June 2003, 23 July 2003, 4 November 2003, 15 March 2004, 18 June 2004, 24 January 2005, 10 May 2005, 15 July 2005, 15 November 2005 and 24 May 2006.

I sent you information on the handling of your complaint on 29 July 2004, 5 October 2004 and 13 February 2006.

I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

According to the complainants, the relevant facts are, in summary, as follows:

The complainants are married and are both working as seconded national experts ("SNE") in the Directorate General for Energy and Transport of the Commission ("DG Energy and Transport"), Mr D. since June 2002 and Mrs P. since July 2002. Before their secondment, they were working in the French Ministry for Infrastructure, Transport and Housing in Paris. On 30 July 2002, the Commission informed Mrs P. that, in accordance with Commission Decision C(2002)1559 of 30 April 2002 concerning Rules applicable to National Experts on Secondment to the Commission, she would receive only 25% of the subsistence allowances because her place of deemed residence was Brussels as her husband was already living in Brussels. Her husband receives the full subsistence allowances and his place of deemed residence is Paris.

On several occasions, the complainants contacted the Commission in order to receive an explanation. The Commission based its decision on Article 20, paragraph 3 (b) of Decision C(2002)1559, which states (quoting the English version) that " *[t]he deemed residence shall be the place of secondment (...) where at the time of the Commission's request for the secondment, the place of secondment is the principal residence of the SNE's spouse or of any of his or her dependent children.* "

In the French version of the Decision, paragraph 1 of Article 17 sets the amount of the subsistence allowances according to the distance between the place of recruitment and the place of secondment, not the distance between the place of deemed residence and the place of secondment (1) . Consequently, as Mrs P. was working in Paris at the time of the secondment request from the Commission, she should receive the full subsistence allowances in accordance with the decision transmitted to her at that time.

According to the complainants, it was wrong to ignore the notion of place of recruitment or to identify it with the place of deemed residence. The Commission's decision as regards Mrs P. was not in conformity with Commission Decision C(2002)1559 of 30 April 2002.

The provision of Article 20, paragraph 3 (b), did not apply to unmarried couples, or to an SNE whose spouse comes to Brussels after the secondment request. Furthermore, it only applied to the spouse who was the last to be seconded and did not lead to an equal reduction for both spouses. Finally, marriage did not imply joint management. The costs of expatriation of both complainants should not be covered by the allowances of only one of the spouses.

Finally, the complainants regretted the behaviour of the Commission, which failed to provide them with detailed answers.

In summary, the complainants alleged that the Commission did not comply with its Decision of 30 April 2002, in particular Article 17, and that, as the place of recruitment of Mrs P. was Paris,

she should receive the full subsistence allowances. Moreover, they alleged that the Commission's Decision of 30 April 2002 discriminated against married couples.

THE INQUIRY

The Commission's opinion

The Commission's opinion on the complaint can be summarised as follows:

Article 17, paragraph 1, of the Commission's Decision of 30 April 2002 establishes the amount of the subsistence allowances according to the distance between the place of deemed residence and the place of secondment. Where this residence is less than 150 km from the place of secondment, it is reduced to 25% of the full allowances.

Article 20, paragraph 1, states that " *[for] the purposes of these rules, the place of deemed residence shall be the place where the SNE performed his or her duties for the employer immediately prior to the secondment.* "

However, Article 20, paragraph 3 (b), of the same Decision clearly states that " *[t]he deemed residence shall be the place of secondment where the place of secondment is the principal residence of the SNE's spouse or of any of his or her dependent children.* " As a consequence, the place of deemed residence and the place of secondment being the same, the SNE is entitled only to the reduced allowances.

According to the Commission, these rules did not discriminate against married couples. In fact they applied by analogy to all formalised partnerships recognised as such by the relevant national legislation of the State to which the SNE belonged.

Subsistence allowances are intended to cover living expenses at the place of secondment (setting up, housing, public utilities, etc.). The Commission believed that, in the case of a married couple, almost all of these expenses have been covered by the full allowances given to one of the two spouses concerned who is already residing at the place of secondment, and a 25% subsistence allowance is therefore fully justified for the other spouse.

This was precisely the case of the complainants, who have repeatedly received full information and complete explanations on how the Commission's Decision applies to their personal situation.

The complainants' observations

In their observations, the complainants made, in summary, the following points:

Contrary to what the Commission stated in its opinion, Article 17, paragraph 1, of the Decision of 30 April 2002 determines the amounts of the subsistence allowances according to the distance between the place of recruitment and the place of secondment. Mrs P. was recruited in Paris where she was working. The complainants considered that it was improper to ignore the notion of place of recruitment or to identify it with the place of deemed residence.

According to the complainants, this provision, which only applied to married couples, was discriminatory. It concerns national experts on secondment whose spouses are already living in Brussels at the time of the request for secondment and not those joining their spouse after the request for secondment. The economic situation of the couple is identical in both cases. The centre of interest of both complainants is France and not Brussels where they are only working temporarily. The complainants drew a parallel with the expatriation allowance received by officials and agents of the European Commission. This allowance is granted regardless of the situation of the spouse. Furthermore, this provision does not apply to national experts already working in embassies and permanent representations located in Brussels. They benefit from a full allowance regardless of the situation of their spouse.

The rights to get married and to start a family are fundamental rights, included in the Charter of Fundamental Rights. Exercising these rights should not lead to a financial sanction for one of the spouses. The expenses linked to a secondment should not be covered only by the allowances of a spouse, who was recruited in identical conditions.

The Treaty establishing the European Community as well as the Charter of Fundamental Rights provide for the principle of equal treatment.

In accordance with Article 18 of the Decision of 30 April 2002, the subsistence allowances are part of the salary. Mrs P. is regarded as falling in category A but her total salary is substantially inferior to the lowest salary in the A category. On 7 October 2002, the complainants requested that this difference be made up, as it also results from the notion of " *place of recruitment* ". They received no reply.

Further inquiries

After careful consideration of the Commission's opinion and the complainants' observations, it appeared that further inquiries were necessary. The Ombudsman requested the Commission to inform him whether the provisions of the Commission's Decision of 30 April 2002, in particular Article 20, paragraph 3 (b), applied to the following cases:

- unmarried couples, both of whom are SNEs;
- SNEs whose spouses come to live in Brussels only after the secondment request has been made;
- SNEs recruited in embassies or permanent representations located in Brussels.

The Commission's further reply

The Commission's further reply can be summarised as follows:

The provisions of the Commission's Decision of 30 April 2002, in particular Article 20, paragraph 3 (b), also apply to all unmarried couples where their partnership is recognised as such by the relevant national legislation of the State to which the SNE belongs.

The provisions of the Commission's Decision can only apply to SNEs who are seconded to the Commission's services. If the spouse coming to live in Brussels is an SNE, the provisions apply to this person. If the spouse coming to live in Brussels is not an SNE, the provisions clearly cannot be applied to him/her.

The Commission's Decision explicitly excludes SNEs recruited in embassies or permanent representations located in Brussels from the application of this rule.

The complainants stated that the allowances paid by the Commission were part of the salary. This is not true as far as SNEs are concerned. Article 1, paragraph 2, of the Rules applicable to SNEs clearly states: " *[t]he persons covered by these Rules, shall remain in the service of their employer throughout the period of secondment and shall continue to be paid by that employer* ". As a consequence, no contractual relationship exists between the Commission and SNEs. The payment of subsistence allowances, agreed between the Commission and the SNE's employer, is intended to cover living expenses at the place of secondment.

Moreover, the complainants stated that, on 7 October 2002, they requested the application of Article 18 of the Commission's Decision on SNEs concerning the additional flat-rate allowance and that no follow-up was given to this request. A negative reply was sent to Mrs P. on 10 December 2002. In fact, Article 18, paragraph 1 of the Rules applicable to SNEs states that: " *[e]xcept where the place of recruitment of the seconded national expert is 150 km or less from the place of secondment, he shall, where appropriate, receive an additional flat-rate allowance equal to the difference between the gross annual salary (less family allowances) paid by his employer plus the subsistence allowances paid by the Commission and the basic salary payable to an official in step 1 of Grade A8 or Grade B5, depending on the category to which he is assimilated* ".

Mrs P. was seconded under the provisions of Article 20, paragraph 3 (b), which state that, the place of the deemed residence and the place of secondment being the same, the SNE is entitled only to the reduced allowances. As a consequence, the exclusion foreseen in the first line of Article 18, paragraph 1, fully applies to the case of Mrs P. who is not entitled to receive the additional flat-rate allowance.

The complainants' further observations

Mrs P. replied to the Ombudsman's invitation to submit observations, which was sent to the complainants. In their further observations, the complainants make, in summary, the following points:

Firstly, the reduction in subsistence allowances is discriminatory. The Commission’s opinion recognises that the reduction in subsistence allowances did not apply to all couples in the same way:
- SNEs recruited in embassies or permanent representations located in Brussels receive the full subsistence allowance regardless of the situation of their spouse;
- SNEs receive the full allowance if their spouse comes to Brussels after the secondment request and not before as is the complainants' case;
- as regards unmarried couples, reducing the allowance if the partnership is recognised by the Member State of the SNE does not appear egalitarian.

Moreover, the complainants did not understand why the provisions of a decision could, on the one hand, limit the tasks, rights and duties of SNEs because of their link with their national administration (which remains their employer) and, on the other hand, reduce the subsistence

allowances because of the marital status of the SNE and because it considered that the centre of interest is the place of secondment. The professional and family interests of Mrs P. are in France despite her marital status; she is covered by the French social security system, and pays taxes and owns property in France. Finally, no similar provision exists in the Staff Regulations of the European Communities. The expatriation allowance is granted to officials regardless of their marital status.

Secondly, certain provisions of the Commission's Decision do not comply with the principle of equal treatment. Contrary to the Commission's statement, the subsistence allowances are part of the salary because, according to Article 18 of the above-mentioned Decision, certain SNEs can receive a supplementary allowance because of the low level of their national salary. The total salary (French salary plus subsistence allowances) that Mrs P. receives is equal to that of an official of C category. This supplementary allowance does not apply to her as she is married. Furthermore, in the complainants' case, the reduction in the subsistence allowances represents a loss of EUR 100 000. This amount does not seem to be proportionate to the savings in subsistence expenses made by the complainants because they are married. The complainants considered that it was difficult to explain why an SNE received the full subsistence allowances which aimed at covering his/her subsistence expenses, while another SNE, in the same situation, received only 25% of the allowances.

Thirdly, according to the complainants, the Commission decided in Mrs P.'s case, to identify the place of recruitment with the place of deemed residence. The Commission had failed to comment on the difference in the French and the English versions of Decision C(2002)1559 of 30 April 2002. Mrs P. never received the additional monthly allowance, provided for in Article 17, paragraph 1, of the Commission's Decision.

Finally, the provisions of the Commission's Decision are contrary to the principle of equal opportunities. Because Mrs P. is married, her personal situation should be the same as that of her husband, who might temporarily work in a different place.

The complainants sent the Ombudsman the revised French version of the Commission's Decision dated 27 February 2004 (2) in which the expression " *place of recruitment* " is replaced by " *place of residence* ".

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

After careful consideration of the Commission's opinions and the complainants' observations, the Ombudsman did not consider that the Commission had responded adequately to the complainants' allegations and claim.

The proposal for a friendly solution

In accordance with Article 3 (5) of his Statute, the Ombudsman therefore wrote to the President of the Commission to propose a friendly solution.

The European Ombudsman suggested that the Commission could consider paying Mrs P.:
- the full daily subsistence allowances to which she appeared to be entitled according to the French version of Article 17 and;
- the additional flat-rate allowance to which she appeared to be entitled according to both the English and the French versions of Article 18.

He also suggested that the Commission's reply to the proposal could take into account the question of the additional monthly allowance under Article 17, paragraph 1.

This proposal was based on the following preliminary conclusions:

1. The Ombudsman noted that the Commission's interpretation of Decision C(2002)1559 appeared to be that the entitlements defined in Articles 17 (the daily subsistence allowances and the additional monthly allowance) and 18 (the additional flat-rate allowance) were restricted by the provisions of Article 20 concerning the place of residence.

2. The Ombudsman carefully analysed the French and English versions of Commission Decision C(2002)1559 and noted that there were disparities between them.

The Commission's Decision of 30 April 2002 (C(2002)1559) states the following:

Articles

English version

French version

Chapter III - Allowances and expenses

Chapitre III - indemnités et dépenses

Article 17

Subsistence allowances 1. A SNE shall be entitled, throughout the period of secondment, to a daily subsistence allowance. Where the distance between the place of deemed residence and the place of secondment is 150 km or less, the daily allowance shall be 26.25 EUR; where the distance is more than 150 km, the daily allowance shall be 105 EUR. If the SNE has not received removal expenses from any source, an additional monthly allowance shall be paid as shown in the table below:

Indemnités de séjour 1. L'END a droit, pour la durée de son détachement, à une indemnité de séjour journalière. Si la distance entre le lieu de recrutement et le lieu de détachement est égale ou inférieure à 150 km, l'indemnité est de 26,25 euros. Elle est de 105 euros si cette distance

est supérieure à 150 km. Si l'END n'a bénéficié d'aucun remboursement de ses frais de déménagement, une indemnité supplémentaire est accordée conformément au tableau ci-dessous:

Distance between place of recruitment and place of secondment (km)

Amount in EUR

Distance entre le lieu de recrutement et le lieu de détachement (km)

Montant en euros

0-150

0

0-150

0

> 150

67.5

> 150

67.5

(...)

(...)

Article 18

Additional flat-rate allowance 1. Except where the place of recruitment of the Seconded national expert is 150 km or less from the place of secondment, he shall, where appropriate, receive an additional flat-rate allowance equal to the difference between the gross annual salary (less family allowances) paid by his employer plus the subsistence allowances paid by the Commission and the basic salary payable to an official in step 1 of Grade A8 or Grade B5, depending on the category to which he is assimilated. (...)

Indemnité forfaitaire supplémentaire 1. A moins que le lieu de recrutement de l'expert national détaché ne se trouve à une distance égale ou inférieure à 150 km du lieu de détachement, l'END perçoit, le cas échéant, une indemnité forfaitaire supplémentaire égale à la différence entre le salaire annuel brut versé par son employeur (moins les allocations familiales), majoré

de l'indemnité de séjour versée par la Commission, et la rémunération de base d'un fonctionnaire de grade A8 ou B5, échelon 1, selon la catégorie à laquelle l'END est assimilé. (...)

Article 20

Place of residence 1. For the purposes of these Rules, the place of deemed residence shall be the place where the SNE performed his or her duties for the employer immediately prior to the secondment. The place of secondment shall be the place where the Commission department to which the SNE is assigned is located. Both places shall be identified in the exchange of letters mentioned in Article 1(5). 2. (...) 3. The deemed residence shall be the place of secondment: (a) (...) (b) where at the time of the Commission's request for the secondment, the place of secondment is the principal residence of the SNE's spouse or of any of his or her dependent children. (...)

Lieu de résidence 1.Aux fins du présent régime, est considéré comme lieu de résidence, le lieu où l'END exerçait ses fonctions pour son employeur immédiatement avant son détachement. Le lieu d'affectation est le lieu où est situé le service de la Commission auquel l'END est affecté. Ces lieux sont mentionnés dans l'échange de lettres visé à l'article 1, paragraphe 5. 2. (...) 3. Le lieu de résidence est censé être le lieu de détachement a) (...) b) si, au moment de la demande de détachement de la Commission, le lieu de détachement est le lieu de résidence principal du conjoint ou de l'enfant (des enfants) que l'END a à sa charge. (...)

In the English version, Article 20 of the Decision provides that, in certain defined circumstances, " *the deemed residence shall be the place of secondment* ".

As regards the English version, Article 20 indeed appears to restrict the entitlement to daily subsistence allowances, which Article 17 defines in terms of the distance between " *the place of deemed residence* " and " *the place of secondment* ". It does not, however, restrict the additional monthly allowance.

However, the French version of Article 17 defines the entitlements in terms of the distance between the place of recruitment (" *lieu de recrutement* " in its French version) and the place of secondment. Article 20 does not therefore appear to be drafted in a way that could restrict the entitlements under Article 17.

3. The Ombudsman also noted that both the French and the English versions of Article 18 defined the entitlement under that Article in terms of the distance between the place of recruitment and the place of secondment. The Ombudsman did not therefore consider that Article 20 was worded in a way that was appropriate to limit entitlement under Article 18, whether in the English or the French version.

4. The Ombudsman also carefully analysed Commission Decision C(2004)577 of 27 February 2004 which amended Commission Decision C(2002)1559. The Ombudsman noted that the new Decision was consistent in the French and English versions and that Article 20 of the new text

clearly limited the entitlements under both Article 17 and Article 18.

The Commission's Decision of 27 February 2004 (C(2004)577) states the following:

Articles

English version

French version

Chapter III - Allowances and expenses

Chapitre III - indemnités et dépenses

Article 17

Subsistence allowances 1. A SNE shall be entitled, throughout the period of secondment, to a daily subsistence allowance. Where the distance between the place of residence as determined in accordance with article 20 and the place of secondment is 150 km or less, the daily allowance shall be 27.96 EUR; where the distance is more than 150 km, the daily allowance shall be 111.83 EUR. If the SNE has not received removal expenses from any source, an additional monthly allowance shall be paid as shown in the table below:

Indemnités de séjour 1. L'END a droit, pour la durée de son détachement, à une indemnité de séjour journalière. Si la distance entre le lieu de résidence déterminé conformément à l'article 20 et le lieu de détachement est égale ou inférieure à 150 km, l'indemnité est de 27,96 euros, si cette distance est supérieure à 150 km, elle est de 111,83 euros. Si l'END n'a bénéficié d'aucun remboursement de ses frais de déménagement, une indemnité supplémentaire est accordée conformément au tableau ci-dessous:

Distance between place of residence and place of secondment (km)

Amount in EUR

Distance entre le lieu de résidence et le lieu de détachement (km)

Montant en euros

0-150

0

0-150

11

0

> 150

71.89

> 150

71,89

(...)

(...)

Article 18

Additional flat-rate allowance Except where the place of residence of the SNE is 150 km or less from the place of secondment, he shall, where appropriate, receive an additional flat-rate allowance equal to the difference between the gross annual salary, less family allowances, paid by his employer plus the subsistence allowances paid by the Commission and the basic salary payable to an official in step 1 of Grade A8 or Grade B5, depending on the category to which he is assimilated. (...)

Indemnité forfaitaire supplémentaire 1. A moins que le lieu de résidence de l'END ne se trouve à une distance égale ou inférieure à 150 km du lieu de détachement, l'END perçoit, le cas échéant, une indemnité forfaitaire supplémentaire égale à la différence entre le salaire annuel brut versé par son employeur (moins les allocations familiales), majoré de l'indemnité de séjour versée par la Commission, et la rémunération de base d'un fonctionnaire de grade A8 ou B5, échelon 1, selon la catégorie à laquelle l'END est assimilé. (...)

Article 20

Place of residence 1. For the purposes of these Rules, the place of residence shall be the place where the SNE performed his or her duties for the employer immediately prior to the secondment. The place of secondment shall be the place where the Commission department to which the SNE is assigned is located. Both places shall be identified in the exchange of letters mentioned in Article 1(5). 2. (...) 3. The place of residence shall be considered to be the place of secondment in the following cases: (a) (...) (b) where at the time of the Commission's request for the secondment, the place of secondment is the principal residence of the SNE's spouse or of any of his or her dependent children; (...)

Lieu de résidence 1.Aux fins du présent régime, le lieu de résidence est le lieu où l'END a exercé ses fonctions pour son employeur immédiatement avant son détachement. Le lieu de détachement est le lieu où est situé le service de la Commission auquel l'END est affecté. Ces

lieux sont mentionnés dans l'échange de lettres visé à l'article 1, paragraphe 5. 2. (...) 3. Le lieu de résidence est considéré comme étant le lieu de détachement dans les cas suivants a) (...) b) si, au moment de la demande de détachement de la Commission, le lieu de détachement est le lieu de résidence principal du conjoint ou des enfants que l'END a à sa charge. (...)

5. Whilst the Ombudsman recognised the new Decision as evidence of what the Commission intended to achieve in its earlier Decision, the Ombudsman was not convinced that the Commission was entitled to interpret the earlier decision so as to achieve that intention as regards Mrs P.. It was obvious that the new Decision could not apply retroactively. The Ombudsman did not consider that the Commission had provided any convincing explanation as to why the English version of the earlier Decision should be regarded as more authoritative than the French as regards the correct administration of the entitlement to daily subsistence allowances under Article 17. Nor did the Ombudsman consider that the Commission had provided any convincing explanation as to why Mrs P.'s entitlement under Article 18 should be reduced by the wording in Article 20, which in neither the French nor the English version appeared to have any relevance for Article 18.

The Commission's reply to the Ombudsman's proposal for a friendly solution

In reply to the Ombudsman's proposal, the Commission made the following points:

The Commission considered that it had acted in full respect of the wording and the *ratio legis* of the rules applicable to national experts seconded to the Commission, ensuring consistency in the implementation for all seconded experts concerned. It considered, therefore, that these rules had been applied correctly.

Indeed, when faced with a situation of this kind, the correct course is to consider the *ratio legis* of the rule in question. It is not a question of one language version being ispso facto authoritative, or a matter of seeing what the majority of language versions say. It is rather a matter of which version, or versions, correctly reflect the author's intention.

An important consideration in determining the author's intention is to compare the provision at issue with the previous rule, to see whether a change was intended, and if so, which change. One may also look at any accompanying documents, which may explain what the intention behind the new provision was. In the present case, it is apparent that the intention (which was correctly expressed in the English and German texts) was to exclude paying the higher-rate allowance when the expert was seconded to a place where his or her spouse was already settled, since in such a case, it may reasonably be assumed that the fact of being sent to another place does not give rise to the same costs as the first move of a member of the couple to the place. Even though the benefit takes the form of a higher allowance rather than a single flat-rate payment by way of installation allowance, the limitation reflects that which can be found in the Staff Regulations (and which has been upheld by the Courts) concerning (re)installation allowance under Annex VII of those Regulations.

The error in the French translation of the original English text which led to the reference to the place of recruitment in the French version of the Commission's Decision of 2002 does not

change this conclusion.

It is true that the French version of Article 17(1) uses the term " *place of recruitment* " (" *lieu de recrutement* "), instead of the term " *place of deemed residence* " (" *lieu de résidence* ") to which, according to the English version, Article 20 refers in order to limit the entitlements under Article 17. The German version, however, is consistent with the English one, using the term " *place of residence* " (" *Wohnort* ") both in Article 17 and in Article 20. It must therefore be concluded that there is an error of translation in the French version and that the actual intention of the legislator was to limit the entitlement to daily subsistence allowances under Article 17.

The fact that the intention was not correctly expressed in French (whereas it was in English and in German) is unfortunate and regrettable but it cannot create a legal right. The Commission considers that there is not even a possible case of maladministration -and certainly not one to which the solution should be simply to grant the rights which the author of the decision did not intend to grant- and which have (rightly) not been granted to others, who may also have acted on the basis of the French text.

The Commission also pointed out that Article 20, which limits the entitlement under Article 18, also mentions the place of recruitment and poses no translation difficulty. The first sentence of Article 20(1) refers generally to the " *purposes of these rules* ". Not interpreting and applying Article 20 in the context of the overall Commission's Decision and in relation to Articles 17 and 18 in particular would deprive this Article of its entire meaning. This point remains true even if one only considers the French version.

The Commission regretted the Ombudsman's accusation of maladministration and was not in a position to accept the friendly solution he proposed which would create a far-reaching legal precedent. However, any citizen who believes he has been illegally deprived of an entitlement by the Commission may exercise his statutory right of appeal to a Court.

In adopting Decision C(2004)577 on 27 February 2004, the Commission has already corrected the unfortunate error in the French version which gave rise to the complaint. The Commission regretted that the full significance of the error was not realised until this case came up.

The complainants' observations on the Commission’s reply

The complainants' observations (3) can be summarised as follows:

Firstly, the complainants thanked the Ombudsman for his proposal for a friendly solution. They maintained their complaint and made the following comments.

According to them, the reference made by the Commission to the principle of *ratio legis* seems wrong and the use of this principle seems to justify all administrative abuses. It is understandable to refer to this principle when the wording of a text is confusing. In this case, the judge looks for the spirit of the law or the intention of the author. In the present case, the author himself refers to the principle of *ratio legis* for a text which is clear and does not pose interpretation difficulties. The complainants only requested the application of the text which was communicated to Mrs P. when she arrived at the Commission and which links the subsistence

allowances to the distance between the place of recruitment and the place of secondment. In its reply, the Commission justifies an administrative practice aiming at denying the text and scorning what is written. This leads to arbitrariness. When an administrative decision grants a right without ambiguity, it seems abusive to withdraw this right because the decision does not or no longer reflects the intention of the author.

Further inquiries

After careful consideration of the Commission's reply to the friendly solution proposal, it appeared that further inquiries were necessary. The Ombudsman was unable to identify the part of the Commission's reply which responded to his request to take into account the question of the additional monthly allowance under Article 17, paragraph 1. Therefore, he asked the Commission to clarify its position on this issue.

The Commission's further reply

In its further reply, the Commission made the following points:

The Commission considered that, in the present case, pursuant to Article 20, paragraph 3 (b), of the Commission's Decision, the place of deemed residence and the place of secondment of Mrs P. were considered to be the same, and therefore the SNE was entitled only to the reduced allowance. In such a case, Article 17, paragraph 1 of Commission Decision C(2004)577, as amended by the Commission's Decision of 22 March 2005 (4) , states that " *[w]here the distance between the place of residence as determined in accordance with Article 20 and the place of secondment is 150 km or less, the daily allowance shall be EUR 28, 16 (...)* ".

The second paragraph of Article 17 reads as follows: " *[i]f the SNE has not received removal expenses from any sources, an additional monthly allowance shall be paid as shown in the table below: (....)* ". The additional monthly allowance provided to the complainant is indicated in the first line of the above-mentioned table as follows: when the distance between the place of residence and the place of secondment is less than 150 km, this allowance is EUR 0.

Under the provisions of Article 20, the daily allowance and the additional monthly allowance are strictly linked, and depend on the place of the deemed residence and the place of the secondment. Therefore, in this particular case the Commission cannot, from a legal point of view, pay the additional monthly allowance.

The Commission maintained its position that it had acted in full respect of the wording and the *ratio legis* of the Rules on the Secondment of National Experts to the Commission, ensuring consistency in the implementation for all seconded experts concerned. It considered, therefore, that these Rules had been applied correctly. In view of the above considerations, the Commission was not in a position to accept the friendly solution proposed by the Ombudsman.

The complainants' further observations

The complainants' observations (5) on the Commission's further reply can be summarised as follows:

They noted that the Commission maintained a firm position showing no sign of openness and spirit of conciliation. They thanked the Ombudsman for his support. They stated that his proposal for a friendly solution legitimated their approach. They were very disappointed to note

that this proposal would probably have no result.

The complainants insisted on the fact that the Commission's decision was based on a wrong assumption. They maintained that Mrs P.'s place of recruitment was Paris and that, in accordance with Article 17, she was therefore entitled to the full daily subsistence allowances and the additional monthly allowance. They mentioned that very recently Directorate General for Personnel and Administration ("DG Admin") agreed to review the case of a Dutch SNE whose husband was working for the Dutch permanent representation in Brussels. She was granted the full daily subsistence allowances. They considered that Mrs P. was in a similar situation. At the time of her secondment request, her husband was working for another Member State or an international organisation (the Commission).

They considered that the length of the dispute between them and the Commission, the Commission's repeated refusals and the amount at stake prevented the Commission from reviewing its position.

The complainants indicated that CLENAD (6) had created, in discussion with DG Admin, a working group on SNE couples.

They repeated that it was discriminatory to take account of the marital status of a SNE before granting an allowance. Moreover, the principle of equality of opportunities seems to be hard to reconcile with discriminatory behaviour towards spouses. Mrs P.'s recruitment has no link with the fact that she was married. They wondered if Mrs P. should have divorced or remained single to have the same rights as her husband.

The complainants insisted on the fact that this dispute between them and DG Admin did not dissuade Mrs P. from working in DG Energy and Transport where she did a very interesting and enriching work.

They hoped that the Ombudsman would continue to try to find a solution.

The observations were copied to the French authorities and the Commission.

Letter from the Ombudsman to Commissioner Kallas

On 15 December 2005, in the spirit of the Commission’s new internal procedure for handling the Ombudsman's inquiries, adopted by the Commission in November 2005 (7) , the Ombudsman wrote to Commissioner Kallas asking for his personal involvement in seeking a satisfactory outcome to the complaint.

In his letter, the Ombudsman first pointed out that by replacing Decision C(2002)1559, the Commission had implicitly recognised that maladministration had occurred and had taken action to put the underlying systemic problem right.

The Ombudsman noted that, in rejecting his proposal for a friendly solution, the Commission had relied on its view of the complainants’ legal rights. In this regard, the Ombudsman drew the Commissioner’s attention to the relevance of two judgements of the Court of First Instance. The

first judgement held that a finding by the Ombudsman of maladministration does not automatically imply that there is unlawful behaviour that could be sanctioned by a court (8) . The second judgement held that the decision of the Council to accept a recommendation from the Ombudsman was limited to that particular case (9) .

The Ombudsman then explained that, in his view, the complainants in the present case have grounds for considering that they have not been treated fairly because, in substance, they have been treated as if Decision C(2004)577 had been in force at the relevant date, rather than the defective Decision C(2002)1559. The Ombudsman suggested that, in these circumstances, it would be appropriate for the Commission to offer to make an ex gratia payment to the complainants.

Finally the Ombudsman expressed the view that it would be possible for the Commission to modify the stance it has taken up to now, so as to demonstrate its willingness to cooperate with the Ombudsman.

On 12 January 2006, the Ombudsman had a meeting with Commission Vice-President Siim Kallas, at which the Commissioner stated that the case would be looked at again by the Commission.

The written reply from Commissioner Kallas

In his written reply to the Ombudsman’s letter of 15 December 2005, Commissioner Kallas stated that the interpretation given by the Commission of its Decisions on SNEs in this specific case was totally correct. He believed that the provisions of the Commission's Decision on this issue were clear, and that the Commission had applied them lawfully. He regretted the unfortunate error in the French translation of the original English text of the Decision which has since been rectified. However, he did not consider that the error justified any financial compensation. Under these circumstances, he regretted that the Commission could not agree on the proposal to make an ex gratia payment to the complainants.

The complainants' observations on Commissioner Kallas' reply

The complainants (10) were disappointed to note that the Commission maintained its position. They recalled a number of principles which they considered essential: the principles of dialogue, of respect for the European Ombudsman, of non-discrimination, of equality of treatment, and of good administration. They indicated that Mrs P.'s contract with the Commission would end at the end of June 2006. They asked the Ombudsman to continue the procedure and repeated that other persons in the same situation obtained a revision of the Commission's initial decision.

THE DECISION

The complainants are a married couple of French citizenship who are both working as Seconded National Experts ("SNE") in the Commission. Their complaint concerns the wife’s entitlement to allowances under Commission Decision C(2002)1559 of 30 April 2002.

1 The alleged discrimination

1.1 The complainants alleged that Commission Decision C(2002)1559 discriminated against married couples. In support of their allegation, they pointed out that Article 20, paragraph 3 (b)

of the Decision, concerning the deemed place of residence, does not apply to unmarried couples, to SNEs whose spouse comes to Brussels after the secondment request, or to national experts working previously in embassies and permanent representations located in Brussels. Furthermore, it only applies to the spouse who is the last to be seconded and does not lead to an equal reduction for both spouses.

1.2 In its opinion, the Commission took the view that the relevant rules were not discriminatory to married couples, as they applied by analogy to all formalised partnerships recognised as such by the relevant national legislation of the State to which the SNE belonged. Moreover, if the spouse coming to live in Brussels is an SNE, the provisions apply to this person. If the spouse coming to live in Brussels is not an SNE, the provisions cannot be applied. Finally, the Commission's Decision explicitly excludes from the application of this rule SNEs recruited in embassies or permanent representations located in Brussels.

1.3 The Ombudsman recalls Article 21 of the Charter of Fundamental Rights which states that: " *[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited* ". According to the established case law of the European Court of Justice, comparable situations shall not be treated differently and different situations should not be treated alike unless such differentiation is objectively justified (11) .

1.4 As regards Article 20, paragraph 3 (b), the Ombudsman notes the Commission's statement that it applies this provision by analogy to all formalised partnerships recognised as such by the relevant national legislation of the State to which the SNE belongs.

1.5 As regards SNEs recruited in embassies or permanent representations in Brussels, the Ombudsman notes that the Commission's Decision excludes them from the application of this rule. The Ombudsman takes the view that it is reasonable for the Commission to consider that SNEs recruited in embassies or permanent representations in Brussels are in a situation different from that of the complainants. The Ombudsman points out in this regard that the Staff Regulations of officials of the European Communities contain an analogous provision in Article 4 of Annex VII which states that: " *[a]n expatriation allowance shall be paid (...) to officials (...). For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account (...)* ".

1.6 As regards the situation of Mrs P. as compared with that of her husband, the Ombudsman notes that they were recruited in similar conditions, except that Mr D. was recruited by the Commission one month before Mrs P. The Ombudsman also notes that the Staff Regulations include special provisions for married officials. For example, before 1 May 2004, Article 10 of Annex VII to the Staff Regulations, which deals with daily subsistence allowance, states that " *[w]here a husband and wife who are officials of the European Communities are both entitled to the daily subsistence allowance, the rates shown in the first two columns shall be applicable only to the person whose basic salary is the higher. The rates shown in the other two columns shall be applicable to the other person. (...) In cases where a husband and wife who are officials of the*

European Communities are both entitled to the basic subsistence allowance, the period in respect of which it is granted as laid down in (b) shall apply to the person whose basic salary is the higher. The period laid down in (a) shall apply to the other person. " A similar provision exists in the new Staff Regulations. In these circumstances, the Ombudsman considers that the Commission was justified in adopting a similar approach in Article 20, paragraph 3 (b) of the Decision in question.

1.7 In light of the above, the Ombudsman finds no maladministration as regards this aspect of the complaint.

2 The claim that the place of deemed residence should be Paris

2.1 The Commission informed Mrs P. that she would only receive 25% of the subsistence allowances because her place of deemed residence was her place of secondment, that is Brussels. The complainants alleged that the Commission did not comply with its Decision of 30 April 2002, in particular its Article 17, and claimed that, as the place of recruitment of Mrs P. was Paris, she should receive the full subsistence allowances.

2.2 In its opinion, the Commission pointed out that Mrs P. was seconded under the provisions of paragraph 3 (b) of Article 20 of Commission Decision C(2002)1559 of 30 April 2002. It added that her husband's principal residence was Brussels and her place of deemed residence was therefore also Brussels. Her place of deemed residence and her place of secondment were the same and she was therefore entitled only to the reduced allowances.

2.3 For the reasons explained above, the Ombudsman made a proposal for a friendly solution to the Commission in which he suggested that the Commission could consider paying Mrs P. (a) the full subsistence allowances to which she appeared to be entitled according to the French version of Article 17 and (b) the additional flat-rate allowance to which she appeared to be entitled according to both the English and the French versions of Article 18. He also suggested that the Commission's reply to the proposal could take into account the question of the additional monthly allowance under Article 17, paragraph 1.

2.4 The Commission rejected the Ombudsman's proposal. It considered that the intention of the author of the Decision (which was correctly expressed in the English and German texts) was to exclude paying the higher-rate allowance when the expert was seconded to a place where his or her spouse was already settled. The Commission admitted that there was an error of translation in the French version of the Decision which referred to the term " *place of recruitment* " instead of " *place of deemed residence* ", but considered that it could not create a legal right and did not constitute a case of maladministration. As regards the additional monthly allowance under Article 17, paragraph 1, the Commission, referring to Commission Decision C(2004)577, as amended by the Commission's Decision of 22 March 2005 (12) , considered that the amount to be awarded to the complainant was zero.

2.5 In December 2005, the Ombudsman addressed a letter to Commissioner Kallas asking for his personal involvement in seeking a satisfactory outcome to the complaint. The Ombudsman suggested that, it would be appropriate for the Commission to offer to make an ex gratia payment to the complainants and expressed the view that it would be possible for the

Commission to modify the stance it had taken until then, so as to demonstrate its willingness to cooperate with the Ombudsman.

2.6 The reply signed by the Commissioner took the view that the Commission had correctly interpreted the applicable rules and rejected the Ombudsman's proposal to make an ex gratia payment to the complainants.

2.7 The Ombudsman takes the view that the Commission has acted unfairly by treating the complainants, in substance, as if Decision C(2004)577 rather than the defective Decision C(2002)1559, had been in force at the relevant date. This is an instance of maladministration.

3 Conclusion

3.1 On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

The Commission has acted unfairly by treating the complainants, in substance, as if Decision C(2004)577 rather than the defective Decision C(2002)1559 had been in force at the relevant date. This is an instance of maladministration.

3.2 The Ombudsman has carefully considered the next step in this case, taking into account the fact that the Commission has dealt with the underlying systemic problem by replacing the defective Decision. Given that the Commission has refused not only a proposal for a friendly solution but also a further initiative to resolve the case, personally addressed to the responsible Commissioner, the Ombudsman takes the view that a draft recommendation would be pointless. Furthermore, the Ombudsman takes the view that the likely consequences of the maladministration identified in the present case are not of a sufficiently serious nature to justify a special report to the European Parliament. The Ombudsman will therefore send a copy of this decision to the Commission and include a short summary in the annual report for 2006 that will be submitted to the European Parliament. The Ombudsman therefore closes the case.

3.3 However, the Ombudsman regrets that the Commission's DG Admin has failed to use this opportunity to demonstrate its commitment to principles of good administration. The Ombudsman therefore intends to examine, with the responsible Commissioner, how best to promote a culture of service in the DG concerned.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Article 17, paragraph 1, states the following in French: " *[l]'END a droit, pour la durée de son détachement, à une indemnité de séjour journalière. Si la distance entre le lieu de recrutement et le lieu de détachement est égale ou inférieure à 150 km, l'indemnité est de 26,25 euros. Elle est*

de 105 euros si cette distance est supérieure à 150 km. (...) ".

(2) Commission Decision C(2004)577 of 27 February 2004 amending decision C(2002)1559 of 30 April 2002 amended by Decision C(2003)406 of 31 January 2003 concerning Rules applicable to National Experts on Secondment to the Commission.

(3) Mrs P. replied to the Ombudsman's invitation to submit observations.

(4) Commission Decision of 22 March 2005 amending Commission Decision C(2004)577 of 27 February 2004 laying down rules on the secondment of National Experts to the Commission.

(5) Mrs P. replied to the Ombudsman's invitation to submit observations.

(6) CLENAD stands for the Liaison Committee for National Experts, which is an association of SNEs.

(7) Communication from the President in agreement with Vice-President Ms Wallström: Empowerment to adopt and transmit communications to the European Ombudsman and authorise civil servants to appear before the European Ombudsman (SEC(2005)1227/4), 4 October 2005).

(8) Cases T-219/02 and T-337/02 *Lutz Herrera v Commission* [2004] ECR-SC IA-319 and II-1407 , paragraph 101.

(9) Case T-371/03 *Vincenzo Le Voci v Council* , judgment of 14 July 2005, not yet published in the ECR, paragraph 126.

(10) Mrs P. replied to the Ombudsman's invitation to submit observations.

(11) Case C-174/89 *Hoche GmbH v Bundesanstalt für Landwirtschaftliche Marktordnung* [1990] ECR I-02681.

(12) Commission Decision of 22 March 2005 amending Commission Decision C(2004)577 of 27 February 2004 laying down rules on the secondment of National Experts to the Commission.