B.

v.

IAEA

140th Session **Judgment No. 5039**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. B. against the International Atomic Energy Agency (IAEA) on 17 May 2023 and corrected on 13 June 2023, the IAEA's reply of 3 October 2023, the complainant's rejoinder of 5 March 2024, the IAEA's surrejoinder of 8 July 2024, the IAEA's additional submissions of 9 October 2024, the complainant's comments thereon of 25 November 2024 and the IAEA's final comments of 20 December 2024;

Considering the information provided at the Tribunal's request by the IAEA and the complainant on 6 and 7 February 2025;

Considering the application to intervene filed by Mr D. E. L. on 26 January 2024 and the IAEA's comments thereon dated 2 May 2024;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the communication, addressed by the IAEA to all of its staff members of British nationality, informing them that officials holding a residence permit under Article 50 of the Treaty on European Union (TEU) would be considered as having obtained permanent residence status in the country of their duty station (Austria),

which would affect their home leave and repatriation grant entitlements as well as the privileges and immunities granted to them.

The complainant is a P-5 staff member of British nationality working for the IAEA in Vienna, Austria.

Following a decision by the Government of the United Kingdom (UK) to leave the European Union (EU), the UK and the EU entered into a Withdrawal Agreement effective 31 January 2020. British nationals in Austria were given the possibility to apply for a residence permit under Article 50 of the TEU, issued for a renewable period of five or ten years. Applications for an Article 50 card had to be submitted by 31 December 2021. During that period, the IAEA received a number of queries from British officials about their ability to remain in Austria.

On 13 January 2020, in response to such queries, the Visa and Customs Unit (VCU), Division of General Services, Department of Management, sent an email to all staff of British nationality. In this email, the VCU stated that British staff members holding a "legitimation card" – a temporary residence permit available to all IAEA staff members – did not require any other residence permit to remain in Austria while being employed by the IAEA.

One year after, on 14 January 2021, the VCU sent another email to all staff of British nationality, informing them that holders of a legitimation card "can [...] apply for [an Article 50 card]" and advising them to consult with the national authorities.

On 30 June 2021, the VCU sent a third email to all staff of British nationality, stating that the IAEA understood that the decision by British staff members to apply for an Article 50 card was a "personal, voluntary decision based on his/her long term interests in residing in Austria" and that "[t]he status of the card holder will generally be similar to that of an Austrian citizen. Therefore, some limitations will occur."

Following an email sent by the Unit Head, Human Resources Service Centre, Division of Human Resources to the Ministry of the Interior of Austria enquiring about whether an Article 50 card should be regarded as a "permanent residence status", on 9 July 2021, the Ministry of the Interior of Austria responded to the IAEA that

Article 50 cards were issued "as a regular permit (for five years) and as a permanent residence status (for ten years)".

The complainant applied for an Article 50 card, which was issued on 17 September 2021 for a duration of five years.

On 3 December 2021, the Austrian Federal Ministry for European and International Affairs sent a *Note Verbale* to the IAEA, stating that the holder of an Article 50 card was considered by the Ministry to be "permanently resident" for the purposes of Article 38 of the Vienna Convention on Diplomatic Relations and that, as a result, the privileges and immunities granted to British officials would be limited to the scope defined in Article 38 of the Convention should they obtain an Article 50 card and, specifically, VAT refunds previously granted to staff members at grades P-5 and above would no longer be applicable.

The IAEA shared this information with its British staff members by an email of 8 December 2021, in which it announced that the Austrian Federal Ministry for European and International Affairs had formally confirmed that the Article 50 card was equivalent to permanent residence in Austria. In light of this, the IAEA explained that "all Agency staff members who opt for the Article 50 card will have only those privileges and immunities accorded to IAEA officials under Section 38 of the Headquarters Agreement" and that "[s]taff who are at grades P5 and higher who opt for the Article 50 card will not enjoy the additional privileges and immunities provided for under Section 39 of the Headquarters Agreement". The IAEA also explained that obtaining permanent residence status in the country of the duty station would affect the benefits and entitlements of staff in the Professional and higher categories as established in the IAEA Staff Rules. The IAEA indicated that "[a]ccording to Staff Rule 6.01.1 (B), staff are not eligible for payment of the repatriation grant if they have permanent residence status in the country of the duty station. Further to Staff Rule 7.02.01 (B)(2), and confirmation from the Austrian authorities that the Article 50 card is equivalent to permanent residence in Austria, staff members will also lose their entitlement to home leave." The IAEA further stated that "staff members considering the Article 50 card

could opt instead to continue their current status and continuing with their current [legitimation card]".

On 18 January 2022, the complainant submitted a request for review directed against the 8 December 2021 communication, which was rejected by the Director General on 18 February 2022. The Director General, who dismissed the complainant's request for review on the merits, noted that the request for review was also irreceivable for not being directed against an administrative decision taken in respect of the terms of the complainant's employment. In this regard, the Director General observed that there was no record of any rejection of home leave or repatriation grant request for the complainant and that the complainant had challenged the "potential impact of something that ha[d] not been specifically applied in a manner prejudicial to [her]". The Director General further stated that any change in the complainant's privileges and immunities would be due to the complainant's voluntary decision to obtain an Article 50 card and the stated position of the Austrian Government.

On 17 March 2022, the complainant lodged an appeal with the Joint Appeals Board (JAB). The JAB received a number of similar appeals from other staff members of British nationality.

On 9 November 2022, the JAB issued its report. The JAB found that the complainant's appeal met the receivability requirements set forth in Staff Rule 12.01.1. The JAB concluded that the 3 December 2021 *Note Verbale* "[could not] be considered as a solid basis for the administration to regard the affected staff members as having 'permanent residence' for the purposes of entitlements under the Staff Rules regarding home leave and repatriation grant". The JAB also found that "it was not in accordance with the Agency's duty of care to present a decision at the last minute and apply it to staff retroactively". The JAB recommended the "restoration of repatriation grant and home leave to those affected" and that the IAEA "consider reinterpretation of 'permanently resident for the purposes of Article 38 of the Vienna Convention on Diplomatic Relations' in the *[Note Verbale]* of 3 December 2021". It further recommended that the IAEA "explor[e] further with the Austrian authorities regarding the withdrawal of the

additional privileges and immunities announced in the *[Note Verbale]* of 3 December 2021".

On 23 February 2023, the Director General notified the complainant of his decision not to follow the recommendations of the JAB and to dismiss her appeal. This is the impugned decision.

On 24 March 2023, the complainant's home leave request was denied with the justification that she held an Article 50 card.

On 16 July 2024, the Austrian Federal Ministry for European and International Affairs sent another *Note Verbale* to the IAEA, explaining that the Republic of Austria uses different legal bases to define permanent residence, and that it is possible to be considered "permanently resident" for the purposes of headquarters agreements and Article 38 of the Vienna Convention on Diplomatic Relations, without having a right to long-term residence under the Withdrawal Agreement or national residency law.

The complainant asks the Tribunal to set aside the impugned decision and to order the reinstatement of her entitlements and benefits. She claims 9,397 euros to "restore" her privileges and immunities. She further claims 1,015.30 euros corresponding to her home leave and 31,214.46 United States dollars corresponding to her repatriation grant. She also seeks the payment of 30,000 euros in moral damages as well as 5,000 euros in costs. She further requests that the Tribunal order the IAEA to "resume discussions" with the Austrian Federal Ministry for European and International Affairs "and, as necessary, invoke Section 51 of the Headquarters Agreement". Lastly, she asks the Tribunal to order any other relief that it deems just and proper. In a letter dated 8 October 2024, the IAEA informed the complainant that, in light of the information provided in the 16 July 2024 *Note Verbale*, and since the complainant was holding an Article 50 card with a five-year duration, the IAEA had decided to "re-set" her home leave and to provide her with compensation for her lost home leave in the 2021-2023 cycle.

The IAEA asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. Eleven similar complaints are before the Tribunal this session with each complainant pursuing a grievance against the IAEA (collectively, the aggrieved complainants). One additional aggrieved complainant has settled her grievance and withdrawn her complaint. The central legal issue is broadly the same though the factual circumstances together with, in some instances, ancillary legal issues concerning each complainant are sufficiently different to preclude joinder of the complaints which, in any event, is not sought by any complainant nor the IAEA. However, for reasons which emerge shortly significant parts of the following discussion can and will be repeated in each judgment.

2. Much of the relevant history concerning this particular complainant is set out earlier in this judgment. However, several matters of detail should be mentioned. Following the publication of an email of 8 December 2021 (8 December email) the complainant sought a review of the email on the footing it was a challengeable administrative decision. This application for review was unsuccessful. The complainant appealed to the JAB. There she was successful. Passages from its opinion are quoted in an extract, set out later, from the impugned decision of 23 February 2023 (the impugned decision) of the Director General. However, the conclusions and reasoning of the JAB were rejected by the Director General in the impugned decision.

3. A threshold issue is raised by the IAEA about the receivability of this complaint. It argues it is not. Several matters can, in this respect, be noted. The first is that the complainant applied for and received an Article 50 card in September 2021 for a duration of five years. The second is that in the 8 December email which is the alleged administrative decision from which a review was sought and an internal appeal maintained, and is foundational to this complaint, the following is said:

> "According to Staff Rule 6.01.1 (B), staff are not eligible for payment of the repatriation grant if they have permanent residence status in the country of the duty station. Further to Staff Rule 7.02.01 (B)(2), and confirmation from

> the Austrian authorities that the Article 50 card is equivalent to permanent residence in Austria, staff members will also lose their entitlement to home leave."

The "confirmation" was in a *Note Verbale* dated 3 December 2021 from the Austrian Federal Ministry for European and International Affairs (the initial *Note Verbale*) (the Austrian Ministry). From this extract from the email, it is clear that the IAEA was stating the complainant, or a person in her position, would not be paid the repatriation grant and would not be entitled to claim home leave.

4. The question is whether this email, and these statements set out above in particular, constitute an administrative decision for the purposes of determining whether the complaint is receivable. As explained in, for example, Judgment 3168, consideration 9, for there to be a cause of action rendering the complaint receivable, the complainant must demonstrate that the contested administrative decision caused injury to the complainant's health, finances or otherwise or that it is liable to cause injury. The injury need not be immediate and liability to cause injury is sufficient (see, for example, Judgment 3740, consideration 11). This aspect of the principle applies in this case. Moreover, a communication clarifying the basis of an entitlement can embody a decision as to entitlements (see Judgment 3861, consideration 5). In the present case the position taken by the IAEA was quite specific. The complainant, as viewed by the IAEA as a permanent resident (based on what the Austrian authorities considered constituted permanent residence status), would receive no repatriation allowance nor home leave. This, in the Tribunal's opinion, gives rise to a cause of action and the complaint is thus receivable.

5. On the merits, the Tribunal firstly notes that the complainant remains a member of the staff of the IAEA. The complainant advances her pleas in her brief under three general headings. The first is that "The Director General Committed Errors of Law and Fact", the second is "Breach of Good Faith and Duty of Care" and the third is "National Origin Discrimination/Unequal Treatment". Under the first heading, the complainant raises a point which is, in fact, decisive. Her rejoinder

amplified some of the arguments earlier advanced under the above headings.

6. The provisions of the Staff Regulations and Rules concerning, respectively, home leave and the repatriation grant are in the following terms:

"**REGULATION 6.01**

(a) On separation from the service, a staff member whom the Agency is obliged to repatriate shall in principle be entitled to a repatriation grant in accordance with Annex II to these Regulations provided he/she is deemed to be internationally recruited and is actually relocating. The amount of the grant shall vary with the length of service with the Agency.

(b) A repatriation grant shall not be paid to a staff member who is summarily dismissed or who has abandoned his/her post.

Rule 6.01.1 – Repatriation grant

(A) For the purposes of payment of repatriation grant under Staff Regulation 6.01 and Annex II to the Staff Regulations, 'obliged to repatriate' shall mean an obligation to return a staff member, upon separation, at the expense of the Agency to a place outside the country of his/her duty station.

(B) A staff member shall be eligible for payment of the repatriation grant if, at the date of separation, the following conditions are met:

(1) he/she is internationally recruited;

(2) he/she is actually relocating;

(3) he/she resides outside his/her country of home leave while serving at the duty station;

(4) he/she does not have permanent residence status in the country of the duty station; and

(5) he/she has completed five years of qualifying service away from the home country.

[...]

REGULATION 7.02

Eligible staff members shall be granted home leave once in every two years subject to rules promulgated by the Director General. However, in the case of service at field duty stations designated by the Director General as having very difficult conditions of life and work, eligible staff members may be granted home leave once every 12 months. A staff member whose home country is the country of his/her official duty station or who continues to reside in his/her home country while performing his/her official duties shall not be eligible for home leave.

Rule 7.02.1 – Home leave

(A) Home leave is granted to a staff member, his/her spouse and dependent child or children once in each two-year period of qualifying service, in order to enable them to renew their ties with their designated country of home leave, by spending there a reasonable period of annual leave.

(B)

(1) An internationally recruited staff member shall be entitled to home leave provided he/she, while performing his/her official duties, continues to reside in a country other than his/her country of home leave.

(2) A staff member who has changed his/her residential status in such a way that he/she may, in the opinion of the Director General, be deemed to be a permanent resident of a country other than that of his/her nationality may lose or incur a change in his/her entitlement to home leave.

[...]"

7. In the impugned decision the Director General firstly quoted from the JAB's opinion in which it said:

"The statement by the Austrian authorities, which covers valid residence permits which are not only permanent but may be of strictly limited duration such as student permits, is limited to the very narrow purpose of the application of Article 38 of the Convention [...] the Austrian Note cannot be considered as a solid basis for the administration to regard the affected staff members as having *'permanent residence'* for the purposes of entitlements under the Staff Rules [...] The Board [...] recommends that the administration consider reinterpretation of *'permanently resident for the purposes of Article 38 of the Vienna Convention on Diplomatic Relations'* in the Austrian Note of 3 December 2021 and the restoration of repatriation grant and home leave to those affected."

Immediately following this passage, the Director General said:

"I do not concur with the above considerations. The relevant Staff Rules refer to limitations that arise in the event that a staff member holds permanent residency. The Agency has been informed of the Austrian authorities' position that holding an Article 50 Card indicates permanent residence status for the purpose of Article 38 of the Convention. It is not possible, for the purpose of applying the Staff Rules, to give a different meaning to the words 'permanent resident' than that used by the Austrian authorities."

8. The JAB's approach in the passage cited in the previous consideration was correct, and that of the Director General was erroneous.

9. Moreover, the Director General failed to provide any explanation as to why it was not possible to give a different meaning. The expression "not possible" is unambiguous and emphatic. This failure, in itself, is a vitiating legal error. According to the Tribunal's case law, an executive head who departs from the recommendation of an internal appeal body must state the reasons for disregarding it and must motivate the decision actually reached (see Judgments 4777, consideration 3, 3969, consideration 10, and 3862, consideration 20).

10. To give a different meaning to the term "permanent resident" was obviously possible, either as a matter of construction of the Staff Regulations and Rules or potentially amending them, if necessary, by the insertion of a definition. As noted above, the provision concerning home leave contained a clause that declared that "[a] staff member who has changed his/her residential status in such a way that he/she may, in the opinion of the Director General, be deemed to be a permanent resident of a country other than that of his/her nationality may lose or incur a change in his/her entitlement to home leave". This element of the provision conferred a discretion in two respects. Firstly, a discretion was conferred on the Director General to "deem" a staff member a permanent resident though, by necessary implication, there was a discretion not to deem a staff member a permanent resident. A multitude of considerations could potentially be relevant. The second element of discretion was that even if deemed a permanent resident, the staff member could either, as possible alternatives, lose an entitlement to home leave or incur a change in that entitlement. The provision does not expressly state who makes that assessment and on what basis though it is more likely than not, it is another discretionary power of some width, vested in the Director General. Nor did it specify the nature of the change though one can reasonably infer it would be something short of losing the benefit, probably a reduction. So, it is not simply a question of asserting, effectively as the Director General does in the

impugned decision, that the initial *Note Verbale* dictated the outcome of the application of the provision. It did not.

11. If it is accepted that the initial *Note Verbale* did not render it not possible "to give a different meaning" to the term "permanent resident" for the purposes of home leave then this would militate against the Director General taking the same approach in relation to the repatriation grant (speaking of "permanent residence") though, it must be accepted, there are not the same discretionary elements in the relevant provisions of the Staff Regulations and Rules governing the repatriation grant guiding that approach. However generally an instrument should be construed as a whole and language in one provision construed to the same effect as another. In addition, the question of the entitlement to a repatriation grant is to be determined as of the date of separation. It was not something that could be declared to be the position before then.

12. The preceding analysis in considerations 6 to 11 would justify an order setting aside the impugned decision as well as the original administrative decision of 8 December 2021 which was based on an assumed inviolable link between the declaration in the initial *Note Verbale* and the entitlement to home leave and the repatriation grant.

13. After the usual pleas were completed by the filing of the IAEA's surrejoinder on 8 July 2024, the IAEA filed additional submissions on 9 October 2024. These submissions said several things of importance. The first was that it had received a *Note Verbale* from the Austrian Ministry dated 16 July 2024 (the subsequent *Note Verbale*) which effectively resiled from the position adopted in the initial *Note Verbale*, at least as it had been understood by the IAEA. The consequences of this were stated in the IAEA's additional submissions as follows:

> "Upon receipt and analysis of this information, the Agency has re-assessed eligibility for relevant benefits and entitlements and considers that holders of an Article 50 card with a 5-year duration are not considered to have 'permanent residence status in the duty station' under Staff Rule 6.01.1 (Repatriation Grant) or to be 'a permanent resident of a country other than

> that of his/her nationality' under Staff Rule 7.02.1 (Home Leave). Further to the assessment of all other eligibility criteria, the Agency has informed affected Complainants about their eligibility for the relevant benefits and entitlements and, as applicable, that it will affect payment, or that it will affect payment subject to the fulfilment of the condition for satisfactory evidence of relocation [...]
>
> Please be advised that the Agency is also applying this approach with respect to all other Agency staff who are internationally recruited and who have declared that they have an Article 50 card of a 5-year duration.
>
> The Agency submits that in doing so, it has continued to act in good faith upon receipt of all relevant information received from the Federal Ministry, and that it has committed no error in the affected Complainants' cases. Moreover, in reassessing and reinstating eligibility for relevant benefits and entitlements of holders of Article 50 cards of a 5-year duration, the Agency submits that the affected Complainants' claims, and associated relief sought, with respect to benefits and entitlements, are effectively rendered moot. [...]
>
> For all other arguments raised, the Agency maintains the submissions set out in its Reply and Surrejoinder."

14. A letter to similar effect, dated 8 October 2024, was sent to the complainant but directed to her specific circumstances.

15. The contention that the complainant's claims, with respect to benefits and entitlements are effectively rendered moot, is incorrect and superficial. Also, no concession is made by the IAEA that the complaint is receivable, the impugned decision and the original administrative decision of 8 December 2021 should be set aside nor that any of the remainder of the relief be granted.

16. Orders should be made setting aside the above-mentioned decisions.

17. The complainant claims in her brief, payment of home leave in the sum of 1,015.30 euros. As it transpired, she was offered by the IAEA, by the letter dated 8 October 2024 referred to above, payment of an amount for home leave which would be determined on an agreed basis. The method of determination was settled and the offered amount was paid, including interest. This claim has become moot.

18. The complainant seeks to have her enhanced privileges and immunities restored. Her grade was, at relevant times, P-5. The JAB considered that Article 38 of the Vienna Convention on Diplomatic Relations referred to in the initial *Note Verbale* of December 2021 did not expressly define the full extent of privileges and immunities of staff members covered by this article, and that this is an issue which the IAEA could explore further with the Austrian authorities.

19. The complainant seeks an order requiring the IAEA to pay her 3,300 euros plus interest, being a quarterly lump sum she was entitled to as a VAT reimbursement for purchases of goods and services in Austria. She also seeks 6,097 euros as an estimated amount of VAT payable on the rent of her apartment. However, she does not establish the basis on which the IAEA is, itself, legally obliged to pay these amounts. She appears to assert she "is contractually entitled" to be paid these amounts. The liability in the IAEA would only arise if these were contractual obligations it had assumed. This is not established and this claim for the payment of a monetary amount should be rejected. Additionally, on this topic, she seeks an order directing the IAEA to engage in discussions with the Austrian Federal Ministry for European and International Affairs, presumably to clarify the position or persuade the Ministry to alter its position. In terms, in her brief, the complainant says:

> "The Agency [IAEA] should be ordered to resume discussions with BMEIA [the Austrian Federal Ministry for European and International Affairs] and, as necessary, invoke Section 51 [dispute settling clause] of the Headquarters Agreement to resolve the obvious tension between BMI [the Ministry of the Interior of Austria] and BMEIA."

20. A similar recommendation was made by the JAB. In substance, this order would, if made, be a mandatory injunction directed to the organisation. Such orders cannot be made by the Tribunal (see, for example, Judgments 4065, consideration 9, and 3506, consideration 18). This claim is rejected.

21. The complainant seeks an order concerning her entitlement to a repatriation grant. But whether she is entitled to the repatriation grant only arises for consideration at the date of separation (see Rule 6.01.1 (B)

set out above). No occasion arises to make an order about this entitlement given that the complainant is still a member of the staff of the IAEA. Her future entitlement will be governed by Rule 6.01.1 given that the decisions otherwise limiting the operation of that provision have been set aside.

22. The complainant seeks moral damages in the sum of 30,000 euros and having regard to the decision in issue, it was likely to have caused moral injury. She provided no particulars beyond saying she was emotionally shocked when she learned of the decision and it resulted in emotional distress, anxiety, stress, anguish and hardship. The Tribunal assesses the moral damages in the sum of 15,000 euros.

23. The complainant seeks costs in the sum of 5,000 euros. She was legally represented and is entitled to this sum as she has been successful.

24. The application to intervene should be refused. The applicant is not in a similar position as the complainant. Apart from anything else, he, unlike the complainant, did not have a five-year Article 50 card but rather a ten-year one.

DECISION

For the above reasons,

1. The impugned decision and the decision of 8 December 2021 are set aside.
2. The IAEA shall pay the complainant 15,000 euros in moral damages.
3. The IAEA shall pay the complainant 5,000 euros in costs.
4. The application to intervene is rejected.
5. All other claims are dismissed.

In witness of this judgment, adopted on 1 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

RENÉ M. VARGAS M.