Registry's translation, the French text alone being authoritative.

NINETY-FIFTH SESSION

Judgment No. 2214

The Administrative Tribunal,

Considering the complaint filed by Mr G. S. against the European Patent Organisation (EPO) on 12 August 2002, the Organisation's reply of 11 December 2002, the complainant's rejoinder of 7 February 2003 and the letter dated 18 February 2003 in which the EPO informed the Registrar of the Tribunal that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. According to Article 72 of the Service Regulations for Permanent Employees of the European Patent Office, the EPO's secretariat, concerning the expatriation allowance:

"(1) An expatriation allowance shall be payable to permanent employees who, at the time they take up their duties or are transferred:

a) hold the nationality of a country other than the country in which they will be serving, and

b) were not permanently resident in the latter country for at least three years, no account being taken of previous service in the administration of the country conferring the said nationality or with international organisations."

The complainant, a national of Luxembourg who was born in 1962, entered the service of the EPO on 1 November 1997, as an examiner at grade A2, in Directorate-General 2 in Munich. He currently holds grade A3. Between October 1988 and the time he was recruited by the Office, he was employed by a number of German companies. During that period, he worked as an independent engineering consultant, as a result of which he rented a small apartment in Türkheim, in Germany.

In the declaration concerning expatriation allowance, which he filled in on 3 November 1997, the complainant indicated that he had not been continuously resident in Germany during the three years before he had entered the service of the EPO. On 8 January 1998 he received an e-mail message from the personnel department saying that according to the documents in his file he appeared to have resided permanently in Germany since 1988 and hence was not eligible for an expatriation allowance. However, it was indicated that the matter may be reconsidered if he was able to prove that his links with Germany had been severed at any time during the three years preceding his recruitment.

In a letter dated 12 July 1999, the complainant asked the President of the Office to take a decision regarding the grant of his expatriation allowance. In the event of a refusal, he wished his letter to be considered as notice of an internal appeal. The Director of Personnel Development replied on 27 September 1999 that the President of the Office had not acceded to his request and that the matter had been referred to the Appeals Committee. In its opinion of 28 March 2002, the latter considered that the complainant had not put forward sufficient evidence to show that he had not been "permanently" resident in Germany during the three years before he had entered the service of the Office and, by a majority, recommended the rejection of his appeal. In a letter dated 29 May 2002, which constitutes the impugned decision, the Principal Director of Personnel informed the complainant that the

President had decided to dismiss his appeal.

B. The complainant maintains that during the three years before he entered the EPO's service, his main residence was in Luxembourg, even though, for professional reasons, he had to rent an apartment in Türkheim until 28 February 1995. Subsequently, the owner of the apartment agreed to let him use it for occasional short business trips to southern Germany, and it allowed him to maintain a "formal postal address". That was therefore the mailing address he had given on the employment application form he had submitted in April 1997, while making it clear that his permanent residence was in Luxembourg. He had rented the said apartment again only as from 11 August 1997 in preparation for his assignment to Munich.

While he admits he is unable to provide absolute proof of his submission, he does produce a series of residence certificates and statements, one of which indicates that he did not hold a residence permit in Germany between 1 October 1995 and 2 July 1997. He accuses the EPO of failing to take due account of those documents. He deduces from the Tribunal's case law that the decisive criterion for entitlement to expatriation allowance is "simple and effective residence". In his view, the EPO tried to take account of links other than those of residence, thereby adopting an approach which defeated the very purpose of the allowance.

The complainant requests that the Tribunal set aside the impugned decision and grant him full redress.

C. In its reply the Organisation maintains that the impugned decision shows none of the flaws which would warrant its annulment, and that it complies with the provisions of Article 72. The documents provided by the complainant have been correctly taken into account.

It notes that, according to the Tribunal's case law, if an official has lived for many years prior to joining the EPO in the country where he is to serve, he will be eligible for an expatriation allowance only if he had severed "objective and factual" residential links with the country for a time during the three years preceding his recruitment. The test applied by the Tribunal is that of "simple residence", that is to say, the objective and factual physical situation, which may therefore be different from official residence.

It was for the complainant to produce evidence allowing the EPO to conclude that the objective and factual residential links with the country of his duty station had been severed. While it appears from the documents he provided that he always maintained a residence in Luxembourg, that is not sufficient proof that he resided exclusively in that country between 1995 and 1997. The defendant explains that if an official can prove that he is no longer officially listed as a resident, that he has maintained no professional ties in the country of his duty station, that he has no accommodation there and hence no address, that he has terminated his sickness insurance and has ceased to be taxable in the country, then it accepts that there is a strong likelihood that the individual concerned has effectively for a time severed his residential links with the country. On the other hand, if the individual's residential status in the country has changed only partially, the allowance is in principle not payable, since the object of Article 72 is to grant it only to employees who have no link with the country in which they are to serve. In the case in hand, the complainant gave the address of his German residence when he applied to the EPO in 1997 and all his correspondence with the Office went through that address. He kept the apartment in Türkheim therefore as a "pied-à-terre" during the period at issue. Moreover, no major change occurred in his professional situation, or in his social security cover during that period, and probably not in his tax situation either, which constitutes a significant indication of continuous residence in Germany.

D. In his rejoinder the complainant explains that from March 1995 to August 1997 he used the apartment in Türkheim as a "hotel room", so that this address in Germany could in no way be considered as a place of permanent residence. Referring to Judgment 1099, he points out that merely paying social security contributions in the country does not constitute an indication of permanent residence there. He considers that the EPO's practice is not as advocated in the case law. The notion of severed links is mentioned neither in the case law nor in Article 72, and only the continuity of simple residence, that is, habitual physical presence, counts. Since the EPO has not specified for how long links have to be severed, the complainant takes that as proof of the arbitrary nature of its procedure for granting the expatriation allowance.

CONSIDERATIONS

1. The complainant's career, prior to his recruitment by the European Patent Office in Munich in November 1997, was as follows. After completing his secondary and university studies in Luxembourg, he studied at the University of Stuttgart from 1982 to 1990. During that period, he had accommodation in Germany. From 1 October 1991, owing to the work he was doing for some German companies, he occupied a small furnished apartment in Türkheim, in Germany, for which he signed a lease that ran until 28 February 1995. From 11 August 1997 the apartment was leased to him again. Between those dates, the owner of the apartment kept it available for the complainant as and when he needed it for his professional activity, which amounted at most to seven days a month.

The complainant produces a number of certificates. One of these, issued by the municipality of Ettelbrück, Luxembourg, on 10 March 1999, certifies that the complainant has been registered there as a resident since birth, that on that account he holds an identity card issued in that town and that, since the age of 18, he has been a registered voter in the municipality and has always voted in elections. It appears, moreover, from certificates issued by other municipalities and authorities, that the complainant had established his main residence in Türkheim from 1 October 1991 to 1 August 1993, then in Gilching, also in Germany, from 1 August 1993 to 1 March 1995, after which he had declared that he was leaving that municipality to re-establish his residence in Ettelbrück. It also appears that he was issued a residence permit by the German authorities from 9 December 1991 to 30 September 1995, and again from 3 July 1997 to 29 September 2000. The complainant puts forward two more statements. One of these was provided by a person living in his neighbourhood in Ettelbrück certifying that he resided and worked there from 1995 to 1997. The other came from a person with whom the complainant practised sport three or four times a week, between March and October 1997, and who certified that he had been in regular contact with him throughout that period at his address in Ettelbrück, from which he concluded that the complainant was permanently resident there.

When he applied for employment at the EPO, the complainant gave Türkheim as his "address for correspondence" and Ettelbrück as his "permanent residence". The EPO sent the offer of appointment to his Türkheim address, stating that, on the basis of information then available, Türkheim would be considered as the place of recruitment. On 3 November 1997 the complainant filled in the necessary declaration for obtaining the expatriation allowance provided for in Article 72 of the Regulations, stating that he had not been continuously resident in Germany during the three years preceding his recruitment.

2. In a letter dated 12 July 1999, the complainant asked the President of the Office to take a decision regarding the grant of an expatriation allowance or, failing that, to consider his letter as lodging an internal appeal. As the President did not accede to his request, the matter was brought before the Appeals Committee, which recommended that the appeal be dismissed. On 29 May 2002 the Principal Director of Personnel wrote to the complainant that the President, endorsing the Committee's recommendation, had decided to dismiss his appeal. This constitutes the impugned decision. The complainant asks the Tribunal to set aside this decision and grant him full redress.

3. In this case, the only issue that arises concerns the interpretation and application of Article 72(1) b) of the Service Regulations.

(a) In order to establish what should be understood by residence for at least three years, the case law has considered both the purpose and amount of the allowance, which was instituted to compensate for the extra effort required of an expatriate (see Judgment 51).

In consideration 8 of Judgment 926, the Tribunal deemed that the "purpose of the [expatriation] allowance is, after all, to meet the case where the employee has no affinity with the country of his duty station". This opinion was reiterated in Judgments 1099 and 1150.

(b) The Tribunal has accordingly arrived at a definition of permanent or continuous residence. While this requires actual long-term presence in the country concerned, it does not necessarily exclude another residence. In Judgment 1099 the Tribunal held that in order to establish whether the complainant met the condition of 'continuous residence' in the country of his duty station for at least three years prior to being recruited by the Office, it was necessary to determine whether there were "objective and factual links with that country". It added that: "What matters is that the complainant had to live, and did live [in that country]". It was not important to know whether the complainant had paid taxes there or whether, at the same time, he kept a home address at his former place of residence (see Judgment 1099, under 8). The status of the residence is not relevant either (see Judgment 1150).

(c) It is clear from the case law when residence must be deemed to have been interrupted, within the meaning of Article 72 of the Service Regulations. It is not sufficient for the person concerned to have stopped living in a particular country; he must in addition have intended to leave the country for some length of time.

(d) As far as the correct procedure is concerned, according to the case law an organisation must automatically grant an expatriation allowance whenever the necessary conditions are met, which presupposes that it must make enquiries. However, if staff members claim a benefit on the basis of facts with which they are better acquainted than the organisation, they should cooperate in establishing those facts or face the possibility that their claim will be rejected (see Judgment 2164).

4. It therefore has to be ascertained whether the complainant resided in Germany during the three years preceding his appointment - in other words from November 1994.

In fact, he had accommodation in the country from 1982 onwards, since he first studied and then worked there. From 1 October 1991 onwards, he kept an apartment in Türkheim, and had his mail sent there. He has held a residence permit issued by the German authorities. The companies for which he worked were German companies established in Germany.

Residence having been established, it must be ascertained whether the complainant changed it, thereby severing his links with Germany. In this respect, he submits that he stopped renting the apartment in Türkheim from 1 March 1995 and moved his residence to Ettelbrück in Luxembourg. As all his clients were in Germany, however, in order to facilitate his contacts with them he had retained his address in Türkheim.

The Tribunal agrees with the Organisation that the complainant's residential links with Germany were not severed, in the meaning of Article 72(1) b) of the Service Regulations. Even though he no longer had his main residence there, he did keep a "pied-à-terre" in that country, went there regularly for reasons of work and continued to have his mail sent there. It is therefore compatible with the purpose of the expatriation allowance to consider, in the circumstances, that the appointment of the complainant and his assignment to Munich do not amount in a real sense to expatriation, such as would justify the grant of a supplementary allowance.

Consequently, the complaint is devoid of merit.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet