SEVENTY-SEVENTH SESSION

In re BUFACCHI (Nos. 1 and 2)

Judgment 1364

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Branimir Alberto Massimiliano Bufacchi against the European Patent Organisation (EPO) on 4 October 1993, the EPO's reply of 23 December 1993, the complainant's rejoinder of 24 February 1994 and the Organisation's surrejoinder of 12 April 1994;

Considering the second complaint filed by Mr. Bufacchi against the EPO, also on 4 October 1993, the EPO's reply of 23 December 1993, the complainant's rejoinder of 24 February 1994 and the Organisation's surrejoinder of 12 April 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 8, 60, 107 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

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

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

A. Article 60 of the EPO's Service Regulations reads:

"Home leave

(1) Permanent employees who are nationals of a country other than the country in which they are employed shall receive eight working days' additional leave every two years to return home. Travel expenses for such leave shall be reimbursed ...

(2) For the purposes of these Regulations, the home of such permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up his duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.

Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee."

The complainant, who is a citizen of both Italy and the Republic of South Africa, was born on 15 June 1956 in Cape Town. Having accepted an offer of employment of 18 October 1990 he joined the staff of the EPO on 1 February 1991 as a patent examiner at grade A3 in Directorate-General 1 at The Hague. His letter of appointment said that he had Italian nationality and that his home was Varese, in Italy, and the record of entry into service confirmed that.

By a letter of 11 May 1992 he asked the President of the Office to review the designation of his home and change it from Varese to Johannesburg for the following reasons: (1) when he was recruited he thought that the Service Regulations limited the designation of home to the territory of European Members of the EPO, and only later did he realise that Article 60 applied also to officials whose home was outside Europe; (2) he was born and brought up in South Africa; (3) he and his wife were South African citizens; (4) his family and his wife's lived in South Africa; and (5) he owned a house in Johannesburg. He asked that if his request was turned down his letter should be treated as an internal appeal under Articles 107 and 108 of the Service Regulations.

By a note of 21 May 1992 a personnel officer rejected his request on the grounds that in his letter of 9 November 1990 he had unreservedly accepted the offer of employment of 18 October 1990, which expressly said that for the purpose of Article 60 of the Service Regulations his home would be Varese. The application form had - the note went on - asked for information on nationality at birth and at the time, and the complainant had answered that at birth he had been both Italian and South African and that he was then Italian. His situation had not changed and he

had not given the full information required.

He replied on 3 June 1992 that in an interview with a recruitment officer he had discussed his dual nationality at length in the context of military service and that he was pressing his claim.

The President of the Office put his case to the Appeals Committee.

By a letter of 20 November 1992 he asked the President to change his designated home from Varese to Johannesburg and, in the event of refusal, again to treat his letter as an internal appeal under Articles 107 and 108 of the Service Regulations.

The Appeals Committee joined both appeals, which were numbered 16/92 and 44/92. In its report of 3 May 1993 it recommended that the President of the Office allow them, set aside the challenged decisions and take new ones provided that the complainant met the conditions in Article 60(2) of the Service Regulations.

By letters of 30 June the Director of Staff Policy told the complainant that the President of the Office had dismissed both appeals. The first was declared irreceivable on the grounds that he had failed to apply in time, and that is the decision he is impugning in his first complaint. The second was unfounded since his situation had not changed since the original designation of his home, and that is the decision he challenges in his second complaint.

B. The complainant puts forward similar pleas in both complaints. He told a recruitment officer that he was born in South Africa and had lived there for 29 years before taking a job in Italy, where he spent less than 4 years; that his family and his wife's lived in South Africa; that he had no kin in Italy; that he had real property in South Africa but not in Italy; and that he had done military service in South Africa. The officer he saw told him that he could not have his home in South Africa since it was not a Member of the EPO, and it was the officer who entered Varese on the application form. The Organisation failed to take account of his personal situation as it was required to do by Article 60(2) of the Service Regulations in the version that has applied since 1 July 1990 and by the case law (Judgment 525, in re Hakin No. 5). The Appeals Committee acknowledged that the Administration had wrongly determined his home on recruitment. The Organisation misled him, and to his detriment, since he may not take home leave with his family in the country with which he has the closest ties.

He submits that the Organisation is in breach of equal treatment: for example another staff member, who is both Italian and Canadian, was allowed to take home leave in Canada. There are other cases. The Appeals Committee was unanimous that the Administration was in breach of equal treatment and good faith by denying some what it granted to others. The Committee also took the view that the recruitment officer should, in discharge of the employer's duty of care to the employee, have given him accurate information about the rules on the designation of home.

Citing Judgment 676 (in re Brocard), he submits that his first internal appeal, which he lodged on 11 May 1992, was not out of time.

In his second complaint he asserts that his family status changed with the birth of his second child, which he says, has forged even closer links with South Africa.

In his first complaint he seeks:

(1) the quashing of the President's decision of 30 June 1993 to reject appeal 16/92;

(2) the designation of Johannesburg as his home as from the date of entry into service;

(3) payment of the difference between Varese and Johannesburg in the cost of travel for the home leave he took in 1992;

(4) an award of 10 guilders in damages for the moral injury he suffered as a result of the Office's unlawful policy and the wrong information he was given;

(5) an award of 10 guilders in damages for breach of equal treatment;

(6) an award of 7,000 guilders in costs.

In his second complaint he seeks:

(1) the quashing of the President's decision of 30 June 1992 to reject appeal 44/92;

(2) review of the designation of his home and the change of his home to Johannesburg for the purposes of Article 60(2) of the Service Regulations;

(3) 7,000 guilders in costs.

C. In its replies the Organisation asks the Tribunal to join the two cases on the grounds that they raise the same issues and the second complaint was filed solely to get round the fact that the first is time-barred and irreceivable. The complainant accepted Varese as his home on 9 November 1990, when he signed the EPO's offer of employment, and again on 1 February 1991, when he took up duty. To be receivable under Article 108(2) of the Service Regulations his first internal appeal should have been lodged three months after 1 February 1991, but he did not file it until 11 May 1992.

When he joined the Organisation he was given, like anyone else, a copy of the Service Regulations and a form of application for home leave stating that tickets had to be produced for home leave taken outside Europe. So he had all theinformation he needed and has only himself to blame for failing to appeal in time against the designation of Varese as home. It was up to him to provide full information on nationality and home, and he failed to do so.

In the Organisation's submission an official's home is usually in the "contracting State" of which he is a national since under Article 8(a) of the Service Regulations a candidate for appointment as a permanent employee must be a national of a contracting State unless an exception is authorised. The complainant was recruited because he was Italian.

There was no breach of equal treatment: the cases he cites were different in fact and in law from his own.

His second complaint has the same purpose as the first, and that is in breach of due process. The only difference between the two is the date from which he wants his designated home to be changed: as from his entry into service in the first and without retroactive effect in the second.

Review of the designation of home requires a special decision by the President of the Office on a reasoned request from the staff member and is an exceptional measure. It is taken only if there is a radical difference between the circumstances that existed when the home was originally designated and those that the employee relies on in seeking review. But the complainant's circumstances have not radically changed.

D. In his rejoinders the complainant develops his arguments. He maintains that the EPO was in breach of good faith: it knew full well after interviewing him on recruitment that South Africa, of which he was also a citizen, was the country he had the closest ties with.

He explains that though both complaints seek to correct the same mistake they challenge "two different decisions" taken on different grounds. He cites Judgment 1324 (in re Rivero), in which the Tribunal held that there is no difference in substance between the original designation and the review of "home" and that they cannot properly be made according to different criteria.

E. In its surrejoinders the Organisation sums up the pleas in its replies and submits that there is nothing in the complainant's rejoinders to make it change its stand.

CONSIDERATIONS:

1. After interviewing the complainant in Milan on 11 October 1990 the European Patent Organisation offered him by a letter of 18 October 1990 a post as an examiner at its office at The Hague. The letter said among other things that "for the purpose of Article 60 of the Service Regulations your home will be considered to be Varese", in Italy. Copies of the Service Regulations and other rules were enclosed. The complainant accepted the offer on 9 November 1990.

2. On 7 December 1990 and as from 1 July 1990 the Administrative Council of the Organisation amended Article 60 to read as set out in A above. The complainant took up duty on 1 February 1991. A form headed "Record of

entry into service" said that his nationality was Italian and that the place of home leave was Varese. On 11 May 1992 he applied to the President of the Office for reversal of the original decision to treat Varese as the place of his home and for change to Johannesburg as from 1 February 1991. But by a note of 21 May 1992 a personnel officer told him that there was no reason to change retroactively the designation of Varese as his home. On 3 June 1992 he informed the Personnel Department that he was pressing his internal appeal of 11 May 1992. The appeal went to the Appeals Committee and was numbered 16/92.

3. On 20 November 1992 he wrote a letter to the President of the Office asking him "to review the designation of my home" and change it from Varese to Johannesburg. The President rejected his second request on 5 January 1993 and referred it to the Appeals Committee. The second appeal was numbered 44/92.

4. The Appeals Committee reported on each of the two appeals. Both reports were unanimous and had the same text: the Committee recommended that the President "allow this appeal, set aside the contested decision and take a new decision after a broad enquiry into whether the appellant fulfils the conditions laid down in Article 60(2)" of the Service Regulations. But by letters dated 30 June 1993 the President rejected both appeals, albeit on different grounds. He rejected appeal 16/92 as "irreceivable" and appeal 44/92 as "devoid of merit".

Joinder

5. Such are the two decisions the complainant is impugning in his two complaints and the claims they make are set out in B above. The Organisation asks the Tribunal to join them on the grounds that they arise from the same set of facts. That is true and the Organisation's application is therefore allowed. But each complaint will be taken separately because the redress sought in each case is different: in one the complainant is seeking retroactive effect, but in the other not.

The first complaint

6. The Organisation submits that the first complaint is irreceivable insofar as it seeks the quashing of the decision on the complainant's place of home leave with retroactive effect from the date of entry in service. It points out that he acquiesced in the determination of Varese as his home on acceptance of the offer of employment on 9 November 1990 and again when he took up duty on 1 February 1991. Since he did not file his internal appeal until 11 May 1992 it was out of time under Article 108 of the Service Regulations, which sets a time limit of three months; he has therefore failed to exhaust the internal means of redress.

7. There is no need to determine whether the first complaint is receivable. Suffice it to say that what the complainant wants is a retroactive benefit that would be at variance with the terms of his original appointment, to which he consented and which designated Varese as his home. The EPO is therefore right to refuse any change in that determination as to the past.

The second complaint

8. The second complaint, seeking review of the original designation of home, rests on the pleas that are summed up in B above. The EPO observes that the President has wide discretion in reviewing the determination of home. It submits that owing to the exceptional nature of such a decision review will be warranted only if there is "a radical change between the circumstances which the complainant asserted or could have asserted when his place of home leave was originally determined, and the circumstances which he put forward to substantiate his request for review". The Organisation contends that the birth of a second child "cannot constitute an exceptional circumstance or a radical change in the complainant's situation". It adds in its surrejoinder:

"Given the particular circumstances of the case at issue, the respondents leave it to the Tribunal to decide if said request should be granted, as in the complaint which gave rise to Judgement No. 1324".

9. In that judgment the Tribunal ruled on a case in which another employee of the EPO, Mr. Carlos Rivero, had sought the quashing of a decision by the Organisation rejecting his application for the change of his home. It held that the impugned decision rested "on a mistake of law, and the mistake lies in misinterpretation of the principle of equal treatment". The present complainant relies on circumstances of the same kind as those that Mr. Rivero cited in his pleadings and that Judgment 1324 set out under 3. The judgment concluded that Mr. Rivero's situation was different neither in law nor in fact from that of the other employees with dual nationality whose cases he had cited, including new employees who had had their "home" automatically designated outside the territory of member

States.

10. There is no material difference between the complainant's case and Mr. Rivero's. Both hold dual nationality; were born outside Italy; were brought up in the country of their birth and lived there until well over the age of 20; travelled and worked in Italy for a few years; have kin living in the country of their birth; and are married to citizens of that country.

11. The Tribunal reaches the same conclusion about the present complainant as it did about Mr. Rivero and repeats what it said in Judgment 1324 under 9:

"It would offend against the principle of equal treatment that the recruit who has strong ties with the country of one of two nationalities should get the automatic designation of a place in that country as "home", while in identical circumstances another employee is refused designation of his home in that country simply because he is seeking review of a determination already made."

Since the distinction does not hold in law the impugned decision cannot stand.

12. The Tribunal is satisfied on the evidence before it that South Africa is the country with which the complainant has the "closest connection" within the meaning of Article 60(2) of the Service Regulations. He was born and brought up and followed primary and secondary education in that country. He lived there until the age of 29, save six years when he was at university in the United Kingdom. His parents and brother live in South Africa. His wife is South African and his wife's family live there. He has real property in Johannesburg. Those circumstances are sufficient to warrant the designation of Johannesburg as his home. The fact that he has had another child since joining the EPO makes no difference. The conclusion is that he qualifies for review of the determination of his home under Article 60(2) and his home must be changed accordingly.

13. Since he has succeeded in his second complaint he is entitled to an award of costs, and the amount is set at 3,000 guilders.

DECISION:

For the above reasons,

1. The first complaint is dismissed.

2. The President's decision of 30 June 1993 rejecting appeal 44/92 is quashed.

3. The complainant's designated home shall be changed from Varese to Johannesburg.

4. The Organisation shall pay him 3,000 guilders in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

José Maria Ruda
E. Razafindralambo
Michel Gentot
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.