

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

## **108th Session**

## **Judgment No. 2864**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. B.-P. d. B. against the European Patent Organisation (EPO) on 21 June 2008, the EPO's reply of 3 November 2008, the complainant's rejoinder of 15 February 2009 and the Organisation's surrejoinder of 27 May, together with the further comments which it submitted on 15 July 2009 at the complainant's request;

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. Article 72 of the Service Regulations for Permanent Employees of the European Patent Office, the EPO's secretariat, concerns the expatriation allowance. It reads in pertinent part:

- “(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.

- (2) An expatriation allowance shall also be payable to permanent employees not referred to in paragraph 1 a) above and who at the time of taking up their duties have been permanently resident for at least ten years in a country other than the country in which they will be serving, no account being taken of previous service in the administration of the latter country or with international organisations.”

The complainant, who was born in 1970, had German nationality by birth. On 4 October 1997 he married a French national. He acquired French nationality on 17 May 2001 by a declaration signed on that date. He was recruited by the Office on 1 September 2001 as a patent examiner at grade A2 based in Munich. He now holds grade A3.

On 3 September 2001 the complainant filled out an application form for the expatriation allowance, in which he declared that he held German nationality by birth and French nationality “since” 15 May 2002. He also declared that he had been partly resident in the country in which he was serving – Germany – in the ten years prior to his appointment. The allowance in question was not granted to him at that juncture.

By a letter of 12 December 2006 the German authorities informed the complainant that he had lost his German nationality on 17 May 2001. On 29 December 2006 he again filled out an application form for the expatriation allowance, declaring that he held only French nationality, which he had acquired on 17 May 2001, and that during the three years prior to taking up his appointment he had not been continuously resident in the country in which he was now serving. On 12 April 2007 he again took German nationality by naturalisation, but he relinquished it on 16 August 2007.

The applications of 29 December 2006 and 3 September 2001 were rejected on 29 November 2007. The Office considered that, as the complainant had himself declared, he had German nationality on taking up his duties, and the fact that the German authorities had recognised his loss of this nationality *ex post facto* did not affect the

decision whether to grant him the expatriation allowance. The Office added that the decision not to grant him the allowance in question should stand, because prior to his recruitment the complainant had not been permanently resident for at least ten years in a State other than Germany.

In a letter of 20 February 2008 addressed to the chairman of the Staff Committee and conveyed to the complainant, the Principal Director of Human Resources explained that the Office's practice was to not grant the expatriation allowance to a staff member with dual nationality including that of the country in which he or she was serving, unless that person had been permanently resident for at least ten years in another State, within the meaning of Article 72(2) of the Service Regulations. On the same date the complainant sent to the President of the Office a letter in which he requested payment of the expatriation allowance as from 1 September 2001. He was notified by an e-mail of 16 May 2008, which constitutes the impugned decision insofar as it does not grant him the expatriation allowance as from 1 September 2001, that he had been granted this allowance retroactively as from 1 December 2006. This decision was confirmed by a letter of 19 June 2008.

B. The complainant submits that he met the conditions set out in Article 72(1) of the Service Regulations for entitlement to the expatriation allowance as from 1 September 2001, as he had only French nationality when he took up his duties and had not been permanently resident in Germany during the three years prior to his recruitment by the Office. He also submits that Article 72(2) does not apply in his case, since he no longer had German nationality when he took up his duties. In this connection he explains that for him French nationality is more important than German nationality, but that he nevertheless initiated proceedings to keep the latter after signing his declaration of French nationality, because in 2001 he had thought that it was possible to retain both nationalities. When he filled in the first application form for the expatriation allowance on 3 September 2001, he had declared that he held German nationality because he did not know that he had lost it, as the above-mentioned proceedings were still

under way. He had made that declaration in good faith, but in the light of the letter of 12 December 2006 it had proved to be incorrect. He explains that the date of 15 May 2002, which he had entered on the application form, was “plainly a mistake” on his part.

The complainant contends that the fact that he could be deemed to hold dual nationality does not warrant the refusal of his application, because a document of the Administrative Council dated 17 April 1990 shows that Article 72 of the Service Regulations was drafted in such a way that it could “apply also to those few staff members who may have double nationality, that of the host country and another”. In this connection he mentions, by way of example, three permanent employees of the Office who are in this situation and who receive the expatriation allowance without meeting the residence criterion referred to in Article 72(2). The complainant infers from this that this article is applied “inconsistently”, that by giving him inaccurate information – in particular in the letter of 20 February 2008 – the Office delayed the processing of his application and that the “principle of protecting legal certainty” as well as the principles of good faith and equal treatment have been breached.

Furthermore, the complainant points out that the Office did not reply to his first application and did not provide him with certain items of information which were, on the contrary, given to other permanent employees in a situation similar to his. Lastly, he criticises the application form for the expatriation allowance as being unsuitable for use by permanent employees with dual nationality including that of the country in which they are serving.

The complainant seeks the quashing of the impugned decision insofar as it denies him the expatriation allowance as from 1 September 2001, and compensation with interest for the resultant financial loss. He also claims moral damages and costs.

C. In its reply the EPO states that as from 21 April 2008 the complainant should have considered that his appeal of 20 February 2008 had been implicitly rejected and he ought to have filed a complaint with the Tribunal within ninety days. Nevertheless, since his

claims were partly satisfied on 16 May 2008, the Organisation considers that his complaint is receivable because it now concerns only the issue of whether he is entitled to payment of the expatriation allowance as from 1 September 2001. It stresses, however, that the complainant did not lodge an internal appeal against the initial decision not to grant him this allowance.

The Organisation explains that, until March 2008, if a permanent employee had the nationality of the country in which he or she was serving and that of another State, its practice was to grant the expatriation allowance only if that person met the conditions laid down in Article 72(2) of the Service Regulations. It therefore considers that the information supplied to the complainant was given to him in good faith. It contends, however, that the principle of equal treatment has not been breached because, in its opinion, the complainant did not possess dual nationality. It asserts that the application of 3 September 2001 was examined on the basis of the provisions of the above-mentioned paragraph 2, since the application form which the complainant had filled in at the time indicated that he had solely German nationality. As he had not resided outside Germany for the ten years prior to his recruitment by the Office, it maintains that this application was rightly rejected. The EPO adds that the complainant was informed of this rejection through his payslips, since they showed that the allowance in question had not been paid. In these circumstances the Organisation considers that Article 72 was applied correctly and that the complainant's application was processed with due diligence. It further contends that the decision to grant him the expatriation allowance as from 1 December 2006 was well founded and consistent with general principles of law. It draws attention to the fact that the issue of the complainant's nationality when he took up his duties was not clarified until December 2006. It explains that requests for a review of decisions regarding "payments of unlimited duration", such as the payment of the expatriation allowance, can be accepted only within certain limits, bearing in mind both the staff member's interests and the Organisation's interest in having its financial resources managed soundly.

Lastly, the Organisation submits that the criticism regarding the application form for the expatriation allowance is groundless for, in its opinion, there was nothing to prevent the complainant from providing precise and correct information. It emphasises that the form merely supplements the “[d]etails” contained in the application for employment which is submitted to the Office, and it notes that when the complainant filled in this document on 11 November 2000, he stated that he had dual French and German nationality, which was not yet true at the time.

D. In his rejoinder the complainant reiterates his submissions. He says that he filled in his application for employment in good faith in November 2000, but denies that he stated at that juncture that he had both German and French nationalities. Under the heading “Nationality(ies)” he had entered “German/French”, meaning German and/or French, in order to warn the EPO that he was likely to change his nationality or acquire another one. He submits that there was never any doubt that he had French nationality when he took up his duties, and to support this view he produces a page from the *Gazette* of September 2001 which shows him as having that nationality.

Moreover, the complainant provides further examples to show that the practice in force before March 2008 with respect to the granting of the expatriation allowance was not scrupulously followed, and he points out that Article 72 of the Service Regulations does not forbid the granting of this allowance to permanent employees possessing dual nationality, including that of the country in which they are serving. In this connection he maintains that he does not know of any permanent employee, apart from himself, who in these circumstances has not been granted the allowance in question, and he invites the Organisation to prove the contrary.

E. In its surrejoinder the EPO maintains its position. It rejects the complainant’s explanations regarding the information which he supplied in his application for employment and states that it was up to him to find out what consequences the acquisition of French nationality would have on his German nationality.

In response to the complainant's submission that he knows of no permanent employee possessing the nationality of the host country and that of another State who has not been granted the expatriation allowance, the author of the surrejoinder – Ms P. – says that she herself had dual French and German nationality when she took up her duties – and that she still has it – but that she does not receive the allowance in question. The EPO considers that the examples mentioned by the complainant are merely exceptions to the Organisation's practice.

In a letter of 8 July 2009 to the Organisation, a copy of which was sent to the Tribunal, the complainant stated that he would like Ms P. to clarify whether, like the permanent employees to whom he referred as examples in his rejoinder, she satisfied the conditions for receiving the expatriation allowance specified in both (a) and (b) of Article 72(1) of the Service Regulations. In his opinion, the EPO's silence is an admission that these conditions were not met. In its further comments of 15 July 2009, the Organisation replies that, in accordance with Article 11, paragraph 1, of the Rules of the Tribunal, it is up to the Tribunal to order measures of investigation and that it has decided to wait until the Tribunal rules on the complainant's request for clarification. It quotes Judgment 1775 in order to emphasise that “[s]ilence does not normally imply consent”.

## CONSIDERATIONS

1. The complainant joined the European Patent Office at the EPO's headquarters in Munich on 1 September 2001. On 3 September 2001 he submitted an application for an expatriation allowance in which he declared that he was of German nationality by birth and would become a French citizen on 15 May 2002. At that juncture he was not granted the allowance.

2. On 29 December 2006 the complainant submitted another application for an expatriation allowance, alleging that he had acquired

French nationality on 17 May 2001 and that he had ceased to hold German nationality as of that date.

This application and that of 3 September 2001 were rejected by a letter of 29 November 2007. After an internal appeal against this decision had been lodged, the Office informed the complainant by an e-mail of 16 May 2008 that an expatriation allowance had been granted to him as from 1 December 2006. This decision, which constitutes the impugned decision, was confirmed by a letter of 19 June 2008.

3. (a) The expatriation allowance is additional remuneration which is paid in order to permit the recruitment and retention of staff who, on account of the qualifications required, cannot be recruited locally. It is intended to compensate for certain disadvantages suffered by officials who are obliged to leave their country of origin and settle abroad. This situation is indeed more difficult than that of officials who do not have the nationality of the country of their duty station either, but who have been living in that country for quite a long time before taking up their duties (see Judgment 2597, under 3).

(b) Article 72(1) of the Service Regulations also applies to permanent employees who, on taking up their duties, have dual nationality including that of the country in which they will be serving. However, it was not until March 2008 that this solution, which apparently results from an amendment of Article 72 of the Service Regulations in 1990, was put into practice by a decision of the President of the Office, which was taken following a recommendation by the Internal Appeals Committee. Permanent employees of the Office who had dual nationality had previously been entitled to an expatriation allowance only if they met the conditions of Article 72(2) of the Service Regulations.

4. The complainant, who had German nationality by birth, married a French national on 4 October 1997. As he wished to acquire French nationality, he signed a declaration at the Consulate General of France in Munich on 17 May 2001 and obtained French nationality on that date under Articles 21-2 and 21-3 of the French Civil Code.



Consequently, in accordance with German law as it then stood, he lost his German nationality on that date, as the German authorities informed him by a letter of 12 December 2006. At that point the complainant again applied for an expatriation allowance. He again took German nationality on 12 April 2007 by naturalisation, then relinquished it in August 2007.

5. In his complaint the complainant claims that he is entitled to an expatriation allowance under Article 72(1) of the Service Regulations.

When the complainant took up his duties, he declared that he held only German nationality. This declaration merely indicated that he had taken steps to acquire French nationality on the basis of the provisions of the French Civil Code relating to the personal effects of marriage. As he anticipated, on 15 May 2002 the complainant acquired French nationality under these provisions, with retroactive effect from 17 May 2001, i.e. before he took up his duties at the Office.

6. On the basis of these facts the Tribunal finds that the complainant held only German nationality when he signed his declaration concerning the expatriation allowance. Under the law in force at that time, he was therefore not entitled to this allowance. The Organisation cannot be criticised for having failed to take account of the retroactive effect of a decision that had yet to be adopted to grant French nationality to the complainant.

However, the complainant must be deemed to be entitled to an expatriation allowance as from 15 May 2002, the date on which his French nationality had to be recognised, after the two-year period specified by the relevant provisions of French private law. The declaration concerning the expatriation allowance should have been interpreted in good faith by the Organisation as an application for the allowance as from the date which the complainant indicated as being that on which he would acquire French nationality. The Organisation's practice of not applying Article 72(1) of the Service Regulations to permanent employees with dual nationality should have been disregarded, since the Organisation could not be unaware that under

German law as it then stood the complainant would *ipso facto* lose his German nationality as soon as he acquired French nationality.

It therefore follows that the EPO ought to have granted the complainant the expatriation allowance that he requested as from 15 May 2002, that being the date as from which he held the nationality of a State other than that in which he was serving, in accordance with Article 72(1) of the Service Regulations.

7. The complaint must therefore be allowed, without there being any need to address the other issues raised by the parties in their submissions. Suffice it to note that the Organisation overlooks the principle of *patere legem quam ipse fecisti* when it warns of the financial consequences of applying Article 72(1) of its own Service Regulations in this case.

8. The impugned decision must therefore be set aside and it will be for the Organisation to work out the amount of the expatriation allowance due to the complainant since 15 May 2002. All the complainant's other claims must, however, be dismissed.

9. As the complainant succeeds in part, he is entitled to costs, which shall be set at 1,000 euros.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is referred back to the EPO in order that it may proceed as indicated under 8, above.
3. The Organisation shall pay the complainant costs in the amount of 1,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 12 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron  
Seydou Ba  
Claude Rouiller  
Catherine Comtet