108th Session **Judgment No. 2870**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr A. B., Mrs R. R. and Mr B. S. against the European Patent Organisation (EPO) on 4 February 2008 and corrected on 20 March, the Organisation's reply of 10 July, the complainants' rejoinder dated 29 September 2008 and the EPO's surrejoinder of 9 January 2009;

Considering the applications to intervene filed by:

A., B.	E., W.
A., S.	F., G.
B., E. J. F.	F., G.
B., C.	G., D.
B., G. L. H.	G., J.
B., K.-P.	G., D.
B., R.	G., H.
B., D.	G., E.
B.-T., G.	G., R.
B., F. J.	G., F.
B., G.	H., S.
D., M. A.	H., B.
d. J., S.	H., G.
D., U.	H., R.
D., E.	H., C.

H., G.	P., R.
H., M.	P., H.
H., S. E.	R., M.
H., H.	R., A. M. E.
I., A.	R., H.
J., P.	R., L.J.
J., R. J. J.	S., A.
J., S.	S., T.
K., K.-D.	S., M.
K., H.-F.	S., D.
K., A.	S., W.
K., C.	S., G.
K., B.	S., S.
K., J.	S., M. P.
K., R.	S.-N., V.
K., C. N.	U., M.
L., E.	v. d. S., C. A. M.
L., P.	v. D., G. A. J.
M., A.	v. D., E.
M.., A.-M.	v. D.-A., J.
M., J.	v. R., M. B. W.
M., Z.	v. S., R.
M., P.	v. D., A.
N., F. Y.	W., B.
P., N.	W., H.-J.

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

Having examined the written submissions;

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

A. The complainants are all German nationals who work in the European Patent Office – the EPO's secretariat – at its headquarters in Munich. At various dates between 13 December 2005 and 6 March 2006 they requested payment, under Article 71 of the Service

Regulations for Permanent Employees of the European Patent Office, of education allowances for their children who were enrolled at universities, some in Germany and some in other European countries. They acknowledged that they did not fulfil the conditions of Article 71 but stated that they considered those conditions to be contrary to the principle of equal treatment. In the event that their requests were rejected, they wanted their letters to be treated as internal appeals. The complainants' requests were in due course referred to the Internal Appeals Committee. By March 2006 more than 90 similar appeals had been filed by other staff members. On 12 July 2006 the chairman of the Committee informed the complainants that their appeals had been received and that, in view of the large number of similar appeals, five appeals, including those of Messrs B and S, would be examined by the Committee as test cases.

In its opinion dated 5 September 2007 the Committee, noting that Mr B.'s appeal was partly time-barred, unanimously recommended that the appeals be dismissed as unfounded. By letters dated 5 November 2007 Messrs B. and S. were informed that, for the reasons put forward by the Office during the appeal proceedings and in accordance with the unanimous opinion of the Committee, the President of the Office had rejected their appeals as unfounded. By a letter of 3 January 2008 Mrs R. who had on 6 June 2007 submitted a further request for payment of an education allowance in respect of another child, was informed that, for the same reasons as those stated in the letters of 5 November, the President would reject her appeal as unfounded unless she made a written request within one month of receipt of the letter for a continuation of the appeal proceedings; if she chose not to do so, she could file a complaint directly with the Tribunal and the Office would not consider her complaint as irreceivable for failure to exhaust internal remedies. Those are the impugned decisions.

B. The complainants argue that, although the Tribunal has previously ruled on a number of issues regarding the EPO's education allowance, it has yet to determine whether Article 71 of the Service Regulations violates the principle of equal treatment. They refer to a judgment of

the Court of First Instance of the European Communities in support of their argument. They state that according to the Tribunal's case law, the principle of equal treatment requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently. The critical question is whether there is a relevant difference warranting the different treatment. Where relevant differences exist, different treatment must be appropriate and adapted to those differences. A breach of equal treatment occurs where staff members in an identical or comparable position in fact and law receive different treatment.

In the complainants' view, Article 71(1) of the Service Regulations violates the principle of equal treatment because it discriminates on the basis of nationality without objective justification. Thus the education allowance is in fact a "hybrid financial benefit". They point to Article 67(1)(a), which provides for family allowances consisting of a household allowance, a dependants' allowance and an education allowance; Article 69(4), which provides for a dependants' allowance for children aged between 18 and 26 who are receiving educational or vocational training; and Article 120a which provides for the payment of school fees when an employee is unable to have his or her child educated at a European school, and contend that none of these provisions makes nationality a condition for entitlement to the allowances in question. Furthermore, they argue that, because the education allowance is included in the list of family allowances, it is related to those allowances and distinct from the expatriation allowance provided for in Article 67(1)(b). They also point out that employees no longer have to be in receipt of an expatriation allowance in order to qualify for an education allowance.

The complainants acknowledge that, because the parents of young children are responsible for decisions concerning their children's education, relevant differences between the situations of national and non-national parents with minor children may justify confining eligibility for an education allowance to non-nationals in order for them to preserve links with their home countries. However, they

argue, nationals and non-nationals are not in relevantly different situations with respect to children who have reached the post-secondary educational stage, because children at this stage have most of the responsibility for making decisions about their education, irrespective of the nationality of their parents. Consequently, the distinction on the basis of nationality contained in Article 71 of the Service Regulations is "artificial and irrelevant" as regards employees whose children are attending post-secondary institutions. Such distinction is also incompatible with the European job market which prohibits discrimination on the basis of nationality. Further, they point out that their position in this respect is supported by the fact that Article 69(4) provides for a dependants' allowance for children aged 18 to 26, regardless of the nationality of the employee and it is used as a basis for calculation of the education allowance.

The complainants also submit that the Office has, in part, based Article 71 of the Service Regulations on the erroneous presumption that non-nationals have strong ties with their country of origin and are obliged to send their children to international schools or institutes of further education in their country of origin.

In their opinion, even if there was a relevant difference, the different treatment applied by the EPO is not appropriate and adapted to that difference because it does not achieve the primary purpose of supporting a child's education.

The complainants apply for an oral hearing on the basis that the case, which has been treated as a test case by the Organisation, raises an important question of law. They ask the Tribunal to rescind the impugned decisions of 5 November 2007 and 3 January 2008, to order the EPO to delete Article 71(2) of the Service Regulations and to delete the phrase "with the exception of those who are nationals of the country in which they are serving" from Article 71(1) of the Service Regulations, and to order the EPO to fulfil its obligations towards its employees under the revised Regulations. They claim financial compensation for any education allowance they have not been awarded, and costs.

C. The EPO argues that the complaints are receivable only insofar as they seek the quashing of the impugned decisions. The complainants' remaining claims are irreceivable for failure to exhaust internal remedies. Furthermore, pursuant to its Statute, the Tribunal is not competent to rule on the lawfulness of Article 71 of the Service Regulations, nor is it competent to order the defendant to delete any of its Regulations.

On the merits the Organisation submits that the Tribunal has ruled on prior complaints related to the EPO's education allowance under Article 71 and that it had the opportunity to address its compatibility with general principles of law. It argues that the judgment of the Court of First Instance of the European Communities cited by the complainants is not relevant to this case because it is not binding on the Tribunal and because the provision challenged in the complaints is not derived from the corresponding provision in the Staff Regulations of Officials of the European Communities.

The EPO denies that it has breached the principle of equal treatment and submits that the different treatment of nationals and non-nationals under Article 71 of the Service Regulations is justified in light of the purpose of that article, which is to help expatriate employees provide their children with an education in their country of origin or in an international school system in order to maintain contacts with the country of origin and to facilitate their children's subsequent return to their country of origin for the purposes of study or employment. Furthermore, the education allowance is not intended to offer financial support to all employees for the financing of their children's education but rather to compensate employees who, as non-nationals, are generally exposed to higher educational expenses for their children.

The defendant submits that the fact that several allowances are listed under Article 67(1) of the Service Regulations does not mean that entitlement to those allowances is subject to the same set of conditions. The classification in Article 67(1) is not based on a distinction between expatriate and non-expatriate staff.

The EPO argues that it is correct in presuming that non-nationals have strong ties with their country of origin in terms of their mother tongue and are often obliged to send their children to international schools or to institutes of further education in their country of origin.

Although the Organisation notes that children at the post-secondary educational stage are more involved in making decisions regarding their education, it argues that they are still, in principle, totally financially dependent on their parents. Consequently, they are not in a "radically different" situation from children in preschool, primary or secondary education. Indeed, Articles 71(3) and 69(4) of the Service Regulations provide that financial support may be paid until dependent children reach 26 years of age.

Lastly, the EPO submits that the complainants' request for an oral hearing should be dismissed.

D. In their rejoinder the complainants press their pleas.

E. In its surrejoinder the EPO maintains its position in full.

CONSIDERATIONS

1. These three complaints have been treated by the EPO as test cases and raise the question whether Article 71 of its Service Regulations offends the principle of equality. Article 71 provides for the payment of an education allowance to employees who are not nationals of the country in which they are serving and, in certain limited circumstances, to nationals of that country. The complainants do not claim to fall within the terms of that article. They contend that the article offends the principle of equality and, thus, the President of the Office erred in law in rejecting their internal appeals in which they claimed payment of the allowance for children undertaking post-secondary education. The complainants are all German nationals working in Germany whose children variously studied in Germany, France, Austria and the United Kingdom.

2. Application is made by each of the complainants for oral hearings on the grounds that the complaints are regarded as test cases and raise an important question of law. The applications are rejected. The outcome of these complaints depends solely on the application of settled principle and the parties have submitted comprehensive written arguments upon which the question in issue may conveniently be decided.

3. It was held in Judgment 2638, under 9, that:

> "The main justification for granting benefits such as home leave or an education grant to some staff members is not that the beneficiaries have a particular nationality, but that their duty station is not in their recognised home country. Far from being discriminatory, such practices, which moreover exist in most international organisations, are designed to restore a degree of equality between officials serving in a foreign country and those who are working in a country where they normally have their home. The two categories cannot be regarded as being in identical situations."

Notwithstanding what was said in that judgment, the complainants contend that the education allowance provided for in Article 71 of the Service Regulations offends the principle of equality.

4. The principle of equality was explained in Judgment 2313, under 5, in these terms:

> "The principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently. In most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved. Even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference."

The complainants contend that Article 71 proceeds by reference to an irrelevant consideration and, if it does not, the different treatment directed by that article is not appropriate and adapted to the difference involved. In support of their arguments, they refer to the judgment of the Court of First Instance of the European Communities in *Hirsch et al v. European Central Bank* (T-94/01, T-152/01 and T-286/01). In that case, a provision for the payment of an education allowance solely to staff members in receipt of an expatriation allowance was held to

infringe the principle of equal treatment. The expatriation allowance to which the education allowance was linked was, in some cases, payable to nationals of the country in which the European Central Bank was located and, in some cases, was not payable to non-nationals. As is clear, the provisions in issue in that case differ materially from Article 71 of the EPO Service Regulations.

5. Article 71 relevantly provides:

"(1) Permanent employees – with the exception of those who are nationals of the country in which they are serving - may request payment of the education allowance, under the terms set out below, in respect of each dependent child […] regularly attending an educational establishment on a full-time basis.

(2) By way of exception, permanent employees who are nationals of the country in which they are serving may request payment of the education allowance provided that the following two conditions are met:

a) the permanent employee's place of employment is not less than 80 km distant from any school or university corresponding to the child's educational stage;

b) the permanent employee's place of employment is not less than 80 km distant from the place of domicile at the time of recruitment."

6. The complainants contend that, at least for the purposes of post-secondary education, nationality is not a relevant difference. The education allowance is, in the circumstances set out in Article 71(2), payable to a person who is a national of the country in which he or she is serving and it is, thus, incorrect to say that the allowance is restricted to non-nationals. Nonetheless, nationality is the primary distinction mandated by Article 71 and if, as the complainants contend, that is not a relevant distinction, the provision will necessarily offend the principle of equality.

7. In advancing the argument that nationality is not a relevant distinction, the complainants impliedly accept its relevance in relation to preschool, primary and secondary education but point out that, by and large, it is the child, not the parent, who chooses to pursue post-

secondary education and, also, chooses the nature of that education. Moreover, they contend that the job market for which a child undertakes post-secondary education is a European market in which discrimination on the basis of nationality is prohibited. Thus, they contend that nationality is an artificial and irrelevant consideration. In this connection, they also point out that the allowance is no longer restricted to employees in receipt of an expatriation allowance which, as with the case considered by the Court of First Instance of the European Communities, is in some circumstances payable to a national of the country in which he or she is serving and from which certain persons who are not nationals are excluded.

8. Although nationality is, perhaps, less relevant within Europe than was once the case, there remain language and cultural differences, as well as different educational systems and different requirements for the acquisition of professional and vocational qualifications. It is within that context that the EPO argues that it is correct in its "presumption [...] that expatriate employees have strong ties with their country of origin in terms of their mother tongue and are therefore often obliged to send their children to international schools or to institutes of further education in their country of origin". The complainants take issue with this "presumption" and argue that discrimination cannot be based on presumptions. However, they mistake the nature of the EPO's argument. What, in effect, is being claimed is that, in the circumstances, it is appropriate to treat all non-nationals in the same way, without regard to individual circumstances. That is a question that will be considered later.

9. Employees who engage in permanent employment outside their own country have a responsibility to take appropriate steps to permit their children to integrate or, perhaps, reintegrate in the country of their nationality. One step that is appropriate to enable that integration is education in the child's mother tongue. Given that there remain different requirements for the acquisition of professional and vocational qualifications, a child's post-secondary education is no less important to the child's integration than is his or her primary and

secondary education. And given that it is the parents who have the responsibility to take steps to permit their child's integration, it is irrelevant whether the child or the parents make the choice as to post-secondary education. It is not to the point that discrimination in employment on the ground of another European nationality is illegal in the European Union. Integration depends not only on formal qualifications and the possibility of employment but also on the assimilation of cultural values and the existence of social contacts within the country concerned, both of which are important aspects of the life of a post-secondary student. Indeed, if children have spent their formative years in another country, even if educated in international schools, post-secondary education in their own country may well be critical to their subsequent integration in that country. In principle, the nationality of the employee is properly to be regarded as a relevant difference warranting different treatment, including with respect to post-secondary education.

10. Before turning to the question of whether the different treatment directed by Article 71 of the Service Regulations is appropriate and adapted to the situations of employees who are not nationals of the country in which they are serving, it should be noted that, once it is accepted that nationality is a relevant difference, the fact that the education allowance is not restricted to persons in receipt of the expatriation allowance is irrelevant. Were it so restricted, it may well be that the principle of equality would be infringed. Linking payment of the education allowance to payment of the expatriation allowance would result in different treatment both as between nationals of the country in which they are serving and as between non-nationals of that country. In this context, it is also relevant to note that, at least in the circumstances postulated by Article 71(2), the education allowance is payable to nationals of the country in which they are serving. Similarly, Article 120a of the Service Regulations, which applies regardless of nationality, provides for the payment of fees charged by an international school if "an employee is unable to have his child educated at a European school for reasons beyond his control". The complainants argue that Article 120a indicates that

nationality is an irrelevant distinction and that the EPO accepts that that is so. On the contrary, Articles 71(2) and 120a recognise that, at least in the circumstances therein specified, the educational needs of the children of nationals may equate to those of non-nationals and that nationals and non-nationals should, to that extent, be treated equally. Similarly, Article 71(4) provides that the education allowance is not payable in respect of "a child attending a European school at the place of employment or where the education costs are covered under Article 120a", thereby also treating nationals and non-nationals equally in those circumstances.

11. In support of their argument that Article 71(1) is not appropriate and adapted to the educational needs of the children of non-nationals, the complainants contend that it is not a genuine educational allowance but a "hybrid financial benefit". In this regard, they point to its inclusion under the heading "family allowances" in Article 67, along with household allowance and dependants' allowance both of which are payable regardless of nationality. Nothing turns on the placement of the education allowance with other family allowances or, even, its description as such. It is, after all, payable to non-nationals for the education of their dependent children, that is, family members. Nor is it relevant that family allowances are paid regardless of nationality. Once it is accepted that nationality is a relevant difference for the purpose of education, the question is solely whether the education allowance is appropriate and adapted to its purpose.

12. The education allowance consists of three parts. The first consists of "direct education costs" (total costs in the case of preschool, primary and secondary education and 70 per cent for post-secondary education) with a limit calculated by reference to the annual dependent child allowance applying in the country where the studies are pursued. The second part consists of a lump sum calculated as a percentage of the dependent child allowance in the country where the child is studying (25 per cent in the case of preschool, primary and secondary education, 40 per cent in the case of post-secondary education and 140 per cent in the case of a child not living at home).

The third is a travel allowance for one round trip per year in the case of a child studying more than 300 kilometres from the parent's place of employment. Travel expenses cannot be claimed if a claim has been made for a round trip on home leave for the child (Article 71(7)), and the supplement for dependent children included in the expatriation allowance is not payable concurrently with the education allowance (Article 71(8)). Provision is also made in Article 71(9) for the deduction of allowances from other sources (e.g. scholarships) payable in respect of the child's education. Although it may be correct to describe the education allowance as "hybrid" in form, it is not correct to describe it as simply a "financial benefit". When regard is had to the provisions of Article 71(7), (8) and (9), it is clear that the allowance has been designed to cover additional education costs associated with educating the dependent children of non-nationals on the basis of direct costs, indirect costs and travel expenses, and that it has been tailored to ensure that there is no double counting. In these circumstances, and in the absence of evidence that the allowance exceeds reasonable education costs, it cannot be concluded that the allowance is not appropriate and adapted to the additional costs actually incurred.

13. The complainants make a further argument, namely, that, so far as post-secondary education is concerned, the allowance is payable whether the child undertakes studies in his or her home country or in a third country. This, according to the argument, results in the treatment of "substantially different circumstances in a like manner". Further, they contend that this can be justified neither on the presumption advanced by the EPO that "as a rule this also serves the child's interest in getting prepared for entry into the education or employment market in the country of origin" nor by reason of the administrative difficulties that would be involved if it "had to check what type of education had been chosen in every single case". As payment of the education allowance depends on the production of supporting documents, the argument with respect to administrative convenience cannot be sustained. Nor can it be assumed that education in a third country will facilitate entry into the education or employment market in the country of origin. However, that does not direct the conclusion that the

education allowance is not appropriate and adapted to the educational needs of the children of non-nationals.

14. As already pointed out by reference to Judgment 2638, the critical difference is between "officials serving in a foreign country and those working in a country where they normally have their home". Having children educated in their mother tongue does not necessarily eliminate the disadvantages of being brought up in a country that is not their home. It may well be that, for this reason, the children of some non-nationals cannot readily pursue post-secondary studies in their own country. In such circumstances, an allowance that enables them to receive post-secondary education in a third country is properly seen as appropriate and adapted to their different educational needs. Whether or not that is so in every case involving post-secondary education in a third country raises the question whether the EPO is entitled to rely on "presumptions".

15. An international organisation such as the EPO, with a large workforce composed of many different nationalities, is entitled to proceed by reference to a rule applicable to all non-nationals provided that the rule is appropriate and adapted to their general circumstances. And that is so even if its application in individual cases is less than perfect. Article 71 of the Service Regulations is appropriate and adapted to the general circumstances of the children of non-nationals.

16. As the complaints must be dismissed on the merits, it is unnecessary to consider the EPO's arguments as to receivability.

DECISION

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment, adopted on 30 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet