109th Session **Judgment No. 2925**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. S. against the European Patent Organisation (EPO) on 18 August 2008 and corrected on 2 October 2008, the EPO's reply of 13 January 2009, the complainant's rejoinder of 11 February and the Organisation's surrejoinder of 20 May 2009;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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 relevantly provides:

> "(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 joined the European Patent Office, the EPO's secretariat, at its branch in The Hague on 1 September 1997. At the time he held Dutch nationality. Prior to entering the service of the EPO, from 1 October 1993 until 31 August 1997, he resided outside the Netherlands. On 12 December 2002 he acquired Irish nationality and as a result ceased to be a Dutch national.

By a letter of 19 December 2005 to the Director of Personnel, he requested that Article 72 of the Service Regulations be amended so as to ensure that the conditions for the award of the expatriation allowance would not be discriminatory. He also requested that he be awarded the said allowance with effect from 1 December 2002, i.e. the date which was taken as the basis for the calculation of his entitlement to home leave under Article 60 of the Service Regulations. The Director of Personnel replied on 18 January 2006 that, as the complainant had held Dutch nationality at the time of taking up his duties and had not been permanently resident for at least ten years in a country other than the Netherlands, he did not fulfil the requirements for the award of the expatriation allowance. He added that an amendment of Article 72 was not envisaged.

On 20 January 2006 the complainant filed an internal appeal requesting that he be awarded the expatriation allowance as from the date of his recruitment or, alternatively, as from the date on which he acquired Irish nationality. He also claimed costs and interest on all payments from their due date. By letter of 16 March 2006 he was informed that it had been decided not to grant his requests and to refer the case to the Internal Appeals Committee. In its opinion of 2 April 2008 the Committee recommended that the complainant's appeal be

rejected as irreceivable in part and unfounded as to the remainder. By a letter of 23 May 2008 the complainant was informed that, in accordance with the Committee's opinion, the President had decided to reject his appeal. That is the impugned decision.

B. The complainant contends that Article 72 of the Service Regulations is discriminatory to the extent that it makes entitlement to the expatriation allowance contingent on nationality. He argues that family relationships, ownership of property and personal perceptions, for example, are more important than nationality in determining a person's ties to a given country and that, consequently, entitlement to the expatriation allowance should be determined on the basis of criteria other than nationality. In his view, a strict application of Article 72 in his case leads to unacceptable results and defeats the purpose of the expatriation allowance, which is to compensate an employee for the additional expenses associated with living away from the country to which he or she has the closest ties.

The complainant nevertheless notes that, if nationality is to be considered of paramount importance in determining entitlement to the expatriation allowance, in the event of a change of nationality, the determination made upon recruitment must be reassessed. Thus, his entitlement must be determined in light of the fact that he now holds the nationality of a country other than that in which he is serving. He argues that in the absence of specific rules dealing with a change of nationality, his case should, for the purposes of Article 72, be considered as one of transfer. He adds that this was the approach adopted by the Office in respect of his request for home leave, and that it should also be applied by analogy to his request for the expatriation allowance.

He asks the Tribunal to quash the impugned decision and to amend Article 72 of the Service Regulations so as to ensure that the conditions for the award of the expatriation allowance are not

discriminatory. He also asks the Tribunal to reassess his position and to award him the expatriation allowance with retroactive effect together with compound interest.

C. In its reply the EPO submits that, in accordance with Article II of its Statute, the Tribunal is not competent to entertain the complainant's claim for the amendment of Article 72 of the Service Regulations. With regard to his claim for the retroactive payment of the expatriation allowance, it argues that it is receivable only insofar as it concerns the three months preceding the lodging of his internal appeal.

On the merits, the Organisation submits that the complaint is unfounded. It denies that Article 72 is discriminatory and contends by reference to the Tribunal's case law that it serves a legitimate purpose and that it is proportionate. It explains that entitlement to the expatriation allowance is not assessed solely on the basis of nationality but also on the basis of the period of residence in or outside the host country. Moreover, unlike personal perceptions or intentions, nationality is an appropriate and objectively verifiable criterion for establishing an employee's ties to a given country.

The defendant states that the complainant has no entitlement to the expatriation allowance under the terms of Article 72; at the time he took up his duties he held Dutch nationality and had resided outside the Netherlands for less than ten years. It dismisses the argument that a change of nationality could be considered as a transfer or that the solution adopted in respect of his request for home leave should by analogy also be adopted in respect of his request for the expatriation allowance. It explains that the criteria for the award of home leave are less strict than those that apply to the award of the expatriation allowance and that, contrary to Article 60 of the Service Regulations, which confers a certain degree of discretion on the President as to decisions concerning home leave, Article 72 precludes any reassessment of decisions concerning the expatriation allowance other than following a transfer.

D. In his rejoinder the complainant asserts that his original request of 19 December 2005 should form the basis for assessing the extent to which his claim for the retroactive payment of the expatriation allowance is receivable. He also asserts that the Tribunal is competent to entertain complaints against individual decisions relating to the validity of the Service Regulations. He reiterates his arguments on the merits.

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

CONSIDERATIONS

1. The complainant joined the EPO at its branch in The Hague on 1 September 1997. At that time he was a Dutch national who had lived and worked in the United Kingdom since 1 October 1993, i.e. a period of three years and 11 months. He is married to an Irish national and obtained Irish nationality on 12 December 2002. He thereupon lost his Dutch nationality. On 19 December 2005 he sought payment of an expatriation allowance, claiming that his case should be considered independently of Article 72 of the Service Regulations which, in his view, is discriminatory. This request and the subsequent internal appeal were rejected.

2. Relevantly, Article 72(1) of the Service Regulations provides for the payment of an expatriation allowance to permanent employees who, at the time of taking up their duties, hold the nationality of a country other than the country in which they will be serving and have not been permanently resident in the latter country for at least three years. Article 72(2) allows for the payment of an expatriation allowance to permanent employees who, at the time of taking up their duties, are nationals of the country in which they will be serving but who have been permanently resident for at least ten years in another country. The complainant accepts that he did not at the time of joining the EPO satisfy the requirements of either paragraphs (1) or (2) of Article 72. However, he contends that that

provision discriminates on the ground of nationality and is, on that account, invalid. He argues that he is, or was at the time of his appointment, an expatriate of the Netherlands and that his entitlement to an expatriation allowance should be determined by reference to his personal circumstances and not by reference to Article 72.

3. Although the purpose of the expatriation allowance has variously been described as that of "grant[ing] an allowance to [an] official who has no affinity with the country of his duty station" (Judgment 1150, under 6), to "take account of certain disadvantages arising from being a foreigner newly installed in a country" (Judgment 1864, under 6), and to "compensate for certain disadvantages suffered by officials who are obliged to leave their country of origin and settle abroad" (Judgment 2864, under 3(a)), it is, perhaps, more appropriate to identify its purpose in terms of persons who have left their permanent home in one country to take up employment in another. This more accurately reflects the fact that, under Article 72(2), the allowance is payable to nationals of the country in which they take up duty but who have resided in another country for at least ten years prior thereto.

4. Although Article 72 proceeds by reference to nationality, it does not make nationality the criterion of entitlement to the payment of an expatriation allowance. The allowance is payable to nationals and to non-nationals of the country in which they are serving, providing they satisfy the particular residential requirements specified therein. Indeed, the importance of the residential requirement was emphasised in Judgment 2597, under 5. In that case it was said, albeit in relation to the expression "permanently resident", that:

> "The country in which the permanent employee is effectively living is that with which he or she maintains the closest objective and factual links. The closeness of these links must be such that it may reasonably be presumed that the person concerned is resident in the country in question and intends to remain there."

It was also pointed out in that case that:

> "a permanent employee interrupts his or her permanent residence in a country when he or she effectively leaves that country with the intention – which must be objectively and reasonably credible in the light of all the circumstances – to settle for some length of time in another country."

5. The question whether a person has taken up permanent residence in a particular country is one that sometimes depends on subjective intention, rather than objective fact. However, it is neither unreasonable nor discriminatory for an international organisation to establish objective criteria, applicable in all cases, on the basis of which it may presume a person has made his or her permanent residence in a particular country. And in establishing objective criteria, it is neither unreasonable nor discriminatory to set specific periods of permanent residency. Further, it is not unreasonable or discriminatory to select different periods for those who are taking up duty in the country of their nationality and those who are taking up duty in a country of which they are not nationals. Certainly, it is reasonable to infer that persons who have been permanently resident for not less than ten years in a country other than that of their nationality, have made their permanent home in that other country. Equally, it is reasonable to infer that a person, who holds the nationality of another country but who has permanently resided for three years in the country in which he or she will be working, has not left his or her permanent home to work in that country. The converse of that proposition is a little more problematic. However, it is not unreasonable to assume that a person has not taken up permanent residence in a country of which he or she is not a national if he or she has been resident there for less than three years.

6. It may be that the application of Article 72 is less than perfect in some individual cases. However, as pointed out in Judgment 2870, under 15, the EPO is an international organisation "with a large workforce composed of many different nationalities"

and is entitled to proceed by reference to a rule of general application, provided that the rule in question is appropriate and adapted to the general circumstances, even if its application in an individual case is less than perfect. Article 72 proceeds by reference to objective facts – nationality and permanent residence – designed to ascertain the place where the employee has made his or her permanent home. The location of an employee's permanent home is a proper criterion for the award of an expatriation allowance, and the selection of nationality and permanent residence as objective facts by reference to which it may be determined whether his or her permanent home is or is not the country in which he or she will be working is appropriate and adapted to the general circumstances of a large workforce comprised of many different nationalities.

7. As the complaint must be dismissed on the merits, it is unnecessary to consider the EPO's arguments with respect to the receivability of the claim for the period prior to October 2005.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2010, 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 8 July 2010.

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