C.

v.

EPO

123rd Session **Judgment No. 3783**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms F. C. against the European Patent Organisation (EPO) on 6 October 2011, the EPO's reply of 19 January 2012, the complainant's rejoinder of 7 February, corrected on 16 February, and the EPO's surrejoinder of 22 May, corrected on 30 May 2012;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the rejection of her application for payment of an expatriation allowance.

The complainant, a Romanian national, applied for an expatriation allowance upon joining the European Patent Office – the EPO's secretariat – in its Munich Office on 1 March 2007. She indicated on the expatriation allowance declaration that she had been "continuously resident" in Germany in the three years prior to the date of her appointment. Under Article 72(1) of the Service Regulations for permanent employees of the European Patent Office an expatriation allowance is granted to non-nationals of the country where they are serving, provided they were

not "permanently resident" in that country for at least three years prior to their appointment. Based on this declaration, she was not granted the allowance.

On 2 July 2008 the complainant submitted another declaration claiming the expatriation allowance with retroactive effect as from the date of her appointment and indicating that she had not been "continuously resident" in the country where she was serving in the last three years prior to her appointment. To support her amended declaration, the complainant provided on 13 August 2008 evidence of her registration with the local authorities in Munich, dated 26 November 2004.

In the absence of a response from the Administration, the complainant lodged an internal appeal on 1 December 2008 against the implied decision not to grant her the expatriation allowance. She asked to be provided with the grounds for this decision and requested that she be granted the allowance. In the event that her request could not be met, she asked that her letter be considered as an internal appeal.

On 28 January 2009 the complainant was informed that, as the President considered that the relevant rules had been applied correctly, the matter had been referred to the Internal Appeals Committee (IAC) for an opinion.

A hearing was conducted on 10 February 2011. In its opinion of 10 May 2011 the IAC unanimously considered the appeal as receivable only with respect to the period from January 2008 onwards. A majority recommended dismissing the appeal as unfounded on the ground that, according to the Tribunal's case law, residency turns on the existence of objective and factual links with the country and the test is one of simple residence. It found that the complainant had lived in Germany since January 2003 at least and that none of the factors she relied on were sufficient to refute the permanent character of her residence in Germany. A minority recommended granting the complainant the expatriation allowance from January 2008 onwards, on the ground that while the complainant was physically present in Germany during the three years prior to joining the EPO, she could not be considered as "permanently resident" within the meaning of Article 72(1) of the Service Regulations.

By a letter of 8 July 2011 the complainant was informed of the President's decision to dismiss her appeal as unfounded. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and the earlier implied decision not to grant her the expatriation allowance, and to order the EPO to grant her the allowance. She claims costs.

The EPO submits that the complaint is partly irreceivable, as part of the complainant's claims are time-barred, and entirely unfounded.

CONSIDERATIONS

1. The issue which arises in this complaint is whether the EPO erred when it did not grant an expatriation allowance to the complainant who joined the EPO in its Munich Office on 1 March 2007.

2. The EPO did not grant the allowance to the complainant because on joining the Office she had stated in her expatriation allowance declaration that she was a Romanian national and had been continually resident in Germany during the three years prior to that date. However, in July 2008 she submitted another declaration which stated that she had not been "continuously resident" in Germany in the last three years prior to her appointment and claimed the allowance with retroactive effect as from the date of her appointment. The complainant impugns the decision dated 8 July 2011, by which the Vice-President in charge of Administration (VP4), acting by delegation of power from the President of the Office, accepted the recommendation of the majority of the IAC and dismissed the complainant's internal appeal. She seeks orders quashing the impugned decision and granting her the expatriation allowance.

3. The EPO grants an expatriation allowance to non-nationals of the country where they are serving if they are not permanently resident in that country for at least three years prior to their appointment. This is done pursuant to Article 72(1) of the Service Regulations, which relevantly states as follows:

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

These are compendious provisions which must both be satisfied by a staff member in order to qualify for the allowance.

4. The complainant satisfied Article 72(1)(a) as she held Romanian nationality when she joined the EPO's Office in Munich. It is necessary to determine whether she also met the requirements of Article 72(1)(b) in that she was not permanently resident in Germany for at least three years prior to joining the EPO. The complainant admits that she has resided in Germany since July 2002. This was for more than three years prior to joining the EPO. She however insists that she was not permanently resident in Germany given the nature and the circumstances of her stay there during that period up to the time when she joined the EPO. She also submits that the provisions of the "Lamadie Note" further support her claim.

5. The Lamadie Note – an administrative instruction of June 2001 – creates an exception to Article 72(1) by providing that periods of living in the country will not be counted when calculating the three-year period of reference, for periods of study (in particular PhD). The EPO states that the Note was intended to clarify the periods of time that are not taken into account in calculating permanent residence in Germany under Article 72(1)(b) of the Service Regulations. Articles 5 and 6 of the Note relevantly state as follows:

> "5. The following periods of time are not taken into account for the calculation of the permanent residence in the sense of Article 72(1)(b) of the Service Regulations:
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> [...]
>
> (c) periods during which the recruited agent was staying in the country in question with the principal purpose of pursuing studies.

> 6. The periods of study (in particular PhD), come normally under article 5(c). When the applicant, during such periods, exercises a gainful activity, it should be appreciated whether this activity has been ancillary or not, in order to decide whether the stay, in the country in question, was principally for the pursuit of studies and not for a gainful activity. The mere fact that this activity was remunerated does not suffice to conclude that the gainful activity was predominant."

6. The Tribunal has explained the rationale and context for the grant of the expatriation allowance, as well as guidance as to the interpretation of the terms "permanently resident" for the purpose of Article 72(1)(b) in the following statements in Judgment 2865, under 4(b), for example:

> "(b) 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. This allowance compensates for certain disadvantages suffered by persons who are obliged, because of their work, to leave their country of origin and settle abroad. The length of time for which foreign permanent employees have lived in the country where they will be serving, before they take up their duties, forms an essential criterion for determining whether they may receive this allowance (see Judgment 2597, under 3).
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> The country in which the permanent employee is permanently resident, within the meaning of Article 72(1)(b) of the Service Regulations, is that in which he or she is effectively living, that is to say the country 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. 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 (see Judgment 2653, under 3)." (Emphasis added.)

7. The Tribunal provided the following perspective on Article 72(1)(b) in light of Articles 5 and 6 of the Note in Judgment 2924, considerations 3 and 4:

> "3. The complainant makes his argument that he was a permanent resident of the Netherlands for less than three years by reference to an administrative instruction, the so-called 'Lamadie note' of June 2001 prepared by the then Principal Director of Personnel. It is stated therein that for the purposes of Article 72(1)(b) of the Service Regulations 'periods during which

> the person recruited resided in the country in which he would be serving for the principal purpose of pursuing studies' are not to be taken into account. This qualification is not found in Article 72(1)(b). However, that is not to say that the fact that a person was present in a country for the purpose of pursuing studies is always irrelevant to the question whether he or she was permanently resident in the country.
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> 4. It was held in Judgment 2597, under 5, that '[t]he 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.' Within the context of that test, the fact that a person was present in a country for the purpose of pursuing his or her studies may well be insufficient to establish permanent residence, particularly if there are strong links to another country. [...]" (See also Judgment 3693, consideration 6.)

8. The complainant argues that the nature and circumstances of her stay were such that they support her case that she was not permanently resident in Germany for the purpose of Article 72(1)(b) in light of Articles 5 and 6 of the Lamadie Note for three years prior to joining the EPO and is thus entitled to the expatriation allowance. She insists that notwithstanding that she was physically present in Germany for the period July 2002 to February 2007 she maintained her closest objective and factual ties with Romania such as leads to the presumption that she was not permanently resident in Germany and intended to remain in Romania.

The complainant's evidence of her residence in Germany is that from July 2002 to August 2004 she did au-pair work in Munich. In another statement given during the hearing in the IAC she gave January 2003 as the date when she commenced that activity. In any event, most of this period was before the commencement of the three-year period provided in Article 72(1)(b) from March 2004 to 1 March 2007 when she joined the EPO. It is clear to the Tribunal that the objective fact of her residency in Germany and not in any other country during that time gives rise to the rebuttable presumption that she was permanently resident in Germany for the purpose of Article 72(1)(b) of the Service Regulations. What then is the evidence which she provides to rebut that presumption?

9. The complainant states that between March and August 2004 she pursued a language course at the University of Munich and also worked part-time at a patent law firm during that period. She further states that her stay in Germany during this period, as well as her stay during the period between March 2003 and August 2004, were for the purpose of improving her language skills because her intention was to take up a position which she had been offered at Ovidius University in Romania. Her evidence is that she had worked for a Romanian company in Germany from January 2003 to November 2004. She also states that she continued professional training in a patent law firm in Munich from September 2004 to the time when she joined the EPO on 1 March 2007.

The Tribunal finds that this evidence does not reasonably rebut the presumption that the complainant was permanently resident in Germany for three years prior to joining the EPO for the purpose of Article 72(1)(b) or to permit her to have the benefit of the exception under Articles 5 and 6 of the Lamadie Note. There is no evidence, for example, that her stay in Germany during the subject period was principally for the pursuit of studies and not for a gainful activity. Her contention that from the outset her intention was always to return to Romania and that her immigration status in Germany was at all times temporary does not further advance her case. This is merely a statement which is not supported by evidence. The Tribunal is satisfied that the complainant's closest objective and factual links during the three-year period immediately prior to joining the EPO were to Germany. She presents no evidence to show that those links were to Romania, as she asserts. In the premises, her complaint is unfounded and must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ