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

FORTY-SEVENTH ORDINARY SESSION

In re SCHAFFTER

Judgment No. 477

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the Central Office for International Railway Transport (OCTI) by Mr. André Schaffter and dated 28 January 1981, the Office's reply of 31 March, the complainant's rejoinder of 29 April and the Office's surrejoinder of 25 May 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 17, 26 and 27(1)(b) of the Staff Regulations of the Office;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, a French citizen, joined the staff of the Office in 1972. On 1 January 1980 he was placed in salary grade 6 in accordance with the Staff Regulations which came into force on 1 January 1980. By a letter dated 7 January 1980 he applied for recognition of non-resident status and payment of the non-resident allowance prescribed by Article 17 of the Staff Regulations. By a letter dated 14 January the Director-General dismissed the application. By a letter of 12 February the complainant asked him to review that decision, but it was confirmed on 29 February. The complainant's appeal against the decision was filed with the Administrative Committee on 28 March. The Committee decided at its session held on 28 and 29 October to dismiss the appeal and he was so informed by a letter dated 5 November 1980. That is the decision impugned.

B. The complainant observes that under Article 17 of the Staff Regulations officials who are not locally recruited are entitled to non-resident allowance. According to Article 26 an official is regarded as internationally recruited if he is "not locally recruited within the meaning of Article 27".(1) According to Article 27 "an official in grades 4 to 10 is considered to be locally recruited if on appointment he fulfils one of the following conditions: ... (b) whatever his nationality, he has been resident in Switzerland for one year".The complainant states that one year before his appointment, in February 1971, he was in the employment of the French Ministry for Foreign Affairs and had been working, and also living, at the residence of the Ambassador of France in Bern. Being the holder of an identity card as a member of the administrative staff of a diplomatic mission in Switzerland, he believes that his legal status is not that of a "resident". Holders of such cards are entered neither in the register of local residents nor in that of the Federal Office for Aliens. Under the law of Switzerland,(2) the country in which the organisation has its headquarters, residence requires not only presence in Switzerland but also qualification under the provisions of the law on aliens. As an employee of a diplomatic mission he fulfilled only the former condition, and he was therefore not resident in Switzerland. He has kept his domicile and exercises his civic rights in France. In 1976 the Director-General granted him an education allowance on behalf of his son, the payment of which was subject to the same conditions as that of the non-resident allowance. He is not insured with any Swiss institution for old-age and survivors' insurance. His appeal of 28 March 1980 against the Director-General's decision was communicated to the members of the Administrative Committee in June. A memorandum of 23 July containing the preliminary opinion of the Chairman, and a memorandum of 13 August by the Director-General were circulated to members of the Committee on 15 October 1980. The Committee's proceedings are in French and in German and papers are always prepared in both languages. According to the complainant the Director-General's memorandum, which recommended rejecting his appeal, was sent out in both languages on 15 October, whereas the Chairman's memorandum, which was in his favour, was not delivered in the German version until later and indeed not soon enough for members who normally read the German to study it before leaving home. The delay in delivering this document may therefore have had an effect on the Committee's decision, and so there was no guarantee of due process. Moreover, under a general rule of law reasons should be given for any discretionary decision which causes

prejudice. No reasons were given for the Committee's decision, and it therefore suffers from a formal flaw. The complainant accordingly invites the Tribunal: (a) to decide that he be paid the non-resident allowance prescribed in Article 17 of the Staff Regulations; (b) in eventu to invalidate the Committee's decision on the grounds of a formal irregularity and failure to respect his right to a hearing.

C. In its reply the Office observes that neither the Statute of the Tribunal nor its Rules of Court provide for invalidating a decision on an issue of law. The standing orders of the Administrative Committee do not require despatch of session papers in both French and German. The circular containing, among other things, the French version of the Chairman's opinion was sent on 17 October. The German went out on 21 October by express post. Since there was a weekend in between and the German text was sent express, it cannot be said that there was any material delay. When the Committee took up the matter on 29 October the Chairman first ascertained that everyone had indeed received the papers (the appeal the Chairman's opinion and the Director-General's memorandum). The Staff Regulations do not require that reasons be given for the Committee's decisions. As regards the complainant's claim to non-resident status, he came to Switzerland in 1948, settled in Bern in 1952, has lived there regularly ever since and is employed there. He is now 54 years old and has spent 33 years in Switzerland. He married a Swiss citizen who has kept her Swiss nationality. Their only son is Swiss and has attended Swiss schools. For many years the family has been living in the same flat in Bern. The notion of domicile must be interpreted according to Swiss law. By virtue of section 23 of the Swiss Civil Code domicile is the place where a person resides and intends to settle. Bern is beyond question the focal point of the complainant's life, and the many years he has spent there reflect his intention to settle there. The absence of residence papers delivered by the competent authorities in no way prevents the establishment of domicile in civil law, and the complainant's allegation that he has an address in France is immaterial. As regards the relevance of Article 27(1)(b) of the Staff Regulations, the Office observes that at the time of appointment he was domiciled in Switzerland and was therefore also "resident" there, the conditions for residence being less demanding. He was therefore locally recruited. Moreover, the payment of an education allowance to the complainant may have been decided at the time on the grounds of nationality and probably also on social grounds. At the time the organisation had in mind only local recruitment, as was clear from the offer of appointment, which appeared merely as a small advertisement in the local press. The purpose of the Article 17 allowance is to compensate some staff members who incur special additional expenditure on taking up residence in Switzerland. The complainant did not incur any such expenditure since he had been living in Switzerland for years.

D. The complainant contends in his rejoinder that the Swiss law on domicile does not apply to his case. True, the holder of an identity card is generally subject to Swiss law, but as regards rules applicable to aliens the material text is the Vienna Convention of 1961 on diplomatic relations. He denies that he has spent 33 years of his life in Switzerland. He began by working in Switzerland as a frontier worker. He later spent one year in France. From 1952 to 1972 he was employed by the French Government and he has since been employed by an international organisation. His wife holds French as well as Swiss citizenship and has civic rights in France. His son also has French citizenship and much of his schooling was in France. He and his family have always kept particularly close links with France. He is domiciled in France under French law. If he leaves the organisation, he may be compelled to return to France, having no permit to reside or settle in Switzerland. It may be inferred from the dates on which the papers were sent to the members of the Administrative Committee that the second despatch, containing the translation of the Chairman's favourable opinion, probably arrived later.

E. In its surrejoinder the Office states that it has looked into the matter and finds that very little time can have elapsed between the dates on which the two despatches were received by the Committee members. It rejects the complainant's arguments concerning the notion of "residence", which in no way change the basic fact that he has been resident in Switzerland for many years. The purpose of Article 27(1) of the Staff Regulations is to put on an equal footing officials who are Swiss citizens and others who have been resident for at least a year in Switzerland. The only condition is that the staff member should have been normally resident in Switzerland during that period. The complainant fulfilled that condition. Article 37 of the Vienna Convention is immaterial (a) because the case has nothing to do with diplomatic privileges and immunities, and (b) because the complainant is permanently resident in Switzerland. The Office therefore takes the view that the complainant was locally recruited and it invites the Tribunal to dismiss the complaint.

CONSIDERATIONS:

The procedure

1. In the claims stated in the complaint form the complainant invites the Tribunal, under (b), to allow an appeal

against the impugned decision "on the grounds of a procedural flaw and failure to observe the principle audiatur et altera pars". He elaborates on this claim in his rejoinder under his appeal for invalidating the decision on an issue of law. Thus, besides a complaint in the correct sense, he is seeking to bring such an appeal on procedural grounds and contends that it is admissible under general principles of law.

As Article II of its Statute makes clear, the Tribunal will hear complaints alleging non-observance of both formal or procedural rules and substantive ones. A complainant is therefore in no way prevented from alleging procedural as well as substantive flaws in the context of the complaint as such. For that purpose he need not bring an appeal for invalidating the decision, a procedure which is provided for neither in the Statute nor in the Rules of Court, and the Tribunal will consider his procedural pleas in the context of his actual complaint.

2. At its session on 28 and 29 October 1980 the Administrative Committee of the Office heard the complainant's appeal against a decision taken by the Director-General on 14 January and confirmed on 29 February 1980. There were three documents before the Committee: the actual appeal; the preliminary opinion of its Chairman, who was in favour of allowing the appeal; and a memorandum by the Director-General, who was not.

The complainant alleges that both the French and the German versions of the Director-General's unfavourable memorandum were sent to the Committee members as early as 15 October 1980, whereas the German version of the Chairman's favourable opinion went out late, on 21 October. He is thus alleging a breach of the rule audiatur et altera pars, but on the evidence the plea fails.

First, it appears from the organisation's statements, which go unchallenged, that the German version of the Chairman's opinion was sent to the Committee members on 21 October by express post. In the normal run of events it reached the German-speaking members soon enough for them to have time to study it before attending the meeting on 28 and 29 October.

Secondly, when he opened the discussion on the complainant's appeal the Chairman "ascertained that the relevant papers (Mr. Schaffter's appeal of 28 March, the Chairman's preliminary opinion of 23 July and the Director-General's memorandum of 13 August 1980) had indeed been received by the delegates" (minutes, page 17). In other words, having put the question to the Committee, he inferred from the members' silence that they had had due notice of the papers in question. The inference was warranted in the circumstances of the case.

3. The complainant is alleging the existence of a general rule whereby for any decision which causes prejudice reasons should be given, at least provided that its author does not have discretion in the matter. He contends that, since no reasons were stated, the decision he impugns is tainted with a procedural flaw. This plea also fails.

There are many decisions taken in international organisations and challenged before the Tribunal for which no reasons are given. They include discretionary decisions. But that does not prevent a staff member from defending his rights. The reasons for the decision he impugns, even when not stated, will be apparent, if not from correspondence exchanged between the parties before it is taken, then at least from the organisation's memorandum in reply to the complaint, on which the complainant is invited to comment in his rejoinder. Accordingly, in the absence of an express exception, there is no reason to require an organisation, contrary to its usual practice, to give reasons for all its decisions. All that is required is that the lack of reasons for the decision should cause the complainant no prejudice.

The complainant appends to his complaint the preliminary opinion of the Chairman of the Administrative Committee and the Director-General's memorandum. Possession of these papers adequately enabled him to plead his case. Moreover, he has supplemented his original memorandum in his rejoinder. He has therefore suffered no prejudice whatever from the absence of a statement of the reasons for the impugned decision and cannot rely on such absence to support his claim.

The merits

4. Article 17 of the Staff Regulations provides for the payment of a non-resident allowance" to staff members in categories 4 to 10 who were "not locally recruited". According to Article 27(1) a staff member is "considered to be locally recruited if on appointment he fulfils one of the following conditions: (a) he holds Swiss nationality; (b) whatever his nationality, he has been resident in Switzerland for one year".

The complainant, who is a French citizen, joined the staff of the Office on 1 July 1972 and has been in category 6

since 1 January 1980. He contends that he was "not locally recruited" and is claiming the non-resident allowance, which he was refused by the impugned decision. He is entitled to it, however. only if, in accordance with Article 27(1)(b), he was not resident in Switzerland in the full year preceding appointment. The main question is therefore the construction to be put on the word "resident".

5. The purpose of the non-resident allowance as prescribed in Article 17 is to compensate non-Swiss officials for the cost of settling in Switzerland. It is intended to cover removal expenses, international differences in the cost of living and the cost of keeping in touch with the home country. It is not, however, granted without distinction to all non-Swiss staff members. It is not payable to those who at the time of appointment have been resident in Switzerland for a year and are therefore deemed to forgo compensation for the cost of expatriation. True, the question may arise in this case whether residence under Article 27(1)(b) means mere residence or residence together with an intention to settle. The French text, which uses the word "résider", suggests the former construction; the German, which speaks of "Wohnsitz", favours the latter. In fact the Tribunal need not settle the point since in this case both conditions - fact and intention - are fulfilled.

From 30 March 1952 to 30 June 1972 the complainant lived in Bern, where he worked in turn as office boy, porter and caretaker in the French Embassy. At the same time he demonstrated an intention of settling in Switzerland. He was therefore resident both factually and with intention to reside, within the meaning of the Staff Regulations, for several years before joining the staff of the organisation and in consequence is not entitled to non-resident allowance.

6. The complainant's objections to this conclusion are not to the point.

It is true that from 1952 to 1972 he was a member of the administrative and technical staff of a diplomatic mission in Switzerland. It is immaterial, however, that he kept an address and enjoyed civic rights in France. Nor does it matter that he enjoyed privileges and immunities under Article 37(2) of the Vienna Convention of 18 April 1961 on diplomatic relations. It is immaterial, too, that the Swiss authorities did not register him or give him a residence permit. Be that as it may, although his position as an embassy employee may have had effects on his relationship with the French or the Swiss Government, it had no effect on his later position in the organisation, which was fully entitled to regard him as having resided in Switzerland.

The complainant is mistaken in relying on the definition of residence in section 36(1) of the Swiss Act of 29 September 1952 on the acquisition and loss of Swiss nationality. The Staff Regulations should be interpreted in themselves, with due regard to their purpose and independently of national legislation. There is no need to consider whether, to quote from the Act, the complainant's presence in Switzerland "complied with the rules applicable to aliens".

Again, it is true that the complainant is not insured with any Swiss institution for old-age and survivors' insurance. This is not an adequate reason, however, for granting him the non-resident allowance. He is on a par with all foreign nationals covered by section 1(2)(a) of the Swiss Act of 20 December 1946 on old-age and survivors' insurance, including foreigners who have joined the Office staff after a year working for a private company in Switzerland. He may not have a benefit which the latter are denied.

He further argues that when he leaves the Office he may be compelled to return to France since he does not have a permit to reside or settle in Switzerland. To qualify for repatriation benefit he therefore contends that he never resided in Switzerland before joining the staff of the organisation. This view is mistaken. He does not allege that his position is any different from that of other non-Swiss officials of the organisation, and he is unlikely to be prevented from remaining in Switzerland, if he so wishes, after leaving his present employment.

Lastly, he relies on a decision taken in 1976 whereby as a non-resident he was granted an education allowance for his son. That decision is based on another provision, not on the rule on non-resident allowance. Whether it was right or wrong, it is irrelevant to this case.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 28 January 1982.

(Signed)

André Grisel
J. Ducoux
Devlin

A.B. Gardner

1. Registry translation.

2. In particular the Act of 29 September 1952 on the acquisition and loss of Swiss nationality.

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