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

FORTY-NINTH ORDINARY SESSION

In re HAKIN (No. 5)

Judgment No. 525

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Robert Hakin on 19 May 1981, the EPO's reply of 10 August, the complainant's rejoinder of 11 September, supplemented on 19 November 1981, and the EPO's surrejoinder of 25 January 1982;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 60(2) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a citizen of Belgium and formerly an official of the International Patent Institute, joined the European Patent Office on 1 January 1978 when it merged with the Institute. When appointed to the Institute in 1967 he had been living at Liège-Chênée, in Belgium, which was treated as his "place of origin" within the meaning of the Institute Staff Regulations. On 12 July 1978 the EPO informed former Institute officials that their "home" as defined in Article 60(2) of the EPO Service Regulations[(1)] would, subject to review, be the same as their "place of origin" as defined in the Institute regulations. In 1975 the complainant and his wife had bought a flat in Tenerife, in Spain, intending to live there after he retired. He sold up his property in Belgium in 1977. On 16 August 1978 and on 26 April 1979 he asked the President of the Office to declare Tenerife to be his "home". He was informed by a letter of 17 December 1979 that the President had refused, and he appealed to the Appeals Committee. In its report of 23 October 1980 the Committee recommended setting the decision aside and reviewing his case. By a letter of 16 February 1981, which he received on 6 March and which is the decision impugned, the President rejected his appeal.

B. The complainant points out that the Institute regulations used the term "place of origin" whereas the EPO regulations refer to "home". What is required under Article 60(2) is a determination of his home at the date of his appointment or of the merger of the two organisations. His home has never been determined, only the place of his origin. He has no family, interests or property left in Belgium, and no reason to go there. His family are all living in Tenerife, where he has property. The President maintains that his home should be in his own country, but Article 60 does not require it. He cites the example of another official whose home is not the same as the place of his origin. He invites the Tribunal to quash the decision of 16 February 1981 and declare Tenerife to be his home.

C. The EPO replies that former Institute officials like the complainant took up duty, not on transfer to the EPO, but on appointment to the Institute. Its letter of 12 July 1978 therefore merely pointed out the possibility under Article 60(2) of reviewing the "home", the notion to be applied in future instead of "place of origin". It is therefore mistaken to say that the complainant's purpose is to have an initial determination made of his home. Such a determination is based on the criteria in Article 60(2), whereas review is a matter for the President's discretion and independent of the official's own wishes. Belgium was the country he had the closest connection with on taking up duty, and the connection is not broken off by short stays or the possession of real property in another country. That his wife spends longer periods in Tenerife is no more conclusive, the family's place of residence being only one criterion. The official's home will generally be in his own country, the purpose of home leave being to keep him in touch with it. It should, moreover, normally be in the territory of an EPO member State, and that rules out Tenerife. The EPO says that the cases in which the home is not in a member State are different from the complainant's in that they relate to former Institute officials who are citizens either of certain non-member States - such as the official the complainant mentions - or of countries intending shortly to ratify the European Patent Convention.

D . The complainant points out in his rejoinder that since former Institute staff never had their "home" determined on taking up duty they were entitled to have it determined on transfer to the EPO. To allege a change of home on transfer is to make a mistaken assimilation of "home" and "place of origin". The EPO has discriminated against the complainant. In exercising his discretion in the matter - if discretion he has - the President has overlooked the complainant's factual circumstances. Various items of evidence which he produces show, in his view, that Tenerife is his family's definitive place of residence, that he himself is already deemed to be living there, that he will retire there when freed of professional commitments, and that he has no connections anywhere else. To declare his home to be in Tenerife would entail no expense for the EPO. He therefore presses his claims for relief.

E. In its surrejoinder the EPO contends that what the complainant wants is review of his "home". Even supposing it did have to be determined, the reference date would be in 1967, when he took up duty at the Institute. Had Article 60(2) been applied to him then, his "home" would have been the same as the "place of origin" under the Institute regulations. Only exceptional circumstances warrant review, and the evidence he produces does not establish the break in his links with Belgium. It is not in the EPO's interests to let an official use Article 60 just to suit himself. His charges of discrimination are unfounded: the reference date for determining the home is the same for all - that on which they took up duty.

CONSIDERATIONS:

The application for oral proceedings

The Tribunal sees no need for oral proceedings as provided for in Article 12 of the Rules of Court. The evidence in the EPO's reply on the points on which the complainant has applied for the hearing of oral evidence is fully sufficient to enable the Tribunal to determine those points.

The merits

1. The complainant seeks the quashing of a decision of 16 February 1981 by the President of the European Patent Office to uphold a decision which the complainant challenged in the internal appeal proceedings.

The complainant contends that that final decision is in breach of Article 60(2) of the EPO Service Regulations.

This provision superseded Articles 18 and 19 of Annex III to the Staff Regulations of the International Patent Institute and became applicable to the complainant on 1 January 1978, as provided in Article 4 of the Agreement on the integration of the Institute into the EPO.

Article 60(2) reads:

"For the purposes of these Regulations, the home of such a permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.

Any review of this decision may take place only after a special decision by the President of the Office upon reasoned request by the permanent employee."

2. In interpreting this provision the Tribunal will first observe that the "home" is not necessarily the same notion as the "place of origin". This term, used in Articles 18 and 19 of Annex III to the Institute Staff Regulations, has a narrow meaning and generally denotes the place to which the official belongs or at least where his family have been settled for one or more generations. Thus the "place of origin" may be described as the place where his family are living. The notion of "home", on the other hand, is determined according to several criteria which include not just origin and nationality but also family connections, spiritual, material and psychological links and which serve to identify the focus of his interests and the place where it may be reasonably assumed that he intends to take up permanent residence.

3. As appears from the submissions in the internal proceedings, what the complainant is seeking is the review of the determination of his home. The original determination was made in accordance with the first paragraph of Article 60(2) and it may be reviewed only in accordance with the second.

The Tribunal concludes from the wording of the rule that review of the original determination is an exceptional measure. While there is agreement between the German and French versions of the rule, which include the words "gegebenfalls" and "éventuellement", there is no corresponding phrase in the third official version, the English. Nevertheless the exceptional nature of review is beyond doubt.

4. Review takes place only "after a special decision by the President of the Office on a reasoned request" by the staff member.

The President has discretion in the matter, and accordingly the Tribunal will quash his decision only if it was taken without authority, or if it was tainted with a procedural or formal defect, or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

The Tribunal holds that in this instance the impugned decision was based on a mistake of law and that essential facts were overlooked.

5. The mistake of law lies in a misconstruction of Article 60(2). The rule does not require that the employee's "home" should be in the country of his birth or nationality, or in the country in which he lived before joining the staff of the Organisation.

It is true that the home will generally be in the country of birth, but this is not an absolute and invariable rule. Article 60 refers to the place with which the staff member has the closest connection and specifies such criteria as the place of residence of his family, where he was brought up and any place where he possesses property.

The sole foundation for the President's decision of 16 February 1981 to dismiss the appeal was the view that the purpose of Article 60 is "to ensure that employees keep personal links with their country of birth" and that the place indicated by the complainant was "situated outside his country of birth". That was a mistake of law, and the Tribunal will therefore set the decision aside.

6. In taking the impugned decision the President also overlooked essential facts of which the complainant has furnished proof. His present wife normally lives in Tenerife, in Spain; their son is living and has attended school regularly there, and he and his wife have real property there. He has no assets in Belgium, he is divorced from his first wife, who is still living in that country, he has not kept in touch with the children of his first marriage, who are now adult, and he has no other kin in the country of his nationality.

7. It is not the sole purpose of home leave to grant a benefit which suits the employee's own interests. Home leave is of benefit to the organisation as well, which has an interest in ensuring that its employees keep in touch with the place with which they have special connections, viz. the home country. This benefit would be sacrificed by a strict and rigid interpretation of the term "home" which required the staff member to take home leave in the country of his origin or nationality. It is indeed for that reason that Article 60(2) says that account shall be taken of close connections with some particular place in determining the home. Such connections may be diverse, and though birth, nationality and former residence are normally the most important criteria, they are not always such. Moreover, the review of the determination of the employee's home is, though an exceptional measure, one which may be made upon a reasoned request by the employee.

DECISION:

For the above reasons,

1. The President's decision of 16 February 1981 is quashed.

2. The Organisation shall pay the complainant 1,000 United States dollars as costs.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner.

Delivered in public sitting in Geneva on 18 November 1982.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

1. The provision reads:

"... the home ... shall be the place with which [the employee] has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.

Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee."

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