

EIGHTY-SIXTH SESSION

In re Liu

Judgment 1836

The Administrative Tribunal,

Considering the complaint filed by Mrs. Anh-Thu Liu against the European Patent Organisation (EPO) on 3 February 1998, the EPO's reply of 24 April, the complainant's rejoinder of 20 May, the Organisation's surrejoinder of 17 June, the complainant's further brief of 12 August and the EPO's comments thereon of 31 August 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, who was born in 1947, is a citizen of both Germany and Vietnam. On 1 July 1987 she joined the staff of the European Patent Office, the secretariat of the EPO, in Munich. She is an examiner of patents.

On 5 September 1996 she claimed payment under Article 71 of the Service Regulations of an education allowance for her son, who was reading economics at the University of Cambridge, in England. In its 1993 version the article says in part:

"(1) Permanent employees entitled to the expatriation allowance - with the exception of those who are nationals of the country in which they are serving - may request payment of the education allowance in respect of each dependent child, within the meaning of the Service Regulations, 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 or who are not entitled to the expatriation allowance may request payment of the education allowance provided that the two following conditions are met:

a) the permanent employee's duty station is not less than 80 km distant from any school or university corresponding to the child's education cycle;

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

By a letter of 20 December 1996 an official of the Remuneration Department refused the complainant's claim on the grounds that the University of Munich offered courses in economics and she did not meet the condition in Article 71(2)(a). She challenged that decision in a letter of 14 January 1997 on the grounds that courses in economics were better at Cambridge than at Munich. She asked to have her letter treated as an internal appeal if her claim was rejected. By a letter of 22 January the Director of Personnel Development told her that her appeal had gone to the Appeals Committee. By a letter of 11 November 1997 - the impugned decision - he told her that on the Committee's unanimous recommendation of 30 September 1997 the President of the Office was rejecting her appeal.

B. The complainant submits that the EPO is putting too narrow a construction on Article 71(2) by referring only to the level of education - whether primary, secondary or university - and to the broad field of study - medicine, engineering, economics and so forth.

She says that she has been discriminated against. The EPO has granted applications for the education allowance for students who because of a *numerus clausus* could not enrol at a university at the employee's duty station. The

numerus clausus is just a "temporary hurdle" that merely delays graduation. So the EPO obviously takes the view that the time needed to get a degree does matter. The British system of education enables the student to qualify sooner.

In the complainant's submission the EPO ought to have applied the criterion of language as well. Her son is a citizen of the United States and intends to live there; so it matters to him to study in English and get a degree that the United States will recognise.

The complainant seeks the quashing of the impugned decision and the grant of the education allowance.

C. In its reply the EPO submits that the President's decision, being a discretionary one, is subject only to limited review. Article 71(2) applies only "by way of exception" when suitable education is unavailable at the duty station. Since Munich is an important university city the EPO puts a narrow construction on the rule: it takes the term "education cycle" to refer to the level and broad field of study, not to "subjective" criteria such as the preferred language, the method of teaching or the length and substance of courses. Those are matters of personal choice, not exceptional circumstances. The complainant is not saying that any *numerus clausus* would bar her son from studying within a radius of 80 kilometres of Munich.

D. In her rejoinder the complainant contends that when the President does have discretion the Service Regulations say so. Here they do not. Nor is it true to say that 71(2) applies by way of exception: if the conditions are met the allowance is due. The term "school or university corresponding to the child's education cycle" must be construed in the light of EPO practice. The Organisation has not always taken a narrow view. It is indeed intending to amend the article so as to grant the allowance to more staff. To judge by criteria that the complainant believes to be objective the courses available at the University of Munich cannot be compared to those available at Cambridge.

E. In its surrejoinder the EPO maintains that where, as here, a provision of the Service Regulations has to be construed the matter is perforce at the President's discretion. It observes that it spoke of *force majeure* only in reference to a *numerus clausus* that bars the student from the chosen courses. Granting the allowance in such a case does not mean treating the length of studies as an essential criterion. Any amendment it might make to Article 71 would be irrelevant to interpreting the present rule.

F. In a further brief the complainant cites a pamphlet from the German centre for university admissions. In her view it shows that the *numerus clausus* makes getting a degree slower but is not an absolute bar.

G. In further comment the EPO contends that the pamphlet shows the time needed to graduate in a particular discipline to be unpredictable and that that bears out its case. The essential criterion is, not the length of studies, but the impossibility of enrolment. The complainant's son did not give any *numerus clausus* as the reason for his decision not to study in Munich.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Office on 1 July 1987. She is stationed in Munich.

Article 71(1) and (2) of the EPO Service Regulations are reproduced in A above.

On 5 September 1996 the complainant claimed payment of the education allowance provided for in Article 71(2) towards the costs of her son's taking the Economic Tripos at the University of Cambridge, in England. She said that the courses for which her son was there enrolled were not on a par with those available at the University of Munich, where the EPO has its headquarters.

2. On 20 December 1996 the EPO refused to pay her the allowance on the grounds that the University of Munich was offering courses in economics and she therefore failed to qualify under Article 71. She then filed an internal appeal and by the decision of 11 November 1997 that is now under challenge the President of the Office rejected it.

3. The complainant argues that for her son the education in economics that Cambridge has to offer is better than what he can get at Munich. She explains that getting into Cambridge is easier because there is no *numerus clausus* as at Munich; there he may graduate as Bachelor of Arts after only three years; the system of teaching is better; Cambridge offers special courses, for example in British economic history, which are not available at Munich; and her son would like to study in English because he is a citizen of the United States and intends to earn his living

there. She also says that she has been discriminated against.

4. The defendant's case is that Article 71(2) cannot apply: the University of Munich has courses in economics and there is no reason to take account of criteria such as the length of courses or the method of teaching, let alone the student's own preferences, for example as to the language of teaching.

5. The rule allows the grant of the allowance in exceptional circumstances, and how it is to be applied is at the discretion of the President of the Office. So the Tribunal will ordinarily interfere with his decision only in the exercise of its limited power of review. It will do so where the decision shows a procedural flaw or a mistake of fact or law, or overlooks some material fact, or amounts to misuse of authority, or rests on mistaken findings of fact.

6. Here the complainant is contending that there was breach of the principle of equal treatment and that the President made a mistake of law and acted arbitrarily in interpreting Article 71(2) in her case. The Tribunal is satisfied that the impugned decision does not show any mistake of law or any arbitrariness: the EPO's interpretation is the right one. Nor has the complainant shown any breach of the principle of equal treatment.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Julio Barberis

James K. Hugessen

A.B. Gardner