SEVENTY-SIXTH SESSION

In re RIVERO

Judgment 1324

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Carlos Gabriel Rivero against the European Patent Organisation (EPO) on 22 April 1993, the EPO's reply of 9 July, the complainant's rejoinder of 19 August and the Organisation's surrejoinder of 27 September 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 8(a), 60 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and EPO circulars 22 of 16 January 1979 and 197 of 20 December 1990;

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. Article 60 of the EPO's Service Regulations, as amended by its Administrative Council on 7 December 1990 as from 1 July 1990, reads:

"Home leave

(1) Permanent employees who are nationals of a country other than the country in which they are employed shall receive eight working days' additional leave every two years to return home. Travel expenses for such leave shall be reimbursed ...

(2) For the purposes of these Regulations, the home of such 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 his 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."

The complainant, who is a citizen both of Argentina and Italy, was born at Dolores, in the Province of Buenos Aires, Argentina, in 1962 and lived there until he was 24. He joined the staff of the EPO on 2 April 1990 as a patent examiner in Directorate General 1 at The Hague. The offer of employment, which was dated 7 December 1989 and which he accepted in a telex of 21 December, made appointment conditional on his showing that he had Italian nationality and stated that his "home" under Article 60 would be Rome.

In a letter of 7 February 1990 he informed the recruitment officer that in the "first few months" he spent in the Netherlands his "fiancée" would be living with him as his dependant; she was, he said, "a lawyer, Italian citizen". They married on 14 December 1990.

By circular 197 of 20 December 1990 the EPO informed staff of new arrangements regarding home leave and expatriation allowance and asked any staff who thought they might be affected to submit evidence of nationality and state what they regarded as "home" within the meaning of Article 60 as amended from 1 July 1990.

In a letter of 14 August 1991 the complainant asked the President of the Office to change his home from Rome to Buenos Aires on the grounds that he had been born and brought up in Argentina, that his family and his wife's lived there and that they were both citizens of that country. On behalf of the Head of the Personnel Department a personnel officer refused his application in a note of 5 September 1991 for want of change in his personal situation since recruitment: according to the rules, including circular 22 of 16 January 1979, home was generally meant to be in a "Contracting State" and the EPO had recruited him as a citizen of such a country, Italy.

In a note to the President dated 18 September 1991 the complainant pressed his claim, maintaining that his marriage had changed his personal situation since he had joined the staff and that the country he had the "closest connection" with outside that of his duty station was Argentina.

In a letter of 17 October the Principal Director of Administration told him that the President was "not prepared" to change his home.

On 29 November 1991 he lodged an appeal under Article 108 of the Regulations. In its report of 18 September 1992 the Appeals Committee unanimously recommended allowing the appeal. But in a letter of 8 January 1993, the impugned decision, the Director of Staff Policy told the complainant that the President saw no grounds for review.

B. The complainant submits that he is entitled under the EPO's new policy on home leave to have his home changed from Rome to Dolores, in the Province of Buenos Aires. Article 60(2) of the Service Regulations empowers the President to change the place of home whenever the reasons an official gives so warrant. Though Article 60(2) treats review as a "special decision" it is called "special" only because it may come after the employee has taken up duty, not because it requires "exceptional" circumstances.

When the EPO originally designated his home it committed a mistake of law. As the Tribunal held in Judgment 525 (in re Hakin No. 5), what Article 60 requires is that the official's home be in the country where he has the "closest connection", where his family is living, where he was brought up and where he possesses property. Contrary to what a recruitment officer led him to believe on 2 April 1990, home need not be in a member State.

He also alleges that the President's refusal to change his home overlooked essential facts. Nine months after his appointment he married a fellow citizen of Argentina who acquired Italian nationality too at the age of 27. His links with Argentina, where his own and his wife's family live, have grown even stronger since the birth of their two children and since 1986 he has been spending at least seven weeks a year there.

By allowing him and his family home leave only in a country where they have no special ties, own no property and have no close relatives, the EPO is also in breach of the duty of care it owes its staff.

Since the EPO brought in its present policy on home leave "home" is no longer restricted to member States. By letting other staff take home leave in non-member States and refusing to let the complainant do so the EPO has offended against equal treatment.

He seeks the quashing of the President's decision of 8 January 1993 and the designation of Dolores in the Province of Buenos Aires as his home. He also claims 7,000 guilders in costs.

C. In its reply the EPO contends that the complaint is devoid of merit. Under Article 8(a) of the Service Regulations candidates for appointment as permanent employees must be a national of one of the "Contracting States, unless an exception is authorised by the appointing authority". But there was no exception in the complainant's case: his recruitment was part of a campaign to increase the number of Italian examiners for the sake of more even geographical distribution of staff between member States. He agreed in December 1989 to taking home leave in Rome and his objections to the original decision are time-barred.

On the merits the Organisation submits that the President will, in the exercise of his wide discretion, review the designation of an official's home only in exceptional cases, when there has been a radical change in the employee's personal circumstances. The complainant told the Administration in his letter of 7 February 1990 that he had an Italian "fiancée". Inasmuch as engagements between Italians imply a "serious intention to marry" his marriage is not so great a change as to warrant review.

The defendant denies breach of its duty of care to him: it was he who abused the Organisation's good faith by stressing his wife's Italian nationality and accepting Rome as his home.

The amendment of Article 60 with effect from July 1990 has not altered the list of countries in which home leave may be taken: the usual place has always been in the Contracting State of which the official is a citizen.

As to the alleged breach of equal treatment the cases he cites were different in fact and in law from the complainant's.

D. In his rejoinder the complainant enlarges on his original arguments. Insofar as he does not claim retroactive effect for the change of his home he is plainly not challenging the original decision: what he wants is review of that decision. In February 1990 he had no intention of marrying and therefore had no reason at the time to mention his future wife's other nationality. Citing cases where the Administration refused to recognise an official's home because it was not in a member State, he contends that it was only after the issue of circular 197 that it began to authorise the taking of home leave in non-member States.

E. In its surrejoinder the EPO says that the rejoinder contains nothing to make it alter its stand. It comments on the issues raised, observing in particular that the changes the complainant mentions in other officials' homes have no bearing on this case since they involved employees whose home was in the country of employment and who could not have them elsewhere before the revised version of Article 60(1) came into force. In any event the circumstances the complainant relies on either existed before he was recruited - and he has only himself to blame for not raising them in good time - or were, like his marriage, easy to foresee.

CONSIDERATIONS:

1. The complainant seeks the quashing of the decision that the President of the European Patent Office took on 8 January 1993 rejecting his application for the change of his "designated home" from Rome to Dolores, in the Province of Buenos Aires. The material rules on home leave for EPO staff are in Article 60 of the Service Regulations and are reproduced in A above. The President gave two reasons for rejection of the complainant's claim. One was that the amendment of Article 60 of the EPO's Service Regulations as from 1 July 1990, notified to the staff by circular 197 of 20 December 1990, did not affect the procedure for review of a permanent employee's designated home; and the second reason was that the changes that had occurred in the complainant's personal circumstances since joining the staff did not warrant any change in his designated home.

2. One preliminary point is that, short of formally pleading that the complaint is irreceivable, the Organisation observes in its reply that the complainant made his claim too late and that he has therefore "lost his chance to assert the circumstances which he belatedly puts forward in support of his request for review". Yet it acknowledges in the same brief:

"His internal appeal ... lodged on 29 November 1991 would, if it had been aimed expressly at the original designation of the place of home leave [in Rome], have been irreceivable due to lateness. On the other hand, it was receivable insofar as it was aimed expressly and exclusively at the 'change' in the place of home leave ... as any permanent employee is free to lodge a request for review at any time if circumstances justify it."

What the complainant is seeking from the Tribunal is an order "that, for the purposes of Article 60(2) [of the Service Regulations], my designated 'home' be reviewed". In other words he is claiming a change in his designated home; on the defendant's own admission that claim is receivable; and his pleas on the merits are taken up below.

3. The complainant pleads breach of equal treatment in that the Organisation has granted home leave in Argentina to a staff member who has the nationality both of Germany and of that country, yet has denied it to him, a citizen of Argentina and Italy. Again, a new employee of Canadian and Italian nationality has been allowed to take home leave in Canada. And new employees who are citizens of Argentina as well as some other country and who have their true "homes" in Argentina have automatically had "home" designated there. In the complainant's submission the decisions taken in those cases are attributable to a change in the EPO's policy which came in after its Administrative Council amended paragraph 1 of Article 60 as from 1 July 1990. He contends that the new policy allows staff with dual nationality to change their designated home, where circumstances so warrant, to a place outside the territory of EPO member States. He points out that the text of 60(1) as in force since 1 July 1990 grants home leave to "permanent employees who are nationals of a country other than the country in which they are employed", whereas the previous text granted such leave only to a permanent employee who was entitled to the expatriation allowance and who was not a national of the country of his employment.

4. The EPO demurs. As to the supposed change of policy, it argues that the amendment to Article 60 did not affect the rules on review of the official's "home" but "concerned the initial determination of the place of home leave only". It goes on: "... the place of home leave continues as before to be normally situated on the territory of the Contracting State of which the employee is a national, unless circumstances justify the choice of another State". In answer to the complainant's charge of breach of equal treatment the Organisation contends that the cases he cites are irrelevant because they "differ legally and factually" from his. The citizen of both Argentina and Germany was

not entitled to home leave before the amendment of Article 60 because he had the nationality of his country of employment; unlike the complainant's, his was a case of original designation, not review of home. As for the Italian-Canadian staff member, he had his home designated in Italy on recruitment, but he showed special reasons warranting a change in home. The Organisation further argues that "there can be no question of the automatic designation of Argentina" as the home of "new employees who have Argentinian nationality as well".

5. In Judgment 525 (in re Hakin No. 5), which was also about a claim by an EPO employee to review of home under Article 60(2), the Tribunal declared such review to be "an exceptional measure". It held, in 4:

"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."

6. The impugned decision in this case rests on a mistake of law, and the mistake lies in misinterpretation of the principle of equal treatment.

7. In Judgment 1194 (in re Vollering) the Tribunal stated that principle in the following terms:

"The case law says that for there to be breach of equal treatment there must be different treatment of staff members who are in the same position in fact and in law. In other words, equal treatment means that like facts require like treatment in law and different facts allow of different treatment. It follows that treatment may vary provided that it is a logical and reasonable outcome of the circumstances."

So is the complainant's situation legally and factually different from that of the other employees with dual nationality that he cites?

8. The EPO says that it is. In all those other cases but one the President of the Office was making the original designation of home whereas here the decision concerns review of the designation already made. Only in the case of the staff member with Canadian and Italian citizenship did the President find that the special circumstances which he was relying on were sufficiently cogent for him to allow the change.

9. The Organisation's plea on that score fails because there is no difference in substance between the original designation and the review of "home". In both cases the purport of the President's decision is the same: to determine the place where the employee may take home leave, and the original designation and the review cannot properly be made according to different criteria. It would offend against the principle of equal treatment the recruit who has strong ties with the country of one of two nationalities should get the automatic designation of a place in that country as "home", while in identical circumstances another employee is refused designation of his home in that country simply because he is seeking review of a determination already made. Since the distinction does not hold up in law, the impugned decision cannot stand.

10. The question accordingly arises whether the complainant's circumstances warrant the change he seeks in the designation of his home under Article 60 of the Service Regulations. According to paragraph 2 of that article "the home of such permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed", and the Organisation must take into account "the place of residence of the employee's family, where he was brought up and any place where he possesses property".

11. The Tribunal is satisfied on the evidence before it that the country with which the complainant has the "closest connection" is Argentina. He was born in that country and did not acquire Italian citizenship, by ius sanguinis, until 1986, when he was already 24 years old. He had primary, secondary and university education in Argentina and did only post- graduate studies in Rome. His parents, grandparents and other relatives live there. His wife is also a citizen of Argentina as well as Italy and has spent the greater part of her life in Argentina. They married in that country in 1990. Since coming to Europe the complainant says - and the EPO does not deny - he has travelled regularly to Argentina and spent seven weeks a year there.

12. The conclusion is that the complainant qualifies for review of the determination of his home under the second paragraph of Article 60(2) of the Service Regulations, and his home must be changed accordingly.

13. Since his claim succeeds he is entitled to an award of costs, and the amount is set at 3,000 guilders.

DECISION:

For the above reasons,

1. The President's decision of 8 January 1993 is quashed.

2. The complainant's designated home shall be changed from Rome to Dolores in the Province of Buenos Aires in Argentina.

3. The Organisation shall pay him 3,000 guilders in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda
William Douglas
E. Razafindralambo
A.B. Gardner

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