

**NINETY-SIXTH SESSION**

**Judgment No. 2292**

The Administrative Tribunal,

Considering the fourteenth complaint filed by Mr J. M. W. against the European Patent Organisation (EPO) on 15 March 2003, the Organisation's reply of 26 June, the complainant's rejoinder of 25 July and the EPO's surrejoinder of 29 September 2003;

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

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

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

A. Article 33 of the Pension Scheme Regulations of the European Patent Office, the secretariat of the EPO, gives the basis of calculation for pensions. Paragraph (1) specifies that pensions shall be calculated by reference to the permanent employee's salary and scales applicable to the country of his last posting. However, paragraph (2) provides that "if the employee settles subsequently [...] in the country of which he is a national", he may "opt for the scale applicable to that country", and that option is deemed to be "irrevocable". Paragraph (4) reads:

"Where a country opted for under the provisions of [paragraph 2] is not or has not been a Member State of one of the [Coordinated Organizations<sup>(1)</sup>], the reference scale shall be that applicable in the host country of the headquarters of the Organisation responsible for payment of benefits."

It should be noted that the EPO has its headquarters in Germany.

Article 42 of those Regulations is entitled "Pensions which are subject to national tax legislation". Its first paragraph reads as follows:

"The recipient of a pension under these Regulations shall be entitled to the adjustment applying to the Member State of the Organisation in which the pension and adjustment relating thereto are chargeable to income tax under the tax legislation in force in that State."

The complainant, a British national, joined the EPO on 11 January 1982 and retired on 1 June 2001 with an invalidity pension.

On 10 June 2001 he wrote to the President of the Office saying that, after initially deciding to retire in London and opting for a pension calculated according to the scale applicable to the United Kingdom, he wished to move "to another part" of that country, namely Gibraltar. He had been told by the Pensions Department, however, that if he moved there his pension would be paid in German marks according to the German scale, and without any income tax adjustment. The complainant, while pointing out that as far as he was concerned Gibraltar was "a part of the United Kingdom", recalled that in accordance with Article 33(2) of the Pension Scheme Regulations, he had irrevocably opted for the United Kingdom scale. He considered, therefore, firstly that he would be entitled to a pension calculated according to that scale if he moved to Gibraltar and secondly that there was no reason why he should not be entitled to the Article 42 adjustment corresponding to the Gibraltar taxation system. Should the EPO disagree, he requested that a reasoned decision be given to him regarding both those points.

The Principal Director of Personnel wrote to the complainant on 3 July informing him that the territorial field of application of the Pension Scheme Regulations was limited to the territories of the European Patent Convention's Contracting States. He added that Article 168 of the Convention gave any Contracting State the possibility to "declare in its instrument of ratification or accession [...] that this Convention shall be applicable to one or more of the territories for the external relations of which it is responsible". Since the United Kingdom had never designated Gibraltar as being a territory to which the Convention was extended, the provisions of Articles 33 and 42 would not be applicable to the complainant were he to take up residence in that territory.

In two internal appeals dated 30 September, the complainant asked for "confirmation" that if he took up residence in Gibraltar his pension would continue to be paid according to the United Kingdom scale and he would be entitled to an adjustment for income tax. In a letter dated 27 November 2001, the Employment Law Department informed him that the President of the Office had come to the conclusion that Gibraltar could not be considered as part of the territory of the United Kingdom and that Articles 33 and 42 had been correctly interpreted. In its opinion dated 22 January 2003, the Appeals Committee unanimously recommended that the appeals be dismissed as unfounded. By a letter of 31 January 2003, which constitutes the impugned decision, the acting Director for Conditions of Employment and Statutory Bodies informed the complainant that the President had decided to reject his appeals.

Meanwhile, as from 1 December 2001, the complainant had taken up residence in the Isle of Man, which is a dependency of the British Crown.

B. The complainant states first of all that, for health reasons, he wishes to move to Gibraltar, where he owns a house and the climate is warmer.

The complainant states that he receives a pension calculated according to the United Kingdom scale with an adjustment for local income tax in the Isle of Man. He considers that the Isle of Man and Gibraltar are both overseas territories of the United Kingdom. The only "slight" difference between the two is that in Gibraltar "UK designated European Patents" need to be registered within a period of three years after grant, which is not necessary for the Isle of Man.

In the complainant's view, Gibraltar is part of the United Kingdom, in other words it is part of a Member State of the EPO. He believes that the terms "Contracting State", within the meaning of the Convention, and "Member State", within the meaning of the Pension Scheme Regulations, are not necessarily synonymous. Pointing out that the Regulations do not refer to the Convention, and vice versa, he wonders whether a Member State includes only the territories for which a Contracting State is responsible and to which the Convention applies. He considers that Article 168 of the Convention concerns the application of the Convention to territories for the external relations of which a Contracting State is responsible and determines whether or not European Patents granted for that Contracting State have effect in such territories. Since Article 168 does not define the territory of a Contracting State, it affords no grounds for confining the territorial extent of a Member State to those territories of a Contracting State where European Patents have effect. He also alleges that in the absence of a precise definition of the term Member State, this term should not be interpreted narrowly in such a way as to adversely affect his interests. Consequently, the field of application of Articles 33(2)(i) and 42 of the Pension Scheme Regulations must include all territories for which a Contracting State is responsible, and not merely those to which the Convention applies. He therefore considers that when he moves to Gibraltar he will be entitled to opt for the United Kingdom scale and to receive an income tax adjustment.

The complainant points out, moreover, that his choice of scale was irrevocable and may not be revoked by the EPO on account of a change of residence.

Lastly, he explains that the European Convention on Human Rights prohibits discrimination, while its First Protocol contains provisions which protect property and which in his view also cover pension rights. Since all 22 Member States of the EPO are signatories to those instruments, the EPO's decisions must comply with them. According to the complainant, British nationals from the Isle of Man are entitled to opt for a pension calculated according to the UK scale and receive an adjustment in respect of tax, and therefore, on grounds of equal treatment, British nationals from Gibraltar should be allowed the same. He adds that, due to the adverse exchange rate of the euro against the British pound, pensions based on the German scale are significantly lower than those based on the UK scale.

The complainant requests an order from the Tribunal to the effect that in accordance with Article 33(2) of the

## Pension Scheme Regulations:

- his pension must continue to be paid in pounds sterling according to the UK scale, when he takes up residence in Gibraltar, with an adjustment for income tax;
- his pension must continue to be paid in pounds sterling according to the UK scale when he settles in Gibraltar, or indeed anywhere else;
- in the event that he settles subsequently in a British territory to which the Convention applies and the EPO has revoked his option for the UK scale, he will be entitled to opt again for that scale.

He also claims 25,000 euros in moral damages and 1,000 euros in costs.

C. In its reply the Organisation refers to Judgment 764 to argue that the complaint is irreceivable. In its view the complainant has not shown that the EPO's declaration of intent to consider that Gibraltar is not covered by the British pension scales has caused him injury. The way his claims are formulated also indicates that his aim is not to challenge a particular decision harming him, but rather to obtain a general declaration from the Organisation, to the effect that wherever he takes up residence the British pension scales will continue to apply. The EPO also points out that the complainant has not shown that he needed to move to Gibraltar for medical reasons or that he really owned property there.

On the merits, the EPO is astonished that the complainant dismisses as a slight difference the fact that the Convention does not apply to Gibraltar and that the Pension Scheme Regulations will therefore not apply to him if he moves there. It points out that the Appeals Committee considered the Office had rightly determined the countries to which the Pension Scheme Regulations applied on the basis of the territorial field of application of the Convention; for the United Kingdom, this is limited to Great Britain, Northern Ireland and the Isle of Man. The legal system instituted by the Convention is typical of an international organisation whose competence is confined to the territory of all its Member or Contracting States, these two terms being equivalent for the purpose of identifying the countries and territories to which the Pension Scheme Regulations apply. As the United Kingdom has not signified that it wishes to extend the effects of the Convention to Gibraltar, the provisions of Article 33(1) and (4) apply in cases where former employees take up residence in Gibraltar. If the complainant were to move to Gibraltar, which is not a Contracting State, the pension scale applicable would be that of Germany, because it is the host country of the Organisation's headquarters, and he would not be entitled to any tax adjustment since, in accordance with Rule 42/1(1) of the Implementing Rules to the Pension Scheme Regulations, Article 42 of the Regulations "shall apply only if the pension and the adjustment relating to it are subject to taxes on income levied in a Member Country of the Organisation".

The EPO notes that it is not a party to the European Convention on Human Rights, so that it is doubtful whether that Convention is directly applicable to it. However, it points out that the Administrative Council adopted a declaration in 1994 whereby the Office undertakes to abide by general legal principles, including those concerning human rights. It also points out that British nationals settling in the Isle of Man are treated no more favourably than those wishing to take up residence in Gibraltar; on the other hand, their legal status is different. The EPO adds that it has not revoked the complainant's choice of scale.

Lastly, the Organisation explains that since the complainant's claims must be dismissed, his claim for moral damages must also fail. It notes that, even though he laments the fact that the exchange rate of the pound to the euro is unfavourable, his claim for damages is not expressed in sterling.

D. In his rejoinder the complainant rejects the Organisation's plea of irreceivability. He maintains that the EPO caused him significant damage by obliging him to reside in a less congenial climate than that of Gibraltar. He states that he is not prepared to reveal medical information to the Organisation, but produces evidence concerning the purchase of his house in Gibraltar.

The complainant draws the Tribunal's attention to the provisions of Article 1 of the Pension Scheme Regulations. Paragraph 2 of that article states that the pension scheme established by the Regulations also applies to permanent employees of the Coordinated Organizations. According to him, there is no doubt that Gibraltar comes within the territorial extent of two of these organisations, namely the WEU and NATO since both organisations have a military base there. He deduces that Gibraltar is part of the United Kingdom, a Member State. Article 33(4)

therefore does not apply to the present case. He maintains, moreover, that the Pension Scheme Regulations apply to retired former employees wherever they reside, and not only on the territories of the Convention's Contracting States.

Recognising that he would indeed prefer his claims to be paid in pounds sterling, the complainant changes his claims to £17,500 for moral damages and £700 for costs.

E. In its surrejoinder the EPO says that the complainant's rejoinder does not introduce any argument that would make the Organisation modify its position. It therefore reaffirms its pleas and submissions. It rebuts the complainant's argument regarding the applicability of the Pension Scheme Regulations, holding that they cannot apply to the territories of all the countries which are Member States of the Coordinated Organizations. On that point, it comments that at the time when it was founded it had considered joining the Coordinated Organizations but withdrew its application in 1987.

## CONSIDERATIONS

1. The complainant, a British national, is a former staff member of the EPO, from which he retired with an invalidity pension on 1 June 2001. He opted to retire in the United Kingdom and, in accordance with Articles 33 and 42 of the Pension Scheme Regulations, that choice determined the scale used to calculate his pension and the adjustment to which he was entitled as a result of the fact that he was liable to pay UK income tax.
2. Having decided to move to Gibraltar, the complainant wrote on 10 June 2001 to the President of the Office expressing surprise at the fact that he had been informed by the Pensions Department that, if he moved, his pension would be paid in German marks according to the German scale without any adjustment for income tax. The complainant considered that Gibraltar was part of the United Kingdom and asked the President, in the event of disagreement with issues he raised, to let him know, in a reasoned decision, why he should be denied his rights under the Pension Scheme Regulations.
3. On 3 July 2001 the Principal Director of Personnel replied that the territorial field of application of the Pension Scheme Regulations was limited to the territories of the European Patent Convention's Contracting States, that Article 168 of the Convention gave any Contracting State the possibility of declaring that the Convention would be applicable to one or more of the territories for the external relations of which it was responsible, and that the United Kingdom had never designated Gibraltar as being a territory to which the Convention was extended.
4. After a further exchange of correspondence, in which neither side gave any ground, the complainant on 30 September filed two internal appeals, one concerning the application of Article 33 of the Pension Scheme Regulations, and the other concerning Article 42 thereof. The Organisation's position was that both appeals were without subject and therefore irreceivable, the complainant having meanwhile moved to the Isle of Man, and that in any case they lacked merit.
5. On 22 January 2003 the Appeals Committee recommended that the appeals, which it considered to be receivable, be dismissed as unfounded. In a letter dated 31 January 2003 the complainant was informed that the President of the Office had decided, in accordance with the Committee's opinion, to reject the appeals for the reasons set out during the appeals procedure. The complainant filed a complaint with the Tribunal on 15 March 2003. His claims are set out under B, above.
6. The defendant argues that the complaint is irreceivable because the appeals themselves were irreceivable. It cites the Tribunal's Judgment 764, according to which:

"A decision by an international organisation is challengeable before the Tribunal only if it causes the complainant injury. One that has no effect on his position is not, for example an act which is not operative but a mere declaration of intent."

Furthermore, the complainant has taken up residence in the Isle of Man, where he does not actually face the problems he would like to see resolved in the event - unlikely, according to the defendant - that he decides to move to Gibraltar.

7. Like the Appeals Committee, the Tribunal considers that the complainant has demonstrated that he has a cause of action enabling him to challenge the decision contained in the letter of 3 July 2001, which amounts to more than a mere declaration of intent, but which denies him what he views as his right to preserve certain benefits he enjoys under the Pension Scheme Regulations. In addition, the complainant declares that he has purchased a property in Gibraltar and, contrary to the assertions of the Organisation, he has produced evidence of that purchase. Even if it may justifiably be doubted that the decision actually causes the complainant harm, the likelihood that he may move to Gibraltar is sufficient for the Tribunal to rule on the objection he has raised. On the other hand, the complainant's request for an order to the Organisation from the Tribunal regarding his right to exercise a new option, should the EPO revoke his option for the UK scale, amounts to a request for legal advice which lies beyond the jurisdiction of the Tribunal and must therefore be dismissed as irreceivable.

8. On the merits, the complainant firstly rejects the view that the field of application of Articles 33 and 42 of the Pension Scheme Regulations is limited to the territories of the Contracting States of the European Patent Convention. He points out that the Regulations refer neither to the Convention nor to the notion of "Contracting State" and that the Convention itself contains no reference to the Pension Scheme Regulations, or to the notion of "Member State". He maintains that Article 168 of the Convention does not have the scope attributed to it by the EPO.

9. Article 168 of the Convention, entitled "Territorial field of application", provides in paragraph 1:

"Any Contracting State may declare in its instrument of ratification or accession, or may inform the Government of the Federal Republic of Germany by written notification any time thereafter, that this Convention shall be applicable to one or more of the territories for the external relations of which it is responsible. European patents granted for that Contracting State shall also have effect in the territories for which such a declaration has taken effect."

The evidence produced by the Organisation shows that, in the case of the United Kingdom, the territorial field of application of the Convention extends to the "[t]erritory of the United Kingdom of Great Britain and Northern Ireland and of the Isle of Man", whereas Gibraltar is considered as an overseas territory where the owners of a "UK designated European Patent" may apply for registration within three years from the grant of that patent. This means that Gibraltar is not a territory to which the Convention is directly applicable.

10. The complainant argues that this does not imply, with respect to the application of the Pension Scheme Regulations, that the territory of a Member State should exclude any territory to which the Convention does not apply. The EPO rebuts the conclusions drawn by the complainant from the different drafting of the Convention and the Pension Scheme Regulations by explaining the origin of the different terms used, and the Tribunal cannot agree with the interpretation suggested by the complainant. It would be absurd to consider that the scope of the provisions of the EPO's pension scheme should be any different from that of the founding instrument of the Organisation, that is to say, the European Patent Convention, and in the present case it cannot validly be argued that where ambiguity arises the interpretation most favourable to staff members should prevail.

11. Secondly, the complainant asserts that, even if the EPO's interpretation were correct, it would be in breach of the provisions of the European Convention on Human Rights which protect property rights, including pension rights, and prohibit discrimination. Since the Member States of the EPO are all signatories to the European Convention on Human Rights, the Organisation must comply with the latter. In fact, the EPO as such is not a member of the Council of Europe and is not bound by the Convention in the same way as signatory states. Nevertheless, the general principles enshrined in the Convention, particularly the principles of non-discrimination and the protection of property rights, are part of human rights, which, as declared by both the President of the Office and its Administrative Council in 1994, in compliance with the Tribunal's case law, apply to relations with staff. However, the fact that in connection with pension rights different rules apply according to the place of residence of retired staff members constitutes neither a breach of property rights nor a violation of the principle of equality, provided that the staff concerned are not deprived of any of the rights they enjoy under the statutory and regulatory provisions which apply to them, and that they have freely exercised their right of option. The question, therefore, is to ascertain not whether general principles have been breached but whether the option exercised by the complainant, who took up residence first in London and then in the Isle of Man, would allow him the same benefits if he decided to take up residence in Gibraltar.

12. On this point, the complainant submits that the option he exercised as a British national deciding to take up

residence in his country of origin is irrevocable under Article 33(2) of the Pension Scheme Regulations and that the Organisation cannot therefore revoke that option if he decides to move to Gibraltar, which, he points out, is a British territory. The EPO is right to reply, however, that in the circumstances it is not a case of the Organisation "revoking" the option freely exercised by the retired employee, but of the latter deciding to take up residence outside the country of which he is a national and therefore no longer being eligible for the UK pension scale. The complainant's argument would lead to the absurd conclusion that, being entitled to a pension calculated according to the situation prevailing in the United Kingdom and to tax benefits calculated according to the income tax paid in that country, he would be free to change his residence and to move to any territory of a Member State or non-Member State of the Organisation whilst retaining the same benefits. The fact that the option he exercised is irrevocable obviously cannot have that effect.

13. In his rejoinder the complainant puts forward a new argument, based on the wording of Article 1(2) and (4) of the Pension Scheme Regulations, where reference is made to permanent employees of the Coordinated Organizations, which the EPO had considered joining before withdrawing its application in 1987. Despite certain shortcomings in the drafting, those provisions cannot have the scope attributed to them by the complainant, who argues that the reference contained therein to organisations such as the WEU and NATO, in which the United Kingdom allegedly included Gibraltar when it joined, implies that the Pension Scheme Regulations also apply to that territory.

14. Thus the complainant's pleas fail. The field of application of the European Patent Convention indubitably covers the United Kingdom of Great Britain and Northern Ireland and the Isle of Man. The United Kingdom, a Contracting State of the European Patent Convention responsible for Gibraltar's foreign relations, did not declare, as it was entitled to under Article 168 of the Convention, that the latter was applicable to Gibraltar. The territorial field of application of the Pension Scheme Regulations and of the Implementing Rules thereto cannot differ from that of the Convention. Consequently, for the purposes of calculating the complainant's pension, the EPO has rightly refused to maintain the scale applicable to the United Kingdom and the related adjustment in the event that he takes up residence in Gibraltar.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

*(Signed)*

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

1. These include: The North Atlantic Treaty Organisation (NATO), the Organisation for Economic Co-operation and Development (OECD), the Council of Europe, the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

