Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B.

v.

EPO

120th Session **Judgment No. 3510**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. C. A. B. against the European Patent Organisation (EPO) on 18 September 2012 and corrected on 8 October 2012, the EPO's reply of 4 March 2013, the complainant's rejoinder of 6 June, corrected on 11 June, the EPO's surrejoinder of 19 September, the complainant's further submissions of 30 October and the EPO's final observations thereon of 27 November 2013;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant objects to the excessive length – 19 months – of the process of obtaining a visa for his wife's adopted daughter.

At the material time the complainant, a Belgian national, was a permanent employee of the European Patent Office, the EPO's secretariat, serving at its branch in The Hague (Netherlands). On 16 June 2008, his wife, who is Thai, adopted S., her niece, who had been born in Thailand at the beginning of that year. She did so in accordance with the procedure applicable in that country. On 25 June 2008, shortly before he was due to accompany his wife on a journey to

Thailand from 28 June to 29 July in order to complete the requisite formalities for bringing S. to the Netherlands, the complainant submitted a "request for support for a visa" for S. to the EPO. At that juncture, he was informed that he must first obtain the approval of the Ministry of Foreign Affairs of the Netherlands, after which he could submit a visa application to that country's embassy in Bangkok. On the following day the EPO recognised S. as the complainant's dependant and forwarded the documents supplied by him in support of his visa application to the Ministry of Foreign Affairs. By an e-mail of 27 June, the EPO advised the complainant that the Ministry would not be able to process his application immediately, since the situation was not a standard one, because only his wife had adopted the child. The EPO sent him an excerpt from the Protocol Guide for International Organisations published by the Ministry of Foreign Affairs and drew his attention to the fact that organisations had to inform the Ministry of a visa application well in advance, since processing such an application could take up to four weeks. The complainant and his wife left for Thailand on 28 June. On 4 July the EPO forwarded the "request for support for a visa" to the Ministry.

On 23 July the complainant and his wife submitted an application for a visa for S. to the embassy of the Netherlands in Bangkok. They were asked to supply several documents, in addition to those listed in the Protocol Guide, as evidence in support of an application for a temporary residence permit. On the following day, the complainant sent an e-mail to the EPO in which he expressed his displeasure at still not having received any reply from the Ministry of Foreign Affairs. The EPO then contacted the Ministry, which explained that, in order to obtain a visa, the complainant had to submit a document attesting to the consent of S.'s biological parents to the adoption. On 31 July the Administration asked the Ministry how the complainant and his wife had behaved at the embassy in Bangkok and whether they had tried to "abuse [the complainant's] privileges and immunities". As the complainant had requested the advice and assistance of the EPO Staff Committee, on 7 August 2008 the latter proposed that the President of the EPO should intervene. That proposal was rejected, as it was considered inappropriate.

In a letter of 11 September 2008 the Ministry of Foreign Affairs undertook to issue a visa for S. as soon as it received evidence that an application for an international adoption had been lodged with the Central Authority in Thailand in accordance with the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter "The Hague Convention"). It also explained that the complainant should produce a document attesting to the consent of S.'s biological parents to the adoption. He did so in November. In an e-mail of 14 November, the complainant contended that an international adoption procedure entailed permanent residence in the Netherlands, whereas he had never requested permanent residence in that country, either for himself, for his wife, or for S.

On 16 December 2008 the EPO explained to the complainant that the application of the Hague Convention depended solely on the habitual residence of the persons concerned. The complainant was therefore asked whether his wife was living in Thailand, in which case she would have to surrender the identity card with which she had been issued by the Ministry of Foreign Affairs, under Article 8 of the Agreement between the European Patent Organisation and the Kingdom of the Netherlands concerning the Branch of the European Patent Office at The Hague (hereinafter "the Seat Agreement"), and to submit an application for a tourist visa to the embassy of the Netherlands in Bangkok.

In an e-mail of 19 March the complainant stated that, since the beginning of 2008, when S. had been abandoned by her biological parents, his wife had been spending more time in Thailand than in the Netherlands. This answer prompted the EPO to ask him to return the identity card held by his wife in order that, in exchange, a "request for support for visas" for both his wife and S. could be submitted to the Ministry of Foreign Affairs. On 23 April 2009, after a meeting with representatives of the Staff Committee – at the end of which it was agreed that the complainant would confirm in writing that his wife was resident in Thailand and would undertake to return her identity card – the EPO sent the "request for support for visas" to the Ministry of Foreign Affairs. On 30 April the complainant and his wife

submitted visa applications to the embassy of the Netherlands in Bangkok, but the visas could not be issued.

On 11 May 2009 the complainant filed a first appeal, challenging the EPO's "decision not to provide assistance" with obtaining visas. He asked for an identity card for S. or, subsidiarily, a multiple entry visa for her. He also claimed compensation under various heads.

On 12 May the complainant's counsel sent the EPO a document in which he summarised the situation and requested that it be forwarded to the Ministry of Foreign Affairs. By letters of 27 May and 9 June 2009 the Administration again asked the complainant to return his wife's identity card. The request that the aforementioned document be forwarded to the Ministry was also rejected on 9 June.

On 19 June 2009 the complainant's counsel filed a second appeal, challenging "the denial of assistance" of 9 June. He requested inter alia an award of damages. This appeal was joined to that of 11 May and forwarded to the Internal Appeals Committee.

On 22 June the Chairman of the Staff Committee again requested the assistance of the President of the EPO. The President rejected this request but, at the beginning of July, she invited the Administration to contact the Ministry of Foreign Affairs without delay in order to secure the issue of a multiple entry visa, although she made it clear that the cooperation of the complainant and his wife was vital to that outcome.

The Ministry of Justice of the Netherlands, which the complainant had contacted on 2 June, informed him by a letter of 17 November that, on certain conditions, the adoption in Thailand could be recognized in the Netherlands and that in order to obtain a visa for S. he should provide the Ministry of Foreign Affairs with a number of documents, which were listed. That letter was forwarded to the Ministry of Foreign Affairs and on 22 January 2010, once all the requisite documentation had been provided, a visa for S. was issued.

As the complainant had nevertheless maintained both of his appeals, the Internal Appeals Committee gave an opinion thereon on 13 April 2012, after hearing the complainant. The majority of committee

members found that the appeals were irreceivable in part, as the complainant had obtained a visa for S. and the whole family was by then resident in the Netherlands. On the merits, it recommended that the appeal should be rejected, since the EPO had honoured its obligations. The minority considered, however, that the appeals were well-founded and that the complainant should therefore receive material damages, 15,000 euros in compensation for moral injury, 2,000 euros for legal expenses and the same sum on account of the inordinate length of the internal appeal proceedings. The complainant was informed by a letter of 19 June 2012, which constitutes the impugned decision, that the President had rejected his appeals in accordance with the opinion of the majority of committee members.

On 18 September 2012 the complainant filed a complaint with the Tribunal in which he seeks compensation for moral and material injury. He also claims 15,000 euros in redress for the excessive length of the internal appeal proceedings.

The EPO asks the Tribunal to reject all the complainant's claims. If, however, the Tribunal were to deem the complaint well-founded, the EPO contends that such compensation as might be awarded should be no higher than the amounts recommended by the members of the Internal Appeals Committee who expressed the minority opinion.

CONSIDERATIONS

1. By a complaint filed on 18 September 2012 the complainant impugns before the Tribunal the decision of 19 June 2012 of the President of the EPO to endorse the opinion of the majority of the members of the Internal Appeals Committee and to reject his two appeals of 11 May and 19 June 2009, respectively, against the EPO's "decision not to provide assistance" in obtaining an entry visa to the Netherlands for his wife and her adopted daughter and against the "denial of assistance" of 9 June 2009 in obtaining an identity card and/or a visa for his wife's adopted daughter.

2. The complainant asks the Tribunal to award him compensation for the injury he has allegedly sustained.

3. The EPO contends that all the complainant's claims should be dismissed.

4. The facts relevant to the case may be summarised as follows:

The complainant, a Belgian national, is a permanent employee of the EPO who is assigned to its branch in The Hague (Netherlands). His wife is Thai. On 16 June 2008, in accordance with the procedure applicable in Thailand, she adopted her niece, who had been born at the beginning of 2008. The EPO recognised this adopted daughter as the complainant's dependant at his request.

On 25 June 2008 the complainant submitted a "request for support for a visa" for his wife's adopted daughter. The request was forwarded for approval to the Ministry of Foreign Affairs of the Netherlands, the host country with which the EPO has concluded a Seat Agreement.

Without waiting for this approval, the complainant and his wife submitted a visa application to the embassy of the Netherlands in Bangkok.

The Ministry of Foreign Affairs explained that the issuing of the visa was subject to the filing of an international adoption application, as required by the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

As indicated above, the complainant filed two consecutive internal appeals disputing the applicability of that convention to his case and contending that the procedural delays were due to the sending of an e-mail in which the Administration of the EPO had enquired whether the complainant and his wife had "tried to abuse the privileges and immunities" flowing from the Seat Agreement.

In November 2009, after a series of steps and exchanges of correspondence, the Ministry of Justice of the Netherlands, which had been contacted by the complainant, issued a legal opinion which made

it possible to issue a visa for his wife's adopted daughter on 22 January 2010.

5. In support of his claims, the complainant first contends that the EPO did not honour its duty to act in good faith and failed to respect his dignity as an employee.

6. He asserts that, from the very beginning of the process in July 2008, the EPO Administration, acting purely out of prejudice against the Thai adoption procedure, had written to the Ministry of Foreign Affairs of the Netherlands insinuating that he and his wife were abusing the privileges and immunities enjoyed by international civil servants and their dependants. His assertion is based on the content of an e-mail which, in his opinion, clearly shows that the "EPO Human Resources were prepared to abandon [him] […] and would not apply any pressure on the highest authorities of the Netherlands".

The e-mail in question reads in pertinent part:

> "report on the behaviour of Ms./Mr. B. please (did they indeed try to abuse the privileges and immunities Mr. B. is entitled to under the EPO Seat Agreement?)".

The complainant submits that, by sending this e-mail, the EPO Administration committed a serious breach in that, instead of providing him with the requisite assistance, it had chosen to denigrate him before the host country's authorities.

7. The Tribunal considers that the content of this e-mail cannot be viewed as an insinuation that the complainant and his wife had behaved wrongfully by relying on the privileges and immunities which they enjoy.

As the EPO submits, it was a question prompted by information received from the Ministry of Foreign Affairs of the Netherlands.

At all events, in the Tribunal's opinion, the terms of the e-mail do not constitute defamatory allegations ascribable to the EPO or a fault for which it may be held liable.

This plea therefore cannot be accepted.

8. The complainant contends that the EPO rejected his requests that the President of the Office should approach the authorities of the Netherlands with a view to seeking a rapid outcome of the process of issuing his wife's adopted daughter with a visa.

9. The Tribunal considers that the fact that the EPO Administration deemed such intervention inappropriate does not mean that, as the complainant maintains, no interest was shown in ensuring that the procedure advanced smoothly.

The forms and methods of approaching the authorities of the host country of an international organisation are a matter for the discretion of the executive body of that organisation, which is free to choose what it regards as the most appropriate course of action.

This argument is therefore misconceived.

10. In the complainant's opinion, the EPO "allowed the creation of a legal vacuum where rules and laws are applied in a random fashion according to vague prejudices"; he contends that the Seat Agreement was breached, as was international law, to wit the Vienna Convention on Diplomatic Relations and the domestic law of the Netherlands.

11. The EPO replies to these contentions as follows:

(a) The fact that the Seat Agreement does not distinguish between various adoption procedures does not signify that the complainant and his wife could choose freely between them and that the Organisation was bound to facilitate the travel of the adopted daughter to the Netherlands "no matter what form the adoption decision took".

(b) With regard to international law, the Hague Convention applies in cases where the adoptive parents both have their habitual residence in the Netherlands while the child resides habitually in another signatory State. This appeared to be the case here until the

complainant made it clear that his wife had taken up residence in Thailand at the time of the adoption.

(c) With regard to a breach of the law of the Netherlands, it took some time to clarify the habitual residence of the complainant's wife, but this clarification ultimately made it possible to obtain a visa for her adopted daughter on the basis of private international law.

(d) With regard to the breach of the Seat Agreement in respect of the complainant's wife, the identity card is issued only to the members of an employee's family who live in his or her home. If this is not the case, the EPO must request that it be returned. The family member may then apply for a multiple entry visa.

None of these replies is contradicted by the evidence in the file.

12. While it is true, as the Tribunal stated in Judgment 2474, under 12, that an international organisation has a duty to act in good faith towards its employees and to protect their dignity, in order to accept the plea put forward by the complainant it would be necessary to establish that the Organisation had shown bad faith or negligence during the procedure for obtaining the requested visa (see, for example, Judgment 2527, under 10).

13. The Tribunal considers that it is essential to bear in mind the particular circumstances of this case in assessing the merits of the complainant's pleas. At the heart of the dispute is the issue of a visa and, possibly, an identity card for persons enjoying the privileges and immunities conferred by a seat agreement. At all events this is the prerogative of the host State, which has the right to verify whether all the requisite conditions are met. The case was complicated by the fact that it involved granting a visa, or an identity card for a person enjoying privileges, to a child whom only the complainant's wife had adopted, since the spouses do not possess the same nationality.

14. The Tribunal is of the view that the EPO could be charged with a wrongful act only if the delay in issuing the visa had been caused by inappropriate behaviour, or if the Organisation had taken

steps which might have influenced the host country's decision, or if it had been negligent in monitoring the progress of the case.

It is clear from the submissions that the authorities of the Netherlands had insisted on certain requirements and that the visa was ultimately issued only after the host country's Ministry of Justice had given a legal opinion.

15. It follows that none of the complainant's pleas examined above can be accepted.

16. The complainant also maintains that the EPO bears the burden of proving its allegations against him and that it is not up to him to establish his innocence. This plea is of no avail since, contrary to his submissions and as stated under 7, above, the Organisation did not accuse him of anything.

17. The complainant takes the EPO to task for breaching its duty to assist him and the members of his family. He submits that the Organisation obstructed the procedure by refusing to take into consideration the documents and information which he had supplied, to forward these documents to the authorities of the Netherlands, to obtain information from the authorities competent in matters of adoption, to take steps to obtain a temporary visa, to demand a reasoned decision for refusing the visa and to intervene through its President's good offices.

18. The Tribunal considers that, in order to rule on this plea, the only operative question is whether, in basing its action on the requirements of the Seat Agreement, the EPO displayed the necessary diligence to persuade the host country's authorities to grant the complainant's request.

19. The evidence in the file shows that the EPO did not raise any objections to recognising the adopted child of the complainant's wife as his dependant, this being a prerequisite for embarking upon the process of obtaining a visa; that it submitted the "request for support

for a visa" to the Ministry of Foreign Affairs within the prescribed time limits; that it regularly monitored the progress of the visa application; that the complainant was kept informed of the difficulties encountered in processing the application; that he regularly received replies to his questions, and that it was the complexity of the case that led to delays in the proceedings.

20. Having regard to the foregoing and the fact that the case was further complicated by the complainant's initial failure to supply the Organisation with all the information it required to deal with the matter, the Tribunal considers that the EPO was sufficiently diligent in the instant case and properly fulfilled its duty of assistance.

This plea is therefore unfounded.

21. The complainant contends that the EPO committed "a procedural error by insisting on joining" his wife's file to that of her adopted daughter.

22. The Tribunal is of the opinion that, in this case, since only the complainant's wife had adopted the child, it was impossible to decide on the latter's visa application without reference to her adoptive mother's status in order to ascertain whether all the requisite conditions were met.

23. The complainant claims 15,000 euros in compensation for the injury he allegedly suffered as a result of the slowness of the internal appeal proceedings.

24. According to the Tribunal's case law, a staff member who files an appeal is entitled to expect a decision to be taken within a reasonable time. Since an internal appeal is a necessary prelude to judicial review, the organisation too must respect the need for expeditious proceedings (see, for example, Judgment 2116, under 11).

25. In the present case, the defendant organisation does not dispute the length of the internal appeal proceedings which, it says, was due to the workload of the appeal body and the complexity of the case.

26. While the Tribunal can accept that the complexity of the case might have occasioned some delay in processing the internal appeal, the same is not true of the workload. The above-mentioned requirement of expeditious proceedings means that the Organisation must ensure that it has the resources to deal with internal appeals within a reasonable period of time, in accordance with the case law cited above.

27. In this case, the complainant filed his first appeal on 11 May 2009 and the second on 19 June 2009. The EPO did not submit its position paper to the Internal Appeals Committee until 26 months after the lodging of the first appeal.

The Internal Appeals Committee gave its opinion on 13 April 2012.

The Tribunal considers that the time-frame that should normally have sufficed to deal with the case was exceeded. The complainant therefore suffered injury entitling him to compensation, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 1,000 euros in compensation for the injury caused by the slowness of the internal appeal proceedings.

2. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2015, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

CLAUDE ROUILLER SEYDOU BA PATRICK FRYDMAN

DRAŽEN PETROVIĆ