

# CONSEIL DE L'EUROPE—— ——COUNCIL OF EUROPE

## COMMISSION DE RECOURS APPEALS BOARD

**Appeal No. 131/1986 (A. KOENIG v. Secretary General)**

The Appeals Board, composed of:

Mr Walter GANSHOF VAN DER MEERSCH, Chairman, and  
Sir Donald TEBBIT and  
Mr Henri DELVAUX, Members,

assisted by:

Mr Michele de SALVIA, Secretary, and  
Mrs Margaret KILLERBY, Deputy Secretary,

has delivered the following decision after due deliberation.

### PROCEEDINGS

1. The appellant lodged her appeal on 6 January 1986, and it was entered in the Board's register under file No. 131/1986 on the same day.
2. The supplementary pleadings were communicated to the Secretary General of the Council of Europe on 18 February 1986.
3. On 18 February 1986, the Secretary General was asked to submit his observations on the appeal by 21 March 1986. These reached the Board on 21 March 1986 and were communicated to the appellant for a reply.
4. In a letter of 23 April 1986, the parties were informed that the hearing had been set down for 29 April 1986.
5. The public hearing duly took place at the Council of Europe on 29 April 1986. The following were present: Mrs Koenig, represented by Ms Nadal, of the Strasbourg Bar; Mr Harremoes, Director of Legal Affairs, representing the Secretary General; and, assisting him, Mr Sims, Administrative Officer in the Central Section of the Directorate of Legal Affairs,

Mrs Tubach-Ortiz, Principal Administrative Officer in Establishment Division, and Mr R. Lamponi, Administrative Officer in the Private Office of the Secretary General.

## THE FACTS

The facts as set out by the parties may be summarised as follows:

6. Mrs A. Koenig, a French national, entered the Council of Europe's service on 1 March 1974. She currently occupies a B4 post in the Directorate of Environment and Local Authorities.

7. On 26 July 1984, availing herself of Article 45, paragraph 3 of the Staff Regulations and Article 3, paragraph 1 (*d*) of the Regulations on leave for personal reasons, Mrs Koenig requested one year's leave for personal reasons from 1 October 1984 in anticipation of her marriage, which was to take place - and took place - on 28 September 1984. She stated that she wished to join her husband, who is resident in Spain.

8. On 1 October 1984, Mrs Koenig lodged an administrative complaint with the Secretary General under Article 59, paragraph 1 of the Staff Regulations; this complaint was against the Head of Establishment Division's decision of 26 September 1984 whereby he had refused to grant her the leave sought.

9. On 14 November 1984, the complainant made an application to the Chairman of the Appeals Board for a stay of execution of the decision whereby the requested leave was refused.

10. On 26 November 1984, the Chairman of Board made an order staying execution of the impugned decision until 30 April 1985.

11. On 27 December 1984 the Secretary General decided to grant Mrs Koenig leave for personal reasons for one year from 1 December 1984.

12. On 21 September 1985, Mrs Koenig, availing herself of Article 4, paragraph 1 of the Regulations on leave for personal reasons asked the Secretary General to grant her a renewal of her leave for one year from 1 December 1985.

The claimant stated when making her application that it was based on exactly the same grounds as her original application.

13. In a decision on 22 October 1985, the Head of Establishment Division refused to grant her application, having regard to the organisation's interests.

14. On 2 November 1985, Mrs Koenig lodged an administrative complaint with the Secretary General under Article 59, paragraph 1 of the Staff Regulations; this complaint was against the Head of Establishment Division's decision of 22 October 1985.

15. By letter of 8 November 1985, the complainant made a fresh application to the Chairman of the Appeals Board for a stay of execution of the decision not to renew her leave.

16. The complainant founded her application on the consequences of the Secretary General's refusal, particularly for her family life; having to return to her post at the Council of Europe on 1 December 1985 would require her to leave her matrimonial home in Spain and also to give up courses she was following at Madrid University.

17. On 19 November 1985, the Secretary General rejected Mrs Koenig's administrative complaint.

He considered that, by the terms of Article 3, paragraphs 1 and 2 and Article 4, paragraph 1 of the Regulations on leave for personal reasons, "staff are not entitled as of right to a grant or renewal of leave for personal reasons" (translation).

The Secretary General also maintained that "the organisation's interests require that the temporary measures entailed" by Mrs Koenig's departure "be replaced by a permanent arrangement".

Finally, he noted that nothing suggested that because of her husband's profession the complainant's established residence was "temporary or likely to be put in doubt again within a given time".

He concluded that the date of 1 December 1985 for Mrs Koenig's resumption of her duties should stand and he pointed out that, if she did not resume her duties, Article 9 of the aforementioned Regulations provided that "a staff member who without due cause has not resumed his duties on expiry of the period of leave shall be deemed to have resigned".

18. On 27 November 1985, the Chairman of the Appeals Board made an order to the effect that the stay of execution would lapse on the day the Board's decision was given or at the latest on 30 May 1986.

19. On 6 January 1986, the appellant lodged her appeal.

20. On 29 May 1986, the Chairman of the Appeals Board made an order to the effect that the stay which had been granted on 27 November 1985 would lapse on 31 July 1986 at the latest.

## **SUBMISSIONS OF THE PARTIES**

21. The appellant seeks to have set aside the Secretary General's decision of 19 November 1985 whereby he refused to renew her leave for personal reasons.

She is requesting renewal until 1 December 1986.

She is also claiming compensation in the sum of 10,000 FF for the damage flowing from the disputed decision.

The **appellant's** submissions may be summarised as follows:

**As to the merits of the appeal**

22. The appellant observed that the request for renewal of her leave for personal reasons was made under Article 4, paragraph 1 of the Regulations on leave for personal reasons, which reads: "Except in special circumstances, such leave shall not exceed a total of three years in the staff member's entire career. Each period of leave shall be limited to one year but may be renewed for not more than one year at a time. An application for renewal should normally be submitted two months before the end of the current period of leave".

23. She pointed out that the application satisfied the requirements provided for in the aforementioned article.

24. As regards the Administration's refusal to recognise any staff right to leave for personal reasons, the appellant noted that the Secretary General's decision to grant or refuse such leave was governed by Article 3 of the Regulations on leave for personal reasons.

25. She observed that paragraph 1 (of) of that article, which provides that leave may be granted "because of establishment of the staff member's usual residence elsewhere than at the place where he is serving, when such residence is determined by the spouse's occupation", exactly describe the position she had been in since 28 September 1984, the date of her marriage to a Spanish civil servant resident in Spain.

26. Lastly, she pointed out that her personal position in 1986 was no different from what it had been ever since the order made by the Chairman of the Appeals Board on 26 November 1984, which referred to the respect for family life secured in Article 8 of the European Convention on Human Rights.

27. As regards the Administration's refusal to recognise a staff right to renewal of leave for personal reasons, the appellant asserted that, since the grounds on which the original leave had been granted were identical with those on which the second application was based, the Administration could not reject the latter when it had granted the first year's leave.

28. As to the argument of the organisation's interests, relied on by the Administration, the appellant pointed out in the first place that under Article 6, paragraph 1 of the aforementioned Regulations on leave for personal reasons, staff members were not entitled to any of the elements entering into their remuneration during the period of such leave.

29. With reference to the Order of 26 November 1984, she observed that the Acting Director of Environment and Local Authorities had approved her taking the leave sought, stating that arrangements could be made to alleviate the consequences of her absence. The appellant noted

that at no time had it been shown by the Administration that these temporary measures could not be prolonged.

30. As regards the submission that there was no reason for supposing that she had established her residence in Spain only temporarily, the appellant maintained that as she had not taken any final decision with her husband as to their future residence, this was pure speculation.

31. She maintained, lastly, that since there had been no new developments since her first application for leave, she had relied, in support of her application for renewal, on the same factors as in her original application (cf. paragraph 27).

The **Secretary General's** submissions may be summarised as follows:

**As to the merits of the appeal**

32. As regards staff entitlement to leave for personal reasons, the Secretary General observed that the purpose of the Regulations on leave for personal reasons "is to prescribe the conditions on which a staff member may be given leave for personal reasons by the Secretary General".

33. He concluded from this that a staff member does not enjoy such a right and he referred to the Opinion submitted by Mr Advocate General Capotorti to the Court of Justice of the European Communities that "... civil servants do not enjoy a right to leave of absence, only an interest therein, which the administration must appraise at its discretion in order to establish that it is compatible with the requirements of the service" (CJEC, Case 2/76, Mascetti v. Commission of the European Communities (1976) ECR 1975).

34. As to the specific conditions on which such leave may be granted, the Secretary General pointed out that under Article 3, paragraph 1 (d) of the Regulations on leave for personal reasons, such leave may be granted "because of the establishment of the staff member's usual residence elsewhere than at the place where he is serving, when such residence is determined by the spouse's occupation".

35. Article 3, paragraph 2 of the aforementioned Regulations also lays an obligation on the Secretary General, when he is deciding whether to grant leave, to "have regard to the exigencies of the service and the nature of the reasons adduced".

36. In this connection, he stressed that in the present case Mrs Koenig's immediate superior, who was Acting Director of Environment and Local Authorities at the time, had said in 1984 that measures could be taken to alleviate the consequences of her absence on leave for a year without impairing the functioning of the department concerned.

37. As regards the right to a renewal of leave, the Secretary General pointed out that by Article 4, paragraph 1 of the Regulations on leave for personal reasons, "each period of leave shall be limited to one year but may be renewed for not more than one year at a time". It was clear from this provision that staff members did not have an unconditional right to renewal of such leave.

38. When considering an application for renewal of leave for personal reasons from a staff member already on leave, the Secretary General had to check that the situation in respect of which leave had been granted had not changed since the date of the original decision to grant leave.

39. He also had to check whether the staff member's continued absence for a further period of leave was compatible with the organisation's interests.

40. The Secretary General pointed out that under Article 11 of the aforementioned Regulations, which provided that "in determining the date of the staff member's resumption of duties the Secretary General shall have regard to the interests of the Council, the staff member concerned and the person replacing him", he had, in the words of the Administrative Tribunal of the International Labour Organisation, "wide discretion". (ILOAT, judgment No. 412)

41. As regards the interests of the department in which the appellant worked, the Secretary General stated that the temporary measures that had been taken during the first year had to be replaced by a permanent arrangement in the interests of the organisation. Under Article 8 of the Regulations on leave for personal reasons, "the vacancy in staff numbers left by the staff member (on leave) may not be filled except by temporary staff". Under the rules currently in force on the recruitment of temporary staff, nobody could be given contracts for more than twelve months in succession.

Moreover, the post of documentalist occupied by the appellant in the environment sector could not easily be filled by temporary staff.

42. In his general staff policy, the Secretary General also had to have regard to the fact that by "freezing" a B4 post for a period of up to three years, he removed any possibility of promotion for the staff remaining in the organisation's service for the same period.

43. In the present case the Secretary General had had regard to the opinion of the Director of the department in which the appellant worked in reaching the conclusion that the needs of the organization were such as to outweigh the staff member's interest in being granted renewal of her leave.

He therefore concluded that he had properly exercised his discretionary powers.

## **THE LAW**

44. The appellant makes her appeal against the Secretary General's decision of 19 November 1985 whereby he refused to renew for one year the leave for personal reasons which had originally been granted her for one year on 27 December 1984.

In her submission, the refusal was unlawful, being both arbitrary and discriminatory.

45. The Secretary General maintains that the appeal is unfounded.

**A. As to the scope of the Regulations concerning leave for personal reasons**

46. The principle of leave for personal reasons is established in Article 45, paragraph 3 of the Staff Regulations, which provides: “The provisions governing leave for personal reasons are set out in Appendix VII to these Regulations”. As this provision indicates, the arrangements for granting such leave are contained in Appendix VII, which is entitled Regulations on leave for personal reasons.

47. The Secretary General points out that the staff do not have an absolute, unconditional right to such leave. Both Article 1 and Article 3 of the Regulations on leave for personal reasons confirm that it is a facility and that the Secretary General has a discretion in the matter. In his view, the same considerations apply to requests for renewal of leave.

48. Undoubtedly, as the terms of the aforementioned provision confirm, leave for personal reasons is not a right which the staff can claim to exercise without any restriction. The Secretary General has the power to grant or not to grant requests for leave, according to his assessment of whether such leave is or is not compatible with the organisation’s requirements and of the nature of the supporting reasons.

**B. As to the extent of the Appeals Board’s power of review**

49. As the Appeals Board has recalled on several occasions, the Secretary General has a wide discretion in the organisation of departments (cf CJEC, Case 61/70, G. Vistosi v. Commission of the European Communities (1971) ECR 535 et seq.).

But this is only so, however, “without prejudice to the rights which servants enjoy under their Staff Regulations and which they can ask the Court to enforce” (ibid).

Although in the event of a dispute concerning measures taken in connection with the organisation of departments, an international tribunal cannot substitute its own judgment for that of the Administration, it nonetheless has a duty to ascertain whether the disputed decision was taken in accordance with the regulations and with the general principles of law which must prevail in the legal system of international organisations (ABCE 8/1972, G. Artzet v. Secretary General, Digest, p. 47).

As has been noted by the ILO Administrative Tribunal, the discretionary authority of the Administration must always be exercised lawfully. This is why it is for the judge hearing an appeal against a decision taken following the exercise of discretionary authority to determine not only whether that decision has been taken by a competent authority and whether it is in regular form but also whether the correct procedure has been followed. As regards the legality of the decision under the Organisation’s own rules, the judge must also determine whether the Administration’s decision took account of relevant facts, whether clearly false conclusions have been drawn from the documents in the file and, finally, whether there has been a misuse of authority (ILOAT, Ballo case, Decision No. 191) (see also: ABCE 76/1981, Pagani v. Secretary

General, Digest, p.100; ABCE 100/1984, Van Lamoen v. Secretary General, Digest, p. 142; ABCE 101-113/1985, Stevens and others v. Secretary General, Digest, p. 153; ABCE 115-117/1985, Peukert, Muller-Rappard, Bartsch v. Secretary General; and OECDAB, Decision No. 55).

### **C. As to the merits of the appeal**

50. While it is true that the staff cannot claim a right to be given leave for personal reasons, it is nonetheless the case that, the principle of such leave having been expressly laid down in the Staff Regulations, they have a legitimate interest in the administrative authority's considering the facts on which any application for such leave is based and giving reasons for any refusal (cf ABCE 51/1979, Meunier v. Secretary General, Digest, p. 83).

51. The regulations in force at the Council of Europe envisage a number of specific cases which might justify the granting of such leave, and these include the one in Article 3, paragraph 1(d) of the Regulations on leave for personal reasons.

This is an example of an objective factor which normally, subject to the needs of the organisation, would justify granting leave for personal reasons.

While in general the Secretary General's discretionary power in the matter is a wide one, it is less wide where he has before him applications from staff which, objectively, come within the class of case mentioned in Article 3, paragraph 1(d).

52. At the hearing the Secretary General's representative said that one of the factors which moved the Secretary General to oppose the granting of a second year's leave was that the regulations in force prevented him from replacing the staff member on leave by a permanent official on the basis of a definitive appointment, as was possible under the institutional law of the European Communities. The Secretary General said:

"But if you refer to Appendix VII of our Regulations, you will see that the legal situation of the Council of Europe officials is quite different, it is clear from Article 8 that the staff member on leave cannot be replaced by a permanent official. In other words, his job is kept open pending his return."...

..."And I think, Mr Chairman, it can be safely said that we would not have been here today if, as would have been the case under Community Rules, the Secretary General had been able to fill Mrs Koenig's post by a permanent official on a permanent basis. If he had been able to do so, the Secretary General would have been able to ensure the smooth functioning of the service, Directorate of Environment, he would have been able to grant Mrs Koenig her leave, he would have been able to extend it and he would have been able to recruit a new permanent official and Mrs Koenig would not have had a post to return to but only a right to reinstatement at some future date after she had indicated her intention to come back to Strasbourg".

53. The Secretary General's representative also indicated at the hearing that temporary arrangements had been made on account of Mrs Koenig's departure, but that these arrangements were not without their drawbacks. In the Secretary General's submission, the Organisation's interests required that this temporary situation should be brought to an end in view of the nature of the duties attaching to the post previously occupied by the applicant.



54. In the light of the information given by the Secretary General's representative at the hearing, the Board observes that, except in the event of a resignation, it is the practice within the Secretariat of the Council of Europe for the staff member concerned to return to the post he or she occupied before going on leave.

55. Undoubtedly, this practice is likely to cause the difficulties from the point of view of the Organisation's interests. The Board observes, however, that there is nothing to prevent a different practice being followed. It follows that the Secretary General cannot base his refusal on the interests of the Organisation where the measures he has taken during Mrs Koenig's leave are the result of a practice which is not dictated by any interpretation of the provisions of the regulations. The Secretary General could even have replaced Mrs Koenig by an official of the same grade, subject, however, to compliance with the principle in Article 8 of the Regulations on leave for personal reasons, which provides: "The vacancy in staff numbers left by the staff member may not be filled except by temporary staff".

56. Any refusal to grant or renew leave for personal reasons in the case envisaged in Article 3, paragraph 1(d) must be based on the need to ensure that the proper functioning of the department concerned is not hampered. In short, the inconvenience suffered by a member of staff as a result of a refusal must be proportional to the interests of the Organisation.

57. In the present case, however, it does not appear from the information submitted to the Board that the Secretary General, by pointing to specific facts, gave reasons for refusing to renew the leave which made clear the genuineness of the interests of the Organisation.

For these reasons, the Appeals Board declares the appeal well-founded;

sets aside the decision whereby the Secretary General refused to renew the leave for personal reasons;

dismisses the claim for compensation;

decides that the Council of Europe shall reimburse the appellant for her costs to an amount not exceeding three thousand francs.

Given in public in Strasbourg on 25 July 1986, the French text of the decision being authoritative.

The Secretary of the  
Appeals Board

The Chairman of the  
Appeals Board

M. de SALVIA

W.J. GANSHOF VAN DER  
MEERSCH