

Decision of the Appeals Board of 25 October 1990
Appeal No. 162/1990 (JAEGER v. Secretary General)

The Appeals Board, composed of:

Mr Gunnar LAGERGREN, Chairman
Sir Donald TEBBIT, and
Mr Emmanuel DIEZ, members

assisted by:

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

has delivered the following decision after due deliberation.

PROCEDURE

1. The appellant brought his appeal on 20 April 1990. This appeal was registered in the register of the Appeals Board under number 162/1990.
2. On 18 May 1990 the Secretary General's observations were submitted.
3. On 29 June 1990 the appellant submitted his observations in reply.
4. On 10 September 1990 the public hearing took place at the Council of Europe in the presence of the appellant, Mr M. Jaeger, and Mr G. Buquicchio, Head of the Central Division of the Directorate of Legal Affairs, representing the Secretary General, assisted by Mr P. Dewaguet, Administrative Officer in the Directorate of Legal Affairs.

THE FACTS

5. The facts as set out by the parties may be summarised as follows:
6. The appellant, a German national, entered France in 1982 as a student. He was granted a permit to reside in France for one year. The permit was subsequently renewed.
7. On 29 December 1984 the appellant married a French national and on 4 January 1985 he was granted a special permit to reside in France for ten years. The permit indicated that he resided in France in Biviers (Isère).
8. From October 1987 to the end of September 1989 the appellant was a teaching assistant at the Graduate Institute of International Studies in Geneva.
9. In early 1988 the appellant and his wife and two children moved from Biviers to St Ismier (Isère).

10. In August 1988, following a disagreement with his wife, the appellant took his car, left the family home and stayed in a studio at his parents' home in Battenberg, (Grünstadt-Land), Federal Republic of Germany.

11. On 10 August 1988 the appellant made a declaration to the German authorities stating that he had moved to Battenberg and on 12 August 1988 he was issued with a German identity card showing his address in Battenberg.

12. About two months later the appellant returned to his family in St Ismier and on 12 October 1988 his French residence permit was altered to show his address in St Ismier.

13. In 1986 the appellant applied for a post at the Council of Europe.

14. By letter dated 18 December 1987 the appellant was informed that he had been placed on a reserve list for employment at the Council of Europe.

15. After being contacted by the Establishment Division of the Council of Europe in July 1989 the appellant was, in a letter dated 11 August 1989, offered a post as Administrative Officer (Grade A2) in the Directorate of Social and Economic Affairs, Social Charter Division. In this letter he was informed that he would be granted a residence allowance. No mention was made of an expatriation allowance which, under paragraph 1 (i) of Article 6 of the Regulations governing staff salaries and allowances, is payable to staff in categories A, L and B who, at the time of their appointment, were not nationals of the host State and had not been continuously resident on that State's territory for at least three years.

16. The appellant accepted the offer of a post and began to work for the Council of Europe on 16 October 1989.

17. On 22 December 1989 the appellant made an administrative complaint against the refusal of the Secretary General to grant him an expatriation allowance.

18. On 26 December 1989 the French Ministry of Foreign Affairs issued the appellant a document indicating his functions at the Council of Europe and that he had entered France in 1985.

19. The complaint of the appellant concerning his entitlement to an expatriation allowance was rejected by the Secretary General on 21 February 1990.

SUBMISSIONS BY THE PARTIES

The appellant's submissions may be summarised as follows:

20. The appellant referred to paragraph 1 (i) of Article 6 of the Regulations governing staff salaries and allowances and claimed that he was entitled to receive the expatriation allowance provided by these Regulations on the ground that he had not, at the time of his appointment, been continuously resident in France for at least three years.

21. The appellant claimed that his period of residence in France had not been continuous as he had left France in August 1988 and returned to Germany. He had returned to Germany for personal reasons and did not at the time foresee that he would return two months later to France.

Furthermore he stated that a German citizen holding residence (“Hauptwohnsitz”) in Germany even if he spends more time abroad than in Germany. He also claimed that he had domicile and principal residence in Germany ever since August 1988.

22. As regards the length of this period of residence in Germany the appellant stated that paragraph 1 (i) of Article 6 did not provide for any minimum period in order to interrupt his residence in France. At the hearing he also stated: “I must clearly admit that two months is not much.”

23. The fact that he had not returned his French residence permit when he left France did not, the appellant maintained, mean that he had been continuously resident in France as the permit only authorised him to reside in France. Moreover he had offered to return the permit but had been advised to retain it by the French authorities dealing with residence permits. In addition he claimed that the question of his residence should not be decided according to French legislation.

24. The appellant pointed out that when he returned to Germany he had been unaware of the importance of the place of his residence for the purpose of the expatriation allowance. Furthermore, although he had applied for a post at the Council of Europe in 1986 and had been placed on a reserve list in December 1987 he had been warned about the small chance of obtaining employment with the Council. He had heard nothing from the Council from this date until he was offered a post in July 1989.

25. The appellant indicated that he had accepted the offer of employment even though his contract only provided for a residence allowance as it was not possible, without becoming a staff member of the Council of Europe, to take the necessary proceedings concerning any inexact application of the rules.

The submissions of the Secretary General may be summarised as follows:

26. The Secretary General submitted that the appellant was not entitled to receive the expatriation allowance provided for under paragraph 1 (i) of Article 6 of the Regulations governing staff salaries and allowances as at the time of his appointment, he had been continuously resident in France for over three years.

27. The residence of the appellant in France could not, the Secretary General claimed, be interrupted merely by staying outside France, for instance as a tourist. The terms and the purpose of the relevant texts must also be taken into account. In the present case the appellant had spontaneously deserted his home leaving his household goods behind. Furthermore any period claimed as residence outside France must also, in order to be relevant, lead to a simultaneous loss of residence in France. And the appellant had not taken steps to end his residence in France. The indications contained in his special permit to reside in France and the document indicating his functions at the Council of Europe were further proof that he had retained his residence in France.

28. The Secretary General considered that, once it had been established that the appellant continued to reside in France, matters relating to domicile and residence of the appellant in Germany, including the declaration that he had moved to Battenberg and that his German identity card showed an address in Battenberg, were no longer relevant.

29. Furthermore the Secretary General noted that the appellant had accepted the offer of employment made on 11 August 1989 granting him a residence allowance even though he was

aware at the time that he had not been granted an expatriation allowance.

THE LAW

30. The appellant is appealing against the decision of the Secretary General dated 21 February 1990 which rejected his claim to be entitled to be paid an expatriation allowance by the Council of Europe.

31. The Secretary General submitted that the appeal was ill-founded as the appellant had, for the purposes of the regulations governing staff salaries and allowances, been continuously resident in France for over three years at the time of his appointment and therefore did not fulfill the required conditions to obtain the expatriation allowance provided by paragraph 1 (i) of Article 6 of these Regulations.

32. The Board is accordingly required to decide whether, for the purpose of paragraph 1 (i) of Article 6, the appellant fulfills the conditions required for the payment of an expatriation allowance. In this case the criteria to be considered relate to the presence or absence of a period of three years as a continuous resident in France immediately prior to the appointment of the appellant to a post as Administrative Officer in the Council of Europe.

33. Within the framework of the Council of Europe a notion such as residence or resident in the terms of Article 6 of the Regulations governing staff salaries and allowances cannot be determined solely by reference to the domestic law of any particular state. Instead an autonomous solution must be found permitting the notion in question to be properly understood within the meaning of Article 6.

34. For that purpose useful indications are to be found in Resolution (72) 1 and its Annex, relating to the standardisation of the legal concepts of “domicile” and “residence” adopted by the Committee of Ministers of the Council of Europe on 18 January 1972, as well as the Explanatory Memorandum prepared by the European Committee on Legal Co-operation.

35. Rule 7 of the Annex states: “The residence of a person is determined solely by factual criteria; it does not depend upon the legal entitlement to reside.”

Rule 8 of the Annex states: “A person has a residence in a country governed by a particular system of law or in a place within such a country if he dwells there for a certain period of time. That stay need not necessarily be continuous”. Similarly it is relevant that the same Article 6 paragraph 1 (iv) of the Regulations governing staff salaries and allowances puts emphasis upon the place of “actual and habitual residence”.

36. Paragraph 54 of the Explanatory Memorandum reads as follows: “A person should not be regarded as having lost his residence if he has been absent from it, even for a fairly long time (for such reasons as a journey, holidays, studies), or as being unable to acquire a residence if he does a great deal of travelling. The basic consideration should be whether, over a whole period, he was mainly or at least largely in one place. What is important is whether he actually returns to the country or place after his various journeys.”

37. In view of the preceding guidelines and considering the objective facts of the case the Board finds that the appellant did not, for the purposes of the Regulations governing staff salaries and allowances, lose his residence in France merely by leaving St Ismier in August 1988 and returning to Germany even if he did not foresee, at that time, that he would return to his

wife and children in France two months later.

38. Therefore the appellant had, within the meaning of the Regulations, been continuously resident in France for over 3 years at the time of his appointment. Thus the appellant is not entitled to receive an expatriation allowance.

For these reasons, the Appeals Board:

Declares the appeal to be unfounded;

Dismisses it; and

Orders that each party shall bear its own costs.

Done and decided in Strasbourg, the English text of the decision being authentic.

The Secretary of the
Appeals Board

M. de SALVIA

The Chairman of the
Appeals Board

G. LAGERGREN

Read in public by Mr Lagergren on 25 October 1990