

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 188/1994 (Martina KELLER v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair
Mr Kåre HAUGE
Mr Alan GREY, Judges

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Ms Claudia WESTERDIEK, Deputy Registrar

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mrs Martina Keller lodged her appeal on 4 July 1994. It was registered the same day under file No. 188/1994.
2. She lodged a supplementary memorial on 22 July 1994.
3. On 30 September 1994 the Secretary General submitted his observations on the appeal.
4. The public hearing took place in the New Human Rights Building, Strasbourg, on 23 March 1995. Mrs Keller was represented by Mr M. M. Leker, member of the Israeli Bar, Secretary General of the International Association of Legal Science; the Secretary General was represented by Mr G. Buquicchio, Head of the Legal Advice Division, Directorate of Legal Affairs, who was assisted by Mr R. Lamponi, Principal Administrative Officer in the same directorate.

THE FACTS

5. The appellant has been a permanent member of the Council of Europe staff since 1 January 1994 and holds a grade A2 post of administrative officer in the registry of the European Court of Human Rights.
6. She was born in 1962 and is a German national. She and her family came to France in 1977 after her father was appointed to the staff of Unesco. As a “person assimilated to a member of a diplomatic mission”, she held an International Organisations residence permit issued by the French Ministry of Foreign Affairs.
7. From 1977 to 1980 she attended secondary school at the Lycée International, Saint-Germain-en-Laye, France, and from 1980 to 1983 studied for a university degree at the Institut d’Etudes Politiques, Paris.
8. From 1984 to 1986 she was employed as a private assistant at the M. E. Duggan Foundation, Paris; from October 1986 to October 1987 she worked for a French bank, Crédit Commercial de France. In both cases the work was paid.
9. In October 1987 she began studying for a master’s degree in law at Paris I and Paris II Universities, completing the degree in June 1989. In 1990 she trained for the Paris Bar’s at the “Centre de Formation Professionnelle des Avocats”, where she obtained her Certificate of Aptitude to practice law in December.
10. From 10 January to 31 August 1991 she worked as a trainee lawyer in Dunkerque, being paid a monthly salary, and from 1 September 1991 as a lawyer in a law practice in Paris.
11. At that point she applied to the prefecture of the Yvelines area for a residence permit, which was issued to her in October 1991 and which stated that she had entered France in October 1991.
12. On 15 June 1992 she applied to sit an external competitive examination which was being held to fill a post of administrative officer in the registry of the European Court of Human Rights. She sat the written and oral tests and was placed on a reserve list.
13. She was subsequently offered the post on its falling vacant.
14. In October and November 1993 she had a number of interviews with the Council of Europe Administration concerning her recruitment and, among other things, the possibility of being paid an expatriation allowance. On 19 November 1993, having originally intended taking up her duties on 1 February 1994, she offered to begin work on 15 December 1993.
15. In a letter dated 9 December 1993 the Secretary General of the Council of Europe offered her a grade A2 post of administrative officer in the registry of the European Court of Human Rights for a two-year probationary period. Under the terms of the offer she was to be paid not an expatriation allowance but a residence allowance.

16. She accepted the offer by letter dated 14 December 1993.

17. In a letter dated 22 December 1993 she claimed expatriation allowance. She stated that she met the conditions laid down in the regulations and that, during the interviews with the relevant Council of Europe departments, she had been led to believe that taking up her duties in January or February 1994 would not affect entitlement to expatriation allowance.

18. In a memorandum dated 10 February 1994 the Head of the Human Resources Division informed her that she was not entitled to expatriation allowance because she had been living in France for more than three years. The memorandum stated that in January 1991 she had begun her lawyer traineeship in Paris and had therefore been resident in France from then on.

19. On 8 April 1994 the appellant filed a complaint against the refusal to pay her expatriation allowance.

20. The complaint was rejected in a memorandum dated 4 May 1994. This stated that working as a trainee lawyer was paid employment which could not be treated as study and that she had been continuously resident in France since 1984.

THE LAW

21. The appeal is directed against the Secretary General's decision withholding expatriation allowance.

22. The appellant maintains that at 1 January 1994, the date on which she began working for the Council of Europe, she had been resident in France for less than three years.

23. She relies on Article 6 paragraph 1 (i) of the Regulations governing Staff Salaries and Allowances, which provides that a staff member's periods of service in the host country in his own country's administration or with other international organisations do not count as residence. She argues that this rule applies not only to officials but also to family whom they bring with them and who are living with them.

24. The appellant argues that until 1991 she was in France as a member of the family of an international civil servant. In particular she maintains that the periods of time which she spent in higher education and training in France should not count as residence. She states that her political science course from 1980 to 1983 was followed by periods of training (in the broad sense) with a private European foundation and afterwards Crédit Commercial de France. With a view to a change of career direction she was studying law at university and then at the Centre de Formation Professionnelle des Avocats until 1990. In addition she argues that her lawyer traineeship in Dunkerque from 10 January to 14 August 1991 should be treated as vocational training.

25. She takes the view that she had no option but to study for a degree in France. She further states that in 1984, 1988 and 1993 she made efforts to return to her country of origin.

26. She contends that her period of residence in France should be regarded as running from September 1991, which is when she began working for the Paris legal practice and is only a month before she was officially recognised as resident in France.

27. She argues that, in any case, the period laid down in Article 6 paragraph 1 (i) expired at the earliest on 10 January 1994 - ten days after she entered the Council of Europe's employment.

28. She alleges lastly that, during the discussions which preceded her recruitment, the staff of the Council of Europe department concerned gave her "inadequate, not to say false information" about the expatriation allowance. Having substantially altered her circumstances by giving up her previous work on the strength of that information, she takes the view that the Council of Europe cannot validly refuse her the allowance.

29. The Secretary General maintains that the appeal is unfounded in that the appellant has not established any contravention of the Staff Regulations in respect of her.

30. He disputes that Article 6 paragraph 1 (i) of the Regulations governing Staff Salaries and Allowances can be interpreted to mean that the exemption applying to, among others, international civil servants for purposes of calculating the period of residence in the host state also applies to members of their families.

31. In the Secretary General's view the appellant has in any case been resident in France of her own choosing and within the meaning of Article 6 of the Regulations governing Staff Salaries and Allowances since 1984.

32. He maintains that, in view of Rule 7 of the annex to Resolution (72) 1 on 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, issue of a residence permit does not mean that the holder was not already resident.

33. He observes that the appellant, when of full age, had paid employment in Paris in 1984 with the M E Duggan Foundation and subsequently, from October 1986 to October 1987, with Crédit Commercial de France. She was thus resident in France independently of her father's professional circumstances. The law degree for which she studied from 1987 to 1989 did not, he argues, interrupt her residence in France within the meaning of Article 6 paragraph 1 (i) of the Regulations governing Staff Salaries and Allowances, and she was still resident in France when she took the training course at the Centre de Formation Professionnelle des Avocats, during her lawyer traineeship and when she worked as a lawyer.

34. The Secretary General further maintains that the duty to provide information was properly discharged. Whatever the information the appellant was given during her conversations with staff of the Human Resources Division, the employment offer dated 9 December 1993 contained no reference to an expatriation allowance and stated that a residence allowance would be paid. The appellant was in full possession of the facts when she accepted the offer. The Secretary General states that it is Council of Europe practice that any draft offer or draft contract must be examined by various departments and becomes firm and

final only after all these departments have given their approval. Before the offer dated 9 December 1993 there was no decision or firm promise incurring Council of Europe liability.

35. In this connection the Secretary General further states that the decision to recruit the appellant on 1 January 1994 was taken for reasons of economy and sound financial management, in accordance with Article 2 of the Financial Regulations, and not because of any desire to injure her: if she had been employed with effect from 15 December 1993 she would have had to be paid for the remaining half of December, which, on account of the end-of-year holidays, contained only a few working days. This would have caused the Council of Europe unwarranted expense.

36. The Tribunal must decide whether, for the purposes of Article 6 paragraph 1 (i) of the Regulations governing Staff Salaries and Allowances, the appellant meets the requirements for payment of expatriation allowance.

37. Article 6 paragraph 1 (i) reads:

“The expatriation allowance shall be 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, no account being taken of previous service in their own country’s administration or with other international organisations.”

38. The Tribunal points out that, in 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 a particular state (ABCE, Decision No. 162/1990, Jaeger v. Secretary General, 25 October 1990, paragraph 33).

39. For guidance in arriving at an autonomous interpretation the latter decision refers to Resolution (72) 1 and the annex to it, on standardisation of the legal concepts of domicile and residence, which the Committee of Ministers of the Council of Europe adopted on 18 January 1972, and to the explanatory memorandum drafted by the European Committee on Legal Co-operation (ABCE, Decision No. 162/1990, Jaeger v. Secretary General, paragraphs 33 and 34).

40. 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.”

41. 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.”

42. Rule 10 of the annex states: “The voluntary establishment of a residence and a person’s intention to maintain it are not conditions of the existence of a residence ... but a person’s intentions may be taken into account in determining whether he possesses a residence or the character of that residence.”

43. Rule 11 of the annex states: “A person’s residence ... does not depend upon that of another person”.

44. The explanatory memorandum by the European Committee on Legal Co-operation states that the concept of residence “depends on consideration of objective facts” (see paragraphs 45 to 58).

45. Since 1977 the appellant, the daughter of an international civil servant, has lived in France, where she received three years’ schooling, took a degree and vocational training and has also had paid employment. Initially she held an International Organisations permit as a “person assimilated to a member of a diplomatic mission”. In September 1991 she applied to the French authorities for a residence permit, which was granted in October 1991.

46. The Tribunal has noted the appellant’s argument that Article 6 paragraph 1 (i) *in fine* of the Regulations governing Staff Salaries and Allowances also applies to family of an international civil servant who come with him to his place of employment and that her years in France at secondary school, at university and in training should therefore not be taken into account.

47. However, it is unnecessary to deal with that question: even assuming that the text and purpose of Article 6 paragraph 1 (i) *in fine* allowed such an interpretation, the Tribunal has reached the conclusion that the appellant’s period of residence in France runs from 1984.

48. It notes that at that point the appellant had completed her first degree, which enabled her to take paid employment in France, provide for herself and be independent of her father. Her residence in France continued during her law degree and legal training.

49. As residence is a matter of objective fact the nature of her authorisation to reside in France is immaterial.

50. For the purposes of the regulations we are concerned with here, therefore, the appellant had been continuously resident in France for more than three years at the time of her appointment. She is therefore not entitled to expatriation allowance under Article 6 paragraph 1 (i) of the Regulations governing Staff Salaries and Allowances.

51. Lastly the appellant is mistaken in inferring from pre-recruitment discussions that the Council of Europe cannot legitimately withhold expatriation allowance.

52. Under general legal principles recognised in international case-law, in particular the principle of good faith, the Organisation is required to honour any undertakings which it has given (see ABCE, Decision No. 133-145/1986, Ausems and others v. Secretary General, 6 August 1987, paragraph 79; No. 163-164/1990, Jeannin and Bigaignon v. Secretary General, decision of 26 June 1992, paragraph 63).

53. In the present case the Council of Europe gave an undertaking only in its employment offer dated 9 December 1993, which provided for a residence allowance, not an expatriation allowance. In full knowledge of the facts the appellant accepted the offer in a letter dated 14 December 1993. Nothing in the interviews which preceded her recruitment created an

entitlement to the expatriation allowance which she is now claiming (see, *mutatis mutandis*, ABCE, Decision 32/1974 of 15 January 1975, Leguin v. Secretary General).

54. It follows that no illegality is ascertainable.

For these reasons the Administrative Tribunal:

Declares the appeal unfounded;

Dismisses it;

Orders that each party bear its own costs.

Delivered in Strasbourg on 5 April 1995, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. RUSSO

Read out by Mr Alan Grey
in the public hearing of 5 April 1995

A. GREY