

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

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 246/1998 (VANGREENBERGHE (III) v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Nicolas VALTICOS, Deputy Chairman,  
Mr Kåre HAUGE,  
Mr José da CRUZ RODRIGUES, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

### PROCEEDINGS

1. Mr Frans VANGREENBERGHE, a retired Council of Europe staff member, lodged this appeal on 25 March 1998. It was registered on 26 March 1998 under N° 246/1998.
2. After being informed of a request for withdrawal, the Chairman of the Administrative Tribunal, Mr Carlo RUSSO, decided on 26 March 1998 that he should not participate in the examination of the present case. Consequently, under Article 2 (last sentence) of the Statute of the Tribunal, Mr Nicolas VALTICOS, Deputy Chairman of the Tribunal, replaced him for the purposes of this case. The parties were duly informed of this by the Registrar of the Tribunal.
3. When lodging his appeal, the appellant asked the Tribunal to order, as a matter of urgency, an immediate stay of execution of the decision to withhold his tax adjustment.
4. By Order of the Deputy Chairman, dated 8 April 1998, Mr Vangeenberghe's application for a stay of execution was rejected. The Deputy Chairman had previously requested the parties' observations on this application.

5. On 17 April 1998, the Secretary General submitted his observations on the appeal. The appellant submitted his observations in reply on 5 May 1998.

6. In a communication dated 15 April 1998, the appellant asked the Tribunal to hear the appeal in camera.

7. The Secretary General accordingly submitted additional observations to the Tribunal on 7 May 1998. The appellant's observations in reply to the Secretary General's additional observations were submitted on 15 May 1998.

8. Taking into account the opinion of the parties, who had agreed to forego oral proceedings in this case, the Tribunal stated on 20 May 1998 that there was no need to hold a hearing in this case, and decided to conduct its deliberations on the basis of written observations and statements.

9. At the start of the proceedings, Mr F. VANGEENBERGHE had indicated that he would be represented by Mr M. MEYER, a lawyer practising in Strasbourg. The Secretary General was represented by Mr R. LAMPONI, Head of the Legal Adviser Department in the Directorate of Legal Affairs.

## THE FACTS

10. The appellant, a Belgian citizen, is a retired Council of Europe staff member resident in France.

11. The present appeal concerns the Secretary General's right to suspend payment of the tax adjustment to a retired staff member when the beneficiary of the adjustment fails to pay the income tax which he or she owes. Tax adjustments are regulated by Article 42 of the Pension Scheme Rules (which constitute Appendix V of the Staff Regulations), as well as by the Implementing Instructions for this article. Article 42 reads as follows:

### ***Article 42 – Pensions which are subject to national tax legislation***

*“1. The recipient of a pension under these Rules shall be entitled to the adjustment applying to the Member Country of the Organisation in which the pension and adjustment relating thereto are chargeable to income tax under the tax legislation in force in that country.*

*2. The adjustment shall equal 50% of the amount by which the recipient's pension would theoretically need to be increased, were the balance remaining after deduction of the amount of national income tax or taxes on the total to correspond to the amount of the pension calculated in accordance with these Rules.*

*...*

*5. The recipient of an adjustment as specified in this Article shall be required to inform the Organisation of his full address and of any subsequent change therein.*

*Such recipient shall produce evidence of his pension and the relative adjustment having been declared or taxed; should he fail to comply with this obligation, he shall be deprived of the right to this adjustment and shall refund any amounts unduly received in this respect.*

6. *The other procedures for calculating the adjustment and, in particular, those necessitated by the special features of certain national tax laws, and the procedure for payment of the adjustment shall be laid down in the Implementing Instructions established in accordance with the tax legislation of Member Countries.*

...”.

12. On 12 February 1996, a first local office of the French Treasury sent the Council of Europe a third-holder notification (“avis à tiers détenteur”) with a view to obtaining certain outstanding sums owed to the tax authorities by the appellant in respect of income tax.

On 5 March 1996, the Secretary General informed the Treasury that, under the General Agreement on the Privileges and Immunities of the Council of Europe, it was impossible to comply.

13. On 19 March 1996, a second Treasury office sent another third-holder notification to the Council of Europe.

The Secretariat General repeated his reference to the provisions of the General Agreement, under which the Council of Europe is immune from any form of attachment, and requested additional information.

14. After a third attempt, made on 29 May 1997, had also proved unsuccessful, the Secretary General requested details of the appellant’s debts for the periods for which he was liable for income tax.

15. Having received details in June 1997 of the amounts due for income tax over a period of several years, the Administration notified the appellant on 29 August 1997 that he was to pay the outstanding tax and submit evidence of such payment, failing which he would be deprived of his right to the tax adjustment.

16. In September 1997, the appellant wrote to the Administration and had an interview with the Deputy Head of the Human Resources Division; while not contesting the sums demanded by the tax authorities, he pleaded various financial difficulties.

On 12 November 1997, the Administration took formal note of the appellant’s statements and, in view of his financial difficulties, sought his agreement to an arrangement whereby it would pay the amount corresponding to the tax adjustment directly to the Treasury, on his behalf.

17. On 17 December 1997, the Administration took formal note of the appellant’s refusal to agree to this arrangement, and notified him that payment of the tax adjustment in respect of his pension would be suspended from 1 January 1998 until such time as his position vis-à-vis the tax authorities had been regularised.

18. On 26 December 1997, the appellant sent a letter to the Secretary General asking him to revoke his decision, and, given the urgency of the matter, asked him to reply as soon as possible.

Among other things, he observed that assessment of his income for tax purposes and the payment of the corresponding tax fell within the jurisdiction of the national authorities, and belonged to the sphere of the staff member's private relations with the authorities of the country in which he was liable for tax.

He noted that there were no obligations on a retired staff member with regard to the use made of sums paid as pension or tax adjustment by the Council of Europe. If this adjustment was intended exclusively for the tax authorities, the Council would pay it to them directly. It was clear that it was intended as financial assistance to the retired staff member.

Finally, the appellant argued that it was therefore not the Council's role to see to the morality and public-spiritedness of retired staff members.

19. The Director of Administration replied on the Secretary General's behalf in a letter dated 3 February 1998, informing Mr Vangeenberghe that he saw no reason to alter his decision to suspend payment of the tax adjustment, which had in fact been put into effect as from 1 January 1998, and that, bearing in mind the appellant's special circumstances, and particularly his financial difficulties, the decision simply to suspend payment of the tax adjustment by way of an interim measure was, in the Secretary General's opinion, totally in keeping with the Pension Scheme Rules.

At the same time, the Administration repeated its offer to pay the tax adjustment directly to the tax authorities if the appellant agreed.

20. On 23 February 1998, the appellant sent a letter responding to the Secretary General's arguments. He also added that he would request "compensation from the Tribunal" and "suspension of the decision as a matter of urgency".

21. After the present appeal had been lodged, the appellant gave the Secretary General his consent to partial use of the suspended tax adjustment in letters dated 8 April, 17 April, 5 May and 4 June 1998, and forwarded to the Administration several "orders to pay" he had received for taxes other than income tax.

22. Following these requests by Mr Vangeenberghe, the Administration made tax payments to the Treasury on his behalf, by deducting sums from his suspended tax adjustment.

## **THE LAW**

23. The appeal is directed against the Secretary General's decision to suspend payment of the tax adjustment. The appellant asks the Tribunal to annul this decision, to order the restitution of the sums withheld to date, and to award him compensation for pecuniary and non-pecuniary damage.

24. The appellant points out that under the terms of Article 42, paragraph 1 of the Pension Scheme Rules, “the recipient of a pension under these Rules shall be entitled to the adjustment”. He adds that according to the second paragraph of Article 42, paragraph 5 of the same Rules,

*“[such] recipient [of the adjustment] shall produce evidence of his pension and the relative adjustment having been declared or taxed: should he fail to comply with this obligation, he shall be deprived of the right to this adjustment and shall refund any amounts unduly received in this respect.”*

Given that he has always declared his pension and tax adjustment, the appellant considers that the Secretary General has no legal basis for suspending payment of the tax adjustment.

At the same time, the appellant recognises that the Secretary General has sole responsibility for the Council of Europe’s diplomatic and other relations with the member states. However, when these relations involve the financial affairs of a staff member (as in the present case) he or she retains a right of inspection and also of fair comment. Since his problems result from the courts’ slowness in dealing with financial litigation in which he is involved, the appellant finds it unacceptable that the Secretary General should urge him to pay part of his pension to the tax authorities so as to satisfy the demands of a national administration.

Finally, the appellant maintains that the Secretary General’s submissions contain factual inaccuracies regarding his dispute with the tax authorities, and that the Secretary General has made different proposals to him and given varying reasons for his decision.

25. For his part, the Secretary General believes, firstly, that the appeal should be inadmissible because the appellant did not first submit an administrative complaint as required by Article 60 of the Staff Regulations. He emphasises the importance of scrupulous compliance both with this provision and with Article 59 of the Regulations, which governs the submission of an administrative complaint.

In his view, failure to comply with the procedures laid down for this purpose is an element likely to affect legal certainty within the Organisation, legal certainty being a principle which is recognised and upheld not only in the majority of states, but also in the majority of international organisations, so much so that it has become a general principle of law.

26. As for the merits of the case, the Secretary General considers firstly that his decision is consistent with the Pension Scheme Rules, which have been correctly applied. Under the terms of the second paragraph of Article 42.5, “the recipient [of an adjustment] as specified in this Article shall be required to inform the Organisation of his full address and of any subsequent change therein. Such recipient shall produce evidence of his pension and the relative adjustment having been declared or taxed; should he fail to comply with this obligation, he shall be deprived of the right to this adjustment and shall refund any amounts unduly received in this respect”. Furthermore, the scope of this provision is subsequently clarified by Instruction 42/5, entitled “evidence of payment of tax”, which concerns the evidence that tax has been paid. According to the Secretary General, it is clear from these provisions that payment of income tax is a precondition for continued payment of the tax

adjustment by the Council of Europe, and that if payment cannot be proved, the beneficiary is deprived retrospectively of this right.

Faced with a *de facto* situation, and taking the appellant's personal circumstances into account, the Secretary General decided to take an interim measure, namely suspension of the tax adjustment, instead of depriving him of this right.

27. Secondly, the Secretary General considers that, under Article 2 of the General Agreement on the Privileges and Immunities of the Council of Europe, he has a duty to co-operate with the authorities of the Council of Europe member states. This provision is as follows:

*"The Secretary General shall co-operate at all times with the competent authorities of the members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities, exemptions and facilities enumerated in the present Agreement".*

The Secretary General is of the opinion that this provision is intended to ensure that the Council of Europe is not hindered in any way from carrying out its institutional tasks, rather than to enable staff members to evade attachment of their salary or pension as a result of their private debts. Consequently, having had to reject the third-holder notifications, and in order to guard against any abuse of the principle of immunity, prohibited in the above-mentioned Article 2, he is obliged to co-operate with the French authorities to prevent such abuse. Given that he enjoys some discretionary latitude in deciding which measures to take, and bearing in mind the appellant's situation, he chose to suspend payment of the tax adjustment, an adjustment, moreover, that is funded by the country collecting the income tax. This decision was in keeping with the Pension Scheme Rules, and was both appropriate and proportional having regard to the case file.

28. In conclusion, the Secretary General asks the Tribunal to declare the appeal inadmissible and, in the alternative, to dismiss it, since the appellant has not established the existence of any violation of the rules applicable to this case or of the general principles of law.

29. In his observations in reply to those of the Secretary General, the appellant claims that he did indeed submit a prior administrative complaint. He cites the content of the correspondence between the parties as evidence. On 26 December 1997, he asked the Secretary General to "revoke his decision", while on 3 February 1998, the Secretary General stated that "there was no reason to alter [his] decision". The appellant adds that it may be seen from his letter of 23 February 1998 that he informed the Secretary General of his failure to reply to him within the time limit set, corresponding to the period of thirty days established by Article 59 of the Staff Regulations.

30. With regard to the merits of the appeal, he reiterates his arguments and submissions.

31. The Tribunal notes firstly that it is appropriate to recall the context of this appeal. This is not a case in which a former Council of Europe staff member considers himself exempt from the obligation to pay income tax. Nor is it a case of a staff member refusing to pay this tax. Were this the case, the Tribunal would not hesitate to remind the appellant of his

obligations. However, the appeal raises a specific issue, namely the Secretary General's attitude when faced with a staff member's financial inability to fulfil the obligation to pay income tax – an obligation which he in fact acknowledges. Thus, the current proceedings do not result from a dispute over the status of international civil servants, but from the problems faced by a former staff member in fulfilling his obligations towards the authorities in the country in which he has retired. It follows that the Council of Europe is involved only to the extent that one of its former staff members is a party to the above dispute.

32. The Tribunal must first of all examine the Secretary General's objection that the appeal is inadmissible.

33. The Tribunal notes that, under the system established in Articles 59 and 60 of the Staff Regulations, an appellant cannot appeal to the Tribunal without first having given the Secretary General an opportunity to make good any damage caused to the appellant through administrative actions, by examining an administrative complaint.

Given that correspondence had been exchanged between the parties in the present case between 17 December 1997, when the decision appealed against was taken, and 25 March 1998, the date of the appeal to the Tribunal, the Tribunal must determine whether such an exchange constitutes execution of the complaints procedure. In particular, it must determine whether the letter sent by the appellant to the Secretary General on 26 December 1997 can be considered as an administrative complaint within the meaning of Article 59 of the Staff Regulations, in that it met the formal and substantive conditions for such a complaint.

The Tribunal notes that the only formal element required by Article 59 – which does not in fact require a complaint to be expressly described as an administrative complaint – and absent in this case, is that the complaint should be "lodged via the Head of the Human Resources Division". However, the Tribunal does not feel that this omission should be considered of fundamental importance in the present case, since it would appear to have presented no impediment or obstacle to the ensuing proceedings. Indeed, the Head of Administration replied to the appellant on 3 February 1998 on the Secretary General's behalf, explaining why he could not agree with the arguments put forward by the appellant in his letter of 26 December 1997, and could not alter the contested decision.

Furthermore, it is clear from the letters dated 26 December 1997 and 3 February 1998 that the Secretary General had the opportunity to re-examine the decision appealed against, and considered that there was no need to change it. Consequently, the substantive conditions set out in Article 59 have been met.

The Tribunal notes that in his letter of 3 February 1998, the Secretary General, contrary to his usual practice, did not inform the appellant that he had the right to appeal to the Tribunal within sixty days. The Tribunal concludes from this that the Secretary General may have thought that the letter of 26 December did not constitute a complaint against an administrative act. However, this perception has no effect on the legal nature of a disputed act.

34. It follows that the appellant effectively submitted an administrative complaint, and therefore the objection that the appeal is inadmissible must be rejected.

35. The Tribunal nevertheless considers it useful to note that, generally speaking, it would contribute to the smooth operation of the system if staff members were to describe any complaint they wish to lodge in accordance with Article 59 of the Staff Regulations as an “administrative complaint”.

36. As for the merits of the case, and with regard to the Secretary General’s first argument, the Tribunal notes that, contrary to the Secretary General’s view, Article 42, paragraph 5 of the Pension Scheme Rules does not require former staff members to provide evidence that tax has actually been paid, but merely evidence that their pensions have been assessed for tax purposes, and states that the person concerned is deprived of his or her right to the tax adjustment if he or she fails to comply with this obligation. Furthermore, while the title of Instruction 42/5 refers to evidence of “payment”, its text clearly refers to the method to be used for proving the existence of an obligation to pay income tax, and is therefore aimed primarily at the tax authorities of the member states.

This being the scope of Article 42 of the Pension Scheme Rules, the Tribunal is not required to determine whether, in the present case, the Secretary General could, under this provision, suspend payment of the tax adjustment so as to force the appellant to fulfil his obligations in this matter.

37. On the other hand, the Tribunal must ask whether the other arguments put forward by the Secretary General allowed him to act in this way.

With regard to the Secretary General's argument that he has a duty to co-operate with the member states in accordance with Article 2 of the General Agreement on the Privileges and Immunities of the Council of Europe, the Tribunal notes that, to its knowledge, apart from the letters from local treasury offices (two-third-holder notifications, which were attempts to secure attachment, and a letter simply indicating the amount owed by the appellant, provided in response to a specific query by the Secretary General), he had received no request for co-operation. In addition, in the case of the appellant’s dispute with the French Treasury, there has been no question to date of “facilitating the proper administration of justice”, since no French court has ruled on the dispute, or of “securing the observance of police regulations and preventing the occurrence of any abuse in connection with the privileges, immunities, exemptions and facilities enumerated” in the General Agreement on Privileges and Immunities, since the appellant has at no time relied on his status as a former Council of Europe staff member.

38. Finally, the Secretary General considers that the appellant has not established a violation of the general principles of law. The Tribunal agrees that there would be an undeniable discrepancy if, for example, a former staff member were to receive a tax adjustment and then refuse to pay income tax.

However, in the present case, the Council of Europe does not seem really to have been faced with such a situation. In addition, the Tribunal notes that the French tax authorities had reported the amounts owed by the appellant without providing information on the nature of the income being taxed or on their attempts to recover the debt through domestic channels.

39. The Tribunal therefore concludes that the decision appealed against is unlawful and should be annulled.



40. The appellant requests the Tribunal to order the Secretary General to return the sums withheld to date.

This being a dispute of a pecuniary nature in which the Tribunal has unlimited jurisdiction (Article 60, paragraph 2 of the Staff Regulations), it is appropriate to allow this application by the appellant, with the exception of the amounts paid to the Treasury at his request.

41. The appellant requests, *ex aequo et bono*, the sum of 10,000 FF as compensation for pecuniary damage and to cover the costs of the present proceedings. He also requests the sum of 100,000 FF for non-pecuniary damage, this amount to be compensation for damage to his reputation and peace of mind.

The Tribunal considers that there is no reason to allow this request for pecuniary damage, since the appellant has not proved that the alleged damage was a direct and immediate consequence of the suspended payment of the tax adjustment alone. Furthermore, having regard to the facts of the case, the Tribunal considers that there is no need to award compensation for non-pecuniary damage, as the appellant has in this case put himself in the wrong by failing to meet his obligations towards the tax authorities of the country in which he has retired.

42. With regard to the costs of the proceedings, the Tribunal rejects this request, since the appellant's legal representative took no part in the proceedings before the Tribunal, and no supporting documents were provided.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares it founded;

Orders the restitution of the amounts withheld, with the exception of the payments already made to the Treasury at the appellant's request.

Delivered in Strasbourg on 26 August 1998, the French text of the decision being authentic.

The Registrar of the  
Administrative Tribunal

The Deputy Chairman of the  
Administrative Tribunal

S. SANSOTTA

N. VALTICOS