

CONSEIL DE L'EUROPE— —COUNCIL OF EUROPE

COMMISSION DE RECOURS APPEALS BOARD

Appeals Nos. 94-99/1983 (Ursula NOUARI and others v. Secretary General)

The Appeals Board, consisting of:

Mr Walter GANSHOF VAN DER MEERSCH, Chairman,
Mr Raul VENTURA,
Sir Donald TEBBIT, members,

assisted by

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Appeals have been lodged with the Board by the following appellants:

- Mrs Ursula NOUARI	Appeal	No.	94/1983
- Mrs Véra CHABERT	"	No.	95/1983
- Mrs Carole GAIN	"	No.	96/1983
- Mrs Eliane BROS-BRANN	"	No.	97/1983
- Mr Malcolm GAIN	"	No.	98/1983
- Mrs Anne GIANNINI	"	No.	99/1983

2. These appeals were lodged on 1 December 1983 and were entered in the Board's register on the same day.

3. The supplementary pleadings were communicated to the Secretary General of the Council of Europe on 12 December 1983.

4. By a letter dated 12 December 1983 the Secretary General was invited to submit his observations on the appeals by 24 January 1984. The observations arrived on 23 January 1984 and were communicated to the appellants for a reply by 23 February 1984.

5. On 2 February 1983 the parties were informed that the hearing had been set down for 28 February 1984.

6. By a letter dated 9 February 1984 the Secretary General and the appellants' representative jointly file an application for the hearing to be postponed.

7. In the same letter the appellants' representative, Mr Reinhardt of the Strasbourg Bar (France), requested an extension of the time allowed by the Chairman for reply.

8. On 22 February 1984 the Chairman ordered that a private hearing should be held on 28 February 1984 at which the parties' representatives would state their reasons in support of the application postponement and the application for an extension of the time allowed for lodging the pleadings in reply.

This order was notified to the parties in a letter dated 23 February 1984.

The hearing of the parties by the Chairman of the Board took place at the Council of Europe on 28 February 1984 and was attended by Mr Reinhardt, and by MM. Harremoes, Director of Legal Affairs, Scheuer of Establishment Division, Buquicchio of the Directorate of Legal Affairs and Miss Podestà, representing the Private Office of the Secretary General.

9. By letter dated 2 March 1984, the Chairman granted an extension of the time allowed for reply to 9 May 1984.

10. On 9 May 1984 the appellants' representative forwarded his reply.

11. In the light of the information in the letter of 25 May 1984 which the parties sent to the Chairman of the Board, the latter exercised his jurisdiction as Chairman and made an order on 31 May requesting the parties to appear before the Chairman sitting in private on 21 June 1984.

This order was communicated to the parties in a letter dated 4 June 1984.

12. By letter dated 22 June 1984 the parties were informed that the date fixed for the interview with the Chairman sitting in private at the Council of Europe was 28 June 1984. The interview took place and was attended by Mr Reinhardt, representing the appellants, and Mr Harremoes, representing the Secretary General.

13. By a letter dated 18 July 1984 the parties were informed that the public hearing had been set down for 17 September 1984.

14. With the parties' agreement the hearing was postponed to 6 November 1984 and it continued on 7 November 1984.

15. On 12 December 1984 a letter was received from the appellants concerning the fact that they had not been affiliated on 1 December 1984.

16. On 20 December 1984 the Secretary General was requested to make comments on this letter by 5 January 1985.

17. His comments reached the Secretariat of the Board on 27 December 1984.

THE FACTS

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

18. Mrs Nouari and the other five appellants are conference interpreters employed by the Council of Europe on a temporary basis to reinforce the permanent staff.

19. In the wake of the Decision of 23 February 1983 in Appeals Nos. 52-75/1981 and applying the criteria set out in that decision, the Secretary General offered 14 interpreters the opportunity of being affiliated to the general French social-security system for all the risks for which temporary staff working for the Organisation are covered.

20. On 10 April 1983 the appellants wrote to the Secretary General expressing their surprise that they had not received the offer of affiliation he had made in the letter of 30 March 1983 sent to other interpreters. They requested the benefit of this offer too.

21. These requests were implicitly refused 60 days after they were made.

22. In the administrative complaint they lodged with the Secretary General in August 1983 the appellants stated among other things that they considered that “none of the features of (their) professional work differed from those of (their) colleagues who ‘benefited’ from the letter of 30 March 1983 that you sent them” (*translation*).

They asked to be affiliated to the general social-security scheme “without prejudice to the welfare scheme in keeping with the five-year Agreement of 1979” (*translation*).

23. By a letter dated 30 November 1983 the Secretary General rejected the complaints as follows:

“As emerges from the decision of the Appeals Board on 23 February in the case of Farcot and others v. the Secretary General, the administrative situation of temporary conference interpreters cannot be defined in a general, uniform way (paragraph 72); the particular circumstances of each individual interpreter must be looked at (paragraph 74). In order to be considered as economically dependent on the Organisation and integrated into its interpreting service, a free-lance conference interpreter must fulfil several conditions, first and foremost of which is a certain number of contracts (paragraphs 74-76)”. (*translation*)

Given the various contracts the appellants had had during 1982 and the first half of 1983, the Secretary General took the view that the number of their contracts did not justify affiliating them.

24. On 1 December 1983 the appellants lodged the present appeals.

25. On 13 January 1984 the Head of Establishment Division sent the interpreters two standard contract forms, the first of which “provides for any additional health-insurance covered with Stewart-Wrightson and for a contribution to an approved welfare fund” (*translation*), and the second of which provides for payment of contributions to the general scheme of the social-security system in respect of all risks covered by that scheme and to the IRCANTEC,

in accordance with the social-security agreements between France and the Council of Europe” (*translation*). The reply had to be received by 1 February 1984.

26. In a letter of 1 February 1984 to Mrs Farcot, the Director of Administration and Finance said that “without being legally bound to do so, the Council of Europe will continue to apply all the provisions of the Agreement which expired on 31 December 1983 for the whole duration of negotiations, except for matters concerning interpreters’ social-security cover which may come under the general scheme of the social-security system” (*translation*).

27. Dissatisfied with the failure of the negotiations with the Council of Europe for renewing the five-year Agreement, the interpreters went on strike on 2 February 1984.

28. In a letter dated 9 February 1984, the Deputy Secretary General informed Mr Nadaud, the AIIC’s delegate, that the Council of Europe undertook to extend the five-year Agreement of 1979 until negotiations between the AIIC and the Co-ordinated Organisations were successfully concluded.

29. On the same day, in a letter to the Chairman of the Appeals Board, the parties sought an adjournment of the hearing planned for 28 February 1984.

30. Following the Chairman’s order of 22 February 1984, a meeting attended by the parties and their representatives was held in private on 28 February, in the course of which the explanations they gave of their respective positions were heard.

The Board granted a postponement of the hearing provided that the parties reached an agreement 28 May at the latest.

31. In March 1984, negotiations took place between the Council of Europe and the Co-ordinated Organisations concerning implementation of the new five-year Agreement.

32. On 15 March 1984, the Director of Administration and Finance wrote to Mrs Farcot as follows: “The arrangement set out above presupposes a satisfactory agreement on the other matters being negotiated; this seems at present *very* likely. In order for it to take effect, it also presupposes acceptance by the French social-security authorities and approval of the necessary appropriations by the Organisation’s budgetary authorities” (*translation*).

33. On 2 April 1984, the Council of Europe wrote to the Ministry for National Solidarity seeking approval for the affiliation of the interpreters to the general social-security scheme, with the exception of old-age cover which was to be provided by contributions to a welfare fund set up for the profession as a whole. A copy of the letter was sent to the Chairman of the AIIC.

34. On 10 May 1984, Council of Europe representatives had talks with representatives from the Ministry for National Solidarity.

35. On 21 May 1984, the final round of negotiations took place between the Co-ordinated Organisations the AIIC concerning the drawing up of the new five-year Agreement.

36. On 10 July 1984, the Director of Administration and Finance wrote to the Ministry for National Solidarity reiterating the request he had made in his earlier letter of 2 April 1984 and asking for a reply as soon as possible.

37. On 13 July 1984, the new five-year Agreement was signed by the Co-ordinated Organisations and the AIIC.

An additional agreement between the Council of Europe and the AIIC was also signed.

38. On 30 August 1984, the Ministry for National Solidarity wrote and approved the assimilation of the interpreters as members of the permanent staff. They would be covered by all the provisions of the agreement concerning permanent staff, including membership of the voluntary old-age insurance scheme.

39. On 10 September 1984, the Council of Europe contacted the URSSAF and the Strasbourg Caisse Primaire by telephone.

40. On 11 September 1984, the Council of Europe wrote to the URSSAF referring to the Ministry's approval and seeking the URSSAF's approval.

41. On 14 September 1984, the URSSAF gave its approval to the system proposed on 10 July, subject to the agreement of the Caisse Primaire.

42. On 3 October 1984, approval was given by the Caisse Primaire.

43. On 10 October 1984, the Council submitted the new standard contracts to the AIIC.

44. On 22 October 1984, the AIIC gave its approval to the new contracts.

45. On the same day, the Council of Europe wrote to the interpreters offering them a choice between, on the one hand, affiliation to the general social-security scheme and, on the other, affiliation to the scheme for independent professional persons. The closing date for receipt of the replies was 1 November 1984.

46. On 12 December 1984, the appellant's representative wrote to the Chairman of the Appeals Board informing him that although his clients had all been appointed since 1 December on the basis of the standard contract, calculation of the amounts payable under the 'employee' contracts had not been made.

47. On 27 December 1984, the Secretary General wrote to the Appeals Board and enclosed the following documents:

- a copy of the standard contract offered since 1 December 1984;

- a copy of the Head of Establishment Division's correspondence with the Strasbourg Caisse Primaire indicating the names of the interpreters who had opted for affiliation; and

- a memorandum from the Head of the Finance Division certifying that final payment of the amounts due under the contracts of these interpreters would make allowance for their affiliation as of 1 December 1984.

The Secretary General ended his covering letter accompanying the documents for the Appeals Board with these words: "It is clear from these documents that, contrary to the assertions of the opposing side's counsel, affiliation took effect on the planned date" (*translation*).

SUBMISSION OF THE PARTIES

48. The appellants ask the Board to annul the decision of the Secretary General not to affiliate them to the general scheme of the French social-security system.

They are asking the Council of Europe to affiliate to the general scheme all the appellants who so request.

They are requesting the Council of Europe to make approaches to the relevant French authorities with a view to aligning the five-year Agreement with affiliation to the general scheme. If there is no such alignment the appellants claim entitlement to the double system of insurance, the cost to be borne entirely by the Council of Europe.

The **appellants'** submissions may be summarised as follows:

49. The appellants claim that the criterion used by the Secretary General to justify his refusal of their 'request for affiliation is the amount of work given to these interpreters. The Council of Europe has hereby violated the five-year Agreement of 1979 between the AIIC and the Co-ordinated Organisations.

50. This Agreement is a collective agreement which provides: "Interpreters residing and working in France or on an official journey abroad for an organisation or one of its subsidiary bodies based in France may be affiliated either to the Caisse Mutuelle des Professions Libérales (Independent Professions' Mutual Fund) or to the general French social-security system" (*translation*).

51. Consequently, given the special circumstances of the interpreters' work, the appellants consider that the criterion of the number of contracts cannot be decisive. They may, for example, do only a small amount of work for one given organisation and be retained the rest of the time by a different organisation.

Similarly, they may work for several international organisations or even for private employers.

52. The appellants point out that they are doubly dependent on the Council of Europe.

53. Firstly, there is legal dependence, which gives them the status of temporary officials and thereby integrates them as employees into the Council of Europe's staff. As such they are subject to the Secretary General's authority and receive a salary. They are also exempt from any form of taxation, as shown by the Council of Europe's letter of 20 April 1983 to the AIIC.

54. Secondly, there is economic dependence in that the interpreters cannot in any circumstances question the actual principle of the amount of their remuneration: they cannot discuss this each time they are appointed, since it is fixed in advance.

55. Moreover, they maintain that the Council of Europe can change the level of remuneration, of the persons concerned by quite arbitrarily altering the number of contracts they are given. In this connection they note that this is indeed the sole criterion that the Council of Europe has used as a basis for rejecting their request for affiliation.

56. This refusal has numerous consequences. The appellants mention the position of Mrs Bros-Brann, who was struck off the register of the Caisse d'Assurance Maladie des Professions Libérales (Independent Professions' Health Insurance Fund) with retrospective effect from 1 October 1980.

Mrs Chabert, for her part, indicated in a letter to the Secretary General dated 16 November 1983 that the refusal to affiliate her was likely to cause her serious damage by, on the one hand, depriving her of entitlement to benefits paid by the Caisse Primaire (Health Insurance Office) because an insufficient number of contributions would have been paid and, on the other hand, by compelling her to join the independent professions' insurance scheme although she was an employee.

57. The appellants maintain that by failing to carry out its obligations the Council of Europe is placing staff concerned in a position of insecurity in that it is depriving them of any status associated with working for the Council of Europe.

58. They are consequently being discriminated against vis-à-vis the temporary staff of the Council of Europe who have been affiliated to the social-security system since 1 April 1982 (temporary conference staff - Circular of 7 March 1983, para. 2). It follows that the Council of Europe is infringing the principle of Welfare law that every employer is obliged to ensure that the staff he employs has proper social security cover.

59. As regards the entirety of their claims concerning the scope of the social-security cover to which they consider they are entitled, the appellants refer to the pleadings lodged by their colleagues who are parties to the appeals in the case of Buhler and others.

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

60. The Secretary General considers that in the entire argument set forth by the appellants with a view to making out their claim that they are entitled to be affiliated to the general scheme of social-security system no account is taken of the criteria set out in the Decision of 23 February 1983.

61. As regards Article II (b) (v) of the five-year Agreement of 1979, for instance, in virtue of which the interpreters can be affiliated "either to the Caisse Mutuelle des Professions Libérales (Independent Professions' Mutual Fund) or to the general French social-security system (excluding the old-age cover)" (*translation*), the Secretary General observes that this provision no longer applied to the appellants: the Decision refers exclusively to the 1959 Agreement.

The Secretary General adds that in any case the five-year Agreement expired on 31 December 1983, so that since then the Secretary General has not been bound by it.

62. The Secretary General refers to the criteria set out in the Decision of 23 February 1983, and more particularly to paragraph 74, which lays down that it is incumbent upon him to take a decision on the basis of the personal position of each of the people concerned, having regard “to the particular circumstances of each individual interpreter”.

63. The Secretary General concludes from this, firstly, that the argument that as soon as they are appointed and irrespective of the number of their contracts, the interpreters are *ipso facto* “legally dependent” on the Council of Europe and that this would justify affiliating them to the social-security system, cannot be accepted.

64. Secondly, the terms of the Decision preclude any general definition being made of the interpreters’ position as regards their social-security cover.

65. As regards the notion of legal dependence, the Secretary General observes that it is not one of the criteria adopted by the Board. The Board refers solely to the criteria of economic dependence and integration into one of the Organisation’s departments (para. 74).

66. Moreover, defining the notion of “legal dependence” mainly on the basis of an analysis of the content of the contracts of employment signed by the persons concerned would contravene paragraph 73 of the Decision which provides “a contract of this nature, taken alone, would not entitle these interpreters to be affiliated to the general French social-security scheme”.

67. As to the notion of economic dependence, the Secretary General considers that it must be understood as being the position of an interpreter working mainly for the Council of Europe and deriving a large part of his income from the contracts binding him to the Organisations.

Given that conference interpreters sign short-term contracts, it is appropriate to look at the combined length of contracts over a given period, which will indicate the frequency with which the Organisation enlists the services of any one person for occasional work.

68. The Secretary General points out that in accordance with the Decision of 23 February 1983, he also based his decisions concerning the appellants’ affiliation on the criterion of integration into one of the Organisation’s departments.

Assessment of whether or not a person is integrated into the Council of Europe’s interpreting service has to be made on the basis of the relevant interpreter’s availability to work for the Organisation. The Secretary General notes in this connection that the appellants all live in Paris and accordingly are employed by the Council of Europe only irregularly, from time to time.

69. As regards alleged discrimination against the appellants vis-à-vis the Council of Europe’s temporary staff, the Secretary General wishes to point out that the European Court of Human Rights has held that equality of treatment does not forbid every difference in treatment reflecting the varied nature of different situations, provided that such distinctions

have an “objective and reasonable justification” (ECHR, Belgian language cases, para. 10, p. 34). Each of the decisions of 3 October 1983 was taken on the basis of the criteria set out in the decision, and these criteria made it possible to establish that the appellants were not in the same position as the other interpreters who were offered affiliation.

70. The Secretary General consequently considers that the appellants’ claims are unfounded.

THE LAW

71. The appellants have brought their appeal against the Secretary General’s refusal to affiliate them to the general French social-security system. They seek to have this decision annulled.

They are also asking the Board to:

- order the Council of Europe to affiliate all the appellants who so request to the general social security system on penalty of a 500 FF fine for each day’s delay once 8 days have elapsed after each appellant’s application;

- order the Council of Europe to take the necessary steps with a view to aligning the five-year Agreement with affiliation to the general scheme on penalty of a 500 FF fine for each day’s delay once 8 days have elapsed after the decision;

- hold that otherwise the appellants shall be entitled to the double system of insurance, the cost of which shall be borne entirely by the Council of Europe;

- reserve the appellants the right to quantify the damage they have suffered on the Council of Europe’s account;

- order the Council of Europe to pay each appellant the sum of 15 000 FF as an advance to cover the damage; and

- order the Council of Europe to pay the costs incurred in the present appeals.

72. The Secretary General maintains that his refusal to affiliate the appellants to the general French social-security scheme is based on the criteria of economic dependence and integration into a service of the Organisation - criteria which are expressly set out in the Decision of 23 February 1983.

As to the main issue of the appeal

73. Under paragraph 1 of Article 59 of the Staff Regulations a “staff member who has a direct and existing interest in so doing” has standing to complain of “an administrative act adversely affecting him”.

This provision which defines the notion of victim lays down the circumstances in which a person affected by the act or omission in dispute is entitled to take action. The interest which the person concerned must demonstrate must be direct, i.e. it must be capable

of having an impact which is personal, and actual, that is to say that the impact must continue to exist for so long as the case has not been determined.

74. The question whether an appellant can claim to be a victim in this sense of an act adversely affecting him remains relevant throughout the proceedings instituted by him before the Appeals Board.

75. The Appeals Board has before it a number of appeals which seek to annul acts adversely affecting the individual rights of the appellants.

76. In the present case it is not disputed that when they brought their appeals the appellants had an interest in establishing that the Secretary General had infringed the rights they are seeking to have enforced.

In addition, after the parties had exchanged written pleadings and in the framework of collective work relations between the AIIC and the Co-ordinated Organisations, including the Council of Europe, an agreement between the Co-ordinated Organisations and the AIIC was signed on 13 July 1984.

77. By the terms of Article 15 of this Agreement, which is also binding on the appellants, “interpreters residing and working in France or on an official journey abroad for an organisation or one of its subsidiary bodies based in France may be affiliated either to the Caisse Mutuelle des Professions Libérales (Independent Professions’ Mutual Fund) or to the general scheme of the French social security system (excluding the old-age cover)” (*translation*).

78. An additional agreement concluded between the Council of Europe and the AIIC on the same day provides in this connection: “The Council of Europe undertakes, however, to open negotiations with the French authorities with a view to enabling interpreters become affiliated to the old-age insurance scheme on a personal basis by voluntarily paying contributions for the purpose” (*translation*).

79. By a letter dated 22 October 1984 the Council of Europe offered the persons concerned the possibility of choosing between affiliation to the general French social-security scheme-excluding the old-age cover-and affiliation to the independent professions’ scheme.

At the public hearing on 6 November 1984 the representative of the appellants agreed in their name to their affiliation as employees to the general French social-security scheme.

80. Moreover, it appears from the letter of 27 December 1984 from Mr Harremoes to the Appeals Board, a copy of which was sent to the appellants, that affiliation to the social-security scheme will have effect retrospectively from 1 December 1984.

81. It follows from the foregoing that the agreement between the Council of Europe and the AIIC has satisfied the appellants’ claims. It has had the effect of removing the cause of the dispute as put before the Appeals Board and consequently it has brought to an end any interest the appellants would have had in persevering with the appeals.

As to the claim for compensation

82. The appellants are seeking compensation for the damage caused by the Council of Europe's delay in carrying out the Decision of 23 February 1983.

83. Now the Appeals Board having concluded that the object of the proceedings had ceased to exist, the act complained of has not been annulled. Under the terms of the last part of paragraph 2 of Article 60 of the Staff Regulations, compensation for alleged damage presupposes annulment. It follows from this that the Appeals Board cannot accept the claim for compensation made by the appellants. Nor is it for the Appeals Board to give effect to the appellants' reservations.

As to the applications for penalties

84. Neither paragraph 2 of Article 60 of the Staff Regulations nor the Statute of the Appeals Board gives the Board the power or the jurisdiction to order the penalties requested by the appellants in this case during the hearing on 6 November 1984.

For these reasons,

The Appeals Board

Declares the appeals unfounded;

Dismisses them; and

Orders that each party shall bear its own costs.

Given in public in Strasbourg on 1 March 1985, the French text of the Decision being authoritative.

The Secretary to the
Appeals Board

M. de SALVIA

The Chairman of the
Appeals Board

W.J. GANSHOF VAN DER MEERSCH