

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 533/2012 (Ellen PENNINCKX v. Secretary General)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Mr Jean WALINE,
Mr Rocco Angelo CANGELOSI, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Ellen Penninckx, lodged her appeal on 2 August 2012. On the same day, the appeal was registered under number 533/2012.
2. On 1 September 2012, the appellant filed a supplementary memorial.
3. On 5 October 2012, the Secretary General forwarded his observations on the appeal.
4. The appellant submitted a memorial in reply on 9 November 2012.
5. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 6 December 2012. The appellant conducted her own defence, while the Secretary General was represented by Ms Christina Olsen, of the Legal Advice Unit in the Directorate of Legal Advice, assisted by Ms Maija Junker-Schreckenber and Ms Sania Ivedi, both of the same department.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

6. The appellant is a permanent Council of Europe staff member employed on a fixed-term contract. When recruited, she was appointed to the Registry of the European Court of Human Rights as an assistant lawyer (grade B3).

7. The appellant is a national of Belgium, where she was born and lived during her early childhood. She subsequently moved to Strasbourg with her family and in due course moved back to Belgium. The appellant is unmarried.

8. Following a recruitment procedure, the Directorate of Human Resources sent the appellant an offer of employment on 3 May 2012. The letter was sent to Belgium. The date of appointment was set at 1 July 2012. The letter stated that if the appellant accepted the terms and conditions of the offer, she should return a copy within 10 days, having first initialled each page and dated and signed the last page, with her signature preceded by the handwritten words “Read and approved after taking due note of the Staff Regulations”.

9. Regarding monthly salary, the relevant section of the offer of employment was in three parts.

The first part specified the basic salary and the second part dealt with allowances, of which two were mentioned: the household allowance and the dependent child allowance. The third part set out a calculation of the appellant’s salary, which corresponded to the basic monthly salary, to which no allowances were added.

10. The place of recruitment was indicated as being “Strasbourg”.

11. On 21 May 2012, the appellant made an enquiry to the Directorate of Human Resources about the “failure to grant the expatriation allowance” (expression used by the appellant in her grounds of appeal, whereas the Secretary General refers to the “reason why no provision was made for the expatriation allowance in the offer of employment”). On 24 May 2012, the Directorate of Human Resources answered her enquiry in the following terms:

“In your email of 21 May 2012 you enquired about the reason for applying local status to you in the offer of employment, in the light of Article 6 *ter* of Appendix IV to the Staff Regulations, ‘Regulations governing staff salaries and allowances’.

“Article 6 *ter* (Expatriation allowance for staff recruited on or after 1 January 2012) stipulates as follows:

1.i. The expatriation allowance shall be paid to staff in Categories A, L and B who, at the time of their appointment by the Organisation:

- a. were not nationals of the host state; and
- b. had been continuously resident for less than one year on that state's territory, no account being taken of previous service in their own country's administration or with other international organisations; and
- c. were recruited internationally from outside the co-ordinated organisations or from outside of the country of assignment; and
- d. were recruited from outside the local commuting area of the duty station.”

You are being offered local status because your recruitment does not meet the four conditions enumerated in this article.

Indeed, although you give an address in Belgium in the form for further information, you state that you are continuing your studies in Strasbourg in order to prepare for the entrance examination to the *Ecole Régionale d'Avocats*.

It also appears from the documents in your file (CV) that you have mainly lived in Strasbourg in the last seven years and that Strasbourg has been the factual centre of your life.

In the light of these elements, we consider that you do not meet the conditions for the award of the expatriation allowance (Article 6 *ter* para. 1.i.c. and d.) and, consequently, that you are not entitled to this allowance.

With regard to the settling-in allowance, we are unable to award it to you because this allowance is payable to ‘staff who either are in receipt of the expatriation allowance or were, at the time of their appointment to the Council, ordinarily resident more than 100 km from their duty station’ (Article 8 of Appendix IV to the Staff Regulations).”

12. On 30 May 2012, the appellant returned the signed offer, on which she had written the following words:

“Read and approved after taking due note of the Staff Regulations.

I reserve the possibility of availing myself of Article 59, paragraph 2, of the Staff Regulations regarding the failure to grant the expatriation allowance.”

13. On 31 May 2012, the appellant submitted an administrative complaint under Article 59, paragraph 2, of the Staff Regulations.

14. On 7 June 2012, the appellant received a memorandum from the Director of Human Resources informing her that he was “unable to accept a reservation of this kind,

making acceptance of the offer conditional on an administrative complaint”. The Director therefore invited the appellant “either to send him the signed offer without this specific reservation or not to accept the offer”.

15. On 14 June 2012, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution of the memorandum of 7 June 2012, in which she was asked to forego either the offer of employment or her statutory rights under Articles 59 and 60 of the Staff Regulations and Article 6 *ter* of the Regulations on Staff Salaries and Allowances (Article 59, paragraph 9, of the Staff Regulations).

16. On 27 June 2012, the Chair dismissed the application for a stay of execution.

17. On 28 June 2012, the appellant received an email from a staff member in the Administration Division of the European Court of Human Rights stating as follows: “Having consulted the Directorate General of Administration, I must inform you that you must accept the offer of employment unconditionally if you wish to take up your duties in the Registry as expected on 2 July 2012. Otherwise, your recruitment will be unable to take effect on 1 July and I ask you to ignore my message of 30 May. Consequently, you should not report either to the Palais de l’Europe or to the Human Rights Building for the induction formalities next Monday”.

18. The appellant states that, after ascertaining the reasons for the Chair’s decision, she signed the offer of employment unconditionally on 29 June 2012, as requested by the Directorate of Human Resources, in order to be able to take up her duties on 1 July 2012.

19. On 2 July 2012, the Secretary General dismissed the administrative complaint arguing that it should be considered inadmissible and/or unfounded and dismissed.

20. On 2 August 2012, the appellant lodged this appeal.

II. RELEVANT LAW

21. According to Article 41 (Remuneration), paragraph 1, of the Staff Regulations, “[s]taff salaries and allowances and the methods of paying them shall be laid down in regulations made by the Committee of Ministers as set out in Appendix IV” to the Staff Regulations.

22. In the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations), matters relating to the expatriation allowance for staff recruited on or after 1 January 2012 are governed by Article 6 *ter*. This provision reads as follows:

Article 6 *ter* – Expatriation allowance for staff recruited on or after 1 January 2012

“1.i. The expatriation allowance shall be paid to staff in Categories A, L and B who, at the time of their appointment by the Organisation:

- a. were not nationals of the host state; and
- b. had been continuously resident for less than one year on that state's territory, no account being taken of previous service in their own country's administration or with other international organisations; and
- c. were recruited internationally from outside the co-ordinated organisations or from outside of the country of assignment; and
- d. were recruited from outside the local commuting area of the duty station.

The 'local commuting area' shall be defined as a radius of 100 kilometres from the duty station.

ii. In the event of an official who has been entitled to the expatriation allowance taking up duty in a duty station where s/he does not meet these four criteria, s/he shall cease to be entitled to the expatriation allowance.

iii. In the event of an official who has not been entitled to the expatriation allowance taking up duty in a duty station where s/he meets these four criteria, s/he shall begin to be entitled to the expatriation allowance.

iv. In the event of an official who has been employed by one co-ordinated organisation and entitled to the expatriation allowance taking up duty with another co-ordinated organisation in the same country or in the event of an official of another international organisation or a member of the administration or armed forces of the country of origin taking up duty with a co-ordinated organisation without changing country, the provisions of paragraph 1, subparagraph i, indents c and d, shall not apply."

23. As regards the submission of an administrative complaint, the relevant paragraphs of Article 59 of the Staff Regulations read as follows:

"2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression 'administrative act' shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.

(...)

8. The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*:

(...)

d. to staff members and candidates outside the Council, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure.”

THE LAW

24. The appellant lodged this appeal to seek the annulment of the Secretary General’s decision to refuse her the expatriation allowance and the related allowances.

25. The Secretary General asks the Tribunal to declare the appeal inadmissible and/or ill-founded and to dismiss it.

I. AS TO THE ADMISSIBILITY OF THE APPEAL

A. Parties’ submissions

26. The Secretary General submits that the appeal is inadmissible because, at the time of submitting her administrative complaint, the appellant was not a staff member of the Organisation.

27. To his way of thinking, the appellant cannot seriously argue that she became a Council of Europe staff member upon signing the offer of employment (subject to a reservation) on 30 May 2012. According to her argument, from that day on she acquired the status of staff member, became entitled to all the rights of staff members and became subject to all their duties. This argument is open to question. Indeed, her theory would mean, among other things, that she should have started work for the Council of Europe on 30 May 2012 and should have been paid by the Council of Europe from that date on. It is important not to forget that if, for example, the appellant had suffered an accident before taking up her duties, the Council’s sickness insurance would not have covered her medical care; that her pension rights began to accrue only from the day on which she took up her duties, and not from the day on which she signed the offer; and that if she had suffered an accident or illness causing invalidity before taking up her duties, she would not have been entitled to an invalidity pension under the Council of Europe scheme.

28. In the Secretary General’s view, there seems to be a degree of confusion in the appellant’s mind between the legal consequences flowing from the signing of a contract of employment and those flowing from the status of staff member, and between the notions of capacity to bring proceedings and interest in bringing proceedings.

29. He contends that a person has capacity to bring proceedings once he or she is bound contractually to the Council through his or her unconditional acceptance of an offer of employment. Nevertheless, any administrative complaint submitted by that person might be inadmissible for other reasons.

30. The condition to be met for the appellant to become a staff member of the Organisation is acceptance of the offer of employment or the signing of the contract (see, *inter alia*, ILOAT no. 1964 of 12 July 2000 and no. 339 of 5 May 1978). Under settled international administrative case law, the contract is considered to have been entered into once the offer has been accepted (ILOAT judgment no. 1916 of 3 February 2000).

It should be remembered that, in the instant case, no contract binding the parties had been concluded at the time when the administrative complaint was submitted. The appellant had withheld her acceptance of an offer unless she was granted an expatriation allowance, and the Council of Europe had not agreed to an offer of employment granting her entitlement to the expatriation allowance.

Consequently, the appellant did not have capacity to bring proceedings in this case. Her complaint, and hence her appeal, are therefore inadmissible because she lacked capacity to bring proceedings.

In the absence of a contract binding the appellant to the Council of Europe, she was not a staff member of the Organisation at the time of the material facts and her administrative complaint is inadmissible. Consequently, the appellant does not have access to the Council of Europe's Administrative Tribunal, which, according to settled international administrative case law, lacks jurisdiction to decide the dispute.

As a result, both the appellant's administrative complaint and her appeal are inadmissible.

31. The Secretary General points out that, according to the appellant, salary and allowances are non-negotiable and that, therefore, the granting of the allowance which she is claiming is an element which does not require agreement between the parties. He is obliged to contradict her on this point. Agreement between the parties is necessary for all contracts. There is often discussion between future staff members and the Administration concerning elements such as salary, grade or step, and allowances. When the Administration considers that the legal or other arguments put forward by the future staff member are valid, it modifies the offer of employment. In the instant case, given that the conditions for entitlement to the allowance were not met, the Administration did not accept the appellant's counterproposal. Accordingly, it neither modified its offer nor gave its agreement, the essential condition for the conclusion of a contract between the appellant and the Organisation.

32. The Secretary General notes that, in the appellant's view, his interpretation is too strict and creates a legal vacuum, "future staff members" being deprived of any right of appeal. The Secretary General disputes that there is any scope for interpretation: Article 59 of the Staff Regulations is clear and allows only staff members (with a few exceptions listed exhaustively in Article 59) to submit an administrative complaint.

33. While it is true that the appellant is now a Council of Europe staff member, the Secretary General argues, that does not alter the fact that, at the time of submitting her

administrative complaint, she did not have that status and did not have the rights and duties of staff members, including the right to apply to the Administrative Tribunal for a ruling on one of her claims.

34. Furthermore, the appellant was given precise information about the conditions of employment set out in the offer of employment sent to her, and in particular the fact that she would not be entitled to the expatriation allowance.

35. Indeed, it should be stressed that, in signing the offer of employment unconditionally and taking up her duties, the appellant accepted all the conditions offered to her in the offer of employment, in accordance with Article 15 of the Staff Regulations. She subsequently reiterated her acceptance by signing her fixed-term employment contract unconditionally on 6 July 2012. If she had wanted to continue to challenge the conditions of employment by which, in her view, she was adversely affected, she could have refused to sign the offer of employment unconditionally, refrained from taking up her duties or refused altogether to sign the contract.

Above all, however, the appellant did not make an application or administrative complaint against the offer of employment which she had signed unconditionally on 29 June 2012. Consequently, she no longer has any interest in bringing proceedings. It is an inescapable fact that she signed the offer of employment as it stood, along with all the conditions set out therein. In consequence of her acceptance of the conditions of recruitment as offered to her – including the expatriation allowance clause – the appellant does not have a “direct and existing interest”, within the meaning of Article 59 of the Staff Regulations, in challenging those conditions. Consequently, the appeal is inadmissible for lack of interest in bringing proceedings because the appellant gave her free and informed consent to the act which might have adversely affected her.

36. The appellant is therefore estopped from contesting her administrative situation as set out in the offer of employment which she signed on 29 June 2012.

37. For all these reasons, the appellant’s complaint, and hence her appeal, should be found inadmissible.

38. For her part, the appellant draws a distinction between capacity to bring proceedings and interest in so doing.

39. As regards capacity to bring proceedings under Article 59, paragraph 2, of the Staff Regulations, she stresses that when signing the offer of employment on 30 May 2012, she wrote the words “Read and approved after taking due note of the Staff Regulations”. In writing these words, she was signifying her formal acceptance of the Council of Europe’s offer of employment. In adding the words “I reserve the possibility of availing myself of Article 59 § 2 of the Staff Regulations regarding the failure to grant the expatriation allowance”, she was asking for her entitlement to the expatriation allowance to be verified by the competent bodies. At no time, she adds, did she intend these words to mean that she was making her acceptance of the offer conditional on

obtaining that allowance. She emphasises that she in fact repeatedly expressed her wish to take up her duties and did everything possible to do so on 1 July 2012 while safeguarding her right to verification of the decision not to grant the expatriation allowance.

40. The appellant submits that if she had wanted to make her acceptance of the offer of employment conditional on being granted the expatriation allowance, she would have phrased the sentence differently to make it clear that she was only accepting the offer subject to being granted the expatriation allowance.

41. After noting that the Secretary General acknowledges that a person has capacity to bring proceedings once he or she is bound contractually to the Council through his or her unconditional acceptance of the offer of employment, she concludes that, following her acceptance of the offer of employment, the contract was concluded as of 30 May 2012, given that both parties agreed on the main terms of the contract.

42. The appellant emphasises that the sole purpose of her appeal is to have her entitlement to the expatriation allowance verified by the Tribunal. The granting of this allowance is, moreover, non-negotiable. Furthermore, the sum which the expatriation allowance represents in relation to the basic salary is not such as to alter the secondary nature of this allowance.

The appellant concludes that, as of 30 May 2012, she had *locus standi* to submit an administrative complaint and to lodge an appeal with the Tribunal.

The Secretary General's position, as it emerges from the various exchanges, would thus be tantamount to denying a right of access to the Tribunal for new staff members wishing to exercise their statutory rights by contesting a secondary element of the offer of employment. Such a practice would not be compatible with the right of access to a court guaranteed by Article 6 of the European Convention on Human Rights, which the Council of Europe requires all its member states to comply with.

43. As regards interest in bringing proceedings within the meaning of Article 59 § 2 of the Staff Regulations, the appellant notes that, on 29 June 2012, she signed the offer of employment without adding anything. She says that her signature constituted a reiteration of her acceptance of 30 May 2012 and was intended solely to enable her to take up her duties on 1 July 2012, but it by no means constituted a relinquishment of her statutory rights. The same applies to the signing of the contract on 6 July 2012.

44. The appellant points out that if she wanted to take up her duties on 1 July 2012, she had no choice but to sign the offer without making any additions to it. In its letter of 7 June 2012, the Directorate of Human Resources asked her clearly either to return the signed offer without any additions or not to accept the offer. This approach was confirmed by an email of 28 June 2012 from the Administration of the European Court of Human Rights (paragraph 17 above).

45. The appellant points out that she waited to receive the order of the Chair of the Tribunal, which was sent to her by email on 28 June 2012. She then signed the offer of employment without adding anything, taking due account of this order, which found that, in contrast to the position in Appeal No 392/2007 (ATCE, Dagalita v. Secretary General, decision of 29 February 2008), she had “expressed reservations from the outset on one aspect of the offer” and that “any prejudice [could] be redressed after the proceedings, if she wins her case”.

46. The appellant infers from this that, in proceeding in this way, and having regard to the order of the Chair of 27 June 2012, she still had an interest in bringing proceedings within the meaning of Article 59, paragraph 2, of the Staff Regulations at the time of lodging her appeal with the Tribunal.

B. The Tribunal’s assessment

47. The Tribunal must first settle the question of the nature of the statement made by the appellant on 30 May 2012 when accepting the offer of employment. Indeed, the Secretary General described this statement as a reservation, while the appellant asserts that she did not intend to attach any conditions to her acceptance of the offer. The appellant’s assertion does not dispense the Tribunal from examining this point.

48. The word “reservation” has been interpreted at international as well as national level. Article 2 (d) of the 1969 Vienna Convention on the Law of Treaties states that

“d) ‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

A similar definition is given in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations signed in Vienna on 21 March 1986.

49. In French law, the law of the Organisation’s host country, which does not apply to the Organisation, but with which it aligns itself in some fields, such as that of medical and social insurance, “reservation” refers to any oral or written statement whereby a party expresses his or her disagreement with a claim or his or her intention to exercise his or her rights in due course by applying to the competent court for a ruling. The person who enters reservations asks the court to take formal note of them. The court seized of the matter is not obliged to grant this request. The failure of a person to enter reservations may in some cases signify his or her acceptance of the claim made by an opponent, even a potential one.

50. Insofar as these definitions, which, incidentally, are accepted by other legal systems, can be applied to the instant case, it appears that the appellant’s intention in making her statement was not to exclude or modify the legal effects of a provision, but

rather to indicate – if this were at all necessary, since, in any case, the right to apply to the courts cannot be validly waived in advance – that she might subsequently exercise her statutory rights. For this reason, on 30 May 2012, independently of the decisions subsequently taken by her and by the Organisation, she accepted the offer unconditionally and, the next day, relying on her status as a staff member of the Organisation, she was able to submit an administrative complaint pursuant to Article 59 of the Staff Regulations. No importance can be attached to the fact that the appellant would not take up her duties until later, namely on 1 July 2012 and that, during that period, like any staff member of the Organisation, she could have relinquished her employment. The question of whether this signature constituted acceptance of the Organisation’s decision not to grant her the expatriation allowance obviously remains open, but this question pertains to the merits of the appeal.

51. In conclusion, the Secretary General’s objection of inadmissibility *ratione personae* is unfounded and must be dismissed.

II. AS TO THE MERITS OF THE APPEAL

A. The parties’ submissions

52. The appellant uses the legal concept of “domicile” to argue that she has been resident in Belgium since 30 December 2009. In her view, no inference may be drawn from the fact that she studied in Strasbourg after that date. Furthermore, it is accordingly irrelevant that she was resident in France for a number of years prior to that. It cannot be concluded that Strasbourg was her place of residence at the time of her recruitment simply because she lived there during her childhood. In her view, it has to be recognised that, at the time of her recruitment, she was resident in Belgium.

53. In Belgium, police checks are carried out to verify whether a person is actually resident at the stated address. These are systematic checks conducted without prior notice, and she herself was the subject of such checks when she registered in her municipality in December 2009. Her inclusion in the population register cannot, therefore, be considered as being based solely on self-declaration and has unquestionable probative force.

54. After making a number of other points relating to her life and education, the appellant comes to the conclusion that the Secretary General made an erroneous assessment of the relevant facts when considering her entitlement to the expatriation allowance and the related benefits. She concludes by asking the Tribunal to declare her appeal well-founded.

55. The Secretary General submits that Article 6 *ter* of the Regulations (paragraph 22 above), whose conditions of application are cumulative, restricts entitlement to the expatriation allowance to staff members who are not nationals of the host state, have been continuously resident for less than one year on that state’s territory and are recruited internationally from outside a local commuting area defined as a radius of 100 km from

Strasbourg. He adds that this Article 6 *ter* gives a precise definition of the notion of “expatriation” and applies objective criteria in order to distinguish in a fair and reasonable manner between those who are entitled to this allowance and those who are not. The Regulations permit no exception to this rule, which must therefore be strictly interpreted by the Administration.

56. In the Secretary General’s view, the appellant does not satisfy the criteria for entitlement to the expatriation allowance because she was not recruited internationally from outside a radius of 100 km from the duty station. The Secretary General does not dispute the fact that the appellant is a Belgian national and that she has an address in Belgium. The issue, in his view, is whether she was recruited internationally and, therefore, is entitled to an expatriation allowance.

57. The Secretary General contends that the appellant, who has spent most of her life in Strasbourg, has not been separated from her country “of origin” and retains ties with it while having been recruited to the Council of Europe and working there. To be an expatriate and to be recruited internationally, it is not enough to have a different nationality from that of the host state and an address in another country.

58. In his view, the mere fact that the appellant is recorded on the population register of a Belgian municipality at her mother’s address and, consequently, receives mail at that address (in connection with elections, tax, social security etc) does not in any way prove that she is resident in Belgium. Generally, official documents issued by national and local authorities, such as a certificate of residence, are not sufficient to prove that the person is actually resident on a stable long-term basis at the stated address because such documents are based on self-declaration. The same applies to registration on the electoral rolls and the sending of tax returns. Furthermore, membership of a social security scheme is compulsory and the issuing of a card to this effect does not prove that a person is actually resident in a country either. Indeed, a person affiliated to a scheme in one country is guaranteed reimbursement of medical expenses incurred in another country, in the European Union member states at least. In this connection, it may be observed that the period of validity of the social security card produced by the appellant began while she was studying in Strasbourg.

59. It is clear to the Secretary General – based on the appellant’s studies – that her life was permanently and mainly centred in France, and more specifically in Strasbourg.

60. Accordingly, she cannot claim the expatriation allowance.

61. The Secretary General states in conclusion that he has not broken any rules or committed any breach of practice or violation of general legal principles. Neither has he made any erroneous assessment of relevant facts, drawn any erroneous conclusions or misused his authority.

B. The Tribunal's assessment

62. The Tribunal believes that it must first clarify the scope of the terms employed in the regulations which form the subject of these proceedings. This clarification is necessary because the two terms “residence” and “domicile” were used by the parties at various times during the proceedings.

It is important, therefore, to define the terms “*résident*” and “continuously resident” as used in the French and English texts of paragraph b) of Article 6 *ter* of the Regulations on Staff Salaries and Allowances (paragraph 22 above).

63. In French law, “residence” is defined as “the place where a person actually lives on a relatively settled basis, but which may not be his or her domicile (eg second home, matrimonial home not coinciding with a woman’s official residence in a neighbouring town, etc), and to which the law attaches certain legal effects on a principal or subsidiary basis or concurrently with domicile” (*Vocabulaire juridique*, published by the Association Henri Capitant, ed. Gérard Cornu).

64. Domicile is defined, for civil rights purposes, as the place where a person is principally resident. It is often referred to as “voluntary domicile”, because it is chosen, as opposed to “legal domicile” (*ibid*).

65. Residence and domicile often coincide (*ibid*).

66. Having regard to the purpose of the expatriation allowance, the Tribunal considers that it can adopt these definitions for the purposes of its decision, even if these terms may have a different meaning in other member states of the Organisation.

67. After assessing all the factual elements brought to its attention, the Tribunal observes that while it is true that the appellant spent her childhood in Strasbourg and lived there until 2009, the fact remains that, from that time on, she lived in Belgium. Admittedly, the appellant subsequently returned to Strasbourg for her studies. It is clear, however, that she did not establish her residence there. For this reason, it cannot be claimed that, at the time of her recruitment, she failed to satisfy the condition of continuous residence for less than one year because she no longer lived in Strasbourg, even if she had come back to the city for her studies. Indeed, by definition, staying in a place for study purposes cannot be equated in all cases with staying in a place in order to establish one’s residence. In any case, even if one were to assume the contrary, the fact remains that the appellant did not satisfy the condition at issue because, if the time which she spent performing a traineeship at the European Court of Human Rights is added to the period of study, the limit of less than one year’s continuous residence would still not be exceeded because she returned to Strasbourg for the traineeship in August 2011 and commenced her studies immediately afterwards in September 2011, which, in May 2012, came to less than a year. Furthermore, the appellant was in Brazil between September 2011 and February 2012 for a voluntary work project.

68. Given the purpose of the expatriation allowance, the Tribunal believes it is worth pointing out that the decision to grant it or not should not be based on a literal interpretation – which, in the instant case, would in fact be favourable to the appellant – of the relevant terms. The legal significance of those terms may vary from one Council of Europe member state to another. Furthermore, it would appear that, when the relevant rules were drafted, the choice of terms was made without taking into account all the different situations which may arise when a staff member is recruited to the Council of Europe and which need to be resolved in accordance with the principles applicable at the time of recruitment.

In the Tribunal's view, regard must be had to the reality of the situation at issue.

Where this appeal is concerned, it is clear that, because of her earlier periods of residence in Strasbourg – to which the Secretary General referred – the appellant will no doubt feel more at home there than other staff members who are also entitled to the expatriation allowance. It is also clear, however, that at the time when she received the offer of employment, the appellant's centre of interest was not – or rather was no longer – France: accordingly, her residence in Belgium cannot be regarded as fictitious or – with a similar end result – purely formal.

69. Since the appellant is entitled to the expatriation allowance, it remains to be seen whether the fact that she agreed to re-sign the recruitment letter, and subsequently the contract, without entering any reservation may be a cause for her to lose entitlement to the expatriation allowance.

70. As stated above, the Tribunal considers that it is not possible to waive a right such as entitlement to the expatriation allowance. The corollary of this principle is that the individual concerned can apply for it at any time if he or she was eligible for it under the rules in force at the time of his or her first recruitment. Furthermore, it is obvious that, in the instant case, the appellant was under pressure because of the ultimatum she had been given – which cannot be criticised here because it might also have been justified by interests of the service. In the circumstances, her decision to re-sign the letter containing the offer of employment was made *oborto collo*, but that signature did not replace the earlier signature with new legal effects.

71. In conclusion, the appeal is well-founded and the contested decision must be annulled.

III. ARREARS OF ALLOWANCE

72. In the conclusions of her supplementary memorial, the appellant asks the Tribunal to order that she be paid the expatriation allowance as from 1 July 2012 and for the entire duration of her contract. She also asks for payment of the settling-in allowance and for reimbursement of her removal expenses in accordance with the criteria laid down in the regulations.

73. The Secretary General makes no comment on this.

74. The Tribunal first wishes to point out that, under Article 60, paragraph 2, second sentence, of the Staff Regulations, it has unlimited jurisdiction in pecuniary matters.

75. Since the Tribunal has annulled the contested decision, it considers that the Organisation must pay the appellant the sum – not specified in her submissions to the Tribunal – which should have been paid to her by way of allowances and reimbursement.

IV. CONCLUSION

76. The appeal is well-founded and the contested decision must be annulled. The Secretary General must pay the appellant the expatriation allowance and the settling-in allowance and reimburse her removal expenses in accordance with the set criteria.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares the appeal well-founded;

Annuls the contested decision;

Orders the Secretary General to pay a sum corresponding to the amount of the expatriation allowance and settling-in allowance which should have been granted to her and to reimburse her removal expenses in accordance with the set criteria.

Adopted by the Tribunal in Strasbourg on 11 April 2013 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 12 April 2013, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS