

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 468/2010 (Pierre DEFER v. Secretary General)

The Administrative Tribunal, composed of:

Mr Georg RESS, Deputy Chair,
Mr Angelo CLARIZIA
Mr Hans G. KNITEL, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEDURE

1. The appellant, Mr Pierre Defer, lodged his appeal on 15 October 2010. The appeal was registered on 18 October 2010 under number 468/2010.
2. On 18 November 2010, the appellant submitted further pleadings.
3. On 20 December 2010, the Secretary General forwarded his observations on the appeal.
4. On 19 January 2011, the appellant filed observations in reply.
5. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 27 January 2011. The appellant was represented by Maître Carine Cohen-Solal, barrister practising in Strasbourg, while the Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, assisted by Ms Maija Junker-Schreckenber, administrative assistant in the same department.
6. Having been authorised to do so by the President at the hearing, the Secretary General forwarded written information to the Tribunal on 4 February 2011.
7. On 15 February 2011, the appellant submitted comments in reply.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The appellant is a French national born in 1955. He is a permanent member of the staff of the Council of Europe.

9. The appellant's daughter obtained a degree in biology and chemistry in June 2008 and is currently continuing her studies with a view to obtaining a master's degree in the pharmaceutical industry. For the 2008/2009 academic year, she applied to several universities, namely, in order of priority, Strasbourg, Montpellier, Bordeaux and Lyon. On 2 July 2008, she received an email from Louis Pasteur University in Strasbourg informing her as follows:

“(..) In view of the very large number of applications for a limited number of places, and despite the undoubted quality of your application, I regret to inform you that the Pedagogical Committee which met on 30 June 2008 was unable to give a favourable response to your application for enrolment in level M1 of the Master's Degree course in Medicines Science - Pharmaceutical Engineering. (...)”

10. The appellant says that his daughter considered that although her application was accepted, enrolment was not possible because of the lack of available places. She was forced to enrol at Bordeaux University.

11. On 26 August 2008, the appellant applied to the Directorate of Human Resources (“the DRH”) for an education allowance.

12. In a memorandum dated 11 September 2008, the Head of the Department for the Administrative, Social and Financial Management of Staff within the DRH informed the appellant that the education allowance applied for could not be granted, for the following reasons:

“(..) one of the conditions of eligibility of non-expatriate staff for an education allowance is that ‘no school or university corresponding to the child's educational cycle is available within 80 km distance from the official's duty station or home’. Yet there are establishments corresponding to your daughter's educational cycle in Strasbourg or in the close vicinity. (...)”

13. After receiving this memorandum, the appellant maintained his application in a letter sent to the Head of Department on 26 September 2008, which read as follows:

“Thank you for your memorandum of 11 September informing me of your refusal to grant my application (...).

You refer to the paragraph of the Staff Regulations (...).

It was also on the basis of this text that I submitted my application because, while there is indeed an establishment in Strasbourg which offers the same course, it is not ‘available’. We received a negative reply on the grounds of the limited number of places (twenty) for the Master's Degree (...).

I should be grateful if you would be so kind as to reconsider my application in the light of these further explanations.”

14. In a memorandum dated 21 October 2008, the Head of Department observed that:

“(…) the Faculty of Pharmacy at Louis Pasteur University offers courses comparable to those of the Faculty of Pharmaceutical Sciences in Bordeaux. Even if [Chrystelle’s] application was not accepted, there is an establishment in Strasbourg corresponding to your daughter’s educational cycle.

You will therefore appreciate that, under our rules, it is still not possible to grant you an education allowance for your daughter Chrystelle. I therefore regret that I am unable to grant your application and I remain at your disposal to explain this decision to you orally at any time that suits you.”

15. In a letter to the Head of Department dated 29 October 2008, the appellant disputed this interpretation of the relevant provision, arguing that:

“(…) in the sentence ‘if no school or university (…)’, you interpret the word ‘available’ as meaning ‘existing’, which is much more restrictive than the actual sense intended. In French ‘available’ signifies ‘vacant’(…).

In the case in point, since there was no ‘vacant place’ for my daughter at the Faculty of Pharmacy in Strasbourg, I consider that my application fully satisfies the criteria of the exceptions provided for in paragraph 2.1.a. of Article VII of Appendix IV (…)”

16. In an email dated 6 November 2008, the Head of Department informed the appellant that he had asked a lawyer for an opinion and would keep him informed.

17. In a memorandum dated 5 December 2008, the Head of Department informed the appellant once again that the education allowance could not be granted to him, justifying his decision as follows:

“We have reconsidered your application of 26 August 2008 and your further submissions of 26 September and 29 October 2008 in the light of your additional explanations.

The education allowance was intended for expatriate staff and is extended to non-expatriate staff only in very exceptional cases. (…)

It is for this reason that Article 7, paragraph 2.1 of the Regulations begins by establishing the exceptional nature of the provision and specifies that the allowance can only be granted in circumstances where there is no establishment available close to the duty station, and it is also for this reason that the strictest possible interpretation is called for.

Insofar as an establishment corresponding to Chrystelle’s planned course of study exists within 80km distance from the duty station or home, it should be taken into account. The Faculty of Pharmacy at Louis Pasteur University meets these criteria.

I fully appreciate the reasons which prompted Chrystelle to enrol at the Faculty of Pharmaceutical Sciences in Bordeaux. However, your interpretation of Article 7, paragraph 2.1 of the Regulations, (...), cannot be accepted without undermining the exceptional nature of the provision as originally intended.

I can confirm that the intention of the legislator, whom I recontacted, was to allow exceptions only in cases where the type of studies planned does not exist within 80km distance from Strasbourg. The original text, drafted in English, uses the word 'available', whose meaning is slightly more restrictive than the word 'disponible' used in the translation.

This is also fully borne out by our consistent administrative practice.(...)"

18. On 17 February 2009, the appellant wrote to the Director of Human Resources asking her to confirm the interpretation given in the memorandum of 5 December 2008.

19. In an email dated 18 February 2009 she informed the appellant that she was asking the Head of the Department for Administrative, Social and Financial Management of Staff within the DRH to contact him in order to arrange a meeting with him "at which he will be able to set out the details of our position orally and explain the reasons for this position in greater depth".

20. The meeting took place on 10 March 2009. Subsequently, in an email dated 19 March 2009, the appellant asked for written confirmation of the arguments set out orally.

The Head of Department replied to him on 24 March 2009, also by email.

21. On 20 May 2009, the appellant wrote to the Secretary General asking him to reconsider his application for an education allowance.

In his memorandum of 10 June 2009, the Secretary General confirmed the position adopted by the DRH, noting in particular:

"The Directorate of Human Resources rejected your application on grounds which were explained to you both orally (at the meeting on 10 March) and in writing (by letters of 5 December 2008 and 1 April). ...

... the education allowance was established to cover the special needs of expatriate staff members who incur special expenses for their children's education as a result of working abroad. As far as local staff members are concerned, the preparatory work of the Co-ordinated Organisations shows that the educational allowance has only been upheld in cases where these staff members are put in a position similar to expatriate staff members – when there is no university or school whatsoever close to their place of duty or home. This is different from not being selected for a place at a particular school or university.

The 164th Report of the Co-ordinating Committee on Remuneration (CCR) has left it to each Co-ordinated Organisation to uphold or to abolish this allowance in such cases. Only the Council of Europe decided to uphold it by Resolution 2007(9) of the Committee of Ministers. However, it did so after lengthy debates in the Committee of Ministers and its working groups on the understanding that the text would be

interpreted narrowly, and that the allowance would only be granted in very exceptional circumstances. The Secretariat is bound by this decision of the Committee of Ministers.

Since nothing in the text of Article 7 paragraph 2 (a) of Appendix IV to the Staff Regulations requires that the applicant's personal circumstances should be taken into account, the narrow meaning of the word 'available' is the only one compatible with the exceptional grant of the allowance to local staff members ... Several similar requests have been rejected on these grounds in the past, and I believe that as a matter of sound policy, the Administration should apply its policies with consistency.

After careful consideration, I have therefore decided to uphold the decision taken by the Directorate of Human Resources."

22. On 7 July 2009, the appellant contested this memorandum by means of an administrative complaint under Article 59, paragraph 1 of the Staff Regulations (version in force at that time), which was received by the DRH and the Legal Advice Department on 9 July 2009.

23. In an advisory opinion of 29 June 2010, the Advisory Committee on Disputes found the appellant's administrative complaint to be well-founded, justifying this view as follows:

"26. For its part, the committee considers that it is clear from a literal interpretation of Article 7, paragraph 2.1. a of the Regulations that entitlement to the education allowance depends not simply on the existence of a school or university corresponding to the child's educational cycle within 80 km from the official's duty station or home, but also on its availability. Consequently, the child must have a real possibility of enrolling at the university situated close to his or her parent's duty station, which would not be the case, for example, if there was a shortage of places or if the application was turned down by the faculty in question. In short, the committee considers that the word 'available' used in Article 7, paragraph 2.1. a. of the Regulations implies that the child concerned must first have applied to the school or university corresponding to his or her educational cycle situated within 80 km of the official's duty station or home before enrolling at an establishment situated outside that area.

27. This teleological approach to the provision concerned is confirmed by the fact that, in its previous version, it did not include the word 'available'. (...) [T]he introduction of the word 'available' in the current wording of the provision was intended to make it less restrictive by making the award of an education allowance subject not only to the non-existence of the relevant school or university but also to its unavailability."

24. On 17 August 2010, however, the Secretary General dismissed the appellant's administrative complaint.

25. On 15 October 2010, the appellant lodged this appeal.

26. In an email dated 3 November 2010, the Directorate of Legal Advice and Public International Law asked Louis Pasteur University for information about the selection

procedure for admission to Master 1 level of the course in “Medicines Science – Pharmaceutical Engineering”, and in particular the criteria applied by the Pedagogical Committee in accepting or refusing applications.

27. As the University’s reply dated 8 November 2010 was not exhaustive, the Directorate requested further details. The University replied on the same day in the following terms:

“In theory there is no selection for the 1st year of the master’s degree, admission to which is based on qualifications or equivalences, but only for the 2nd year (...), the limitation on numbers being justified for reasons of capacity, particularly in the practical rooms. (...)

A pedagogical committee consisting of teacher-researchers teaching on this course studies the applications when their number exceeds capacity. (...)

The criteria applied are the same in initial and further training: in addition to the level of education required (requirement to supply examination certificates and a record of marks in support of the application or decision by the VAE (validation of learning through experience) panel, the candidate’s career goals and personal motives are studied by this committee, which also endeavours to provide applicants with advice and guidance in line with existing employment opportunities.”

II. THE RELEVANT LAW

28. Article 7 of Appendix IV (Regulations governing staff salaries and allowances) to the Staff Regulations read as follows at the material time:

“Staff members entitled to the expatriation allowance with dependent children as defined according to the Staff Regulations, regularly attending on a full-time basis an educational establishment, may request the reimbursement of educational costs under the following conditions:

(...)

2.1. By way of exception, staff members not qualifying under the terms of paragraph 1 above may request payment of the education allowance in any of the following situations:

a.. for education in the duty country, if no school or university corresponding to the child’s educational cycle is available within 80 km distance from the official’s duty station or home;

(...).”

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

CM(2005)62 164th Report of the Co-ordinating Committee on Remuneration (CCR) Education allowance: rules for the reimbursement of educational costs.

29. The Committee of Ministers examined this report at its 932nd meeting on 29 June 2005. The report sets out the opinions and conclusions of the Committee of the Representatives of the Secretaries/Directors-General (CRSG) and the Committee of Staff

Representatives (CRP) on the review of the education allowance. The latter concluded that, in the case of staff not entitled to the education allowance, not only did the Secretary Generals' proposal fail to envisage any improvement, but it also contained an additional restriction (limiting their choice to the duty country alone), which failed to take account of certain specific situations, particularly for staff living in Luxembourg or Strasbourg.

CM(2006)98 Draft resolution revising Articles 7 and 9 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations) on the education and language allowances

30. The Committee of Ministers examined this draft at its 978th meeting on 25 October 2006. Part II of this document explained the principal changes to the current education allowance regime (paragraph 3 of the document). The Secretary General proposed the adoption of the exceptional clauses. He drew the Deputies' attention to the fact that non-expatriate staff were currently able to claim the education allowance if there was no school or university corresponding to their child's educational cycle within 80 kilometres from their duty station and home; under the new rules, only the cost of education in the duty country could be reimbursed (paragraph 9 of the document).

31. It was proposed to amend Article 7, paragraph 2 as follows:

“1. By way of exception, staff members not qualifying under the terms of paragraph 1 above may request payment of the education allowance ~~provided that they fulfil either one of the following conditions~~ in any of the following situations:

a) ~~the official's duty station and home are not less than 80 kilometres from any school or university for education in the duty country, if no school or university corresponding to the child's educational cycle is available within 80 km distance from the official's duty station or home...~~”

THE LAW

32. On his appeal form, the appellant states that the administrative act against which he is appealing is the Secretary General's decision of 10 June 2009 and he asks the Tribunal to annul it.

33. For his part, the Secretary General asks the Tribunal to declare the appeal inadmissible and/or ill-founded and to dismiss it.

I. THE PARTIES' ARGUMENTS

A) The admissibility of the appeal

34. The Secretary General submits that the administrative act adversely affecting the appellant is not his reply of 10 June 2009, which was merely a confirmation of the decision taken by the DRH on his behalf, but the DRH's decision of 5 December 2008, which is the only decision that can be considered as an administrative act within the meaning of Article 59, paragraph 2 of the Staff Regulations (version currently in force). Moreover, it was clear from the terms of the decision of 5 December 2008 that this was indeed the decision unequivocally laying down a measure with legal effects affecting the appellant's interests and binding on him. If the appellant considered himself to be adversely affected by that decision, he should

have contested it within 30 days of the day on which he was notified of it, and not several months later, after his request to the Secretary General had failed. Consequently, his complaint lodged on 9 July 2009 was inadmissible because it was out of time.

35. The Secretary General adds that, in any event, it would have been possible for the appellant to preserve his rights by lodging an administrative complaint within the requisite time-limit while at the same time submitting a request to the Secretary General for reconsideration of the decision. However, the appellant waited for nearly five months after the final decision rejecting his application before applying to the Secretary General, then for several more weeks before lodging his complaint. He therefore failed to act with due diligence.

36. The appellant submits that, under the provisions of the Staff Regulations, an administrative complaint may only be lodged against an administrative act having adverse effects, in other words any individual or general decision or measure taken by the Secretary General. The only decision originating from the latter is indeed that of 10 June 2009, which he contested in his administrative complaint in accordance with Article 59, paragraph 1 of the Staff Regulations, by lodging his complaint with the Director of Human Resources, as required by Article 59, paragraph 3 of the Staff Regulations. Of course, the Secretary General could not personally perform all the tasks with which he was entrusted and needed to delegate various tasks to other administrative officers. However, the Secretary General had not provided any material evidence of the existence of such a delegation of responsibility and/or power. Consequently, the decisions taken by the DRH could not be recognised as having the same legal effects as an administrative act adversely affecting a staff member within the meaning of Article 59, paragraph 1 of the Staff Regulations.

B) The merits of the appeal

37. The appellant maintains that he satisfied the conditions for the award of an education allowance under Article 7, paragraph 2.1.a. of the Regulations governing staff salaries and allowances because no establishment corresponding to his daughter's educational cycle was available within 80 km distance from his duty station and home.

38. In his view, the Secretary General gave a narrow interpretation of the scope of this provision in order to reject his application, replacing the word "available" by "existing" in order to give a narrower meaning to paragraph 2.1.a. of Article 7, thus breaching the principles of sound administration, good faith and legitimate trust.

39. The appellant observes that his position was confirmed by the Advisory Committee on Disputes, which endorsed his argument by stating that "the introduction of the word 'available' in the current wording of Article 7, paragraph 2.1.a. was intended to make it less restrictive by making the award of an education allowance subject not only to the non-existence of the relevant school or university but also to its unavailability."

40. The appellant also criticises the insufficient substantiation of the Secretary General's decision and the fact that he justifies his position with reference to an alleged administrative practice.

41. In conclusion, he asks the Tribunal to annul the Secretary General's decision rejecting his application for an education allowance for his daughter.

42. For his part, the Secretary General notes first of all that the education allowance is structurally linked with the right to an expatriation allowance and that a non-expatriate staff member may only apply for it on an exceptional basis. He observes that the appellant's situation cannot be considered as falling under the exception provided for in Article 7, paragraph 2.1.a. of the Regulations. There is indeed an establishment in Strasbourg corresponding to the course of study chosen by the appellant's daughter. The reason which prompted her to enrol at the Bordeaux faculty was actually that her application was not accepted by the Strasbourg faculty, whose pedagogical committee made a selection on the basis of the candidates' files and results. The criteria enabling non-expatriate staff to qualify on an exceptional basis for an education allowance were not met.

43. According to information received from the Strasbourg faculty, applications are considered by a pedagogical committee which bases itself on the candidates' qualifications and marks, as well as on their career goals and personal motives. In short, if the marks or career goals of the appellant's daughter had been better, she would have been awarded a place. It is not for the Council of Europe to bear the cost of a situation which is attributable purely to the application submitted by the appellant's daughter, which, moreover, was judged to be of "undoubted quality", although not as good as other applications. If her application had been better, she would have been among the candidates admitted to places available at the Strasbourg faculty.

44. The Secretary General also contests the appellant's argument that his decision was insufficiently substantiated. In fact, the appellant was informed on numerous occasions of the reasons for the rejection of his application: in several letters from the DRH dated 11 September and 21 October 2008, as well as in the administrative decision of 5 December 2008 rejecting his application. These reasons were repeated to him at an interview with a member of the DRH on 10 March 2009, in an email dated 1 April 2009 and, lastly, in a letter from the Secretary General dated 10 June 2009. The appellant was therefore perfectly aware of the reasons for the decision not to grant him an education allowance

45. The Secretary General therefore asks the Administrative Tribunal to declare the appeal ill-founded and to dismiss it.

II. THE TRIBUNAL'S ASSESSMENT

A) The admissibility of the appeal

46. The Tribunal considers it unnecessary to examine the question of admissibility in detail since the appellant's appeal is in any case ill-founded. However, in view of the way in which the Administration dealt with the appellant's request from the procedural and formal standpoint, it seems appropriate to make the following comments.

47. The Secretary General argues that the appellant's appeal was out of time because, in his view, the act having adverse effects was not "the letter" of 10 June 2009 but "the decision" dated 5 December 2008. The Tribunal notes that the documents bearing those dates are both entitled "memorandum" (see paragraphs 17 and 21 above). It is only in his observations on this case that the Secretary General describes them as "the letter" and "the decision", although in his "memorandum" of 10 June 2009 he refers inter alia to "the letter" of 5 December 2008 (see paragraph 21 above).

48. The Tribunal also notes that the DRH had already adopted a position in its memorandum of 11 September 2008 rejecting the appellant's application (see paragraph 12 above). This negative position never changed. It is therefore this document which should have represented a final decision against which the appellant should have lodged an administrative complaint. However, the DRH continued to deal with the case, answering the appellant's correspondence without ever stating that it had already taken the final decision in the case. Similarly, the Secretary General was at liberty not to give an answer on the merits of the appellant's request to reconsider his application and simply to refer him to the DRH's decision. But he decided otherwise (see paragraph 21 above). The appellant therefore acted in good faith in considering that the memorandum of 10 June 2009 was the act adversely affecting him.

49. The Tribunal notes that, if an international organisation like the Council of Europe is to function properly, its staff must be treated fairly and in a clear, transparent and consistent manner. The organs of the Organisation must ensure that its staff are duly informed of their rights, obligations and duties, so that they can act accordingly. This is all the more valid and important when a dispute arises between the Organisation and a member of its staff. Although the Council of Europe's Staff Regulations and the Appendices thereto undoubtedly and unquestionably constitute a very sound legal basis which certainly satisfies all the general principles of law, the organs of the Organisation must nevertheless apply them in a clear and consistent manner if the staff are to be able to act in an appropriate and effective manner.

50. In the light of all these observations, the Tribunal considers that the organs of the Organisation made the appellant's situation procedurally ambiguous and that the resulting confusion is attributable to them. The Tribunal therefore cannot accept the Secretary General's argument that the appellant did not act with due diligence.

B) The merits

51. The appellant applied to the DRH asking it to grant his daughter, who wished to continue her university studies in Strasbourg, the education allowance provided for at the time in Article 7, paragraph 2.1.a. of the Regulations governing staff salaries and allowances, under which a non-expatriate staff member may submit such an application for his or her child's education in the duty country if no school or university corresponding to the child's educational cycle is available within 80 km distance of the staff member's duty station or home.

52. The appellant's application was rejected on the grounds that there were indeed in Strasbourg, the appellant's duty station, or in the close vicinity, establishments corresponding to his daughter's educational cycle (see paragraphs 12, 14, 17 and 21 above).

53. According to the appellant, the Secretary General gave a narrow interpretation of the scope of Article 7, paragraph 2.1.a. by replacing the word "available" with "existing" (see paragraph 15 above).

54. The Tribunal notes that the parties disagree on the interpretation of the above-mentioned provision, particularly as regards the notion of "university available".

55. The Advisory Committee on Disputes considered that the award of an education allowance within the meaning of Article 7, paragraph 2.1 a. of the Regulations did not depend solely on the existence of a school or university corresponding to the child's educational cycle, but also on its availability (see paragraph 23 above).

56. The Tribunal does not share this view, for the following reasons.

57. The Tribunal notes that the education allowance was introduced into the Council of Europe Staff Regulations primarily for expatriate staff, to compensate for educational costs incurred as a result of working abroad. The situation of non-expatriate staff is different: the education allowance may only be granted to them when they, and their children, are in a similar situation to that of expatriate staff, which, logically, is a much less frequent occurrence. The position with regard to such cases is, moreover, reflected in the actual text of Article 2.1. a. of the Regulations, in which the term "by way of exception" is expressly used.

58. The Tribunal therefore considers that the "availability" of a school or university under the provision in question refers to the idea that an establishment exists and, at the same time, that it is ready to admit a certain number of students. In other words, the university must be "objectively" accessible. Of course, each university has the right to select the candidates of its choice, as did Louis Pasteur University in Strasbourg in this case (see paragraph 26 above).

59. The situation would have been different, however, if the university had not offered the course which the staff member's daughter wished to attend in the academic year in question. But this was not the case. The appellant's daughter applied for admission to level M1 of the Master's Degree in Medicines Science – Pharmaceutical Engineering at Louis Pasteur University in Strasbourg, but she was not included by the pedagogical committee among the twenty or so candidates who were finally admitted.

60. In other words, although Louis Pasteur University was "objectively" available, the appellant's daughter was unable to enrol there for reasons inherent in the selection procedure, which are not based on arbitrary considerations and which cannot justify the award of an education allowance within the meaning of Article 7, paragraph 2.1.a. of the Regulations.

61. Neither can the Tribunal accept the argument of the Advisory Committee on Disputes, which the appellant adopts, that the introduction of the word "available" in the version of Article 7, paragraph 2.1.a. of the Regulations in force in 2007 (see paragraph 31 above) was intended to make it less restrictive (see paragraph 23 above). In fact, it is clear from the text of the document submitted to the Committee of Ministers that the new text of the article in question was not intended to extend its scope, but, on the contrary, introduced an additional restriction by limiting its scope to the duty country (see paragraphs 29 and 30 above).

62. In the light of these circumstances, the Tribunal considers that the decision by the Secretary General not to grant the appellant an education allowance was taken in accordance with the relevant provisions of the Staff Regulations.

63. In conclusion, the appeal must be dismissed.

For these reasons, the Administrative Tribunal:

Dismisses the appeal;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg on 11 April 2011 and delivered in writing pursuant to Article 35, paragraph 1, of the Tribunal's Rules of Procedure on 18 April 2011, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

G. RESS