CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 503/2011 (Ana GOREY (III) 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.

PROCEEDINGS

1. Ms Ana Gorey lodged her appeal on 7 September 2011. It was registered the same day under number 503/2011.

2. On 11 October 2011, the Secretary General submitted his observations on the appeal.

3. The appellant filed a memorial in reply on 5 January 2012.

4. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 20 March 2012. The appellant was represented by Maître Carine Cohen-Solal, barrister practising in Strasbourg, and the Secretary General by Ms B. O'Loughlin, Deputy Head of the Legal Advice Department in the Directorate of Legal Advice, assisted by Ms Maija Junker-Schreckenberg and Ms Sania Ivedi, from the same department.

The Tribunal put a question during the hearing to which the Secretary General replied in a letter received on 23 March 2012. Subsequently, on 26 March, the Secretary General supplied further details which had been requested by the Tribunal. The appellant submitted her comments on 29 March 2012.

THE FACTS

I. BACKGROUND

5. The appellant, Ms Ana Gorey, of British nationality, is a permanent member of the staff of the Council of Europe.

6. Recruited by the Council of Europe in 1987, she currently holds grade B3 and works in the European Commission for Democracy through Law, better known as the Venice Commission.

7. The subject of this appeal is a question relating to the reimbursement of educational costs at the "exceptional rate" under Article 7 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations – see paragraph 15 below).

8. A previous case on the same issue ended with a decision delivered by the Tribunal on 19 December 2008 (ATCE, appeal no 401/2007 – Gorey v. Secretary General). At the time, this matter was governed both by the above-mentioned Article 7 and by Rule No 1277 of 25 June 2007 on the education allowance.

9. During the course of these proceedings before the Tribunal, the Secretary General had informed the appellant that he had agreed to reimburse at the exceptional rate the costs relating to one of her four children (M.) but not those relating to the other three (including A. and G.). The Tribunal had decided at the time to strike out the case in respect of M. and to dismiss it as to the remainder (the case of the other three children, including A. and G.).

10. On 16 February 2011, the Committee of Ministers adopted Resolution CM/Res(2011) 4 amending Articles 7, 9 and 11 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations). Changes were made to Article 7 which are not important for the present proceedings.

11. On the same day, the Secretary General adopted Rule No 1329 amending Rule No 1277 of 25 June 2007 on the education allowance (paragraph 20 below). The purpose of this new Rule was to bring Rule No 1277 into line with the changes made by the Committee of Ministers to Article 7 of Appendix IV to the Staff Regulations. The new Rule also introduced a change with regard to the reimbursement of educational costs at the "exceptional rate".

12. On 11 March 2011, the appellant submitted an administrative request to the Secretary General pursuant to Article 59, paragraph 1, of the Staff Regulations. Its subject was stated as follows: "*Administrative request for the re-examination of my education allowance in view of amendments to Rule N°. 1277, pursuant to Article 59, paragraph 1 of the Staff Regulations*". By means of this procedure, the appellant asked the Secretary General to reconsider her request again and to grant that the exceptional rate of reimbursement of educational costs be applied to two of her children, A. and G.

13. On 9 May 2011, the Secretary General rejected the request on the ground that the amendments made to Rule No 1277 by Rule No 1329 did not allow a wider application of the exceptional rate of the education allowance and did not affect the appellant's situation. The Secretary General said that the earlier final decisions rejecting her previous requests remained valid and that the Tribunal's decision of 19 December 2008 on Appeal No 401/2007 brought by the appellant on the same subject, which was a final decision having the force of *res judicata*, precluded consideration of a further request by her on this question.

14. On 9 June 2011, the appellant lodged an administrative complaint under Article 59, paragraph 2, of the Staff Regulations.

15. The next day the Directorate of Human Resources acknowledged receipt of the "administrative complaint of 9 June received by Human Resources on the same day".

16. The Secretary General rejected the administrative complaint in an explicit decision dated 11 July 2011, which was a Monday.

17. The rejection letter was sent by registered mail with acknowledgement of receipt and an attempt was made to deliver it to the appellant's address on 13 July 2011. Because the appellant had not been to the post office to collect the letter, it was returned to the Council of Europe marked "undeliverable - not collected".

18. The reply to the administrative complaint was therefore sent again by registered mail with acknowledgement of receipt and an attempt was made to deliver it to the appellant's address on 20 August 2011. Once again the letter was not collected by the appellant and was returned to the Council of Europe.

19. On 14 September 2011, the letter was sent for the third time by registered mail with acknowledgement of receipt. On 26 September 2011 the appellant went to the post office and collected the registered letter.

20. Meanwhile, on 7 September 2011, the appellant had lodged this appeal.

II. RELEVANT LAW

A. Principle of non-discrimination

21. Article 3 of the Staff Regulations, on non-discrimination within the Organisation, reads as follows:

> "1. Staff members shall be entitled to equal treatment under the Staff Regulations without direct or indirect discrimination, in particular on grounds of racial, ethnic or social origin, colour, nationality, disability, age, marital or parental status, sex or sexual orientation, and political, philosophical or religious opinions.
>
> 2. The principle of equal treatment and non-discrimination shall not prevent the Secretary General from maintaining or adopting, in the context of a predetermined policy, measures conferring specific advantages in order to promote full and effective equality and equal opportunities for everyone, provided that there is an objective and reasonable justification for those measures."

B. Award of the education allowance

22. The award of the education allowance is governed by Article 7 of Appendix IV to the Staff Regulations (Regulations governing staff salaries and allowances).

23. Following the amendments made by the Committee of Ministers on 16 May 2007, the relevant parts of this provision read as follows:

> Article 7 – Education allowance
>
> "1. 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:
> *a.* in respect of children in compulsory education up to completion of secondary level of education;
> *b.* in respect of children at post-secondary level of education for studies carried out in the country of which the staff member or the child's other parent is a national or in the duty country. If duly justified by the staff member, for reasons of continuity in following an educational cycle or if educational costs are lower in a third country, an exception to this rule can be granted by the Secretary General.
>
> (…)
>
> 6. Reimbursement of educational costs mentioned in paragraph 5 above shall be made according to the rates, ceilings and conditions below, each case being treated individually:
> *a.* Standard rate: 70% of the educational costs up to a ceiling of 2.5 times the annual amount of the dependent child allowance;
> *b.* Country of nationality rate (if different from country of duty): 70% of educational costs up to a ceiling of 3 times the annual amount of the dependent

child allowance if the child is educated in a country of which the staff member or the other parent is a national;
c. Increased rate: 70% of educational costs up to a ceiling of 4 times the annual amount of the dependent child allowance provided that:
i) educational expenditure as defined in paragraph 5 *a.* and *b.* is excessively high;
ii) such costs are for education up to completion of the secondary cycle;
iii) are incurred for imperative educational reasons;
d. Exceptional rate: up to 90% of total educational costs up to a ceiling of 6 times the annual rate of the dependent child allowance provided that:
i) educational costs as defined in paragraph 5 *a.* and *b.* are exceptional, unavoidable and excessively high, according to the judgement of the Secretary General;
ii) such costs refer either to education up to completion of the secondary cycle or are costs as defined in paragraph 5 a. and b. for the post-secondary cycle;
iii) costs are incurred for imperative educational reasons.

(…)

14. The Secretary General shall establish instructions for implementation of the provisions of this Article."

24. On 25 June 2007, the Secretary General adopted Rule No 1277 on the education allowance. This Rule was intended to "clarify a number of questions concerning the education allowance and set out the conditions for granting it" and read as follows:

Article 1

"Where a staff member claims an exception based on educational costs being lower in a third country, pursuant to Article 7 paragraph 1 b) of the Regulations, the comparison shall be made between registration fees and general fees for schooling and education applicable for the first year in the educational cycle in either the duty country or the country of which the official or the child's other parent is national (the staff member concerned having the choice).

(…)

Article 4

Reasons for claiming the existence of imperative educational reasons for the purpose of Article 7, paragraph 2, and 6 c) iii) of the Regulations may include medical problems, learning difficulties (including language-related difficulties), behavioural problems or specific family situations. In every case the staff member claiming an imperative educational reason shall provide the Directorate of Human Resources of the Directorate General of Administration and Logistics with a detailed explanation and supporting documentation.

Article 5

The educational costs shall be reimbursed at the exceptional rate within the meaning of Article 7 paragraph 6 d) of the Regulations when incurred:

a. for children with special educational needs resulting from their medically certified physical, developmental or behavioural condition;

(…)

Article 10

This rule shall enter into force on the first day of the month following its signature by the Secretary General and shall revoke Instruction No. 27 of 7 April 1993 on the application of Article 7.7 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations)."

25. Following the Committee of Ministers Resolution of 16 February 2011 amending certain provisions of the Regulations governing staff salaries and allowances, on the same day (16 February 2011) the Secretary General adopted Rule No 1329 amending Rule No 1277 of 25 June 2007 on the education allowance. The new Rule read as follows:

"The Secretary General of the Council of Europe,

HAVING REGARD to Resolution CM/Res(2011)4 adopted by the Committee of Ministers on 16 February 2011 at the 1106th meeting of the Ministers' Deputies;
HAVING REGARD to Rule No. 1277 of 25 June 2007 on the education allowance;

CONSIDERING that Rule No. 1277 of 25 June 2007 on the education allowance should be amended;

HAVING CONSULTED the Staff Committee in accordance with Article 5, paragraph 3, of the Regulations on Staff Participation (Appendix I to the Staff Regulations);

DECIDES:

Article 1

(…)

Article 2

Article 5 of Rule No. 1277 of 25 June 2007 on the education allowance shall henceforth read as follows:

"The educational costs shall be reimbursed at the exceptional rate within the meaning of Article 7 paragraph 6 d) of the Regulations when incurred:

a. for children with special educational needs resulting from their medically certified physical, developmental or behavioural condition; or
b. for children who live with a staff member attached to an external duty station, provided that no other adequate educational establishment corresponding to the child's educational cycle is available within reasonable distance from this duty station."

Article 3

(…).

Article 4

This Rule shall enter into force on the day of its signature by the Secretary General."

C. Time-limit for lodging appeals with the Tribunal

26. Article 60, paragraph 3, of the Staff Regulations specifies the time-limit for lodging an appeal with the Tribunal. Disregarding a lack of consistency which should have been rectified following the adoption of Resolution CM/Res(20010)9 of 7 July 2010 amending inter alia (together with some reorganisation of paragraphs) Article 59 of the Staff Regulations, paragraph 3 of Article 60, in its legally correct form, reads as follows:

"3. An appeal shall be lodged in writing within sixty days from the date of notification of the Secretary General's decision on the complaint or from the expiry of the time-limit referred to in Article 59, paragraph [4]. Nevertheless, in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods."

27. Article 61 of the Staff Regulations, on the calculation of time-limits, reads as follows:

"The time-limits in Articles 59 and 60 shall run from midnight of the first day of each time-limit as defined in the provision concerned. Saturdays, Sundays and official holidays shall count when calculating a time-limit. However, where the last day of a time-limit is a Saturday, Sunday or an official holiday, the time-limit shall be extended to include the first working day thereafter."

THE LAW

28. In her form of appeal, the appellant asked the Tribunal to "annul the Rule of 16 February 2011 on the grounds that it is discriminatory, arbitrary in substance and unreasoned, to annul the Administration's decision of 9 May 2011 and to order the Administration to reconsider the appellant's request to be granted the education allowance at the exceptional rate for her children [A.] and [G.] in the event that a new Rule widening the scope of Rule No 1277 is issued".

In her memorial in reply, the appellant asks the Tribunal to "hold that the condition in Article 2 of Rule No 1329 of 16 February 2011 that educational costs may be reimbursed at the exceptional rate where incurred for children living with a staff member attached to an external duty station is discriminatory". She also asks the Tribunal to "rule that her request shall be re-examined by the Administration".

Lastly, the appellant claims the sum of 4 000 euros by way of reimbursement of all the costs arising from this appeal.

29. The Secretary General asks the Tribunal to declare the appeal inadmissible and/or ill-founded and to dismiss it. With regard to the reimbursement of procedural costs, the Secretary General rejects the appellant's claim.

I. SUBMISSIONS OF THE PARTIES

A. The admissibility of the appeal

The Secretary General

30. The Secretary General pleads the inadmissibility of the appeal on several grounds: it is a wrongful appeal, the appellant in any event failed to comply with the statutory procedure, and her appeal should be declared inadmissible for failure to exhaust internal remedies. The appeal was accordingly premature. It is also inadmissible because it has the same subject-matter as the first appeal, because the appellant made new submissions to the Tribunal in relation to those set out in the administrative complaint, because the appellant asks the Tribunal to make an order and, lastly, because the appellant has not proved a "direct" and existing interest within the meaning of Article 59, paragraph 2, of the Staff Regulations.

31. As to the first plea, the Secretary General notes that the appellant knowingly lodged her appeal without even having acquainted herself with the substance of his reply to the administrative complaint, although he had done everything in his power to bring it to her notice. The Secretary General points out that the appellant had already lodged several administrative complaints in the past and was therefore perfectly aware that the Secretary General's replies to them are sent by registered letter with acknowledgement of receipt. She was informed of this but refrained from going to the post office to collect the registered letters in question. According to the Secretary General, the appellant gave

incorrect information in her form of appeal because her administrative complaint had not been implicitly rejected. He re-affirms that he had indeed given an explicit decision within the statutory period of thirty days allowed under Article 59 of the Staff Regulations. It is therefore a wrongful appeal.

32. The Secretary General stresses that two registered letters with acknowledgement of receipt containing his reply to the administrative complaint were sent to the appellant before she lodged her appeal. Referring to the Tribunal's case law, which, in his opinion, applies *mutatis mutandis* in this case (ATCE, Appeal No 416/2008 - Švarca v. Secretary General, decision of 24 June 2009), the Secretary General submits that the appellant must bear the consequences of her choice not to collect the letters sent to her.

33. Secondly, the Secretary General argues that the appellant failed to comply with the statutory procedure. Relying on the wording of paragraphs 1 to 3 of Article 60 of the Staff Regulations and on the Tribunal's case law (ATCE, Appeal No 466/2010, Kravchenko v. Secretary General, decision of 27 January 2011, paragraph 93), he says that the appellant could not have known the substance of his reply to her complaint at the time she lodged her appeal. In lodging an appeal well before knowing the Secretary General's reply to her complaint, she failed to comply with the statutory procedure and her appeal must be declared inadmissible for failure to exhaust internal remedies. It also follows that the appeal is inadmissible by reason of being premature.

34. The Secretary General further notes that it is clear from a reading of Rule No 1329 that the amendment made to Article 5 of Rule No 1277 applies to staff attached to an external duty station (ie outside Strasbourg). Otherwise, Rule No 1329 did not alter the situation of staff attached to the Organisation's headquarters, which is the appellant's case, and the wording of Article 5 is unchanged as regards the granting of the exceptional rate for children with special educational needs. It follows that, in amending Rule No 1277, the Secretary General did not widen the scope of the provisions governing the award of the education allowance at the exceptional rate for children with special educational needs. The amendment affects only the situation of staff attached to an external duty station and in no way affects the appellant's personal situation because she does not belong to that category of staff. Consequently, the appellant is not justified in submitting a new request for reconsideration of her situation because the rules applying to her have not changed.

35. In this connection, the Secretary General points out that the appellant had already lodged an appeal concerning A. and G. and that, in its decision delivered on 19 December 2008, the Tribunal held the appeal to be unfounded. The decision in question is final and the appellant has not adduced any new facts which would justify re-opening the case or any evidence which casts doubt on that decision.

36. Because the present appeal challenges the decision not to grant the appellant the education allowance at the exceptional rate for A. and G., which was the subject of the dispute in the earlier proceedings, it follows that the appeal is inadmissible on that ground too. In the Secretary General's view, the appellant's attempts to justify the present appeal

by the amendments to Rule No 1277 – which do not affect the rules applicable to her – are ineffective.

37. Next, the Secretary General argues that it is not in order for the appellant to make submissions in her appeal which go beyond those laid before him in her administrative complaint. The appellant asked in her administrative complaint that her request to be awarded the education allowance at the exceptional rate for her children Alexander and Gabriella be granted. In the present appeal, she is asking for the annulment of Rule 1329 and the Administration's decision of 9 May 2011. She also asks the Tribunal to "order the Administration to reconsider [her] request to be granted the education allowance at the exceptional rate for her children [A.] and [G.] in the event that a new Rule widening the scope of Rule No 1277 is issued".

38. Furthermore, he argues, it is not within the remit of the Administrative Tribunal to make an order of this kind requiring the Administration to "reconsider [her] request to be granted the education allowance at the exceptional rate for her children Alexander and Gabriella in the event that a new Rule widening the scope of Rule No 1277 is issued". This submission is accordingly inadmissible.

39. Lastly, the Secretary General points out that, under Article 59, paragraph 2, of the Staff Regulations, staff members who have a "direct and existing interest in so doing may submit […] a complaint against an administrative act adversely affecting them". Yet Rule No 1329 does not affect the appellant's situation and does not adversely affect her. In the same way, her request "to be granted the education allowance at the exceptional rate for her children A. and G. in the event that a new Rule widening the scope of Rule No 1277 is issued" is unfounded and the appellant accordingly does not have a "direct" and "existing" interest in respect of a purely hypothetical situation. It follows from all the above that her appeal is also inadmissible on the ground that she does not have an interest in bringing proceedings.

40. In conclusion, the Secretary General infers from this that the appeal is inadmissible.

The appellant

41. For her part, the appellant argues that she asked for the new regulations introduced by the Secretary General in his Rule of 16 February 2011 to be applied to her. It is an established principle that new regulations confer entitlement to reconsideration of a request. She adds that the new Rule gave her the right to request reconsideration of the rate of the education allowance applied to her children. Consequently, the Administration cannot claim that its earlier decisions continue to apply indefinitely.

42. Regarding the alleged premature nature of her appeal, the appellant stresses that, on the date when the time-limit for replying to her administrative complaint expired, no reply had been notified to her. She alleges that the Secretary General's reply was notified to her on 13 July 2011, namely the date on which the first attempt was made to deliver the registered

letter, ie after the period stipulated in Article 59, paragraph 4, of the Staff Regulations had expired.

43. As far as the final and binding nature of the decision of 27 November 2008 is concerned, the appellant submits that the changes in the rules after that decision was delivered changed the situation regarding her entitlement to the education allowance. Her new request was not identical to that which gave rise to Appeal No 407/2007: it was prompted by the introduction by Rule No 1329 of a paragraph b in Article 5 of Rule No 1277. It cannot be objected that the earlier decision retains its binding force because events subsequent to that decision changed the previous, judicially recognised situation.

44. In reply to the Secretary General's defence that the appeal is inadmissible because new submissions, differing from those set out in the administrative complaint, were made to the Tribunal, the appellant says that she maintains her initial submissions requesting annulment of the decision of 9 May 2011 and reconsideration of her application for the education allowance.

45. Lastly, the appellant maintains that she has an interest in bringing proceedings. She argues that Rule No 1329 extended entitlement to the exceptional rate of the education allowance to staff members' children lacking an adequate educational establishment corresponding to their educational cycle within a reasonable distance, it being specified that this new provision applies only to staff members attached to an external duty station, ie outside Strasbourg. Because she challenges this discrimination, the appellant considers that she does indeed have an interest in bringing proceedings against the decision by the Director of Human Resources refusing her the benefit of this new provision.

46. In conclusion, the appellant believes her appeal to be admissible.

B. The merits of the appeal

The appellant

47. The appellant relies on two grounds of appeal: the discriminatory nature of the condition relating to the staff member's duty station, stated in Article 2.b of Rule No 1329, and the failure to give reasons for the decision of 9 May 2011.

48. Where the first ground is concerned, the appellant submits that there is no justification for the difference of treatment between staff of the Organisation. Staff working in Strasbourg encounter difficulties in finding an adequate educational establishment corresponding to their child's educational cycle within a reasonable distance from their duty station. The appellant maintains that the city of Strasbourg, headquarters of the Council of Europe, does not offer more in the way of educational facilities, and possibly even offers less, than all the other cities in which Council staff are based.

49. The appellant notes that Article 5 of Rule No 1277 originally allowed staff to obtain reimbursement of educational costs at the exceptional rate if they were incurred in respect of children with special educational needs resulting from their medically certified physical, developmental or behavioural condition. Yet the new wording of this provision is broader and unrelated to the child's medical state.

The search for an adequate educational establishment corresponding to their children's educational cycle is a matter of general concern to staff. The measure provided for in Article 2.b of Rule No 1329 of 16 February 2011 does not apply generally because it is also subject to a criterion of distance between the duty station and the school.

In the appellant's view, only distance is an objective criterion for limiting the scope of the measure, which is not the case for the duty station criterion. The latter criterion is unfounded, unjustified and discriminatory.

50. She then adds that the fact that the Rule was submitted to the Staff Committee does not mean that her objections can be dismissed out of hand.

51. As to the second ground of appeal, the appellant states that the decision of 9 May 2011 should be annulled because no reasons are given to justify the Secretary General's refusal. The Secretary General merely rebutted her arguments by raising vague, general objections and relying on his discretionary power without, however, providing any clear, detailed explanation of his decision.

52. In conclusion, the appellant asks the Tribunal to hold that the condition in Article 2 of Rule No 1329 of 16 February 2011 that educational costs may be reimbursed at the exceptional rate where incurred for children living with a staff member attached to an external duty station is discriminatory. She also asks the Tribunal to rule that her request shall be re-examined by the Organisation.

The Secretary General

53. In reply to the appellant's first ground of appeal, the Secretary General submits that she fails to substantiate her allegations relating to the arbitrary nature of Rule No 1277 as amended by Rule No 1329.

In allowing for the particular circumstances of staff attached to an external duty station, the Secretary General took into account the difficult situation in which these staff members may find themselves when they do not have an adequate educational establishment corresponding to their child's educational cycle within a reasonable distance from their duty station.

Where they are based, these staff members do not necessarily have access to the same wide range of courses and educational establishments as staff who work at the Organisation's headquarters in Strasbourg. Consequently, the decision to apply the exceptional rate to cases where educational costs are incurred for "children who live with

a staff member attached to an external duty station, provided that no other adequate educational establishment corresponding to the child's educational cycle is available within reasonable distance from this duty station" is a justified and necessary measure which is fully consistent with the terms of Article 7, paragraph 6.d, of the Regulations governing staff salaries and allowances.

54. The Secretary General further submits that, in adopting Rule No 1329 amending Rule No 1277, he acted in conformity with the regulatory powers which the Staff Regulations explicitly confer on him, while remaining within reasonable limits in exercising his discretionary powers. Indeed, according to Article 7, paragraph 13, of the Regulations governing staff salaries and allowances: "*The Secretary General shall establish instructions for implementation of the provisions of this Article*". Moreover, Article 62, paragraph 1, of the Staff Regulations also provides that: "*The Secretary General shall issue rules, instructions or office circulars laying down the provisions for implementation of these Regulations*".

55. Lastly, in consulting the Staff Committee in accordance with Article 5, paragraph 3, of the Regulations on staff participation (Appendix I to the Staff Regulations), the Secretary General discharged his statutory obligations. Consequently, it cannot be said that there is any arbitrariness and the Directorate of Human Resources was justified in describing the appellant's arguments on this subject as "inappropriate", particularly as the amendment made to Rule No 1277 does not affect her situation in any way and does not cause her any prejudice.

56. In reply to the appellant's ground of appeal alleging a discriminatory difference of treatment, the Secretary General says that she fails to substantiate this argument and fails to prove in what respect she is subject to discriminatory treatment. Lastly, he notes that discrimination only exists where two identical situations are treated differently. In the instant case, the appellant's situation cannot be regarded as identical to that of staff attached to an external duty station.

Consequently, contrary to the appellant's claim, it cannot be argued that there is any discrimination in the case in point.

57. Lastly, the Secretary General stresses that the appellant is already receiving large sums of money for her children. He adds that the many requests and complaints which the appellant has submitted regularly to the Administration of the Council of Europe over a period of several years in order to obtain additional sums have been unsuccessful quite simply because she does not satisfy the conditions to be eligible for this exceptional rate.

58. In the Secretary General's view, it follows from all the above that he has not violated any regulations or any rules of legal practice or general principles of law. Neither have there been any errors in assessing evidence, faulty conclusions or misuse of authority.

59. In the light of the foregoing, the Secretary General asks the Tribunal to declare the appeal inadmissible and/or ill-founded and to dismiss it.

II. THE TRIBUNAL'S ASSESSMENT

A. Admissibility of the appeal

60. The Tribunal must focus first of all on the objections to admissibility. The various grounds of inadmissibility relied on by the Secretary General can be grouped together under two headings: objections related to the final and binding nature of the earlier decision and objections related to the premature nature of the appeal.

61. Regarding the objection based on the final and binding nature of the decision of 19 December 2008 (paragraph 8 above), the Tribunal notes that, as correctly pointed out by the appellant, her application of 11 March 2001 did not have the same legal basis – and, even if this was not explicitly pleaded before the Tribunal, probably did not concern the award of the education allowance for the same school year. There was nothing to prevent the appellant from submitting a new request, which, rightly or wrongly – but this pertains to the merits of the appeal and has no bearing on the admissibility of the appeal or the administrative complaint which preceded it – was a different request from that which gave rise to the decision of 18 December 2008. Moreover, in her request for an administrative decision under Article 59, paragraph 1, of the Staff Regulations, the appellant was careful to specify that she was requesting a re-examination of her application for the "exceptional rate" of the education allowance on the basis of the new regulations which had just come into force (paragraph 8 above).

62. Furthermore, in the memorandum which the Director of Human Resources sent the appellant in reply to her memorandum of 11 March 2011, he took care to point out that "*should the Secretary General decide to amend Rule No. 1177 so as to allow a wider application of the exceptional rate, the Directorate of Human Resources would have to consider any new request on the basis of the amended Rule*", without indicating, however, that the memorandum of 11 March concerned an issue which was covered by *res judicata*.

63. The Tribunal must therefore dismiss this objection to the admissibility of the administrative compliant and the ensuing appeal.

64. Regarding the other objection to admissibility, alleging that the appellant did not wait to receive notification of the rejection of her administrative complaint, the Tribunal must first make the following points.

65. According to Article 59, paragraph 4, of the Staff Regulations,

> "4. The Secretary General shall give a reasoned decision on the complaint as soon as possible and not later than thirty days from the date of its receipt and shall notify it to the complainant. If, despite this obligation, the Secretary General fails

> to reply to the complainant within that period, he or she shall be deemed to have given an implicit decision rejecting the complaint."

66. Under the terms of Article 60, paragraph 3, of the Staff Regulations,

> "3. An appeal shall be lodged in writing within sixty days from the date of notification of the Secretary General's decision on the complaint or from the expiry of the time-limit referred to in Article 59, paragraph 3. Nevertheless, in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods."

67. In his submissions to the Tribunal, the Secretary General argues that it is enough for him to send the appellant his reply within thirty days in order to comply with the notification requirement of Article 59, paragraph 4. The appellant considers, however, that notification is only valid if the letter reaches the appellant within thirty days.

68. In the view of the Tribunal, it is clear from a combined reading of these two provisions, and having regard to the aims pursued, that the words "notify" and "notification" used therein refer to two different dates. In the first provision, this is the day on which the Secretary General brings his decision to a complainant's notice, by personal delivery or by post. In the second provision, "notification" refers to the receipt of the decision, which, in the case of a letter as opposed to personal notification, nearly always involves a time-lag, which obviously has implications for the start of the period for submitting an appeal to the Tribunal.

69. Consequently, the appellant's argument that she should have received the rejection of her complaint within thirty days must be rejected, whereas the Secretary General's argument that it is sufficient for the rejection to be sent within that period must be accepted.

70. However, based on the principle that *necessitas probandi incumbit ei qui agit* ("the necessity of proof always lies with the person who lays charges"), to support his defence that the appeal was inadmissible because it was submitted prematurely before the appellant became aware of the explicit rejection of the administrative complaint, the Secretary General, faced with the appellant's counter-defence that this document was not valid owing to a failure to comply with the time-limit for notification, needed to prove to the Tribunal that he did in fact send his letter within the 30-day period. The mere fact that the reply letter was signed does not constitute proof that it was actually sent within that period. Since the Secretary General was unable to prove the facts on which he bases his defence, it must be dismissed, and hence it cannot be concluded that the appellant's appeal was premature.

71. However, the Tribunal cannot conceal its surprise at the fact that the Organisation failed to keep any record of the sending of this letter, given that a pre-contentious procedure was involved.

72. In conclusion, this defence must also be dismissed..

B. Merits of the appeal

73. With regard to the first ground of appeal, concerning the discriminatory nature of the condition relating to a staff member's duty station, the Tribunal points out that it cannot express an opinion on the provision per se. Indeed, the first sentence of Article 59, paragraph 2, of the Staff Regulations states that staff members may only submit to the Secretary General a "complaint against an administrative act adversely affecting them". The second sentence then specifies that "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." However, Rule No 1329 is a regulatory act and, as such, cannot be challenged by means of contentious proceedings. It follows that the Tribunal cannot rule on the first of the appellant's submissions, namely her request to it to hold that the condition in Article 2 of Rule No 1329 making the exceptional rate of the education allowance subject to the impugned conditions is discriminatory.

74. The Tribunal can, however, express an opinion on whether the administrative decision taken pursuant to those regulations is discriminatory or not.

75. The Tribunal observes that this measure whereby the exceptional rate is granted only to staff members in posts at external duty stations is clearly intended to create conditions conducive to encouraging staff members to apply for such posts. Consequently, given that these staff members are not in the same circumstances as staff serving in Strasbourg, this measure does not treat staff members in the same situation differently and, hence, is not discriminatory.

76. The Tribunal notes that paragraph 1 of Article 3 of the Staff Regulations, which prohibits discrimination, does not specify the duty station as a prohibited ground of discrimination. Furthermore, paragraph 2 allows measures "conferring specific advantages in order to promote full and effective equality and equal opportunities for everyone, provided that there is an objective and reasonable justification for those measures." The fact that a staff member is stationed away from headquarters constitutes just such an objective and reasonable justification.

77. Admittedly, the appellant argues that, despite working in Strasbourg, she encounters the same difficulties as, and sometimes even greater difficulties than, those attached to an external duty station. However, the fact remains that she is, *de facto*, in a different situation from such staff and it would not be possible for the Tribunal to find that she has been subjected to discriminatory treatment within the meaning of Article 3 of the Staff Regulations or treatment contrary to the general principle of non-discrimination in comparable situations.

78. It follows that this ground must be dismissed.

79. The appellant's second ground of complaint is that the decision of 9 May 2011 (paragraph 13 above) gave no reasons justifying the Secretary General's refusal.

80. The Tribunal observes that, in his reply, the Director of Human Resources referred first of all to previous similar requests which the appellant submitted following the decision of 19 December 2008. The Director then pointed out that the amendments introduced by Rule No 1329 did not make it possible for the "exceptional rate" to be applied more widely and in a way that affected the appellant's situation; he therefore disputed her finding. It follows that the Secretary General gave sufficient reasons for his administrative decision; moreover, in her subsequent administrative complaint, the appellant set out arguments concerning the admissibility and merits of her claim, which she subsequently took up again in the proceedings before the Tribunal. She argued her case without mentioning any difficulty in identifying the reasons which led the Secretary General to reject her application.

81. In conclusion, this ground of appeal by the appellant is unfounded.

82. Having reached this conclusion, the Tribunal is not required to express an opinion on the appellant's second request, namely that it should order the Administration to reconsider her request for the award of the exceptional rate. However, the Tribunal deems it appropriate to point out that, as already pointed out in other appeals, the Tribunal has jurisdiction to annul the impugned administrative decision and, in disputes of a pecuniary nature, it has unlimited jurisdiction (Article 60, paragraph 2, of the Staff Regulations). However, it does not have jurisdiction to issue instructions for the execution of a decision.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares the appeal unfounded and dismisses it;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg on 16 April 2012 and delivered in writing on 25 April 2012 pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure, the French text being authentic.

The Registrar of the Administrative Tribunal	The Deputy Chair of the Administrative Tribunal
S. SANSOTTA	G. RESS