

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 383/2006 (Ulrich ROSE v. Secretary General)

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Angelo CLARIZIA,
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr Ulrich Rose lodged his appeal on 17 August 2006. The appeal was registered the same day under No. 383/2006.
2. On 24 October 2006, the appellant's representative, Professor Piquemal, lodged further pleadings.
3. On 24 November 2006, the Secretary General lodged his observations concerning the appeal. He was represented by Mr P. Titium, the then Deputy Head of the Legal Advice Department, Directorate General I – Legal Affairs.
4. On 16 January 2007, the appellant lodged observations in reply.
5. The Tribunal having requested various items of information concerning the issuing of the special residence permit and diplomatic car number plates, the Secretary General submitted his reply in stages between 10 May and 29 August 2007. The appellant submitted his comments during the period between 22 June and 18 September 2007. In the last document, he also raised the question of *restitutio in integrum*.
6. As the parties had expressed their willingness to forego oral proceedings, the Tribunal decided that there was no need to hold a hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The appellant, Mr Ulrich Rose, is a permanent member of staff of the Council of Europe and a German national.

8. Appointed by the Council of Europe on 15 October 1991, he currently holds the grade A3 and holds a post of Principal Administrator in the European Service for the Quality of Medicines (SEQM).

9. Since October 1991, the appellant had been receiving the expatriation allowance under Article 6, paragraph 1, of Appendix IV (Regulations governing staff salaries and allowances – see paragraph 20 below) to the Staff Regulations.

10. The appellant was not entitled to any other allowance which depended on the granting of expatriation allowance.

11. The appellant had a special residence permit issued by the French authorities via the Council of Europe. He had his cars registered in the special “CD” series intended for Council of Europe staff of his rank.

12. On 28 November 2005, the Directorate of Human Resources asked the appellant for further information concerning his residence in France. It asked him to complete a declaration on his honour and to supply proof that his residence was in France.

13. On 15 December 2005, the appellant returned the completed declaration together with various documents. He stated that he had his residence in France (in a bedsit until 31 December 2005 and in a flat as from 1 January 2006).

14. On 18 April 2006, the Directorate of Human Resources sent a letter to the appellant.

It reminded him that under Article 6, paragraph 1 iv), of the Regulations governing staff salaries and allowances, “when any point on the frontier of the country in which the staff member is a national is within a radius of 50 km from the duty station, such a staff member shall not be entitled to the expatriation allowance unless he or she supplies proof that he or she has established his or her actual and habitual residence in the country of service (...)”.

The Directorate of Human Resources said that it had also noted that the appellant had first rented a bedsit and subsequently a flat in France. It added that the appellant had demonstrated that he had rented an apartment in France. However, simple confirmation of the fact that he rented an apartment was, of course, not sufficient proof that it was his “actual and habitual” residence. It added that the appellant had not succeeded in providing any evidence that he had established his “actual and habitual” residence in France.

It therefore informed the appellant that payment of the expatriation allowance would cease as from 1 June 2006. The appellant was also requested to return his special residence permit and green car number plates by the end of May 2006.

The relevant passages read as follows:

“You could demonstrate that you are renting an apartment in France, the country of service. However, the requirement of proof of actual and habitual residence obviously calls for more than a simple confirmation of the fact that you are the tenant of a dwelling. You failed to provide the Directorate of Human Resources with any prove of the fact that you established your actual residence and, accordingly, the centre of your interest in France.

In the light of the information you have provided, I regret to inform you that you do not meet the requirements of Article 6 of the Regulations governing Staff salaries and allowances. Therefore, payment of the expatriation allowance will cease as from 1 June 2006. You are also requested to return to [the Directorate of Human Resources] your special residence permit as well as the green number plates of your car before the end of May 2006.”

15. On 15 May 2006, the appellant lodged an administrative complaint.
16. On 19 June 2006, the Secretary General dismissed the administrative complaint.
17. On the same day, the Organisation informed the appellant that he was to be the subject of an administrative inquiry (Instruction No. 51 of 10 June 2006).
18. On 29 September 2006, the appellant was informed that the Secretary General had decided not to take any disciplinary action against him.
19. In the meantime, on 17 August 2006, the appellant lodged the present appeal.
20. On 18 September 2007, the appellant informed the Tribunal that the Organisation had once again granted him the expatriation allowance and the education allowance, following the establishment of a new address.

The appellant further pointed out that the Organisation had not returned to the French authorities the special residence permit which had been withdrawn from him but had kept it, and on granting him the expatriation allowance again, had sent it to the authorities requesting an extension.

II. INTERNAL LAW

21. Article 6, paragraph 1, of Appendix IV (Regulations governing staff salaries and allowances) to the Staff Regulations deals with the granting of the expatriation allowance and reads 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 were not nationals of the host state and had not been continuously resident on that state’s territory for at least three years, no account being taken of previous service in their own country’s administration or with other international organisations.

ii.This allowance shall also be paid to staff in the same categories who, although nationals of the host state, had been continuously resident for at least ten years in another state at the time of their appointment, no account being taken of previous service in their own country’s administration or with other international organisations.

iii.In the event of a staff member who is entitled to the expatriation allowance being transferred to the country of which he or she is a national, he or she shall cease to be entitled to the expatriation allowance.

iv. When any point on the frontier of the country of which the staff member is a national is within a radius of 50 km from the duty station, such a staff member shall not be entitled to the expatriation allowance unless he or she supplies proof that he or she has established his or her actual and habitual residence in the country of service or, exceptionally and subject to agreement by the Secretary General, in another country of which he or she is not a national, taking account of his or her family circumstances.”

22. As regards the issuing of special residence permits, it should be noted that, following exchanges (a note verbale and e-mails), between the French authorities and the Council of Europe, for the purpose of providing information to the Tribunal, it emerged that staff who are not French nationals are entitled to hold such permits as, even if they decide to reside in Germany, they also have the right to reside in France by virtue of their association with the Council of Europe. They need to be able to prove this right by means of a *carte spéciale*.

23. As to the granting of diplomatic car number plates, further to the said exchanges, the French authorities finally stated that:

“It is clear from consultations with the competent French agencies that only Council of Europe staff residing in France are entitled to register their cars in the special series. This consideration, however, should not detract from the fact that withdrawal of the special registration is a matter for the host state and not for the Council of Europe.”

THE LAW

24. The appellant contests the decision to withdraw his expatriation allowance and his special residence permit and diplomatic car number plates. He also asks the Tribunal to award him the sum of 3,000 euros to cover the costs incurred in the present appeal. In pleadings dated 18 September 2007, the appellant further raised the question of *restitutio in integrum*.

25. The Secretary General asks the Tribunal to dismiss the appeal as unfounded and to dismiss it.

I. SUBMISSIONS OF THE PARTIES

26. The appellant relies on three arguments: violation of Article 6, paragraph 1, of the Regulations governing staff salaries and allowances, violation of the rules governing the granting of the special residence permit and diplomatic car number plates and, lastly, failure to give reasons.

27. In support of his first point, the appellant maintains that the check to ensure that a person is eligible for the expatriation allowance, under Article 6 of the Regulations, is carried out only at the time of their appointment. That is the time when the staff member concerned must show that he or she has established his or her “actual and habitual residence” in the country of service. The appellant further argues that the text makes no mention of the possibility that this right might subsequently be forfeited and that therefore, under the general rule whereby all agreements must be interpreted in good faith, no such forfeiture is possible.

28. Alternatively, the appellant maintains that, even supposing that Article 6, paragraph 1 (iv) could be construed as requiring the expatriation allowance to be withdrawn if the staff member is unable to prove that he or she continues to have his or her residence in France, the

impugned decision would still be unlawful and would be in breach of the provision in question, even thus interpreted. In other words, the appellant considers that he has shown that he has established his “actual and habitual” residence in France. He refers here to rule No. 9 of Resolution (72) 1, adopted on 18 January 1972 by the Committee of Ministers of the Council of Europe, on the standardisation of the legal concepts of “domicile” and of “residence”. The appellant adds that “it is in Strasbourg that he works, and it is in Strasbourg that he has decided, for various practical and personal reasons, to spend most of his time during the working week”.

29. The appellant goes on to advance a series of arguments challenging the Secretary General’s submission that the material supplied is insufficient to establish that the appellant has his “actual and habitual” residence in Strasbourg. He reiterates that he is physically present in Strasbourg most of the time.

30. In support of his second point, the appellant contends that the decision to withdraw his special residence permit is unlawful, as there is nothing to indicate that such permits are intended solely for Council of Europe staff who have established their residence in France. The appellant notes from the information provided by the French authorities that they share this view.

As to the question of the registration of vehicles in the special series, the appellant submits that such entitlement arises from the special residence permit, as established by a memorandum sent to staff by the Administration.

31. Lastly, the appellant alleges failure to give reasons. He notes that while the reasons given for the decision to withdraw the expatriation allowance were inadequate and inappropriate, even less attempt was made to justify the decision to withdraw the special residence permit and the diplomatic number plates.

32. In conclusion, the appellant requests that the decision complained of be annulled and that he be awarded the sum of 3,000 euros to cover the costs incurred in the present appeal.

33. The Secretary General maintains firstly that entitlement to the expatriation allowance (as in the case of other allowances) is not conferred irrevocably simply because at one point, the staff member qualified for it. If the eligibility criteria for a particular allowance are no longer met, it ceases to be payable. According to case-law, moreover, entitlements should not be maintained in all circumstances.

34. The Secretary General adds that the concept of “actual and habitual” residence should be understood as meaning the place where the staff member has established his or her permanent or habitual centre of interest, with the intention of giving it a stable nature. It transpires from the material submitted by the appellant and from his declarations, however, that he has no wish to establish his permanent or habitual centre of interest in France, with the intention of giving it a stable nature. The fact that the appellant rents an apartment where he spends little time is in no way indicative of a resolve to establish the centre of his interests in France. Particularly as he owns a house a few kilometres from his workplace, a house in which his partner lives and where he spends several nights week.

35. In response to the submissions in support of the second argument, the Secretary General maintains that the information given in the Guide for non-French Council of Europe staff members and their families has no statutory or regulatory basis.

In the light of the information provided by the French authorities (paragraphs 5 and 24-25 above), the Secretary General accepts that staff residing in Germany are entitled to the special residence permit issued by the French authorities and maintains that such persons are not entitled to diplomatic car number plates.

36. Lastly, the Secretary General denies that there was any failure to give reasons. In responding to the appellant's complaint about the withdrawal of the expatriation allowance, he maintains that he addressed the other points raised, in that these other points are related to the first one, of which they are merely a consequence.

37. In conclusion, the Secretary General asks the Tribunal to dismiss the appeal as unfounded.

II. TRIBUNAL'S ASSESSMENT

38. As to the first argument, the Tribunal considers firstly that, as stated in its case-law, "the Secretary General may reconsider his decision to grant a given allowance to a staff member if a re-examination of the file justifies such action" (ATCE, Appeal No. 283/2001, Polackova-Rossi v. Secretary General, Decision of 5 December 2001, paragraph 27).

Established in a case involving the withdrawal of an allowance for a dependent child, this principle also applies to the granting of the expatriation allowance. For the expatriation allowance is intended not to compensate for the inconvenience involved in moving when taking up a post but rather, as indeed the appellant herself correctly notes, to offset, by means of a fixed sum, a series of objective disadvantages which only expatriate staff experience and which involve financial and non-financial factors.

Consequently, the Tribunal considers that the Secretary General was justified in checking whether the appellant still satisfied the conditions on the basis of which the expatriation allowance was granted at the time of his appointment.

39. In response to the arguments advanced by the appellant (paragraph 28 above), the Tribunal notes that, under the terms of aforementioned Article 6, paragraph 1 (iv) (paragraph 22 above), staff who are in the appellant's position must prove that they have their actual and habitual residence in France. However, the Tribunal is not convinced by the appellant's declaration that he has supplied such proof. The material submitted in support of his declarations does not establish, given the evidence gathered by the Secretary General, that the appellant – who acknowledges that he has a house in Kehl in which his partner lives – does actually live in France. While it is true that the appellant has declared that he lives in the Strasbourg flat for most of the time during the week, the fact remains that the person who apparently constitutes his family resides only a few kilometres from the appellant's workplace and, most importantly, from his "French residence".

40. The Tribunal, mindful of the need for the Council to avoid inquiring about staff members' private affairs in an intrusive manner, considers that the appellant would have been justified in wanting to provide only strictly necessary information. However, it is clear that

under the aforementioned Article 6, incontrovertible proof needs to be furnished in order to avoid any abuse. That means that the information provided must be satisfactory in order to unequivocally show that the staff member continued to be entitled to the expatriation allowance. Such proof was not supplied, either during the administrative examination of the file or during the proceedings before the Tribunal.

41. Consequently, the appellant's first argument must be dismissed.

42. As to the second argument, concerning violation of the rules governing the granting of the special residence permit and registration of vehicles in the French diplomatic series, the Tribunal notes that the information provided by the French authorities was not disputed by the Secretary General during the proceedings before the Tribunal.

According to this information, the issuing and withdrawal of the special residence permit and the car number plates are solely a matter for the French authorities.

Yet the French authorities did not exercise their right of withdrawal in this instance. In acting as he did, the Secretary General exceeded his authority in the matter. Consequently, his decision to effect this withdrawal was unlawful and should be annulled.

43. As to the third argument that no reasons were given, the Tribunal notes that this argument refers only to the decisions concerning the special residence permit and the registration of vehicles in the special series.

Having come to the conclusion that the second argument is well-founded, the Tribunal has no need to consider this third argument, as the decision to withdraw the special residence permit and the car number plates must in any case be annulled for the reasons stated above.

44. In his last letter to the Tribunal, the appellant maintained "that the decisions complained of caused his prejudice of a financial nature". He added that "in addition to the annulment of these decisions" he was also seeking "*restitutio in integrum* and hence full compensation".

45. Assuming that the appellant wishes the Tribunal to rule now on a claim for compensation for damage under Article 60, paragraph 2, of the Staff Regulations, the Tribunal finds that the appellant has failed to file submissions in due form and, in particular, has not supplied it with the evidence required to make a ruling at this stage. This finding does not prevent the appellant from exercising his rights under the procedure laid down in Article 59, paragraph 1 *in fine* of the Staff Regulations.

46. The appellant, who used the services of a lawyer, has claimed 3,000 euros for costs. The Tribunal finds it reasonable that the Secretary General should reimburse the sum of 2,000 euros (Article 11, paragraph 2, of the Statute of the Administrative Tribunal – Appendix XI to the Staff Regulations).

For these reasons, the Administrative Tribunal:

Declares the appeal to be well-founded as to the complaint concerning withdrawal of the special residence permit and withdrawal of the car number plates;

Dismisses the remainder of the claims;

Orders the Secretary General to pay the sum of 2,000 euros in costs.

Delivered in Strasbourg on 3 October 2007, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

E. PALM