

SEVENTY-FIRST SESSION

In re THEODOROPOULOS

Judgment 1099

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jannis Theodoropoulos against the European Patent Organisation (EPO) on 12 October 1990 and corrected on 2 November 1990, the EPO's reply of 18 January 1991, the complainant's rejoinder of 21 February and the Organisation's surrejoinder of 26 April 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 72 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 72(1) of the EPO Service Regulations provides for payment of an expatriation allowance to permanent employees in staff categories A, L and B who at the time of appointment are "not nationals of the country in which they are serving" and "were not continuously resident in that country for at least three years, no account being taken of previous service in their home country's administration or with other international organisations".

The complainant, a citizen of Greece who was born in 1957, lived continuously in the Federal Republic of Germany, first as a doctoral student at the University of Karlsruhe on a Greek Government scholarship from September 1983 to August 1985; as a half-time junior scientist at the Karlsruhe Nuclear Research Centre and doctoral student at the same university until January 1987; and under full-time employment in Munich until the end of December 1987. He took up duty at the European Patent Office in Munich on 1 January 1988 as an examiner at grade A2. By a letter of 18 January 1988 he applied for payment of the Article 72 expatriation allowance. By a letter of 17 February 1989 the Personnel Department refused his application on the grounds that he had resided in the Federal Republic for more than three years and under his agreement with the Greek Ministry for Economic Affairs he had not been in the service of his country's administration. On 16 March 1989 he filed an internal appeal. On 19 April 1990 the Appeals Committee recommended allowing his appeal, but a letter of 16 July 1990, the decision under challenge, informed him that the President rejected the Board's recommendation.

B. The complainant submits that he had not been continuously resident for three years in the Federal Republic before his appointment to the EPO. Although he did hold half-time employment from September 1985 to January 1987 at the Karlsruhe Nuclear Research Centre while finishing his doctorate and subsequently took up full employment in Munich, he had been a student at Karlsruhe University on a Greek Government "technical assistance scholarship" between 1 September 1983 and 31 August 1985. During that period he was resident in the Federal Republic not permanently but only for the purpose of his studies. He had not intended to change his place of permanent residence and continued to pay Greek taxes and social security contributions. When determining expatriation entitlements other international organisations discount even long-term stays for the purpose of study abroad. The case law of the Court of Justice of the European Communities distinguishes periods of study abroad from other periods of residence outside the home country.

Besides, even if he had been permanently resident in the Federal Republic for three years he would still qualify for the allowance since, as a holder of a scholarship from the Greek Government, he was in the service of his home country's administration from 1 September 1983 to 31 August 1985. His contract with the Ministry for Economic Affairs required him to report on the progress of his work in return for emoluments equivalent to the salary of university-trained employees of the Greek civil service.

He invites the Tribunal to set aside the decision denying him the expatriation allowance and to award him 2,000 Deuschmarks in costs.

C. In its reply the Organisation asks the Tribunal to dismiss the complaint as devoid of merit. During the material

period - from 1 September 1983 to 31 August 1985 - the complainant was not in the employ of his national administration. Had his agreement with the Ministry amounted to a work contract, as he alleges, why was the Karlsruhe Nuclear Research Centre the only employer he mentioned for the period 1 September 1983 to 31 January 1987 on his job application form? Neither the grant he received nor the tasks he carried out made him a Greek Government employee.

The purpose of the expatriation allowance is to meet the needs of an official who may have no affinity with the country of the duty station and the notion of continuous residence in Article 72 is a factual criterion of links with that country. Though the complainant may not have intended to change his place of residence, a subjective consideration of that kind has no bearing on the administration's practice. What matters is that the complainant had to live in Karlsruhe throughout the scholarship period, not that he paid taxes or kept a home address in Greece. Nor are the rules and practices of other international organisations binding on the EPO.

D. In his rejoinder the complainant enlarges on his earlier pleas. Well may the Organisation rely, in his view, on objective criteria for applying Article 72, but it has never adopted implementing rules to make such criteria known to its staff. In an earlier case (in re Benze No. 7, Judgment 926) it made out that its reason for adopting 72 was to keep in line with the practice of the "co-ordinated organisations", so the practice in other organisations does matter, and it distinguishes between stays for the purpose of study abroad and periods of continuous residence abroad. He presses his claims.

E. In its surrejoinder the Organisation presses the pleas in its reply with particular reference to the construction to be put on Article 72 and its application to the facts of the case.

CONSIDERATIONS:

1. Article 72(1) of the EPO's Service Regulations provides for payment of an expatriation allowance to permanent employees in staff categories A, L and B provided that "at the time of their appointment" they:

"a) were not nationals of the country in which they are serving and

b) were not continuously resident in that country for at least three years, no account being taken of previous service in their home country's administration or with other international organisations."

2. For some time before joining the staff of the EPO the complainant was resident in the Federal Republic of Germany, at first studying for a doctorate and then in employment. He took up duty on 1 January 1988 as a permanent employee in category A in the Organisation's office in Munich. A fortnight or so later he claimed payment of the expatriation allowance, but the EPO refused on the grounds that at the time of his appointment he had been continuously resident in the Federal Republic for at least three years.

3. It is not disputed that the complainant satisfied condition a) in Article 72(1): at the time of his appointment, being a Greek citizen, he was not a national of the country in which he was serving, the Federal Republic. The dispute is over condition b), the issue being whether by the date of his appointment he had been continuously resident in the Federal Republic for at least three years. If, as the EPO maintains, he had, he was not entitled to the allowance; if, as he contends, he had not, his claim must succeed.

4. His residence in the Federal Republic may be divided into three periods:

(1) From 1 September 1983 to 31 August 1985: studies for a doctorate at the University of Karlsruhe on a scholarship from the Greek Government.

(2) From 1 September 1985 to 31 January 1987: continuing doctoral studies at Karlsruhe University. The University gave him financial help in the form of a half-time post as a junior scientist at the Karlsruhe Nuclear Research Centre at a salary equivalent to half that of a scientific assistant. This second period ends at the date at which he obtained his doctorate.

(3) From 1 February to 31 December 1987: full-time employment on full salary with a company in Munich known as MTU (Motoren-und-Turbinen Union).

The first period comes to two years, the second to one year and five months and the third to eleven months, making

a total of four years and four months.

5. The complainant submits that the first of the three periods should be discounted and that, if it is, the total period of his continuous residence in the Federal Republic comes to only two years and two months, less than the disqualifying period in condition b). His argument is that, although he did hold half-time employment in the second period and full-

time employment in the third, in the first he was receiving a "technical assistance scholarship" from the Greek Government and was then resident in the Federal Republic, not permanently, but only for the purpose of study. He had not changed his place of permanent residence and he continued to pay tax and social security contributions in Greece. He goes on to point out that in determining entitlement to expatriation allowances other international organisations discount even long-term stays for the purpose of study abroad, and indeed the case law of the Court of Justice of the European Communities distinguishes periods of study abroad from other periods of residence outside the home country.

In his submission his argument is borne out by the German version of Article 72(1), which uses the words "ständig ansässig", meaning "permanently established".

6. The Tribunal has already rejected a similar plea in Judgment 926 (in re Benze No. 7). The complainant's plea fails because it rests on the mistaken assumption that what Article 72(1)b) means is permanent or established residence. His interpretation of the rules is untenable because it entails paying him the allowance even though at appointment he had been continuously resident in the Federal Republic for over three years. The English and French versions are quite explicit: the English says "resident" and the French "résidaient", words that do not connote permanent or established residence. As for the German version, it is to be interpreted in a way that reconciles all three versions.

7. The complainant further submits that even if he was "continuously resident" in the Federal Republic for over three years he should still get the allowance because according to 72(1)b) "previous service in [his] home country's administration" does not count: as the holder of a scholarship from the Greek Government he was in his "home country's administration" from 1 September 1983 to 31 August 1985. In support of that view he explains that the contract he concluded with the Greek Ministry for Economic Affairs required him to report on the progress of his studies in return for pay equivalent to the salary of graduate employees of the Greek civil service.

From 1975 to 1980 the complainant studied mechanical engineering at the Technical University of Athens and after 26 months' military service he was awarded a scholarship funded by the North Atlantic Treaty Organization (NATO) and administered by the Greek Ministry for Economic Affairs for the purpose of study in the Federal Republic. It is plain on the evidence that during the tenure of his scholarship he was not in the Greek administration. Contrary to what he alleges, his agreement with the Ministry did not amount to a contract of service and neither the sums he received nor the tasks he carried out made him an employee of the Greek Government. Indeed on his job application form he gave the Karlsruhe Nuclear Research Centre as his only employer for the period from 1 September 1983 to 31 January 1987. His residence in the Federal Republic during that period was therefore properly treated as residence for the purpose of Article 72. That period and the period he spent in full-time employment with MTU after completing his studies - from 1 February until 31 December 1987 - made a total of over three years' residence in the Federal Republic and therefore disqualified him for the allowance under 72(1) b).

8. As the Tribunal observed in Judgment 926, the allowance is intended to meet the case of an official who has no affinity with the country of his duty station. Whether the condition of "continuous residence" is met depends on the existence of objective and factual links with that country: the test is one of simple residence. What matters is that the complainant had to live, and did live, in Karlsruhe throughout the tenure of his scholarship, not that he may at the same time have been paying taxes or had a home address in Greece.

9. Lastly, the rules and practices of other international organisations are not binding on the EPO and the Tribunal's ruling turns solely on its interpretation of the Organisation's own texts.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Tun Mohamed Suffian, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

Mohamed Suffian
Mella Carroll
José Maria Ruda
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.