Registry's translation, the French text alone being authoritative.

103rd Session **Judgment No. 2653**

The Administrative Tribunal,

Considering the complaint filed by Mr A. M. against the European Patent Organisation (EPO) on 27 February 2006 and corrected on 21 March, the EPO's reply of 28 June, the complainant's rejoinder of 1 October and the Organisation's surrejoinder of 22 November 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Greek national born in 1963, joined the European Patent Office – the EPO's secretariat – on 2 April 2002 as an examiner at grade A3, based in Munich. On taking up his appointment he was asked to sign a declaration concerning the expatriation allowance provided for in Article 72 of the Service Regulations for Permanent Employees of the Office. The complainant indicated in that declaration that during the three years prior to the date of his appointment he had been continuously resident in Germany. On the basis of that information, the Office did not grant him an expatriation allowance.

In a letter of 19 May 2003 the complainant stated that, in the light of information that he had obtained since joining the Office, he considered that he was entitled to the expatriation allowance, which he claimed retroactively. He explained that during the three years preceding the date on which he had taken up his functions he had not in fact been permanently resident in Germany: indeed, from 18 to 26 March 2000 and from 8 May to 4 June 2000 he had been employed in the United States, and from 24 August to 23 September 2001 he and his family had lived in Greece, where they would have stayed, but for the Office's offer of employment. At the Office's request he provided further details of these periods of residence outside Germany. However, by a letter of 18 November 2003, the Personnel Administration Department informed him that, in the Office's view, these stays abroad had not interrupted his permanent residence in Germany and that his request was therefore denied.

By a letter of 10 February 2004 the complainant asked the President of the Office to grant his request for an expatriation allowance or, failing that, to treat his letter as an internal appeal. He was informed by letter of 1 April that the President, considering that the provisions of Article 72 of the Service Regulations had been correctly applied, had referred his appeal to the Appeals Committee. In its opinion dated 12 October 2005, the Committee unanimously recommended that the appeal be dismissed as unfounded. A copy of the Committee's opinion was forwarded to the complainant, who wrote to the President on 25 October providing further arguments in support of his appeal, but the President decided to accept the Committee's recommendation. The complainant was notified of this in a letter dated 1 December 2005, which constitutes the impugned decision.

B. The complainant submits that the key argument put forward by the Administration and the Appeals Committee to support the conclusion that he is not entitled to an expatriation allowance is that his periods of residence outside Germany during the three years preceding his appointment had been too short. In this regard, he points out that neither the Service Regulations nor the Tribunal's case law gives any indication as to how long he would have to spend in another country in order for his continuous residence in Germany to be considered as being interrupted. In his view, what matters is that he interrupted his residence in Germany "for reasons of employment and relocation of [his] family".

With regard to the time spent in the United States in May and June 2000, he states that he went there to work full-time on secondment from the German company employing him at that time, which continued to pay his salary while he was abroad, and that during that time his family remained in Germany. He emphasises that three of his colleagues, who were seconded in similar circumstances, were nevertheless granted the expatriation allowance. He also draws attention to the fact that, in addition to a visa for business trips, the US authorities issued him a three-

year visa for a longer period of employment, because he had intended to leave Germany for some length of time.

The complainant asserts that when he travelled to Greece with his family in 2001 his intention was to move there permanently, or at least, not to return to Germany until his wife had been granted unpaid leave by her Greek employer. He explains that he had been offered a job by a Greek company, for which he had worked in June and September 2001, but that he had also continued to work for his former German employer, which, instead of accepting his resignation, had granted him "time out" to complete a project. His wife had taken up employment in Greece, and his son had been enrolled in school there. Moreover, the duration of his stay in Greece was comparable to the period spent abroad by a colleague who, unlike him, was considered to have interrupted his permanent residence in Germany and had been granted the expatriation allowance.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to grant him the expatriation allowance retroactively from May 2003, either on the basis of Article 72(1) of the Service Regulations, or "in compliance with the general principle of equal treatment", or on the basis of the case law.

C. In its reply the EPO maintains that the complainant is not entitled to the expatriation allowance because he was permanently resident in Germany during the three years prior to the date on which he took up his duties at the Office. Referring to the case law, it recalls that, in order to interrupt permanent residence, it is not enough to stop living in a particular country; the person concerned must also intend to leave it for some length of time.

The Organisation states that it is because of their short duration that the complainant's stays in the United States were not considered as having interrupted his 15 years of residence in Germany. It acknowledges that there is no definition of how long such a stay must be in order to interrupt permanent residence, and indicates that this is assessed on a case-by-case basis. In its view, the circumstances that he stayed in a hotel and that his family remained in Germany support the view that his stays in the United States were business trips. Given that he never stayed in that country for a longer period, the fact that he held visas covering a period of several years is irrelevant.

The EPO argues that the complainant's stay in Greece for less than one month likewise cannot be considered as having interrupted his permanent residence in Germany. It points out that he accepted the Office's offer of employment on the day before he departed for Greece, thereby indicating that he intended to return to Germany to take up his duties as an examiner. Moreover, during his stay in Greece he remained registered in Germany, where he kept his accommodation. His wife's offer of employment in Greece and the fact that his son attended school there are, according to the EPO, irrelevant: from the moment he accepted the Office's offer of employment, the complainant must be considered as having intended to return to Germany.

Lastly, the Organisation submits that since none of the colleagues whose cases are mentioned by the complainant is in a situation comparable to his, he cannot rely on the principle of equal treatment.

D. In his rejoinder the complainant presses his pleas. He maintains that in view of the similarities between his case and those of several of his colleagues, he ought to have been granted the expatriation allowance on the basis of the principle of equal treatment.

E. In its surrejoinder the Organisation maintains its position in full. It emphasises that in deciding whether or not to grant an expatriation allowance, the Office takes into account not just one, but a whole series of factors in each individual case.

CONSIDERATIONS

1. The complainant, a Greek national, has been a permanent employee of the European Patent Office in Munich since 2 April 2002.

On 18 November 2003 the application for an expatriation allowance which he had submitted on 19 May 2003 was refused on the grounds that, at the time when he took up his duties, he had been continuously resident in Germany for more than three years and that this residence had not been interrupted by his short stays in the United States in the spring of 2000 and in his country of origin in the summer of 2001.

On 1 December 2005 the complainant was informed that the President of the Office had decided, in accordance with the unanimous recommendation of the Appeals Committee, to dismiss the internal appeal he had filed against

the decision of 18 November 2003.

2. The complainant challenges that decision and submits that it is contrary to Article 72(1) of the Service Regulations, which states:

“An expatriation allowance shall be payable to permanent employees who, at the time they take up their duties or are transferred:

a) hold the nationality of a country other than the country in which they will be serving, and

b) were not permanently resident in the latter country for at least three years, no account being taken of previous service in the administration of the country conferring the said nationality or with international organisations.”

The evidence on file shows that, apart from a period of approximately six months in 1990 when he was doing his military service in Greece, the complainant has been permanently resident in Germany since 14 April 1986. He had previously stayed in the country from 1976 to 1980 in order to complete his secondary schooling. He worked there continuously for the same German employer until he joined the Office. However, he submits that this permanent residence was interrupted twice in the three years preceding his appointment, by a stay in the United States from 8 May to 4 June 2000 and a stay in Greece from 24 August to 23 September 2001.

3. The country in which the permanent employee is permanently resident, within the meaning of Article 72(1)(b) of the Service Regulations, is that in which he or she is effectively living, that is to say the country with which he or she maintains the closest objective and factual links. The closeness of these links must be such that it may reasonably be presumed that the person concerned is resident in the country in question and intends to remain there.

A permanent employee interrupts his or her permanent residence in a country when he or she effectively leaves that country with the intention – which must be objectively and reasonably credible in the light of all the circumstances – to settle for some length of time in another country (see Judgments 926, 1099, 1150, 2214, under 3(b) and (c), and 2597, under 5).

4. The complainant stayed in the United States on two occasions in the year 2000, from 18 to 26 March, then from 8 May to 4 June, in order to participate in projects run by an American subsidiary of his German employer. In his opinion, the two visas issued to him at the time show that he had left Germany with the intention of settling in the United States for some length of time.

These circumstances are not such as to convince the Tribunal that the complainant’s permanent residence in Germany was interrupted during the period in question. It is not so much the brevity of the stays as the circumstances in which they took place which are in this respect decisive for determining the intentions which may reasonably be ascribed to the complainant. He and his German employer at that time acknowledge that these stays in the United States were connected with the performance of temporary duties on behalf of that employer; the complainant stayed in a hotel and retained his home in Germany, where his family was still living. There is no clear evidence to suggest that he took any steps to give up this home and to settle in the United States with his family for some length of time. Moreover, at the end of the second stay he returned to Germany and resumed his work there.

5. The following year the complainant stayed in Greece from 24 August to 23 September. The circumstances of this stay were different from those described above. When he left for Greece on 24 August 2001, the complainant no doubt also intended to perform temporary duties with which he had been entrusted by his German employer. But Greece is his country of origin with which he appears to have retained close ties, and his wife, who is also Greek, left for Greece at the same time. There she found a job in the state educational sector and their son was enrolled in a school as from September.

Nevertheless, on the very day before he left for Greece, the complainant had accepted an offer of employment from the Office. At no time during his stay did he inform the Office that he had changed his mind and that he no longer wished to enter its service. On the contrary, the main purpose of his correspondence with the Office was to postpone the date of taking up his duties in order to complete a project in Greece on behalf of his German employer. Scarcely one month after his departure he returned to Germany, where he had kept his home, in order to continue working with the said employer. The following month he underwent the requisite medical examination for

joining the Office. He then took up his appointment on the newly agreed date of 2 April 2002.

It cannot reasonably be inferred from all these circumstances that when the complainant left Germany on 24 August 2001 he firmly intended to leave that country permanently and to settle for some length of time in Greece. It is certainly possible that he then wished to return to his country of origin with his family. But the undertakings he had given to the Office in particular show that this wish was no more than a possibility he had envisaged.

6. The Office therefore had good grounds to consider that at the material time, that is to say when he took up his duties, the complainant had not interrupted his permanent residence in Germany within the meaning of the case law and that consequently the condition laid down in Article 72(1)(b) of the Service Regulations for the payment of an expatriation allowance had not been met.

7. The complainant submits that the impugned decision breaches the principle of equal treatment because the Office granted an expatriation allowance to colleagues who were in a situation entirely comparable to his own. This plea is unfounded. Apart from one case in which entitlement to an expatriation allowance was recognised – in accordance with the principle of the protection of legitimate expectations – on the basis of specific undertakings by the Office, the cases to which the complainant refers are in no way similar to his own, either with respect to the length of the period during which the persons in question ceased to live in Germany, or with respect to the circumstances in which these persons lived abroad.

8. The complainant's claims must therefore be rejected in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2007, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2007.