118th Session **Judgment No. 3338**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. S. against the European Patent Organisation (EPO) on 27 April 2010, the EPO's reply of 16 August 2010, the complainant's rejoinder of 9 May 2011 and the EPO's surrejoinder of 15 August 2011;

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

Having examined the written submissions and decided not to order oral proceedings, 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 joined the EPO at its branch in The Hague on 1 September 1997. He was recruited from the United Kingdom as a Dutch national. With effect from 12 December 2002 he lost his Dutch nationality through acquisition of Irish nationality. In March and April 2005 he and his wife were issued with identity cards as permanent residents, i.e. bearing the code "BO-DV", even though in the discussions leading up to the issuance of the identity cards the complainant had taken the position that he and his wife should have been attributed non-permanent resident status.

In March and April 2006 he reiterated this position and formally requested that he and his wife be issued identity cards for non-permanent residents, i.e. bearing the code "BO". On 3 May 2006 the Head of Personnel Administration referred the matter to the Ministry of Foreign Affairs (MFA), as the authority to take a decision on the complainant's request. The MFA replied on 25 July 2006 that, as the complainant was a Dutch national at the time of recruitment by the EPO, upon losing his Dutch nationality he had automatically fallen within the category of permanent residents within the meaning of the Vienna Convention on Diplomatic Relations done on 18 April 1961 (hereinafter "the 1961 Vienna Convention"). It added that Dutch nationals and permanent residents had a particular status as a result of their link to the host country, and that this link was not severed when a staff member gave up her/his nationality while remaining in the country working for an international organisation. By an e-mail of 28 July 2006, the Head of Personnel Administration notified the complainant of the MFA's position and informed him that the EPO would respect it. On 15 August 2006 the complainant replied that he disagreed with that position and he sought the EPO's assistance under Article 28(1) of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "the Service Regulations") in pursuing the matter or a financial contribution towards a counsel. In a letter of 4 October 2006 the Principal Director of Administration reiterated to the complainant that the EPO would respect the MFA's position and would refrain from taking further action. Should the complainant wish to contest the MFA's position in national courts, he would have to do so in a private capacity.

On 19 December 2006 the complainant filed an internal appeal against that decision but requested that it be put on hold at least until he had the benefit of a ruling by the national court of first instance. In January 2007 the appeal was referred to the Internal Appeals Committee (IAC) and registered under reference number RI/167/06. On 10 August 2007 the complainant provided the EPO with a copy of the ruling of the national court of first instance, delivered on 31 July 2007, according to which the complainant's interest in the matter was derived from that of the EPO and hence the latter, not the

complainant, was to be regarded as the interested party in the dispute. It was therefore up to the EPO to challenge the MFA's decision by way of arbitration, so the complainant ought to take up the matter with the EPO.

On 15 August 2007 the complainant applied for a tax-free car registration. As the deadline for his application was the end of the month, he asked the EPO to complete the required Form D39 and to forward it together with the rest of his documents to the tax authorities as a matter of priority. On 17 August 2007 the EPO forwarded copies of the complainant's documents to the MFA with the request that they be transmitted to the tax authorities. It nevertheless refrained from submitting Form D39. The complainant protested against the EPO's failure to submit Form D39 together with the rest of his documents directly to the tax authorities, as per the standard procedure. The EPO responded by sending the complainant's original documents directly to the tax authorities. It nevertheless again refrained from submitting Form D39. On 30 August 2007 the complainant informed the EPO that the tax authorities had indicated that they would deny his application for a tax-free car registration, because his identity card bore the code BO-DV for permanent residents. He once again asked the EPO to submit Form D39 to the tax authorities by 31 August 2007, as this would allow him to have an appealable decision, even if his application was denied.

By an e-mail of 3 September 2007, the Head of Personnel Administration informed him that the Central Office for International Tax Affairs had confirmed his status as a permanent resident. Accordingly, as he did not fulfil one of the main conditions for the issuance of Form D39, the EPO had not submitted it. The complainant replied that same day asserting that he fulfilled the conditions for a tax-free car registration and that the MFA's assessment of his residency status had no bearing on his application in that respect. He argued that because of the EPO's failure to submit Form D39, and thereby a formal request, there was no decision by the tax authorities that he could appeal. As the deadline for appealing the ruling of the national court of first instance was approaching, he requested a

meeting with the Administration to discuss the matter. In his reply of 4 September 2007, the Principal Director of Administration refused the complainant's request for a meeting and informed him that the EPO saw no reason to contest the MFA's decision of 25 July 2006 regarding his residency status. The EPO was not a party to the proceedings that he had launched before the national courts and it was his responsibility to decide whether or not he wished to further pursue the matter. The complainant wrote back that same day noting that, according to the ruling of the national court of first instance, it was for the EPO to challenge the MFA's decision. He reiterated that he saw no connection between his application for a tax-free car registration and the MFA's decision and contended that the EPO's submission of his documents to the MFA constituted an infringement of the Guidelines for the Protection of Personal Data (Data Protection Guidelines).

On 7 September 2007 the complainant wrote to the President of the Office requesting a review of the EPO's decisions on the matter. Should this not be possible, he asked that his letter be treated as an internal appeal against the EPO's refusal to provide him with Form D39 and the decision to attribute to him permanent resident status without providing reasons. He asked that the proceedings on appeal RI/167/06 be resumed and that the two appeals be joined. In November 2007 the complainant's appeal of 7 September 2007 was referred to the IAC and registered under reference number RI/143/07. In its decision of 23 April 2008 the national appeals court ruled that the MFA's decision of 25 July 2006 was not an order with legal implications within the meaning of the Dutch General Administrative Law Act and was therefore not open to challenge under national law. The IAC issued its opinion on 30 November 2009 recommending that both internal appeals be dismissed. It nevertheless also recommended that the complainant be awarded 100 euros in moral damages for a breach of the Data Protection Guidelines. By his decision of 27 January 2010, the President endorsed the IAC's recommendations. That is the impugned decision.

B. The complainant contends that by refusing to assist him in his efforts to obtain non-permanent resident status and the privileges that go with it, the EPO failed to fulfil its obligations towards him under Article 28(1) of the Service Regulations. He argues that the difference of opinion with the MFA was not just a private matter between himself and the latter and that, in light of the national courts' rulings it was for the EPO to contest the permanent-resident status attributed to him by the MFA. Emphasising that the instances in which the EPO has an obligation to provide assistance under Article 28(1) are non-exhaustive, he alleges that the MFA's determination of his residency status qualifies as an "attack" within the meaning of that article. He considers that the EPO had an obligation to assist him, if not under Article 28(1), then certainly under the general duty of care it owes to its employees and that, as it failed to do so, it now has an obligation to compensate him in accordance with Article 28(2).

In his opinion, the MFA erred in its determination of his residency status. Since he clearly does not fall under either of the categories described in Article 22 of the Protocol on Privileges and Immunities of the EPO (hereinafter "the Protocol on Privileges and Immunities"), he should be entitled to the privileges enjoyed by non-nationals and non-permanent residents. Indeed, he is not, nor has he ever been a permanent resident in the Netherlands and he is no longer a Dutch national; the fact that he had held Dutch nationality at the time of his recruitment should not have influenced the MFA's decision. Thus, according to the criteria spelled out in the MFA's relevant note to all international organisations (note DKP/DIO 2005/220) he should have been considered as a non-permanent resident. He adds that, notwithstanding the above, the MFA's decision on his residency status was without legal effect. As was confirmed by the national courts, the privileges and immunities of EPO staff are directly derived from the Protocol on Privileges and Immunities and the Agreement between the EPO and the Kingdom of the Netherlands concerning the Branch of the European Patent Office at The Hague, Including Separate Agreement (hereinafter "the Seat Agreement"). Consequently, neither the determination made by the MFA on his

residency status nor the indication on his identity card were constitutive of the rights he may have under the said instruments.

The complainant maintains that the EPO was under an obligation to submit Form D39 together with the rest of his documents to the tax authorities so as to allow them to make their own assessment of his residency status. Indeed, the MFA's determination of his residency status had no bearing on his application for a tax-free car registration, since the tax authorities apply their own criteria for determining residency status and eligibility to a tax-free purchase, which are different from those applied by the MFA, which, in any event, has no competence to decide fiscal matters. As a result of the EPO's refusal to submit Form D39, his application for a tax-free car registration was never formally submitted and he was thus deprived of the benefit of a decision that he could have challenged before the national courts. This, he argues, amounts to a violation of his rights under Article 6 of the European Convention on Human Rights. He contends that he had a legitimate expectation that his application for a tax-free car registration would be approved, since he fully met the tax office's criteria, as listed on the EPO intranet. He reiterates his allegation of a breach by the EPO of the Data Protection Guidelines and he argues that his treatment amounted to discrimination on the basis of nationality, which is contrary to international and European law.

The complainant claims compensation in an amount equal to the taxes he paid on the car that he purchased and moral damages. He also claims reimbursement of the legal expenses incurred, including the fees he paid in pursuing his claims before the national courts, as well as of the travel expenses incurred in connection with the proceedings before national courts. He seeks interest on all amounts awarded from the date they fell due or the date they were incurred.

C. In its reply the EPO denies that it had any obligation under Article 28(1) to claim non-permanent resident status for the complainant and the fiscal privileges that go with it. Contrary to the complainant's belief, the Dutch courts did not ascertain an obligation for the EPO to defend his point of view before the MFA. In fact, the

EPO has a certain discretion when acting in the framework of the relation with a host State and it is not obliged to claim privileges to the advantage of an employee, if it considers this unjustified and hence against its general interests in its relation with the host State. What is more, the attribution of permanent resident status by the MFA does not qualify as an insult, threat, defamation or attack to the complainant's person or property within the meaning of Article 28(1), nor can it be considered as injury by reason of his office or duties within the meaning of Article 28(2). Also, although its general duty of care owed to staff does not include the obligation to aim for non-permanent resident status for every employee who would prefer such status, the EPO did its utmost to assist the complainant to clarify the issue of his residency status.

According to the EPO, the privileges and immunities afforded to its staff, except for Dutch nationals and permanent residents, are laid down in the Seat Agreement and the Protocol on Privileges and Immunities and may be unilaterally determined by the Netherlands. The complainant compares himself to any foreigner recruited from abroad and consistently ignores the relevance of the fact that he had Dutch nationality at the time of his recruitment. The EPO fully shares the MFA's position on the complainant's status as a permanent resident as well as its logic in making this determination. Accordingly, as long as the MFA's position is applied consistently to all Dutch nationals who give up their Dutch nationality while working for the EPO, there are no compelling reasons for it to either enter into consultations or arbitration regarding the complainant's residency status. It adds that it is established practice, based on Articles 8 and 10 of the Seat Agreement, for the MFA to determine a staff member's residency status upon receipt of an application for an identity card. The code on the identity card reflects that status, which is the key to entitlement of all privileges and immunities stipulated in the relevant agreements. Unclear cases are discussed and decided in meetings with the MFA. However, the EPO does not have the authority to decide on the residency status of its staff under the Seat Agreement. The right to a tax-free car purchase, in particular, is not a privilege aimed at ensuring the unhindered functioning of the EPO, but rather a fiscal

privilege granted at the courtesy of the host State and, as such, it does not concern one of the complainant's fundamental rights.

The EPO submits that, as it had no obligation to claim non-permanent resident status for the complainant and the resultant fiscal privileges, it clearly had no obligation to fill out Form D39 and to submit it along with his application for a tax-free car purchase to the tax authorities. It explains that privileges are granted under the relevant agreements in the interest of the EPO, not for the advantage of staff. Hence, applications for tax exemptions are submitted by the EPO, which must therefore ensure that the forms it signs bear the correct data. It adds that an employee's entitlement to a tax exemption is proven by her/his identity card, which reflects her/his residency status, and that there is only one definition of permanent residency, whether for the purpose of an identity card or fiscal privileges. The fact that without the EPO's cooperation the complainant has no possibility to obtain an appealable decision by the tax authorities is not enough to create an obligation for the EPO to request a tax exemption for him.

The EPO also points out that the complainant was fully aware as early as 2005 of the MFA's and the EPO's position on his residency status and cannot therefore claim that he had a legitimate expectation that he would be granted fiscal privileges. It denies any violation of the Data Protection Guidelines, noting that all of the complainant's personal data that was transmitted to the MFA was already in its possession. It invites the Tribunal to dismiss the complainant's claims and to order that he bear the costs of the internal appeal, as well as the costs of the proceedings before national courts, since it was his personal choice to initiate such proceedings.

D. In his rejoinder the complainant reiterates his arguments. He insists that the EPO was under an obligation to submit Form D39 to the tax authorities, together with a statement confirming his status as a non-permanent resident, and to provide as evidence of that status an extract from the Municipal Personal Records Database, showing his current nationality and immigration from abroad at the time of

recruitment. He denies that already in 2005 he knew, in light of the MFA's assessment of his residency status, that he would not be eligible to a tax-free car registration. He points out in this regard that the MFA's assessment was at the time the object of legal proceedings before national courts and that the matter had not been definitively decided. He adds that, as he has exhausted the means of redress open to him under Dutch law, the Tribunal remains the only forum which can guarantee respect for his right to a fair trial.

E. In its surrejoinder the EPO maintains its position in full. It notes that the extract from the Municipal Personal Records Database referred to by the complainant in his rejoinder was indeed among the documents that the EPO forwarded to the MFA with the request that they be transmitted to the tax authorities. However, as no reference to that extract was made in either the confirmation of the complainant's status as a permanent resident from the Central Office for International Tax Affairs or the ruling of the national appeals court, it must be considered irrelevant for the reasoning of these institutions. The EPO considers that it fully honoured its duty of care towards the complainant by requesting clarification of his residency status and it asserts that it could not possibly have provided the tax authorities with information regarding the complainant's residency status which, it knew full well, had not been approved by the MFA.

CONSIDERATIONS

1. The complainant filed an appeal, registered under reference number RI/167/06, in which he challenged the EPO's decision of 4 October 2006 whereby the latter accepted the legal position adopted by the MFA of the Netherlands regarding his designation as a permanent resident and denied his request for legal assistance under Article 28(1) of the Service Regulations. He subsequently filed another appeal, registered under reference number RI/143/07, in which he challenged the EPO's decision of 3 September 2007 not to send Form D39 to the Dutch tax authorities since the complainant was

regarded as a permanent resident and therefore not eligible for a tax-free vehicle registration.

2. The IAC joined the complainant's internal appeals. In its opinion of 30 November 2009 it considered the appeals to be "admissible, but for the most part unfounded". Specifically, it found that the EPO was not liable under Article 28(2) of the Service Regulations as there was no causal link between the injury suffered and the complainant's office or duties, "especially as the Principal Director of Administration expressly informed the [complainant] on 4 October 2006 that the Office did not share his legal view and explained why […]." It considered that the EPO had fulfilled its duty of care when "[b]y letter of 3 May 2006, the Office described the [complainant's] situation to the [MFA] and asked it to set out its legal position on his specific cases" and "[h]aving received a reply, the Office informed the [complainant] of the [MFA's] legal position and told him that it would respect it". The IAC unanimously took the view that "the line of argument put forward by the [MFA] must be regarded as reasonable" and as such, the EPO had no duty to intervene or to take additional steps to assist the complainant. The IAC concluded that "the Office did not infringe its special duty to assist under Article 28(1) or (2) [of the Service Regulations], or its general duty of care".

3. With regard to the subject of appeal RI/143/07, the IAC unanimously found that "the Office had **no duty** to fill in Form D39 for the [complainant] and **forward** it to the Netherlands tax office" [original emphasis]. It further stated that "an international organisation cannot have a duty to fill in and forward an application for an exemption from national taxation on behalf of an employee even when it legitimately takes the view that the employee has no substantive entitlement to the exemption sought. This applies even if the employee has produced all the documents needed to meet the formal requirements. Since the Organisation was not merely the [complainant's] agent, but rather itself the party applying to the

Netherlands authorities, it was entitled to exercise its discretion and decide on its own authority whether or not to fill in Form D39."

4. The IAC found in favour of the complainant regarding the issue of data protection. It concluded that the EPO had "infringed Article 13 [of the Data Protection Guidelines] by unlawfully forwarding the [complainant's] personal data to the [MFA]" and recommended a payment of 100 euros as "reasonable compensation for the breach", considering that the "unlawfully forwarded data relating to the contract of sale was not of a highly sensitive nature". As the IAC found that both appeals were for the most part unfounded, it recommended that the complainant bear his costs.

5. In the present complaint, the complainant impugns the President's decision, notified to him by letter of 27 January 2010, to reject appeal RI/167/06 in its entirety, to pay him 100 euros as compensation for the breach of the Data Protection Guidelines, and to reject the rest of his claims in appeal RI/143/07 as unfounded. He bases his complaint on five grounds. First, the EPO failed in its obligation under Article 28(1) of the Service Regulations to assist him in his efforts to obtain non-permanent resident status and the attendant privileges. Second, the MFA erred in its determination of his status as a permanent resident and its decision on his residency status was without legal effect. Third, the EPO was under an obligation to fill out Form D39 and submit it together with the rest of his documents to the tax authorities in order to allow them to make their own assessment of his residency status. Fourth, by forwarding his application for a tax-free car registration to the MFA without his prior consent, the EPO breached the Data Protection Guidelines. Fifth, the EPO discriminated against him on the basis of nationality.

6. The Tribunal finds the complaint receivable but unfounded in its entirety. Article 28 of the Service Regulations provides, in relevant part, as follows:

> "(1) If, by reason of his office or duties, any permanent employee [...] is subject to any insult, threat, defamation or attack to his person or

property, the Organisation shall assist the employee, in particular in proceedings against the author of any such act.

(2) If a permanent employee [...] suffers injury by reason of his office or duties, the Organisation shall compensate him in so far as he has not wilfully or through serious negligence himself provoked the injury, and has been unable to obtain full redress.

(3) [...]."

7. The Tribunal is of the opinion that the EPO had no obligation to intervene further on the complainant's behalf with regard to his residency status. The fact that the MFA determined that the complainant was a "permanent resident" cannot be considered an "insult, threat, defamation or attack to his person or property", particularly considering there was no direct link to his office or duties. The Tribunal finds that the EPO fulfilled its duty of care towards the complainant in this regard and the MFA's assessment of the complainant's residency status (that he was a Dutch national at the time of taking up duties with the EPO and was automatically classified as a permanent resident within the meaning of the 1961 Vienna Convention upon giving up his Dutch nationality and becoming an Irish national) was not an arbitrary decision. This treatment cannot be considered as discrimination on the basis of nationality.

8. The Tribunal's case law provides that "it is neither unreasonable nor discriminatory for an international organisation to establish objective criteria, applicable in all cases, on the basis of which it may presume a person has made his or her permanent residence in a particular country. And in establishing objective criteria, it is neither unreasonable nor discriminatory to set specific periods of permanent residency. Further, it is not unreasonable or discriminatory to select different periods for those who are taking up duty in the country of their nationality and those who are taking up duty in a country of which they are not nationals" (see Judgment 2925, under 5). Considering this, the Tribunal finds that the reasoning of the MFA, as set out in its letter of 25 July 2006, was not flawed. In that letter, the MFA specified that it had considered the

provisions relating to privileges and immunities (and their exceptions) found in the 1961 Vienna Convention, the Memorandum of Understanding between the EPO and the Netherlands, the Protocol on Privileges and Immunities and the Seat Agreement, when taking decisions regarding the identity card code used for the registration of staff members. The Tribunal notes that one of the paragraphs in the Preamble of the 1961 Vienna Convention reads in relevant part: "The States parties to the present Convention […] [realize] that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". The Tribunal further notes that throughout the Convention, nationals and permanent residents are considered as being in similar categories of staff with regard to limited privileges and immunities. It is also useful to note that Article 22 of the Protocol on Privileges and Immunities provides that:

> "No Contracting State is obliged to extend the privileges and immunities referred to in Article 12, Article 13, Article 14, sub-paragraphs (b), (e) and (g), and Article 15, sub-paragraph (c), to:
>
> (a) its own nationals;
>
> (b) any person who at the time of taking up his functions with the Organisation has his permanent residence in that State and is not an employee of any other inter-governmental organisation whose staff is incorporated into the Organisation."

The Tribunal finds that the specification "at the time of taking up his functions with the Organisation" applies not only to a staff member who was a permanent resident of the State concerned at the time of joining the Organisation, but also to a staff member who was a national of that State at the time of joining the Organisation. It is logical to apply it in both situations because, if a staff member who is a permanent resident (at the time of taking up his functions) gains no privileges even upon a change of permanent residency during her/his employment with the Organisation, it is clear that the same logic should apply to a staff member who is a national of the host State and who later changes her/his nationality (a situation even more unusual than a change of permanent residence and in which the link with the host State is stronger). Therefore the Tribunal finds that the MFA's

decision to automatically assign the complainant as having "permanent resident" status for his identity card upon his change of nationality (while still living and working in the Netherlands) was consistent with the rationale of the system as noted above.

9. Regarding the claim that the EPO had an obligation to fill out and forward Form D39 to the tax authorities, the Tribunal finds that the complainant was properly identified as a permanent resident and, therefore, not only was the EPO under no obligation to fill out Form D39 knowing that his status as a permanent resident prevented him from being eligible for the tax-free vehicle registration, but it could not fill out and forward that form.

10. The IAC found that "the Office's forwarding to the [MFA], without the [complainant's] prior consent, of information relating to the contract of sale concluded by him was a breach of data protection requirements". The Tribunal finds that the IAC's recommendation, endorsed by the President, to award the complainant 100 euros in compensation for that breach, is sufficient compensation.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
HUGH A. RAWLINS

DRAŽEN PETROVIĆ