ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 26 October 2020

JUDGEMENT IN CASE No. 93

AA

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 93 OF THE ADMINISTRATIVE TRIBUNAL

Hearing held by videoconference on 1st October 2020

In Château de la Muette,

2 rue André-Pascal à Paris

The Administrative Tribunal consisted of **:**

Mrs. Louise OTIS, Chair

Mr. Pierre-François RACINE

And Mr. Chris DE COOKER

with Mr. Nicolas FERRE providing Registry services.

The Tribunal heard

Mr. Christophe COURAGE , counsel of the Applicant ;

Mr. Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretray-General ;

Mr. Jeremy MADDISON, President of the Staff Association

INTRODUCTION

1. In her application for annulment and compensation lodged with the Registry on 30 July 2019, AA (hereinafter the Applicant) requests that the Secretary-General's decision of 4 June 2019 rejecting her prior request of 13 March 2019 for the withdrawal of a decision of 14 January 2019 refusing her the benefit of family allowances and the expatriation allowance be annulled, and that a financial order be made in her favour to compensate for the damage suffered and reimburse the legal costs incurred as a result of these proceedings.
2. The Secretary-General submitted his comments on 15 November 2019.
3. The Chair of the Administrative Tribunal issued her decision on the procedure and timetable for the examination of the case.
4. The Applicant submitted a reply on 17 December 2019.
5. An application for an extension of the time limit for the Secretary-General to present his comments in rejoinder was made on 18 December 2019. This application was granted by the Chair of the Tribunal, who extended the time limit to 31 January 2020.
6. The Secretary-General submitted his comments in rejoinder on 31 January 2020.
7. The Staff Association submitted written comments and presented its comments during the hearing.
8. The application hearing was postponed several times due to the pandemic and the Applicant's desire for a face-to-face discussion.
9. However, due to the evolving medical and public health situation, it was finally agreed by the parties that the hearing would be held by videoconference on 1 October 2020.
10. All the documents cited and produced by the Applicant (annexes) bear the reference letter **R**, whereas those cited and produced in defence by the Organisation (documents) bear the reference letter **O**.

The facts

11. After reviewing the documentary evidence, the Tribunal singles out the following facts as relevant:

12. The Applicant is of Spanish nationality. In 1998, she was recruited by the *Consejo de Seguridad Nuclear* (CSN – the Spanish Nuclear Safety Council).

13. Between September 2002 and June 2004, the Applicant was seconded to the *Autorité de Sûreté Nucléaire française* (ASN – the French Nuclear Safety Authority).

14. The Applicant married on 1 April 2006 and gave birth to two children on 23 July 2008. At the time of the children's birth, the Applicant was living in Spain; her husband had been living in France since 2007 and working as an official of the European Space Agency (ESA).

15. On 15 June 2009, at the end of a period of parental leave, the Applicant wished to reunite the family in Paris. She was therefore recruited by the ASN '*as an official seconded* (by the CSN) *on contract*' for a period of three years. Article 7 of her contract stated that the Applicant was subject '*to the legal and regulatory provisions applicable to seconded officials*'[1].

16. The CSN approved the principle of the secondment, stressing that the Applicant's French experience would be useful to her when she '*returned to her duties in Spain*'[2].

17. The secondment contract was extended for three years from 16 July 2012[3] and for a second time for three years from 16 July 2015[4].

---

[1] Contract, 10 July 2009, document R-3.
[2] CSN approval, document R-2.
[3] Amendment extending the Contract, 2012-2015, document R-4.
[4] Amendment extending the Contract, 2015-2018, document R-6.

18. On 10 June 2015, the Organisation selected the Applicant for the post of specialist in radiological protection and nuclear accident management. The Applicant completed the form to establish her eligibility for allowances[5].

19. On 16 June 2015, a first salary proposal was presented by the Organisation to the Applicant, who was still attached to the ASN. In addition to the basic salary, this proposal included a monthly expatriation allowance, a monthly household allowance, a child's allowance and an expatriation supplement. The allowance was subject to the presentation of 'supporting documentation'[6].

20. On 20 June 2015, the Applicant sent an email to BB and CC, her future supervisors, stating in particular that if she did not receive the requested allowances, the proposed salary did not meet her expectations, which would reduce her interest in changing posts[7].

21. On 23 June 2015, the Human Resources Management Service (HRM) sent the Applicant a second proposal with a revised grade and a salary augmented by the allowances already included in the first proposal[8].

22. This being the case, on 24 June 2015, the Applicant informed the NEA that she would be leaving in mid-September 2015[9]. On 6 July 2015, she did likewise to the ASN, the agency to which she had been seconded. The ASN informed her that the notice period was two months.

23. On 8 July 2015, the Organisation's Human Resources Management Service (HRM) informed the Applicant that she was not eligible for either the expatriation allowance or the expatriation allowance supplement for a dependent child. This communication

[5] Form, document R-8.
[6] Document R-9.
[7] Document R-10.
[8] Document R-11.
[9] Document R-13.

added that a response regarding her eligibility for expatriation-related benefits would be given to her later.

24. On 10 July 2015, the Organisation sent the Applicant a letter of appointment to grade A3, step 4. To this letter was attached the remuneration table, which no longer included the expatriation allowance and specified that 'household or family allowances received from another source by the Applicant or her spouse will be deducted from her remuneration'[10].

25. The Applicant pointed out that these conditions did not represent the agreement initially reached with the Organisation. However, as she had already announced her departure from the ASN and NEA, she signed the letter of appointment with the Organisation[11].

26. On 14 September 2015, Mr DD from HRM sent the Applicant an email stating that she could not be granted the expatriation allowance because she had been living in the secondment country, namely France, continuously for at least a year[12].

27. On 28 September 2015, the Applicant joined the Organisation.

28. On 21 January 2016, HRM learned from the ESA that the Applicant's spouse had been receiving the ESA's household allowance and dependent child allowance since 15 September 2007.

29. On 9 February 2016, Mr DD informed the Applicant that, in accordance with Rules 16/1.2, 17/7.1 and 16/2.1.0, she could not receive family allowances since her husband was also receiving them. He also advised her that the amounts already received would be deducted from her salary[13].

[10] Letter of appointment and Acceptance Form. Document R-16.
[11] Document R-15.
[12] Document O-2.
[13] Document O-3.

30. In response to this email, the Applicant requested clarification regarding the rules for divorced persons and the possibility of a waiver of allowances by a spouse.

31. On 31 March 2016, following a meeting, the Head of the HRM Operations Service informed the Applicant by email that she was considered to have been employed by ASN when she was working for it, and that she was regarded as having been resident in France during that time. She therefore did not meet the eligibility criterion for the expatriation allowance, since she had lived in France uninterruptedly for more than a year[14]. This decision was not contested by the Applicant.

32. In addition, the relationship between the spouses had deteriorated to the point that in September 2016 the Applicant's husband began divorce proceedings.

33. On 20 March 2017, as part of these proceedings, the Family Affairs Judge of the Tribunal de Grande Instance de Paris (Regional Court, Paris) issued an interim residence and custody order.

34. Following a meeting with the Applicant, on 23 June 2017, the Deputy Head of HRM clarified that the maintenance allowance determined in the interim residence and custody order took account of the family allowances received by her husband from the ESA.

35. According to the Organisation, the Applicant would be eligible for these once her divorce was finalised, unless the Applicant's spouse waived them. The Organisation suggested putting her in touch with the ESA administration so that she would have direct access to the medical insurance system in which her children were enrolled.

[14] Document R-23.

36. On 28 June 2017, following the Applicant's request, the Deputy Head of HRM sent an amended version of the email of 23 June 2017, adding that if the complainant's spouse waived family allowances, the Organisation would take this circumstance into account in calculating the Applicant's entitlements.

37. On 23 November 2018, the Applicant sent a letter to the Secretary-General requesting expatriate status, the allocation of the expatriation allowance, and the allocation of family allowances. This request was rejected.

38. On 14 January 2019, the Organisation's Head of Human Resources Management notified the Applicant by letter that the Secretary-General had rejected this request.

39. In a letter addressed to the Secretary-General on 12 March 2019, the Applicant filed a prior request for the withdrawal of the rejection decision of 14 January 2019.

40. On 4 June 2019, the Applicant was notified of a decision rejecting this prior request by the Organisation's Head of Human Resources Management, on behalf of the Secretary-General.

41. Today, the Applicant and her husband are separated, live in different homes and have joint custody of their children.

The dispute

42. The Applicant claims that the decision to refuse her the expatriation allowance and the family allowance is unlawful in that:

    i) At the time of her appointment, she met the conditions set out in the Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation

(hereinafter the Staff Regulations) for obtaining expatriate status and, consequently, she was eligible for the expatriation allowance.

ii) She is also eligible for payment of the family allowance since (1) she is separated from her husband (2) the Family Affairs Judge of the Paris Tribunal de Grande Instance has issued an interim residence and custody order and (3) the interpretation proposed by the Organisation is discriminatory.

43. As a result of the foregoing, the Applicant requests that her application be held admissible and that the Organisation be ordered to pay her (1) a sum corresponding to the expatriation allowance that she should have been granted on the date of her recruitment and (2) a sum corresponding to the family allowances that she should have been granted on the date of the interim residence and custody order as well as (3) costs of €7,200.

44. The Organisation disputes the Applicant's request, claiming first that the application is inadmissible since the contested decisions, which date from 14 September 2015 and 31 March 2016, were not challenged in time, no prior request for withdrawal having been submitted within the time limits prescribed by Article 3 (a) of Annex III of the Staff Regulations.

45. If the application is admissible, the Organisation asserts that the contested decisions are not contrary to the terms of appointment or to the Staff Regulations since (1) the Applicant did not meet the conditions for granting the expatriation allowance at the time of her appointment and (2) she is still married under national law and cannot claim double payment of family allowances.

Analysis

Admissibility

46. The Organisation claims that the Applicant's application is inadmissible because it was not submitted within the time limit prescribed by the Staff Regulations. It argues that a procedural time limit applies here.

47. Such an argument, based on a limitation period bringing about an extinguishment of rights, has the effect of preventing a party from seeking a legal remedy if he or she has not exercised his or her right to do so within the predetermined period following the action that gave rise to the right.

48. For this time limit to cause the right to take legal action to lapse, its holder must have been fully aware of the action that gave rise to his or her right.

49. In the case of short limitation periods, such as a predetermined period of two (2) months, it must be clear from an examination of the facts that the holder was properly informed of the Organisation's irrevocable decision and that this decision was taken as part of a simple and unambiguous case.

50. It is also necessary to consider whether the holder is acting for him- or herself or on behalf of another party, in which case the Tribunal will have to take this into account in its examination.

The admissibility of the request with regard to the expatriation allowance

51. Article 3 of Annex III to the Staff Regulations states that the prior request must be addressed to the Secretary-General within two months of the contested decision[15].

52. The Organisation claims that the period for obtaining the withdrawal of the decision to refuse the expatriation allowance began to run from the email of 14 September 2015. The Organisation asserts that the application is therefore out of time and inadmissible. For her part, the Applicant asserts that the period did not start to run until 14 January 2019.

53. Following the discussions between the Applicant and the Organisation, the Human Resources Management Service (HRM) informed the Applicant by email on 8 July 2015 that she was not eligible for the expatriation allowance. On 10 July 2015, the letter of appointment sent to the Applicant reiterated her ineligibility for the expatriation allowance.

54. By signing the letter of appointment, the Applicant – feeling disappointed[16], it is true, but in full knowledge of what she was doing – accepted the grade, the salary conditions and the remuneration table which did not include any expatriation allowance.

55. On 14 September 2015, Mr DD from HRM sent the Applicant a final email confirming once again that she could not be granted the expatriation allowance because she had been living in the country of secondment, namely France, continuously for at least a year[17]. This decision was reiterated by the Head of the HRM Operations Service on 31 March 2016[18].

---

[15] *Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation*, Annex III- Resolution of the Council on the Statute and Operation of the Administrative Tribunal, Article 3.
[16] *Supra*, note 12.
[17] *Supra*, note 13.
[18] Document O-23.

56. The Applicant relies mainly on the decision in OECDAT Judgment 90 to argue that a decision which does not come from the Secretary-General, does not mention that it has been taken under his delegation and does not indicate the means of and deadline for appealing does not trigger the limitation period. According to the Applicant, it was not until 14 January 2019 that the final decision regarding the refusal of the expatriation allowance was given according to the above criteria.

57. The Tribunal rejects this argument on the grounds that OECDAT Judgment 90 is inapplicable in the present case.

58. The case in OECDAT Judgment 90 concerns the retroactive payment of medical expenses (a private nurse) for an official who had suffered a head injury with irreversible damage which resulted in permanent incapacity.

59. In OECDAT Judgment 90, the application for the withdrawal of the decision had been presented to the Organisation by a third party, namely the applicant's guardian, her father. The decision came from the insurer without mentioning that it was taken under the delegation of the Organisation or even copying the Organisation into the letter. Finally, the letter from the insurer made no mention of the means and time limits for appeal, which were unknown to the applicant's guardian. In addition, negotiations were entered into between the parties which gave rise to a settlement proposal. It was the date on which the settlement proposal was rejected that marked the starting point for the limitation period in that case.

60. In OECDAT Judgment 90, the Organisation argued that the contested decision had been challenged 3 months late, and not 4 years as in the present case.

61. In the present case, the Applicant is an official in post, who had access via the Internet to the means and time limits for appeal and who was notified three (3) times in writing in the space of six (6) months that she was not eligible for the expatriation allowance.

62. The decision of 14 September 2015 was communicated to her by HRM, which was duly authorised by the Organisation. This decision was: '*an act by an officer of an organisation which has a legal effect (and) constitutes a challengeable decision*'[19].

63. It should also be stressed that Instruction 101/2 states that: '*An official on whom powers are conferred by these Instructions with respect to specific matters shall be deemed to act, in the exercise of such powers, on behalf of the Secretary-General*'.

64. The fact that the Applicant separated from her husband after 2015 does not change anything with regard to the refusal of the expatriation allowance, which was decided on solely on the basis of events prior to 2015, i.e. the calculation of the period of uninterrupted residence of the Applicant before the appointment. This was a determination at a set moment that was made – permanently – on 31 March 2016. Events subsequent to 2015 have no effect on the original determination.

65. The application is therefore inadmissible as regards the expatriation allowance.

The admissibility of the request with regard to the family allowances

66. From the date of her appointment, the Applicant received the household allowance and the allowance for dependent children. These allowances were withdrawn from her by the decision of 9 February 2016, confirmed on 31 March 2016, because her husband was also receiving them from the ESA. At that time, the Applicant still shared the same residence as her husband, to whom she was still married. The decision to withdraw family allowances and to request the reimbursement of the overpayment was not contested by the Applicant, who accepted its fairness since the rule was clear.

[19] ILOAT, Judgment 3141, 21.

67. However, the separation of the spouses and the interim residence and custody order of 20 March 2017 represented new circumstances giving rise to the new request for the granting of family allowances.

68. This was therefore a new situation which prevents the decision of 9 February 2016 from being regarded as the starting point for the calculation of the two- (2-) month period.

69. These allowances, the monthly payment of which is periodic and the eligibility of which is linked to the marital status of the spouses, are not subject to an immutable decision that is separate from the family context.

70. However, to challenge the admissibility of the request for reconsideration submitted by the Applicant on 23 November 2018, the Secretary-General cites two documents subsequent to 20 March 2017, namely an email dated 23 June 2017 and a letter dated 28 June 2017 referred to as 'clarifications', coming respectively from the deputy head and the head of the human resources management service.

71. The significance of these documents must be appraised in relation to the requests to which they respond. The Applicant confined herself at that time to asking what consequences of any kind the interim residence and custody order had for the Organisation. The Organisation's replies were therefore likewise of a purely informative nature ('clarifications') and cannot therefore be regarded as decisions that became irrevocable because they had not been challenged in time.

72. Moreover, the legal proceedings between the spouses are ongoing, as evidenced by the ruling issued by the Paris Court of Appeal on 13 February 2020.

73. It is undeniable that the context of the proceedings is complex and that the case concerned is a very difficult one. The exceptional circumstances of this case argue in favour of a flexible and liberal interpretation.

74. Consequently, the request for reconsideration presented by the Applicant on 23 November 2018 and refused by the Secretary-General on 14 January 2019 constitutes the starting point for the limitation period for calculating the prior request.

75. The period started to run when the Applicant obtained a final response from the Secretary-General on 14 January 2019. The Applicant's prior request, dated 12 March 2019, fell within the time limit provided for in the Staff Regulations.

76. In addition, it should be mentioned that, by contrast with the position as regards the expatriation allowance, the Applicant is acting here on behalf of the children's rights, since the family allowances are provided exclusively for their benefit. It is therefore necessary to assess the circumstances giving rise to the right with even more rigour.

THE MERITS OF THE CASE

Family allowances

77. Regulation 16 of the Staff Regulations states that '*Officials shall be entitled to the following allowances as established by rules of the Secretary-General subject to approval by the Council:*
   a) *family allowances…'*[20].

78. Rule 16/1.1 adds that staff appointed before 1 January 2017, as is the case with the Applicant, are entitled '*to a household allowance equal to 6 per cent of their salary...*'[21].

79. However, according to Rule 16/1.1.2:

> 'Where two spouses are both employed by the Organisation, or where the spouse of an official is employed by one of the organisations specified in Rule 17/7.1 and both spouses are entitled to the household allowance, it is paid to the spouse they choose by mutual agreement, or, failing that, the spouse whose salary is the greater.'[22]

[20] Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation, Regulation 16.
[21] Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation, Rule 16/1.1.
[22] Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation, Rule 16/1.2.

The same principle applies to the allocation of the dependant's allowance[23].

80. In the chapter on the family, the Staff Regulations cover four situations: (1) the official is unmarried (2) the official is married (3) the official is divorced and (4) the official is living in a *de facto* union (a partnership organising the conditions of a marital relationship)[24].

81. The status of officials who are still married but legally separated, who are sharing joint custody of the children and whose marital status is covered by a provisional order of the national courts is not covered by the Staff Regulations applicable to officials appointed before 1 January 2017.

82. However, since 1 January 2017, the case of alternating or shared custody is provided for in the Staff Regulations when both parents are officials of the Organisation or of an organisation referred to in Rule 17/7.1, including the ESA. The dependent child supplement is shared equally between the two officials, unless there is a court decision or agreement between the parties to the contrary. The changes are only applicable to officials appointed after 1 January 2017.

83. The Applicant argues that she is eligible for family allowances because she lives apart from her spouse and the family affairs judge at the Paris Tribunal de Grande Instance has issued an interim residence and custody order in the context of divorce proceedings between her and her husband. Against this, the Organisation argues that as long as the Applicant is not divorced, she should be regarded as married for the purposes of the Staff Regulations.

---

[23] Staff Regulations, Rules and Instructions Applicable to Officials of the Organisation, Rule 16/1.4.1.

[24] Staff Regulations, Rule 16/0 (bis),16/2.2.4b)

84. The Staff Regulations have not provided for the situation where officials appointed before 2017 are still married but legally separated, living in separate residences and sharing joint custody of the children as recognised by a French court.

85. This legal situation, recognised by French law since the 2007 reform, authorises parents to agree on the distribution of family allowances in the event of alternating residence (Articles R.521-2 to R.521-4 of the Social Security Code). If the parents disagree, each receives half of the family allowances, regardless of the termination of the marriage.

86. However, in the present case, the officials' legal situation must be analysed according to the provisions of the Staff Regulations and not according to the various national laws governing officials according to their place of residence.

87. It is therefore in the wording of the Staff Regulations that the solution to the dispute submitted to the Tribunal must be found.

88. The Staff Regulations as applicable to officials appointed before 1 January 2017 regard the Applicant as married until such time as a divorce judgment is pronounced. This leads to the situation where a person separated from his or her spouse and living in a separate residence has to live with the rules treating that person as married since the divorce judgment has not yet been pronounced.

89. The Organisation was able to agree with the ESA that only one parent, in this case the husband as his salary was higher, could receive the family allowance in order to avoid double payment of benefits. This decision was applicable to the parents who were still living together in the same residence and had joint custody of the children.

90. It is true that the Staff Regulations could have made provision for the equal sharing of the family allowances of <u>parents who are separated but not yet divorced and with shared custody on an equal time basis</u> in the event of disagreement about the distribution of

family allowances, as is provided for by French law. Unfortunately, the Organisation did not see fit to agree on this for officials appointed before 2017.

91. However, it is not up to the Tribunal to rewrite the Staff Regulations, which make a distinction between officials according to their date of appointment. It should be recalled here that the jurisdiction of the Tribunal is a jurisdiction related to subject matter, as accurately described in *La Fonction Publique Internationale*[25]*:*

> 'The international court has a duty to verify whether the contested decision was taken in accordance with the organisation's regulatory provisions as well as with the general principles of law as they apply in the legal order to international organisations. It is a matter for the court in which an administrative decision taken by virtue of this discretionary power is challenged to examine not only whether the decision emanates from a competent body and whether it is regular in form, but also whether the procedure has been followed correctly and, with regard to internal legality, whether the administrative body's appraisal has taken account of all relevant factors, whether any erroneous conclusions have been drawn from the documents in the case, and finally, whether there has been any improper exercise of authority.' *(ATCE 26-4-1996, 210/1995 ;24-4-1997,226/1996, 4-7-2003, 307/2002).*

92. The Staff Regulations, which do not contravene the general principles of the international civil service, must be applied even if the administrative double standard leads to an unfair situation which, as the Staff Association rightly argues, takes no account of the changing state of personal relations in contemporary society.

93. The complaint relating to the family allowance is therefore rejected.

[25] A. Plantey, F. Loriot, CNRS Editions, Paris 2005, para

FOR THESE REASONS, THE TRIBUNAL

1. **DECIDES** that the application is inadmissible as regards the expatriation allowance.

2. **DECIDES** that the application is admissible as regards the family allowance.

3. **DISMISSES** the application on its merits.

   And, having regard to the particular nature of this case,

4. **DECIDES** that 3,000 euros should be awarded to the Counsel for the Applicant in costs.