

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 401/2007 – Ana GOREY 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. Ms Ana GOREY lodged her appeal on 3 December 2007. The appeal was registered that same day as File No. 401/2007.
2. On 4 February 2008 Maître Gaia Giappichelli, counsel for the appellant, submitted further pleadings on her client's behalf. On 21 February 2008 she gave the Tribunal a document to be added to the appellant's file.
3. The Secretary General submitted his observations on the case to the Tribunal on 12 March 2008.
4. The appellant replied on 12 April 2008.
5. The oral hearing had been scheduled to begin on 24 April 2008, but on 21 April 2008 the Secretary General requested an adjournment in order to allow an out-of-court settlement to be sought. The Chair of the Tribunal agreed.

When the parties failed to reach a settlement, the hearing was held in the Administrative Tribunal's hearing room in Strasbourg on 28 May 2008. The appellant was represented by Maître Gaia Giappichelli and Mr Manuel Barca, barrister, whilst the Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice

Department, Directorate of Legal Advice and Public International Law, together with Ms Christina Olsen and Ms Maija Junker-Schreckenber from the same department.

## **THE FACTS**

### **I. THE CIRCUMSTANCES OF THE CASE**

6. The appellant, Ms Ana Gorey, is a UK national and a member of the Council of Europe's permanent staff.

7. Recruited by the Council in 1987, her grade is currently B3 and she works in the European Commission for Democracy through Law, more commonly known as the Venice Commission.

8. On 27 June 2007 the appellant applied for an education allowance, namely reimbursement of educational costs at the "exceptional rate" pursuant to Article 7 of the Regulations governing staff salaries and allowances, Appendix IV to the Staff Regulations – see paragraph 15 below). The application was for her four children.

9. On 26 July 2007 the request for reimbursement at the exceptional rate was rejected and the costs were reimbursed at the increased rate.

10. On 4 September 2007 the appellant entered an administrative complaint under Article 59 of the Staff Regulations.

11. On 2 October 2007 the Secretary General rejected the administrative complaint.

12. On 3 December 2007 the appellant lodged the present appeal.

13. On 19 November 2007 the appellant forwarded additional information to the Secretary General. She pointed out that if she did not receive reimbursement at the exceptional rate she would have to pay excessively high school costs, and explained why she had placed her children in their present schools and the kinds of assistance they were receiving – learning support for three of them and special educational needs for child M.

14. Whilst proceedings before the Tribunal were ongoing the Secretary General, in a letter of 25 April 2008, informed the appellant that he had agreed to reimbursement at the exceptional rate for one child (M) but not for the other three children.

15. In a memorandum dated 14 May 2008 the appellant replied that she was continuing with her appeal in respect of the other three children and that her claim would be pursued further at the hearing set for 28 May 2008.

### **II. APPLICABLE LAW**

16. The provisions on the education allowance are set out in Article 7 of Appendix IV to the Staff Regulations (Regulations governing staff salaries and allowances). Following amendment by the Committee of Ministers on 16 May 2007, this article reads as follows:

## Article 7 – Education allowance

“1. Staff members entitled to the expatriation allowance with dependent children as defined according to the Staff Regulations, regularly attending on a full-time basis an educational establishment, may request the reimbursement of educational costs under the following conditions:

a. in respect of children in compulsory education up to completion of secondary level of education;

b. in respect of children at post-secondary level of education for studies carried out in the country of which the staff member or the child's other parent is a national or in the duty country. If duly justified by the staff member, for reasons of continuity in following an educational cycle or if educational costs are lower in a third country, an exception to this rule can be granted by the Secretary General.

(...)

6. Reimbursement of educational costs mentioned in paragraph 5 above shall be made according to the rates, ceilings and conditions below, each case being treated individually:

a. Standard rate: 70% of the educational costs up to a ceiling of 2.5 times the annual amount of the dependent child allowance;

b. Country of nationality rate (if different from country of duty): 70% of educational costs up to a ceiling of 3 times the annual amount of the dependent child allowance if the child is educated in a country of which the staff member or the other parent is a national;

c. Increased rate: 70% of educational costs up to a ceiling of 4 times the annual amount of the dependent child allowance provided that:

- i) educational expenditure as defined in paragraph 5 a. and b. is excessively high;
- ii) such costs are for education up to completion of the secondary cycle;
- iii) are incurred for imperative educational reasons;

d. Exceptional rate: up to 90% of total educational costs up to a ceiling of 6 times the annual rate of the dependent child allowance provided that:

- i) educational costs as defined in paragraph 5 a. and b. are exceptional, unavoidable and excessively high, according to the judgement of the Secretary General;
- ii) such costs refer either to education up to completion of the secondary cycle or are costs as defined in paragraph 5 a. and b. for the post-secondary cycle;
- iii) costs are incurred for imperative educational reasons.

(...)

14. The Secretary General shall establish instructions for implementation of the provisions of this Article.”

17. On 25 June 2007 the Secretary General adopted Rule No. 1277 on the education allowance. This Rule sought to “clarify a number of questions concerning the education allowance and set out the conditions for granting it” and reads as follows:

#### **Article 1**

“Where a staff member claims an exception based on educational costs being lower in a third country, pursuant to Article 7 paragraph 1 b) of the Regulations, the comparison shall be made between registration fees and general fees for schooling and education applicable for the first year in the educational cycle in either the duty country or the country of which the official or the child’s other parent is a national (the staff member concerned having the choice).

(...)

#### **Article 4**

Reasons for claiming the existence of imperative educational reasons for the purpose of Article 7 paragraphs 2.1 b) and 6 c) iii) of the Regulations may include medical problems, learning difficulties (including language-related difficulties), behavioural problems or specific family situations. In every case the staff member claiming an imperative educational reason shall provide the Directorate of Human Resources of the Directorate General of Administration and Logistics with a detailed explanation and supporting documentation.

#### **Article 5**

The educational costs shall be reimbursed at the exceptional rate within the meaning of Article 7 paragraph 6 d) of the Regulations when incurred for children with special educational needs resulting from their medically certified physical, developmental or behavioural condition.

(...)

#### **Article 10**

This rule shall enter into force on the first day of the month following its signature by the Secretary General and shall revoke Instruction No. 27 of 7 April 1993 on the application of Article 7.7 of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations).”

## **THE LAW**

18. The appellant asks that the decision not to reimburse her for the educational costs of her four children at the “exceptional rate” pursuant to Article 7, paragraph 6 d) of the Regulations governing staff salaries and allowances (Appendix IV to the Staff Regulations), be set aside.

In her additional pleadings of 30 January 2008 the appellant also asks for the sum of € 5 000 to compensate her for all the costs incurred in connection with the present appeal. Following the Secretary General’s decision of 25 April 2008 (paragraph 14 above), she is further pursuing her application in respect of three of her children.

19. The Secretary General asks the Tribunal to declare the appeal unfounded and to reject it. Following his decision of 25 April 2008 to apply the exceptional rate to child M. and not to do so for the other three children, the Secretary General stands by the position he has taken on the other three children. On the matter of the procedural costs requested by the appellant, the Secretary General defers to the wisdom of the Tribunal.

### **I. THE PARTIES’ ARGUMENTS**

20. At the hearing of 28 May the appellant asked the Tribunal to find that the Secretary General had acted unlawfully because he had exceeded his discretionary powers by introducing a new restriction, had failed to act in good faith and had not upheld the principle of legitimate expectation. She also asked that the decision to deny her the exceptional rate for three of her children be set aside and that the Secretary General be ordered to reconsider her application. Lastly, she asked that the Tribunal make recommendations to the Secretary General on the introduction of a fair and transparent procedure for considering education allowance applications.

21. The appellant made two allegations: infringement of Article 7 of the Regulations governing staff salaries and allowances; and a breach of the general principles of law – fulfilment of legitimate expectation, good faith and the prohibition of all forms of discrimination.

22. Concerning the first allegation, the appellant holds that the grant of the allowance at the exceptional rate must be considered individually as stipulated in Article 7, paragraph 6 c) of the Regulations governing staff salaries and allowances. Any interpretation which restricted the possibility of reimbursement at the exceptional rate solely to the exceptional circumstances described in Rule No. 1277, Article 5, would be contrary both to the intention and to the spirit of the said Article 7, paragraph 6 c). This provision states only that the educational costs must be “exceptional, unavoidable and excessively high” and that the Secretary General must judge each case on its own merits, whereas Rule No. 1277, Article 5, says that reimbursement at the exceptional rate will be granted only for “children with special educational needs resulting from their medically certified physical, developmental or behavioural condition”. The appellant adds that Rule No. 1277 is an instrument that ranks below regulatory acts in the hierarchy of sources. Consequently, Article 5 of the Rule cannot stipulate the terms on which the Secretary General applies Article 7, paragraph 6 c) of the Regulations governing staff salaries and allowances.

23. Concerning the second allegation, the appellant argues that the principle of legitimate expectation has a precise definition that satisfies legal certainty. In her view this principle is defined as “public confidence in a certain rule of law”.

She further maintains that “the prohibition of all forms of discrimination comprises two elements: non-discrimination consists in equal treatment in equal situations and different treatment in different situations”.

Lastly, the appellant contends that the principle of good faith was breached, alleging that her legitimate expectations were dashed by the way in which the Secretary General applied Article 7, paragraph 6 c) of the Regulations.

24. The Secretary General, for his part, concluded at the hearing that the appeal should be declared unfounded and rejected.

25. Concerning the first of the appellant’s allegations, the Secretary General argues that the Regulations governing staff salaries and allowances explicitly give him the discretion to decide what, in his judgement, constitutes educational costs that are “exceptional, unavoidable and excessively high”. In view of the need to establish control measures in respect of the exceptional rate, he had chosen to list, clearly and transparently, the criteria he undertook to apply when exercising his discretion, in due observance of the regulatory hierarchy.

The Secretary General summarised the circumstances in which reimbursement of educational costs at the exceptional rate had been introduced into the Council of Europe’s rules. Reimbursement at the exceptional rate was the result of a proposal by the Co-ordinating Committee on Remuneration (CCR), made in its 164<sup>th</sup> report. In that report the CCR had made two recommendations of substance. The first called on the Councils of the Co-ordinated Organisations to adopt new rules on the education allowance in place of the rules in force at the time; the new rules would include the introduction of reimbursement at an “exceptional rate” more generous than the existing “standard” and “increased” rates. Secondly, the CCR called on Councils “to establish appropriate measures of control of the exceptional cases referred to in paragraph 6 d) of the Annex below” – that paragraph being the one concerning the exceptional rate.

The Secretary General said that the Committee’s recommendation left the Co-ordinated Organisations free to decide whether or not they wished to introduce an exceptional rate into their rules and that some of them had elected not to. He personally had decided to propose adopting an exceptional rate to the Committee of Ministers, but he had nevertheless needed to define the criteria for it very carefully in order to safeguard its exceptional nature. The Secretary General emphasised that he had expressed himself in those terms in the document prepared for the Committee of Ministers (document CM (2006) 98 of 18 July 2006):

“the new rules introduce an exceptional rate of reimbursement up to 90% of educational costs, with a ceiling of 6 times the annual dependent-child allowance. (...) In the secondary instrument, the Secretary General intends to limit the application of the exceptional rate to cases where the educational costs are incurred for children with special educational needs resulting from their medically certified physical, developmental or behavioural conditions”.

The Secretary General said that he had clearly stated his intention with regard to measures of control, and the Committee of Ministers, in adopting the Resolution, had at no point and in no way opposed his adoption of the specific measure on application of the exceptional rate which he had announced clearly and transparently.

From all this he concluded that he was not only empowered to act in this way; he had received a specific remit to do so.

The Secretary General further stated that he had not failed in his obligation to consider each case individually as required in Article 7, paragraph 6 of the Regulations. He had always decided, from a case-by-case consideration of the circumstances specific to each staff member and each child, whether in his judgement the costs reflected additional requirements and could be regarded as “exceptional” and “unavoidable”. All this, he said, was in fact proved by the fact that he had reconsidered Ms Gorey’s application and found that for one of her children she should in fact be reimbursed at the exceptional rate.

26. Addressing the second allegation, the Secretary General denied that there had been a breach of the general principles of law.

Regarding her complaint about legitimate expectations, he said that the arguments he had laid before the Tribunal in refuting the first allegation were enough to show straight away that he had not breached this principle. They provided proof that, prior to adoption of the Resolution by the Committee of Ministers, not only had staff been informed that measures of control would be put in place in respect of the exceptional rate; the Secretary General had also expressly announced that in connection with those measures he was advocating that eligibility for the exceptional rate should be restricted to cases which would subsequently be specified in Article 5 of Rule No. 1277. Thus, in his view, the appellant was aware of the way in which the exceptional rate would be applied.

The Secretary General then stated that the appellant’s arguments did not prove that she had been discriminated against. He had done what was necessary to establish with total clarity the limitations within which the exceptional rate of reimbursement would be granted, stipulating the different applicability criteria for the various rates.

Lastly, the Secretary General said he had not breached the principle of good faith.

## II. THE TRIBUNAL’S ASSESSMENT

27. Following the Secretary General’s decision of 25 April 2008 to apply the exceptional rate in reimbursing the costs for child M., the Tribunal believes that this appeal is now without purpose because it concerns the case of child M. Consequently the Tribunal cannot rule on the merits of that part of the application and, *a fortiori*, of that part of the Secretary General’s decision. Thus it is not appropriate to give a ruling on the merits.

28. In the case of the other three children the Tribunal notes, with regard to the merits of the first allegation, that under the Rules educational costs may be reimbursed at one of three rates. Under the system as devised by the CCR from the beginning, it is clear that the Secretary General exercised a power of discretion in choosing to introduce an exceptional rate of reimbursement into the Organisation and that in setting rules for its application he acted in

line with the CCR's recommendation "to establish appropriate measures of control of the exceptional cases referred to in paragraph 6 d)".

29. Moreover, the Secretary General had informed the Committee of Ministers of the guidelines he intended to follow in putting this reform into operation and had done so before the Committee adopted its resolution; it is further significant that the said resolution contained nothing to suggest that the Committee of Ministers was not in agreement with the information the Secretary General had provided.

The Tribunal considers it normal that the Secretary General should, in a rule, have laid down the criteria for applying one rate rather than another, and should have introduced criteria for the exceptional rate that were different from those applicable to the increased rate. If that were not the case, it would make no sense to have the different rates. The Tribunal finds that in acting in this way the Secretary General was being fully transparent and did not exceed his discretionary power, given the existence here of rules laid down by the Committee of Ministers, the body with regulatory responsibility for these matters.

30. The Tribunal is also satisfied that the Secretary General did, in the event, give individual consideration to the appellant's request. It sees as proof of this the fact that the Secretary General considered the additional information which the appellant forwarded to him for examination, ultimately changing his mind about the status of one of the children.

31. The conclusion is that the Secretary General's application of the Regulations governing staff salaries and allowances was not unlawful.

32. Concerning the appellant's second allegation, the Tribunal finds that the arguments put forward by the appellant do not prove that the Secretary General breached the principle of legitimate expectation or that he did not act in good faith. On the contrary, the Secretary General has shown that he upheld those principles. The Tribunal emphasises here that the Secretary General took his decisions on the basis of texts which were known in advance to the appellant.

33. Lastly, the appellant has produced nothing to show that she suffered discrimination. And she has not substantiated this allegation, but merely stated the principles which prohibit discrimination.

34. The conclusion is that this allegation by the appellant is unfounded.

35. Concerning the appellant's demand for reimbursement of the costs of the proceedings, the Tribunal notes that the appellant, who employed the services of a lawyer and was assisted at the second hearing by a second lawyer, asked for the sum of € 5 000 in costs and expenses for the appeal as a whole. The Tribunal notes that it dismissed the appeal in that part relating to three of the appellant's children. Given that she was obliged to lodge an appeal in order to obtain satisfaction for her fourth child, she must be reimbursed for a portion of her costs. The Tribunal deems it reasonable in view of the circumstances of the case that the Secretary General should reimburse the sum of € 2 500 (Article 11, paragraph 2 of the Statute of the Administrative Tribunal – Appendix XI to the Staff Regulations).

For these reasons, the Administrative Tribunal:

Decides that the appeal in the case of child M. shall be struck off the list;

Rejects the remainder of the appeal;

Orders the Council of Europe to pay the appellant the sum of € 2 500 in costs and expenses.

Adopted by the Tribunal in Strasbourg on 27 November 2008 and delivered in writing pursuant to Article 35, paragraph 1 of the Tribunal's Rules of Procedure on 19 December 2008, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

E. PALM