

## **EBRD ADMINISTRATIVE TRIBUNAL**

### **Appeal of Mr C**

Preliminary hearing on jurisdiction held at EBRD, London on 20 October 2003.

Appellant, who was present, assisted by Martin Fodder, Counsel, and Gillian Howard, Solicitor.

Respondent assisted by David Bean QC and Lee Marler, OGC.

Administrative Tribunal President: Professor Roy Lewis

Assessors: Ray Portelli, Deputy Head, Internal Audit and Lindsay Forbes, Director, Equity.

Tribunal secretariat: Patricia Bounds and Julia Bird.

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### **Decision on Jurisdiction**

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#### **Introduction**

1. The Appellant has raised his grievance following the adoption by the EBRD's Executive Committee (Excom) on 3 April 2003 of an updated version of the Staff Handbook. Under the provisions of the Handbook accommodation and education allowances are payable to certain staff. The Appellant considered that the scale of these allowances was excessively generous and disproportionate. Furthermore, the allowances were generally unavailable to locally recruited staff such as the Appellant, which he alleged was discriminatory. He claimed that, if the Bank refused to scale down the allowances, they should be paid to him.
2. The Appellant raised his grievance in a letter dated 3 April 2003 to the Human Resources Director. By letter dated 29 May 2003 the Appellant wrote to the EBRD President requesting an administrative review under the GAP. By letter dated 8 August 2003 he initiated his appeal to the Administrative Tribunal.
3. By memo dated 15 August 2003, the Respondent under GAP 7.02 challenged the jurisdiction of the Administrative Tribunal to hear the Appellant's case.

## Summary of parties' main submissions

4. The Respondent advanced three principal arguments. First, it argued that ExCom's adoption of the updated Staff Handbook on 3 April was a limited regulatory decision to amend certain specific eligibility rules for the education and accommodation allowances. It was not a considered decision on behalf of the Bank to determine that these allowances were to be or to continue to be broadly restricted to "expat" staff members. That decision had been taken much earlier, originally in 1990. It had been reviewed subsequently but not in 2003. The accommodation allowance had last been reviewed by the Board of Directors in 2001. The education allowance had last been reviewed by the Board of Directors in 1998.
5. Second, the Appellant's grievance was time-barred. The Respondent relied on GAP, 11.01, which provided that the GAP was applicable only to administrative decisions taken on or after 2 April 2003. It maintained that the decisions concerning the overall scheme for expat benefits had been taken long before 2 April 2002.
6. Third, the Respondent relied on GAP 1.01(b), which restricted appeals to challenges to administrative decisions the implementation of which would materially affect the private rights of the staff member. According to the Respondent, no decision was made by the Bank on 3 April that would materially affect the private rights of the Appellant. The situation was merely that his pre-existing ineligibility in connection with the two allowances continued and his private rights were thus unaffected.
7. The Appellant argued that on 3 April the Bank, in adopting the revised Staff Handbook, made a regulatory decision. The decision involved a consideration of the existing policies in respect of predominantly expat benefits, a reaffirmation of those policies, and amendment to certain of the eligibility requirements. The Appellant referred to paragraph 5.3 of the Respondent's statement of 15 August 2003 challenging jurisdiction as containing an express acknowledgement that the Bank had reaffirmed its overall policy in respect of eligibility.
8. The Appellant argued further that his private rights were materially affected by the implementation of this decision in that it perpetuated his ineligibility to receive benefits. That was his primary argument in respect of material effect. By way of a subsidiary argument, he maintained that his particular role in the Bank gave him a locus to complain about their discriminatory nature.
9. In their submissions to the Tribunal the parties cited recent decisions of the Administrative Tribunal of the IMF, in particular the decisions in the cases of Ms "S" (5 May 1995) and Ms "G" (18 December 2002). Both parties relied

on paragraph 72 of the Ms G decision. This drew a distinction between a considered continuation of an existing policy, on the one hand, and a mere individual decision on the other. The Appellant argued that his case fell within the former category, while the Respondent argued that it fell within the latter category. Indeed, the Respondent argued further that, if the Tribunal had jurisdiction in the Appellant's case, the floodgates would be opened to any staff member who requested a benefit for which he/she was not eligible under the Handbook and who would then be able to access the Tribunal.

10. Paragraph 72 of the Ms G decision reads as follows:

**As indicated above, the Executive Board's reaffirmation of the eligibility requirements in 1994 and its adoption of the 2002 amendment represented the reconsideration of the contested policy and its adaption at the highest levels of the Fund's decision-making. As such, they represent an "administrative act" falling within the Tribunal's jurisdiction *ratione temporis*. In the Tribunal's view the facts in the present case may be distinguished from those of Ms "S", in which there was no evidence that the contested rule had been reconsidered and reaffirmed in the period of the Tribunal's jurisdiction apart from the "individual decision" resulting from Ms "S"'s request for an exception to the generally applicable policy; no new policy was adopted in that case. In the instant case, because reconsideration, reaffirmation and amendment of the 1985 policy took place years after the Statute of the Tribunal took effect, the Tribunal concludes that the Application and the Intervention should not be held to be inadmissible on temporal grounds.**

## Considerations

11. The Tribunal reminds itself in the first place of the basic definitions in the GAP. An individual may seek redress against an administrative decision, which is defined as any individual or regulatory decision taken in the administration of the staff of the Bank. A regulatory decision is defined as "any rule concerning the terms and conditions of staff employment".
12. The Respondent conceded that on 3 April the Bank made a regulatory decision to the extent of the amendment to the eligibility rules in connection with the two allowances. However, the Tribunal considers that the scope of the Bank's regulatory decision on 3 April was more broadly based. This was apparent from the documentary evidence surrounding that decision:
  - (1) An email from OGC dated 27 November 2002 and a memo from them dated 2 December 2002 to the Appellant and others underlined the comprehensive nature of the review of the allowances, including the Respondent's potential exposure to claims for nationality-based discrimination.

- (2) The Director of Human Resources' memo date 28 January 2003 to the Appellant demonstrated the importance of the amendments and the underlying rationale for preserving the overall scheme of expat benefits.
  - (3) A memorandum dated 27 March 2003 from the General Counsel to ExCom demonstrated that during 2002 and the first quarter of 2003 OGC and the Human Resources Department carried out a comprehensive review of the Staff Handbook. The memorandum highlighted certain important substantive revisions to the Handbook which ExCom were invited to expressly consider and approve. These included the amendments to eligibility for allowances, which were justified in the following terms: "the revision ... is intended to prevent the Bank being exposed to possible claims of discrimination on the grounds of nationality".
13. It was also the case that the amendments that were made to the eligibility criteria were significant. An additional basis for claiming accommodation allowance was introduced, namely, one based on main residence. The eligibility for education allowance was amended by confining it to those who were not UK nationals at the time of their recruitment. Finally, the Director of Human Resources was given an exceptional discretion to pay education allowance to UK nationals who at the time of their recruitment had their main residence outside the UK.
14. The overall conclusion that the Tribunal draws from this evidence is that the Bank gave detailed consideration to its overall scheme of expat benefit policies in 2003. Further, the amendments - which were themselves significant – could not have been considered in a vacuum. ExCom must reasonably be taken to have considered those amendments in the context of the scheme as a whole. Indeed, the Respondent acknowledged that the Appellant's previous ineligibility to the disputed benefits was "reaffirmed" in 2003.
15. The Tribunal thus considers that the Bank's regulatory decision made on 3 April 2003 was a decision, subject to the amendments, to reaffirm and to continue with the Bank's previous policy concerning expat benefits. Given the scope of that decision, the Appellant's grievance that was raised later in April 2003 was not time-barred.
16. The next question to consider is whether the Appellant's private rights were materially affected by the implementation of this decision. Where – as here – the Bank reconsidered, reaffirmed and amended its expat benefits policy it is difficult to see why as a matter of logic the implementation of the decision did not affect the private rights of the Appellant. Put positively, the inescapable effect of the Bank's decision was to continue the Appellant's ineligibility to

those benefits. That in turn materially affected his private rights.

17. The Tribunal considers that the decision of the IMF Administrative Tribunal in the Ms G case is helpful. On the evidence and reasoning set out above, the Appellant's case fell on the Ms G rather than the Ms S side of the line.
18. For the avoidance of doubt, the Tribunal rejects the Appellant's subsidiary argument concerning his post. His private rights were not materially affected by the fact that he was required to administer a policy with which he profoundly disagreed, or even a policy that he considered unlawful.
19. Finally, the Tribunal does not accept the Respondent's contention that the floodgates would be opened by allowing any member of staff who claims a benefit which is then denied, in accordance with a pre-existing policy set out in the Handbook, to bring a case before the Administrative Tribunal. In order to bring a case within the Tribunal's jurisdiction there has to be an administrative decision taken on or after 2 April 2002. In this case a positive decision was made following a comprehensive review of the expat benefits, subject to certain amendments, to continue with the scheme as a whole. In the absence of that decision no appeal could have been made.
20. The updating of the Staff Handbook in April 2003 involved a consideration of significant amendments to a small number of specific policies that translated into substantive terms and conditions of employment. According to the General Counsel's memorandum of 27 March 2003, these specific areas were unpaid leave, abandonment of post, demotion, leave in cases of adoption, and eligibility for allowances. Outside of these areas it would not be possible to argue that the revision of the Staff Handbook in April 2003 involved any regulatory decisions. Even within these areas there would probably have to be evidence in addition to the General Counsel's memo that the Bank addressed its mind on the specific issue to the point where it could be concluded it made a regulatory decision. That would of course just represent first base. It would then have to be established that the decision was contrary to the contract of employment, the internal law of the Bank, or the generally recognised principles of international administrative law, see GAP 4.04(c).

## **Decision**

21. The Administrative Tribunal has jurisdiction to hear the Appellant's case.

**Professor Roy Lewis**  
**President, Administrative Tribunal**  
**21 October 2003**