EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

ADMINISTRATIVE TRIBUNAL

Mr C (Appellant) v EBRD (Respondent)
Case reference: EBRDAT 01/03

Appellant assisted by Michel Kallipetis QC, Martin Fodder, Counsel, and Gillian Howard, Employment Lawyer

Respondent assisted by David Bean QC and Lee Marler, EBRD Office of the General Counsel

Substantive hearing held at EBRD, London, 3-4 November 2003

President of the Administrative Tribunal: Professor Roy Lewis

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

Tribunal Secretariat: Patricia Bounds and Julia Bird

DECISION ON LIABILITY AND REMEDY

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1 The Appellant having appealed on the basis that the Respondent discriminated against him on grounds of nationality by denying him the accommodation allowance, and the Tribunal having reached the following conclusions in respect of the accommodation allowance:

(i) the Respondent indirectly differentiates, according to nationality, between professional employees who are ineligible to claim the allowance and professional employees who are eligible, because a significantly smaller proportion of UK nationals than non-UK nationals are eligible to claim the allowance;

(ii) notwithstanding that professional employees who are eligible to claim the allowance have to physically relocate to the UK in order to take up their posts, their circumstances and those of the Appellant are

sufficiently similar as to require the Respondent to justify the differential treatment;

(iii) the eligibility criteria and the amount of the accommodation allowance are reasonably related to the Respondent's legitimate aim of recruiting and retaining expatriate staff, and are proportionate to the achievement of that aim;

(iv) the Respondent's differential treatment of the Appellant and the other UK nationals who are ineligible to claim the allowance is therefore justified;

the Tribunal DECIDES THAT the Appellant's claim that the Respondent discriminated against him on grounds of nationality by denying him the accommodation allowance is not well founded and is dismissed.

2 The Appellant having further appealed on the basis that the Respondent discriminated against him on grounds of nationality by denying him the education allowance, and the Tribunal having reached the following conclusions in respect of the education allowance:

(i) entitlement to the education allowance is expressly restricted to professional employees who not only relocate to the UK but also are not UK nationals at the time of recruitment;

(ii) by virtue of this express nationality restriction, the Respondent directly differentiates, according to nationality, between the Appellant (together with other professional employees with UK nationality) and professional employees who are not UK nationals;

(iii) under international administrative law, it is in principle open to an employer to justify direct discrimination;

(iv) the circumstances of the Appellant, a professional employee with UK nationality, and professional employees who are not UK nationals, is sufficiently

similar as to require the Respondent to justify the differential treatment;

(v) save for one feature specified in the next sub-paragraph, the eligibility criteria and the amount of the education allowance are reasonably related to the Respondent's legitimate aim of recruiting and retaining expatriate staff, and are proportionate to the achievement of that aim;

(vi) the payment of the education allowance, without restriction, to a recipient of the allowance who then becomes a UK citizen, is not reasonably related to the aim of recruiting and retaining expatriate staff, or alternatively, is not proportionate to that aim;

(vii) it follows that by denying the education allowance to the Appellant, the Respondent discriminates against him unjustifiably on grounds of nationality;

(viii) however, the Respondent's denial of the education allowance to the Appellant is required by decisions of the Board of Directors, within the meaning of section 4.04(d) of the Grievance and Appeals Procedures, and, by virtue of that provision, the Tribunal is unable to uphold the appeal;

the Tribunal DECIDES THAT the Appellant's claim that the Respondent discriminated against him on grounds of nationality by denying him the education allowance is not upheld because the Respondent's action was required by decisions of the Board of Directors within the meaning of section 4.04(d) of the Grievance and Appeals Procedures.

3 For the reasons set out in paragraphs 81-99 of the attached Judgment, the Tribunal CONSIDERS THAT the denial of the education allowance to the Appellant and, by the same token, the decisions of the Board of Directors requiring that denial, are in breach of international administrative law.

4 Pursuant to section 9.03(a) of the Grievance and Appeals Procedures, the Tribunal REQUESTS THAT the President of

the EBRD brings the Tribunal's view that the decisions of the Board of Directors in respect of the education allowance are in breach of international administrative law and the reasons for it to the attention of the Board of Directors.

Professor Roy Lewis
President
Administrative Tribunal
9 January 2004

JUDGMENT

Introduction

1. The parties to this appeal are Mr C ("the Appellant") and the EBRD ("the Respondent"). The Appellant brings his appeal under the Respondent's Grievance and Appeals Procedures ("the GAP").

2. The Appellant commenced employment with the Bank in 2001. His line manager down to the date of the hearing was Mr F.

3. The Appellant formally raised his grievance in a letter dated 7 April 2003 to Mr F. By letter dated 29 May 2003 the Appellant wrote to the President of the EBRD requesting an administrative review under the GAP. By letter dated 8 August 2003 he initiated an appeal to the Administrative Tribunal. By memorandum dated 15 August 2003 the Respondent, under section 7.02 of the GAP, challenged the jurisdiction of the Tribunal to hear the Appellant's case. By a decision dated 21 October 2003 the Tribunal decided that it had jurisdiction.

4. The issues in dispute were clarified by the parties at a pre-hearing conference on 20 October 2003, and were confirmed in the Tribunal's directions dated 21 October 2003. The Appellant claims that the decision made by the Respondent on 3 April 2003 to adopt a new edition of the Staff Handbook discriminated against him in that it continued the entitlement of professional employees other than the Appellant to the education and accommodation allowances. He says that this was discriminatory on grounds of nationality and contravened the law governing the EBRD, in particular the relevant principles of international administrative law. By way of remedy, he wants the education and accommodation allowances to be paid to him. The Respondent denies that any decision on its part was discriminatory or contrary to the principles of international administrative law.

5. At the hearing the Appellant gave evidence on his own behalf. The Respondent gave evidence through Mr F. The Tribunal had the benefit of written witness statements, a substantial bundle of documentary evidence, and written as well as oral submissions on behalf of the parties.

6. At the Tribunal's request, the parties produced statistical data in addition to that contained in the bundle. Following the hearing, further statistics were supplied at the Tribunal's request. The Tribunal reworked this material, and the parties were invited to provide written comment on it. The parties' final comments on the statistics were received by the Tribunal Secretariat on 20 and 21 November 2003.

7. Before reaching its conclusions the Tribunal will examine the following matters that are dealt with in turn:

   (1) The substantive provisions relating to the education and accommodation allowances contained in the Bank's Staff Handbook.

   (2) The historical evolution of those provisions and the policy debates surrounding them.

   (3) The statistical evidence on the take-up and value of the education and accommodation allowances.

   (4) The applicable law, including the relevant principles of international administrative law.

   (5) The arguments advanced by the Appellant and by the Respondent.

Education and accommodation allowances: substantive provisions

8. The Bank provides its employees with allowances in respect of relocation, accommodation, home leave travel, education, and resettlement. These allowances are generally payable only to staff members who relocate to the UK for the purpose of taking up their appointment at the EBRD and who are generally referred to within the Bank as "expatriate staff".

9. The substantive provisions are set out in the Staff Handbook, which applies to staff employed on headquarters-based contracts and the most recent edition of which was approved by the Respondent's Executive Committee ("Excom") on 3 April 2003. The level of the allowances is reviewed periodically by the Respondent's Board of Directors, most recently on 11 December 2001. As already noted, in this case the two provisions in dispute are the allowances for education and accommodation. In addition, a third allowance – the mortgage

subsidy – is relevant to the Appellant's case in respect of the accommodation allowance.

Education allowance

10. The stated purpose of the education allowance is "to help employees who have come from abroad to meet the costs of educating their dependent children either in the UK or in the employee's home country" (5.8.1).[1]

11. Eligibility is confined to regular, fixed-term, and special employees at the professional level "who are not nationals of the UK at the time of their recruitment and who relocate to the UK in order to take up their Bank appointments" (5.8.2). However, "in exceptional circumstances, the Director of Human Resources may allow the benefit of the education allowance to be paid to a UK national who, at the time of his or her recruitment, has his or her main residence outside the UK" (ibid).

12. A child qualifies for assistance in the academic year in which he/she reaches the age of four. The child will then continue to qualify to the end of the academic year in which the age of 21 is reached or until full-time education ceases, whichever is earlier. However, if the child attends university or the equivalent, the qualification for assistance continues until the end of the academic year in which the age of 25 is attained (5.8.3).

13. The allowance is available to reimburse the cost of fees, textbooks and insurance. The amount for each qualifying child attending school is, if one child qualifies, 65% of the expense; if two, 70%; and if three or more, 75%. If the child is living away from home, there are in addition two flat rate monthly allowances (currently of £125) for ten months a year to meet accommodation costs and other living expenses. However, the maximum allowance that the employee can receive in respect of each qualifying child attending school is currently £6,000 per academic year (5.84, 5.85). For each qualifying child attending university or the equivalent, the employee is entitled to claim 70% of the expenses in respect of fees and textbooks, plus the flat rate monthly allowances, but with a maximum allowance in

[1] The bracketed references in this section of the Judgment are to the numbered paragraphs in chapter 5 of the Staff Handbook.

respect of each qualifying child of £3,500 per academic year (5.8.6). In addition, an education travel allowance is payable in defined and limited circumstances.

14. The education allowance as described is payable to those who are stationed at London headquarters. As regards employees who are normally based at London headquarters but are temporarily assigned to resident offices, the Staff Handbook provides that they will be eligible for the education allowance provided they are not nationals of the resident office country (5.1.2(2)).

Accommodation allowance

15. The stated purpose of the accommodation allowance is "to help eligible employees who have come to the UK to take up employment with the Bank meet the cost of renting or purchasing suitable accommodation for themselves and their families in London" (5.7.1).

16. Eligibility is restricted to professional employees who are regular, or employees on fixed-term contracts, or special employees on contracts of not less than two years. If an employee falls within one of these categories he/she is eligible for accommodation allowance provided three conditions are met: (1) the employee relocates to the UK in order to take up the appointment; (2) at the time of the appointment the employee has his or her main residence outside the UK; and (3) neither the employee nor his or her spouse or domestic partner own residential property within reasonable commuting distance of the Respondent's headquarters (5.7.2). The accommodation allowance is not available if the employee or his/her spouse or domestic partner is in receipt of the mortgage subsidy (ibid).

17. In determining where an employee has his/her main residence at the time of appointment, the following criteria are considered: (1) whether, at the time of recruitment, the employee is living in the UK or elsewhere; (2) the length of time the employee has been living in (or outside) the UK; (3) the immigration status of the employee if living in the UK at the time of appointment; (4) whether the employee came to the UK as an expatriate for another employer; (5) whether, at the time of recruitment, the staff member's dependants are living in the UK; (6) whether, at the time of recruitment, the staff member owns or rents a residence in the UK (ibid).

18. Eligible employees may claim accommodation allowance either to help cover the cost of renting accommodation, or to help make a down-payment on the purchase of accommodation, or to help meet the cost of financing a mortgage loan taken out in order to effect such a purchase (5.7.4). The allowance is payable only in respect of accommodation that is the employee's principal residence in the UK and is situated within reasonable commuting distance of the Respondent's headquarters (5.7.5).

19. Accommodation allowance is a standard weekly amount, the size of which depends on the employee's family status. The standard amounts are currently as follows:

single:	£179
married with no dependent children:	£263
married with one dependent child:	£297
married with two dependent children:	£414
married with more than two dependent children:	£487

An employee with a domestic partner receives the same treatment as a married employee. An unmarried employee with one or more dependent children is treated the same as a married employee with the same number of dependent children (5.7.8).

20. The accommodation allowance is payable in full for four years after the date it first becomes payable. Thereafter the amount reduces progressively over the subsequent seven years, until it phases out completely at the end of the eleventh year (5.79):

Years 1 – 4	100%
Year 5	85%
Year 6	68%
Year 7	51%
Year 8	38%
Year 9	29%
Year 10	22%
Year 11	16%
Year 12	0%

Mortgage subsidy

21. A third allowance - the mortgage subsidy – featured in the evidence and argument concerning the accommodation allowance.

22. The stated purpose of the mortgage subsidy is to help eligible employees meet their obligations to make payments of principal and/or interest on a mortgage loan secured on their residences in the UK (5.6.1).

23. Unlike the accommodation and education allowances, mortgage subsidy is available to support as well as professional staff. All regular, fixed-term and special employees are eligible for a mortgage subsidy, subject to the following conditions: (1) unless otherwise agreed by the Director of Human Resources, the property that is subject to the mortgage must be the employee's principal residence in the UK, and must be located within reasonable commuting distance of London; (2) the employee must be the sole or joint "mortgagor"[2]; (3) if the employee or the employee's spouse or domestic partner is receiving accommodation allowance from the Bank, the employee is not entitled to receive a mortgage subsidy; (4) if an employee's spouse or domestic partner is receiving a mortgage subsidy from the Bank, the employee may also claim a mortgage subsidy in respect of the same mortgage, but the total amount received by both may not exceed the outstanding amount of the mortgage debt; (5) if the payments due on the mortgage are being subsidised by another entity, such as the employer of the employee's spouse or domestic partner, the Director of Human Resources determines whether the employee will be eligible for a mortgage subsidy, and if so the amount that will be paid (5.6.2).

24. The amount of the mortgage subsidy granted annually to each employee is determined by deducting the first 3% from the "reference interest rate", and applying the resulting rate to the eligible capital sum. The reference interest rate is the rate for a variable-rate mortgage as published by a major home loan provider selected by the Bank, subject to a ceiling of 10%. The eligible capital sum is the capital amount of the employee's mortgage actually outstanding as of the date that the allowance is applied for, or the maximum capital amount eligible for a subsidy as determined by the Bank, whichever is less. Currently, the maximum eligible amount is £130,000 for a

[2] The Staff Handbook must have intended to say "mortgagee".

professional-level employee, and £90,000 for a support-level employee (5.6.5).

Historical background to the allowances

25. The present allowances evolved over a period of time as a result of high level policy discussions and decisions and cannot be fully understood in isolation from their history. Moreover, both parties referred to and relied upon the historical development in support of their respective cases. This development is conveniently divided into three phases: 1991-96; 1998, and 2003.

1991-1996

26. The education allowance has always been a feature of employment at the Bank and was included in the original 1991 edition of the Staff Handbook. From the outset it was restricted to non-UK nationals who did not have a permanent residence in the UK prior to appointment. That remained the essential eligibility requirement through all subsequent editions of the Handbook.

27. Similarly the accommodation allowance, which was previously called a rental allowance, has in one form or another always existed. The 1991 Handbook provided a rental allowance for those who were not permanently resident in the UK immediately prior to their employment. Originally it was available for a period of up to 5 years. However, the Bank became concerned about the retention of employees as the allowance tailed off.

28. That concern was built into the terms of reference of a consultancy report prepared in January 1994 by external consultants, Employment Conditions Abroad Ltd ("ECA"). Following the ECA report, the 1996 Handbook extended the period over which rental allowance was payable to 11 years and made it available for the purchase as well as the renting of property.

The 1998 review

29. In April 1998 a document entitled *Accommodation and Education Allowance Policies* was produced. It had three

authors: Mr F, Mr B, and Mr N. Its purpose was to persuade the Respondent's Budgets and Administrative Affairs Committee ("BAAC") to make various changes, including a 27% increase in the rental allowance and an even bigger proportionate increase in the mortgage subsidy of 44-50%. As regards the education allowance, it proposed to increase the allowance and, more controversially, to extend it to all professional staff.

30. The document's rationale for extending the education allowance to all professional staff was put in the following terms.

> **An issue which is frequently brought to the attention of Bank management is the lack of internal parity in terms of eligibility for education allowance. Locally recruited professionals - irrespective of whether they are UK employees or non-UK employees - are ineligible to receive this benefit. Currently, seventy-three professional staff with children of school age are excluded from claiming the benefit on this ground.**
>
> **The justification usually given for paying this allowance is that it helps overcome the reluctance which non-UK nationals who have children of school age, or pre-school children who will soon be entering the school system, might otherwise feel about coming with their families to work in London. Had they remained in their home countries the children would normally have been educated in their national school system, with teaching in their national language and with a curriculum oriented towards their own national universities. In most European countries, in particular, the schooling would very likely have been provided at a reasonably high level by the state, substantially free of charge. By offering to cover up to 70% of the costs of educating these expatriated children, the Bank is making it easier for the parents, if they wish, to exercise one of three options with respect to their children:**
>
> 1. **to send them back to the home country to be educated there, if their age and maturity and other circumstances make this feasible (this applies to 16% of claimants);**
>
> 2. **to pay for a place at a private school in this country with a curriculum similar to that of the**

home country, such as the French, German or American schools (38% of claimants); or

3. **to send them to an English private school offering education of a quality and type which they judge to be suitable for the child's needs (46% of claimants). The free British state system, is, of course, also open to the children of expatriate employees, though this option is rarely selected.**

It is the fact that the majority of expatriate employees claiming the education allowance have chosen to exercise the third of these options that gives rise to most of the questions raised by UK employees and others about the fairness of the Bank's policy. It suggests that these expatriate employees have no special concern about having their children educated in the British system, in English, but that their primary concern is to give their children the best quality of education they can afford. This, of course, is also the primary concern of the UK employees, and in the context of the UK it has traditionally been addressed by sending the children, where possible, to a private school in preference to a state school. This issue of disparity between the benefits afforded to our employees was recently raised in the BAAC when a number of Board members expressed some concerns, and asked for an opportunity to discuss the matter further.

It is considered, therefore, as a matter of principle, that eligibility for the education allowance should be extended to all professional staff. Such a change would demonstrate the Bank's recognition of the importance attached by all parents to get the best education they can for their children, remove a sense of unfair and unwarranted discrimination that is currently felt about its current policy, and strengthen the morale and commitment of the UK professional staff. To do so would not infringe upon the basic justification for the Bank - and for other similar institutions - to provide an education benefit which arises, in essence from its obligation to maintain a wide range of nationalities on its staff and a consideration of what inducements are needed to achieve that aim.

It is estimated that the additional annual cost of extending this benefit would be approximately £260,000.

31. While BAAC accepted the other proposals, it rejected the extension of the education allowance to all professional staff. According to the BAAC minute of its meeting on 30 April 1998, "some Committee members could not agree to endorse an extension of the educational allowances to locally engaged staff. They explained that they were concerned with the precedent that this might set as other IFIs[3] did not extend such benefits".

The 2002-03 review

32. The next major event was the revision of the Handbook approved by Excom in April 2003. Excom's decision was preceded by a comprehensive review undertaken in 2002-03 by the Human Resources Department and the Office of the General Counsel ("OGC") of the eligibility criteria for allowances, including the education and accommodation allowances. This review, in which the Appellant participated, involved a series of meetings and resulted in a number of documents. The more noteworthy ones are outlined in the following paragraphs.

33. An email dated 27 November 2002 from OGC expressed concern about the Respondent's potential exposure to claims for discrimination on grounds of nationality. A memorandum dated 2 December 2002 also from OGC reiterated that concern. In addition, it listed the amendments to the eligibility criteria for the various allowances through successive revisions of the Staff Handbook from 1991 to 2001.

34. A memorandum dated 6 December 2002 from the Appellant complained that expatriate benefits discriminated against UK nationals and could not be justified in view of their allegedly disproportionate duration and value.

35. In response a memorandum dated 28 January 2003 from Mr F explained the Bank's rationale for preserving the overall scheme of expatriate benefits. He acknowledged that the scheme differentiated between locally recruited staff and

[3] "IFI" is the abbreviation for international financial institution.

internationally recruited staff, and between internationally recruited staff who are nationals of their duty station and those who are not nationals of their duty station. The Bank's position was that it could differentiate between different groups of staff if the differential treatment was justified by valid objectives and was broadly proportionate to those objectives.

36. The memorandum referred to the various amendments to the scheme that were likely to be made as a result of the on-going review. It suggested that the scheme could be amended so that non-UK nationals, who subsequently acquired UK nationality, might be entitled to receive education allowance only for children who were already attending schools at the time of naturalisation. In the event that proposed restriction was not put before Excom.

37. By memorandum dated 20 March 2003 the Appellant stated that he still disagreed but set out how he thought the education and accommodation allowances should be scaled down. He suggested that they should be available for a period of up to three years, and that the accommodation allowance should be restricted to renting rather than purchasing.

38. A memorandum dated 27 March 2003 from OGC to ExCom highlighted the important substantive revisions to the Handbook that ExCom were expressly invited to consider and approve. The relevant amendments to eligibility criteria were explained in the following terms: "The eligibility criteria for certain allowances have been revised, so that the entitlement to relocation allowance, accommodation allowance and resettlement allowance is based on the notion of the employee's main residence at the time of his or her appointment rather than nationality…The revision to the eligibility criteria is intended to prevent the Bank being exposed to possible claims of discrimination on the grounds of nationality".

39. The 2003 Handbook approved by Excom contained three important amendments to the eligibility criteria for the education and accommodation allowances. First, the main residence requirement was added to the other conditions for claiming accommodation allowance. Second, eligibility to education allowance was confined to those who were not UK nationals <u>at the time of their recruitment</u>. Third, 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.

Statistical evidence

40. The parties' arguments in this case were in part based on figures demonstrating the take up and value of the education and accommodation allowances as between UK and non-UK nationals. For its part, the Tribunal considers that a rational decision in a case such as this must be underpinned by the relevant statistics.

41. Only professional staff are eligible for the education and accommodation allowances. The Tribunal was provided with a table giving the number of professional staff by nationality as at 30 June 2003. Excluding Board members and certain other categories, there were 643 professional staff. Of these 167 (26%) were UK nationals and 476 were non-UK nationals (74%). The largest non-UK national contingents in descending order came from the USA (49 - 7.6%), Russia (43 – 6.7%), France (40 – 6.2%), Germany (30 – 4.7%), Italy (26 – 4%), Canada (24 – 3.7%), Australia (17 – 2.6%), Ireland (17 – 2.6%), Poland (15 – 2.3%) Japan (13 – 2%), and the Netherlands (13 – 2%).

42. The Tribunal requested and received additional statistics showing the take-up of the relevant allowances, the average length of service of professional staff, and the costs of providing the allowances. These statistics were then re-worked by the Tribunal.

43. As at 3 November 2003 there were 647 professional staff who were London headquarters-contracted, of whom 173 were UK nationals and 474 were non-UK nationals. The professional staff in receipt of the relevant allowances on 3 November 2003 were as follows:

    (1) Education allowance: 92 recipients of whom 91 were non-UK nationals and 1 was a UK national.

    (2) Accommodation allowance: 267 recipients, of whom 262 were non-UK nationals and 5 were UK nationals.

    (3) Mortgage subsidy: 274 recipients, of whom 131 were non-UK nationals and 143 were UK nationals.

44. The expenditure by number of professional staff and the average amount received per claimant for each allowance from 2001 to 2003 are set out in the following table:

Accommodation allowance

	Actual expenditure	No. of Staff	Average Per Claimant
	£		£
2001	3,682,697	238	15,474
2002	3,913,190	255	15,346
2003 (with last two months extrapolated)	3,584,432	271	13,227

Education allowance

	Actual expenditure	No. of Staff	Average Per Claimant
	£		£
2001	923,359	113	8,171
2002	900,804	124	7,265
2003 (with last two months extrapolated)	1,081,993	135	8.015

Mortgage subsidy

	Actual expenditure	No. of Staff	Average Per Claimant
	£		£
2001	1,852,154	244	7,590
2002	1,322,352	262	5,047
2003 (with last two months extrapolated)	1,274,154	280	4,551

45. One of the factors accounting for the actual take-up of and expenditure on the relevant allowances is the length of service

of professional staff. Information on average length of service of professional staff was provided in two ways. First, during the last two years (1.11.01 - 31.10.03), the average service length of professional staff with UK nationality who left the Bank's employment was 6.3 years, and the corresponding figure for professionals with non-UK nationality was 5.4 years. Second, as at the beginning of November 2003 the average service length of professional staff in post was 6.3 years for UK nationals and 5.8 years for non-UK nationals.

46. As can be seen from the summary analysis in section 1.1 of the statistical appendix, the average education allowance paid per recipient in 2003 ranged between £6,700 and £8,000. The average number of children per recipient was 1.79, of whom 83.4% were in primary/secondary education, and 16.6% were in post-secondary education. Had each recipient claimed the maximum allowance, on an average number of 1.79 children, the average amount per recipient would have been £10,000 per annum. Based on current average length of service of 5.8 years, the expected average payment of education allowance ranged from £38,870 to £46,000. For a recipient who remained in employment for 21 years, the expected average payment of education allowance ranged from £140,740 to £168,000.

47. These figures based on actuals for recipients in 2003 contrasted with the theoretical maxima suggested by the Appellant. He based his claim on three children. He calculated that over a 21 year period a recipient with three children would receive education allowance of £325,500. The Appellant made four assumptions that tended to inflate this figure: he assumed that maximum value would be claimed; that the three children were all of the same age; that the recipient commenced employment with the Bank at the precise moment at which the children became eligible for education allowance; and that the recipient would stay in employment for 21 years.

48. The summary analysis in section 2.1 of the statistical appendix, shows that in 2003 accommodation allowance was received by 55.3% of non-UK nationals and 2.9 % of UK nationals. Assuming the two groups – UK and non-UK nationals are comparable – it is clear that the eligibility conditions for claiming accommodation allowance have a disparate impact on UK nationals.

49. As regards the amount of accommodation allowance, the summary in section 2.2 of the statistical appendix shows that in 2003 the average per recipient was £13,227. In the same year the average mortgage subsidy per recipient was £4,551.

50. It is to be noted that mortgage subsidy per recipient decreased in 2002 and 2003, which in part reflected low interest rates. It is also to be noted that whereas 82.7% of UK nationals were recipients of mortgage subsidy in 2003, 27.6 % of non-UK nationals were also in receipt. The latter group typically start by receiving accommodation allowance but move over to mortgage subsidy when accommodation allowance begins to reduce to the point where it is worth less than mortgage subsidy. When that point occurs depends in part on the level of interest rates, which in turn affects the value of the mortgage subsidy.

51. The summary figures in section 2.3 of the appendix project accommodation allowance and mortgage subsidy over a period of 6 years, which broadly approximates to the current average length of service, and over a period of 21 years. The figures show that over time the gap in value between the two benefits progressively narrows.

Applicable law[4]

52. According to section 4.03 of the GAP, the Administrative Tribunal is to base its decisions on the staff member's contract of employment, the internal law of the Bank, and the generally recognised principles of international administrative law. By virtue of section 4.04(c) of the GAP, a challenge to a regulatory decision may be upheld only if it is contrary to the contract of employment, the internal law of the Bank, or the generally recognised principles of international administrative law.

Contract of employment and internal law of the Bank

53. As regards the contract of employment and the internal law of the Bank, the following provisions are relevant:

    (1) According to the Agreement Establishing the EBRD, Article 30.5, "in appointing officers and staff [the

[4] The Tribunal acknowledges the assistance derived from the Appellant's and Respondent's submissions on the applicable law, in respect of which there was a degree of common ground between the parties.

President] shall, subject to the paramount enforcement of efficiency and technical competence, pay due regard to recruitment on a wide geographical basis among members of the Bank".

(2) The Staff Regulations, which were adopted by the Board of Directors at its inaugural meeting in 1991, embody the "fundamental conditions of service, namely the duty and obligations of the Bank and of staff members" (section 1(b)).

(3) By virtue of section 3 of the Staff Regulations, the Bank is at all times to "act with fairness and impartiality in its relations with staff members".

(4) According to section 5(a) of the Staff Regulations, in recruiting staff the Bank is to "seek to attract staff members of the highest calibre appropriate to job requirements under employment terms and conditions that are responsive both to the Bank's purposes and functions. To that end the Bank shall (a) give paramount importance to securing the highest standards of professionalism, efficiency and technical competence in appointing staff members and, within that parameter, pay due regard to the importance of recruiting staff on a wide geographic basis amongst country members of the Bank…citizens of all member countries shall be considered for employment, promotion, and assignment without unjustified discrimination".

(5) According to paragraph 1.1.1 of the Staff Handbook, candidates for posts "must be persons of discretion and integrity, who meet high standards of professionalism, efficiency, and technical competence. Subject to these paramount criteria being met, the aim of the Bank is to recruit staff on a wide geographical basis from its member countries, without discrimination on grounds of gender, race or religious belief".

Generally recognised principles of international administrative law

54. The jurisprudence developed by the administrative tribunals of international organisations is a prime source for the general principles of international administrative law. This does not mean that one administrative tribunal is bound to follow the approach let alone the particular decision of another tribunal. On the other hand, it does mean that the reasoning of other administrative tribunals is persuasive.

55. The rule against unjustified discrimination embodied in section 5(a) of the Staff Regulations reflects a well established principle of international administrative law as accepted in the decided cases of administrative tribunals.[5] In this connection the case of *Mr R v IMF*[6] is particularly helpful because the IMF Administrative Tribunal ("IMFAT") undertook a comprehensive review of the jurisprudence concerning discrimination and, in the process, confirmed a number of important principles that constitute the relevant generally recognised principles of international administrative law. The key points were as follows:

(1) It is a "well established principle of international administrative law that the rule of non-discrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organisation".[7]

(2) An administrative tribunal may not substitute its own judgment for that of the management of the international organisation.[8] That necessarily means that the organisation retains a broad discretion to formulate and apply its own preferred policies.

(3) Discrimination may arise either through express differentiation between two categories of staff, or through a policy neutral on its face that involves a consequential differentiation,[9] that is, discrimination may be direct or indirect.

(4) Non-discrimination only applies as between staff who are in the same position in fact or in law.[10]

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[5] For an overall summary, see C F Amersinghe *Principles of the Institutional Law of International Organisations* Cambridge University Press, pp 340-341, 346-350, 356-357.
[6] IMFAT (2002-1)
[7] IMFAT (2002-1), para 30.
[8] Citing *Lindsey v Asian Development Bank* AsDBAT (1992-1); *D'Aoust v IMF* IMFAT (1996-1).
[9] IMFAT (2002-1) para 36.
[10] IMFAT (2002-1) para 39, citing *In re Vollering* ILOAT(1992-No 1194). A broadly similar principle applies in respect of national and European provisions dealing with discrimination and equal pay. It also applies to Article 14 of the European Convention of Human Rights: *Carson v Secretary of State for Work and Pensions* [2003] EWCA Civ 797 and *Purja v Ministry of Defence* [2003] EWCA Civ 1345.

(5) The principle of non-discrimination is a qualified principle: a difference in treatment is contrary to international administrative law only if it cannot be justified. Thus in the *de Merode* case the World Bank Administrative Tribunal stated that, in making legislative amendments to terms and conditions of employment, the World Bank "must not discriminate in an unjustifiable manner between individuals or groups within the staff".[11]

56. In the *Mr R* case the question was whether the IMF discriminated against an overseas office director in denying him the overseas assignment and housing allowances afforded to a category of staff called resident representatives. After its comprehensive review of the authorities, the IMFAT formulated the test that it would apply in terms of three questions:[12]

(1) The IMF's reasons for the distinction in benefits had to be supported by evidence, that is, the administrative tribunal was entitled to ask whether the decision could have been taken on the basis of facts accurately gathered and properly weighed.

(2) There had to be a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification. That involved a consideration of the stated reasons for the different benefits and an assessment of whether their allocation to the two categories of staff was rationally related to their purposes.

(3) If the *De Armas* case (on which see below) was to be followed, the third question was whether the differential treatment was not only reasonably related to the greater disadvantages suffered by the group in receipt of the enhanced benefits but also whether the benefits were proportionate to those disadvantages, or whether the disparity could be justified by some other valid distinction between the two categories of staff.

57. The IMFAT's review of the authorities thus included the decision of the Asian Development Bank Administrative Tribunal ("AsDBAT") in *De Armas v Asian Development Bank.*[13] This decision merits separate consideration since it is

[11] *de Merode v World Bank* WBAT (1981-1) para 47.
[12] IMFAT (2002-1), para 47.
[13] AsDBAT (1998-39).

particularly relevant to the present case – indeed the Respondent argued that it was indistinguishable from it.

58. *De Armas* dealt with the situation of employees of an international organisation who challenged the application of different benefits to different categories of staff. In particular, a group of home-based Filipino staff members alleged that they had been discriminated against by the Asian Development Bank ("AsDB") with respect to four employment benefits: education grant, home leave travel, *force majeure* insurance protection, and severance pay. The AsDBAT considered that it had to look closely at the policies and practices that the organisation relied upon to justify the differential treatment. Its general approach was set out in the following passage:[14]

> **The Applicants contend that the refusal of the four benefits...constitutes discrimination against the Filipino professional staff. However, the Tribunal finds that those benefits depend not on the nationality of a staff member but on the place where he serves. An expatriate staff member, that is, one who serves outside his home country, is subject to some obvious disadvantages vis a vis a colleague who serves in his home country. On principle the grant of compensatory benefits to the former does not constitute discrimination if such benefits are reasonably related and proportionate to those disadvantages...The Tribunal will therefore examine the disputed benefits in that light: whether the "expatriate benefits" are reasonable compensation for the disadvantages which expatriates experience, particularly because of the need to attract and retain staff with the highest standards of efficiency and competence...**

59. The AsDBAT also made an important point concerning comparisons between international organisations and their variable degree of generosity in determining expatriate benefits:[15]

> **In the absence of a completely uniform practice, in regard to any particular benefit, by all organisations, it is inevitable that one organisation will be the most generous, and another the least generous. But that by**

[14] AsDBAT (1998-39), paras 33-34.
[15] AsDBAT (1998-39), para 39.

itself is not proof of unreasonableness, perversity, or discrimination on the part of either. Further, the benefits reasonably necessary to attract staff with the highest standards of efficiency and technical competence, may differ from place to place.

60. Finally, and specifically in respect of the education grant, the AsDBAT considered that the disadvantages experienced by expatriates were not purely financial. They included non-pecuniary disadvantages, notably, "the separation of the child from his parents in the case of home country education, and the weakening of other family, social and cultural links in the case of duty station education."[16]

Summary of the Appellant's main arguments

61. According to the Appellant, the Respondent could not successfully argue that there was no need for it to justify the differential treatment of expatriates and non-expatriates on the basis that the circumstances of the two groups were not sufficiently similar. Both groups constituted professional staff who did the same kind of jobs, worked side by side in the same headquarters building, had the same need to live in London, which was expensive, and had the same need to educate their children, if any.

62. The Appellant submitted that the explicit non-UK nationality qualifying condition for the education allowance directly discriminated against him and other non-UK nationals. While it was true that the Human Resources Director might now exceptionally exercise his discretion to award the education allowance to a UK national, only non-UK nationals had a right to the allowance. He submitted further that the accommodation allowance indirectly discriminated against him because a much smaller proportion of UK nationals were able to satisfy the eligibility criteria compared with non-UK nationals.

63. As part of its argument on justification, the Respondent relied on the practice of other IFIs, principally the IMF, the World Bank, and the AsDB. The Appellant submitted that this reliance was misplaced because:

[16] AsDBAT (1998-39), para 46.

(1) The other IFIs offered expatriate benefits that were not as excessive as those of the EBRD, for example, the education allowance in the IMF was withdrawn if the recipient became a citizen of the duty station country, whereas in the EBRD naturalisation did not affect entitlement to education allowance. The AsDB offered housing assistance irrespective of expatriate status, and the IMF did not offer an accommodation allowance. The World Bank's mobility allowance, which compensated among other things for the cost of education, only lasted for 10 years, tapered off after year 4, and was withdrawn if the recipient took out US nationality.

(2) European bodies such as the ECB, the EIB and the EU were equally or more comparable to the Respondent. They offered education allowances to all staff irrespective of nationality. The EIB offered an accommodation allowance for staff recruited from abroad but without any express nationality requirement. The ECB and the EU did not offer accommodation allowance as such.

64. The purported justification for the education allowance did not stand up to scrutiny. In practice, it was not used by most recipients to keep their children in touch with the home country, or to send them to foreign nationality schools in London. Indeed, for the majority of nationalities no appropriate national school existed in the UK. As the 1998 report to BAAC demonstrated, the largest single group of recipients sent their children to English private schools.

65. The lack of justification for confining the education allowance to non-UK nationals had been recognised in 1998 by the Human Resources Director and the Vice President, Human Resources and Administration, who had recommended that it should be extended to all staff. Their report referred to discrimination.

66. The fact that the education allowance was still paid to those who later took out UK nationality underlined its lack of justification. Such payment was currently made, despite Mr F's assurance in his letter dated 28 January 2003 to the Appellant that the entitlement of recipients who subsequently took out UK nationality would be restricted. As far as the Appellant was concerned, the classic example of the recipient who took out UK nationality was that of an East European who

would obtain a UK passport in order to be able to take up other employment in the UK or, more widely, in the EC.

67. The purported justification for the accommodation allowance did not stand up either. If expatriates merited compensation for high rental and property prices in London, home recruited staff had a similar housing experience and also had to live within a reasonable commuting distance from headquarters. Similarly, if the accommodation requirements of expatriate staff increased with the number of children, so did those of non-expatriate staff. Yet in 2001 the Respondent had increased the accommodation allowance, while not increasing the mortgage subsidy, which exacerbated the impact of the discrimination.

68. The duration and value of the EBRD's benefits were, in the Appellant's submission, excessive. While the Appellant accepted that 5.8 years was the current average length of service, the Bank had only existed since 1991 and it was clear that many expatriates were long-term employees. In the case of the education allowance, an employee might spend their entire career at the Bank and yet, depending on when dependent children were born, receive the education allowance throughout from commencement of employment to retirement. Although accommodation allowance tailed off, it could still last for a decade before the employee moved over to the mortgage subsidy. If one took the value of education allowance over 21 years and the value of accommodation allowance over 11 years, assuming 3 children, it could produce an expatriate net pay advantage over an employee of UK nationality, such as the Appellant, of in excess of £500,000. If the expatriate employee used the accommodation allowance to purchase rather than rent, the net benefit would be boosted by the appreciation of the capital asset. In addition, the expatriate might also be in receipt of rent from a property in the home country.

69. In summary, the Appellant contended that the Respondent's differentiation between expatriate and non-expatriate benefits in respect of education and accommodation bore no rational or proportionate relationship to the Respondent's policy objectives of recruiting and retaining expatriate staff. In that connection, it was noteworthy that on the most recent figures the Bank already employed many non-UK professional employees who for one reason or another were not eligible for accommodation allowance.

70. The only type of differential treatment that could in principle be objectively justified was the reimbursement of reasonable expenses arising from relocation during a period of assignment, irrespective of nationality, including the payment of an education allowance to those expatriates (a minority) who actually sent their children to an appropriate school following a home country curriculum. If on the other hand the allowances in question could be justified in terms of the need to recruit and retain high quality expatriate staff, there was an equal need to recruit and retain high quality non-expatriate staff.

71. The Respondent's strong reliance on *De Armas* in respect of the education allowance was misplaced. Whether there was discrimination in a particular case was a question of fact and the *De Armas* decision concerning the AsDB's education grant depended on its own facts.

Summary of the Respondent's main arguments

72. The Respondent submitted that the defence of justification was unnecessary in this case since the expatriate employees to whom the Appellant sought to compare himself were in a wholly different position from him and other non-expatriate employees. In the language of one of the leading UK decisions on the European Convention of Human Rights, this was not a case where the circumstances of the claimant (Y) and his proposed comparator (X) were "so similar as to call, in the mind of a fair minded and rational person, for a positive justification for the less favourable treatment of Y in comparison with X".[17]

73. Alternatively, if justification was required, the Respondent's starting point was that the EBRD was an international organisation constituted by states and other entities by means of a multilateral treaty, and which possessed a mandate from its member states to further the will of the international community. This was reflected in the Agreement Establishing the EBRD. According to Article 30.5 of that Agreement, the Bank "shall, subject to the paramount enforcement of efficiency and technical competence, pay due regard to recruitment on a wide geographical basis among members of the Bank". It was also reflected in the Staff Regulations, especially section 5(a), which provided that the Bank's recruitment policy would seek to recruit the most able, and subject to that, would "pay due

[17] *Carson v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, para 61 (per Laws LJ).

regard to the importance of recruiting staff on a wide geographic basis amongst country members of the Bank".

74. Consistently with the founding Agreement and the Staff Regulations, the general justification for expatriate benefits was that they eased the expatriate's burden of leaving a main residence outside of the UK, thereby assisting the Respondent in recruiting professional staff on a suitably wide geographical basis. At present 26% of professional staff were UK nationals. If the expatriate benefits were extended to them, the likely effect over time would be to further increase that proportion and to lower the proportion of non-UK nationals employed by the Bank. That would make it more difficult for the Respondent to carry out its legal obligation to have due regard to the importance of recruiting on a wide geographic basis amongst country members of the Bank.

75. The Respondent submitted that the retention of expatriate staff was as important as recruitment in terms of meeting the obligation of the founding Agreement. Without expatriate benefits, the Bank would be less able to retain the services of expatriate staff, which would negate the aim of recruiting on a wide geographical basis. There was empirical evidence to support this proposition. In 1994 the ECA found that the abrupt withdrawal of the accommodation allowance after three or four years would increase turnover of expatriate staff.

76. The education allowance was designed to assist the Respondent in recruiting and retaining expatriates and was broadly proportional to that objective. It enabled internationally recruited staff to send their children home for their education, or to international schools in London, or to suitable fee-paying schools, including those following an international curriculum, given that UK state schools did not generally cater adequately for the needs of expatriate children. The Respondent recognised that the justification for the education allowance, in contrast to that of the accommodation allowance, did not diminish over time. However, proportionality was achieved by the Bank contributing not all but between 65 and 75% of costs against invoices and the cap of £6000 per child in school per year or £3500 per child in university.

77. As regards the 1998 report recommending the extension of the education allowance to all professional staff, the Respondent submitted that the BAAC had reasonably rejected the proposal.

Its decision was made not simply because of the precedent in relation to other IFIs, as recorded in the minutes, but also because it was felt to be unreasonable to expect the international community to compensate UK nationals for the alleged shortcomings of the UK state education system. Those shortcomings were not experienced by UK personnel because of recruitment by the Bank but were there in any event. The Respondent emphasised that the 1998 report referred to a sense of discrimination and did not suggest that there had been actual discrimination.

78. The accommodation allowance was also designed to achieve the same valid objective and was proportional to that objective. It allowed eligible staff to live in and around London where residential property was notoriously expensive. The amount of the allowance mirrored the reality that the more children the expatriate had, the greater the size and therefore the cost of the required accommodation. The fact that the allowance was available for purchasing as well as renting property made it a more valuable tool for the Respondent in encouraging expatriate staff to stay longer, without involving any additional cost to the Respondent. On the other hand, the phasing out from year 5 to 11 was consistent with the principle of proportionality.

79. Other comparable international organisations adopted a similar policy. Thus the IMF and the AsDB provided an education allowance to expatriates only, and the World Bank now had a mobility premium covering all aspects of expatriation. EU institutions, the ECB and the EIB were less comparable to the Respondent, not least because of the provision by the EU of separate national-based schools in the relevant cities.

80. The Respondent relied on the decision of the AsDBAT in *De Armas*, which it considered to be indistinguishable from the present case. First, the AsDBAT analysed the object and effect of the disputed benefits in terms of expatriation, that is, serving in a country in which the employee was not a national. According to the Respondent, the present case concerned expatriation in that sense. Second, the AsDBAT fully recognised the disadvantages of expatriate employment and the corresponding justification of compensating for these disadvantages, including the non-pecuniary disadvantages. Third, with only one minor exception, the AsDB's whole scheme of education grant was upheld as being reasonable and proportionate.

Tribunal's conclusions on liability

Differentiation on grounds of nationality

81. The first question is whether the Respondent has differentiated on grounds of nationality between the Appellant and the expatriate professional staff who are eligible for the education and accommodation allowances. Such differentiation may occur either expressly or through a policy that is nationality-neutral on its face but nevertheless involves a consequential differentiation.

82. As regards the education allowance, the Appellant claims that the Respondent has directly treated him differently and less favourably than the expatriate comparators because of his nationality. The eligibility criteria for the education allowance expressly restrict entitlement to those who are not UK nationals at the time of their recruitment, and who relocate to the UK to take up their appointments. In view of these express provisions it is quite obvious that the Respondent has on the face of it differentiated on grounds of nationality between the Appellant, a UK national, and his comparators. Furthermore, this nationality-based differentiation is unaffected by the exceptional discretion vested in the Human Resources Director to allow the benefit of the education allowance to be paid to a UK national who, at the time of recruitment, has a main residence outside of the UK. In respect of entitlement, as opposed to being the beneficiary of a possible exercise of an exceptional discretion, there is differential treatment expressly based on nationality.

83. As regards the accommodation allowance, the Appellant claims that the Respondent has by virtue of his nationality indirectly treated him differently and less favourably than the expatriate comparators. In order to be eligible for the accommodation allowance professional staff have to satisfy three criteria: (1) they relocate to the UK in order to take up the appointment; (2) at the time of appointment they have their main residence outside the UK; and (3) neither they nor their spouses or domestic partners own residential property within reasonable commuting distance of the Respondent's headquarters. The Appellant maintains that these conditions are far more likely to be satisfied by non-UK nationals than by UK nationals. His claim is, in fact, borne out by the statistical evidence. As noted at paragraph 48 above, in 2003 accommodation

allowance was received by 55.3% of non-UK nationals and only 2.9% of UK nationals. It is thus clear that the eligibility criteria for claiming accommodation allowance have a disparate impact on UK nationals.[18] Although the eligibility criteria for accommodation allowance are nationality-neutral on their face in that they do not expressly require non-UK nationality, the Tribunal nevertheless concludes that they involve a consequential differentiation or indirect discrimination among staff according to their nationality.

Degree of similarity of circumstances

84. The second question is whether the Appellant compares himself with those whose circumstances are so similar to his as to require the Respondent to justify the differential treatment. On the Appellant's case there is an overall pool of all professional employees, which the Tribunal takes to mean all professional employees covered by the Staff Handbook that sets out among other things the education and accommodation allowances. The overall pool is then divided into two separate pools for comparative analysis, namely, the professional employees who are entitled to the education and accommodation allowances under the eligibility criteria set out in the Staff Handbook, and those who are not so entitled.

85. The circumstances of the expatriate and eligible comparators are by definition not identical to those of the Appellant, notably because they physically relocated to another country in order to take up their posts, which the Appellant did not have to do. However, the expatriate and eligible comparators have the following circumstances in common with the Appellant: as professional staff they perform the same type and level of work as the Appellant; they have the same career and line management structures within the Respondent's organisation; they are London headquarters-contracted and are thereby covered by the Staff Handbook, which only applies to London headquarters-contracted staff; they live in or around London; and they are subject to the same London-based cost of living regime. Accordingly the Tribunal concludes that the circumstances of the comparators are sufficiently similar to those of the Appellant as to require the Respondent to justify the differential treatment.

[18] It is of course acknowledged by the Tribunal that the criteria would also have an obvious differential effect, irrespective of nationality, on those professional employees who do not relocate in order to take up their appointments.

Justification: general

86. The third question is whether the Respondent is able to justify the differential treatment. As regards the education allowance, it might be thought that there is an initial issue of the extent to which express (or direct) differentiation, as opposed to consequential or indirect differentiation, can in principle be justified. This is a controversial issue in EC law. However, European law is not to be equated with the generally recognised principles of international administrative law, and at the hearing the representatives of both parties accepted that, in the context of an international organisation, it might in principle be possible to justify express or direct differentiation in the treatment of staff. The Tribunal confirms that under its understanding of international administrative law express differentiation is amenable to justification.

87. The Respondent offers the same general justification in respect of both allowances. It has three elements. First, the Respondent is under a legal obligation under the Bank's founding Agreement to have due regard to the importance of recruiting the best staff on a wide geographical basis among country members of the Bank. Second, in order to fulfil that obligation, there is a need to recruit and retain expatriate staff. Third, expatriate staff experience the disruption of their own and their families' lives by moving to the expensive location of London, which merits compensation.

88. The Tribunal entirely accepts the validity of the Respondent's general justification. However, that is only the starting point of the analysis. In the light of the generally recognised principles of international administrative law, the Tribunal must go further and examine whether the allowances, especially the eligibility criteria, are rationally related to their purpose and whether they are proportionate to the disadvantages experienced by the expatriates and thus to the achievement of the purpose.

Justification: accommodation allowance

89. Dealing with the accommodation allowance first, the Tribunal has regard to the following considerations:

    (1) In 2003 the average amount of accommodation allowance per recipient was about £13,000 and the average mortgage subsidy was about £4,500 (paragraph 49

above). The statistical evidence also suggests that in relation to long service employees the gap in value between accommodation allowance and mortgage subsidy progressively narrows (paragraph 51 above).

(2) The availability of the allowance for purchasing as well as renting is related to the aim of recruiting and retaining expatriate staff.

(3) The ECA Report of 1994 showed that the abrupt termination of the accommodation allowance would frustrate the aim of recruiting and certainly retaining expatriate staff. The gradual phasing down of the allowance from years 4 to 11 and then the possibility of moving over to the mortgage subsidy, which is available to both expatriate and non-expatriate staff satisfying the criteria, are indicative of proportionality.

(4) In the Tribunal's view the amount and the conditions attaching to the accommodation allowance do not break the connection with the overall aim of recruiting and retaining expatriates, and do not render the allowance disproportionate in relation to the disadvantages experienced by expatriates.

90. In the light of these considerations the Tribunal concludes that the eligibility criteria and other substantive provisions governing the accommodation allowance contained in the Staff Handbook are reasonably related to the aim of recruiting and retaining expatriate staff and are proportionate to the disadvantages experienced by expatriates and thus to the achievement of the aim. It follows that the Respondent's denial of the accommodation allowance to the Appellant amounts to a justified difference in treatment of him compared with staff who are eligible to receive the allowance. By the same token the Respondent has not unjustifiably discriminated against the Appellant on grounds of nationality by denying him the allowance.

Justification: education allowance

91. Dealing with the education allowance, the Tribunal notes the following considerations:

(1) In 2003 the average payment per recipient for an average 1.79 children ranged from £6,700 to £8,000, and based on current average length of service of 5.8 years, the

expected average payment of education allowance ranged from nearly £39,000 to £46,000 (paragraph 46 above). Obviously, the allowance may go on being paid for longer periods, although the statistical evidence suggests that the Appellant made a number of assumptions, which are not necessarily valid, in calculating the theoretical maximum value of the education allowance over the longer term and, as a result, his calculations inflated its value (paragraphs 46-47 above).

(2) By virtue of the maximum amounts per child of currently £6,000 (primary/secondary) and £3,500 (post secondary), the education allowance does not necessarily cover the full cost of a child's education. In addition, the allowance is claimable against actual expenditure evidenced by receipts. Both these points are indicative of proportionality.

(3) The amount of the allowance, including the increases that take account of the number of dependent children, is quite generous but is not in the view of the Tribunal so excessive as to break the connection with the overall aim, or to render the benefit to expatriates disproportionate in relation to that aim.

(4) Following the general approach of *De Armas*, the Tribunal accepts that the disadvantages experienced by expatriates that may appropriately be compensated include non-pecuniary disadvantages, notably, the separation of the child from his parents in the case of home country education, and the weakening of other family, social and cultural links in the case of duty station education.

(5) The Appellant suggested that a non-discriminatory education allowance would be narrowly restricted to certain specified types of education, for example, education in a school in the UK pursuing the home country curriculum. The Tribunal rejects this approach for two reasons. First, it would be likely to lead to grievances and anomalies, for example, the parents who apply to such a UK school only to find that there are no vacancies would be aggrieved, as would parents from a country that has no national school in the UK. Second, it overlooks the need to compensate for the non-pecuniary disadvantages described above.

92. These considerations would suggest that the provisions in the Staff Handbook dealing with the education allowance are

reasonably related to the aim of recruiting and retaining expatriate staff and are broadly proportionate to the disadvantages experienced by expatriates. However, one further aspect of the education allowance has to be considered, namely, the continued payment of the allowance to recipients who become UK citizens. Clearly it would have been unnecessary to consider this issue if the education allowance was paid to all professional staff, irrespective of nationality, or if the only eligibility criterion was whether the professional employee had physically relocated to the UK in order to take up an appointment. The logical need to consider it results from the fact of the express requirement for non-UK nationality.

93. What then is the justification for continuing to pay the allowance to recipients who become UK nationals after recruitment? In addressing its mind to this issue, the Tribunal has considered the following:

(1) The education allowance is expressly restricted to professional staff who (a) are not UK nationals at the time of recruitment, and (b) relocate to the UK in order to take up their posts.

(2) At the hearing it was agreed by the parties that a number of professional staff have become UK citizens since being appointed, but there is no requirement to inform the Bank of this and it is not known how many have done so. It is also unknown how many of those who have become naturalised are in receipt of the education allowance, but it was agreed that those in receipt would remain entitled to receive the allowance.

(3) It might be said that continuing to pay the allowance is reasonably related to the retention of expatriate staff. The Tribunal does not accept this point. The Appellant gave the example of the employee from an East European country, who takes out UK nationality subsequent to being appointed, with a view to leaving the Respondent's employment in order to obtain other work in the UK or the EC. In that scenario, the loss of the education allowance on taking out UK nationality, assuming that was a clear consequence at the time of recruitment, might deter an individual from seeking UK nationality and thus from seeking employment outside of the Bank.

(4) By expressly specifying non-UK nationality as an eligibility requirement, the Respondent has chosen to focus on a particular personal characteristic of the

individual employee. The logic of continuing to pay the allowance to those who cease to have that characteristic by becoming UK nationals is questionable. This was recognised in Mr F's letter dated 28 January 2003 to the Appellant (paragraph 36 above). This letter suggested that "future naturalised staff members would no longer be entitled to standard education allowance. Instead naturalised individuals could claim education allowance only in respect of children who, at the time of naturalisation, already attend primary, secondary and post-secondary schools". This letter clearly acknowledged the problem and suggested a particular solution.[19] In the event the proposal was not put to Excom.

(5) As a result of the 2003 amendments, the focus on non-UK nationality is for the first time in the history of the allowance expressly restricted to a single point in time, that is, the moment of recruitment. However, the exclusive concentration on that snapshot in time does not make the eligibility requirement more reasonably related to the aim of recruiting and retaining expatriate staff.

(6) It might be said that it would be illogical not to continue to pay the allowance to those who become UK citizens since, as a result of the 2003 amendments, a UK national recruited at the time when the main residence is outside the UK now has the possibility of being awarded the benefit of the education allowance. The Tribunal does not accept this point. The central thrust of the Respondent's justification for the education allowance focuses on non-UK nationality, that is, it is supposed to assist recruitment and retention by compensating for the pecuniary and non-pecuniary disadvantages of sending a child back to the home country for education, or to a school in the UK that either follows the home curriculum or in some other way caters for the needs of a child of the parent who is not a UK national. This emphasis on non-UK nationality is underlined by the statistical evidence that in November 2003 there were 92 recipients of education allowance of whom only one was known by the Respondent to be a UK citizen (paragraph 43 above).[20] In any event, the possibility of the Human Resources Director exercising an exceptional discretion in favour of a UK national cannot be given the same weight as the non-UK national's right to the allowance, subject only to satisfying the eligibility criteria.

[19] It would no doubt be possible to devise various solutions that would safeguard the rights of existing staff.
[20] The circumstances of that single exception are by no means clear to the Tribunal.

(7) It is part of the Respondent's case on justification that the closest and most analogous international organisations to it are the IMF and the World Bank. The IMF has a nationality eligibility requirement for its education allowance, but it expressly provides for loss of benefit on the date that the staff member becomes a citizen of the duty station country or, subject to certain transitional exceptions, the staff member's application for permanent residence status in the duty station country is approved: IMF Manual, General Administrative Order No 21, paragraph 3.02. That provision was contained in a bundle of documents containing materials on the practice of other international organisations supplied to the Tribunal. The relevant provisions of the World Bank's mobility allowance, which covers education, were not set out in equivalent detail. However, it was clear from an extract from the World Bank's web site, which was reproduced in the bundle, that its mobility allowance is payable only to those who are not US nationals at the time of recruitment and who do not become US nationals "at any time after appointment". Thus, by continuing to pay the education allowance to those who become UK citizens, the Respondent is out of step with the IMF and the World Bank, the very organisations that it says are most closely comparable to it.

(8) The Respondent's general reliance on these comparators is underlined by the reason it put forward for rejecting the proposed extension of the education allowance to all professional staff in 1998. According to the BAAC minute of 30 April 1998, the proposed extension of the allowance could not be accepted because of the concern over "the precedent this might set as other IFIs did not extend such benefits" (paragraph 31 above). If the Respondent were to follow the example of the organisations it regards as its closest comparators, by restricting the entitlement of the education allowance in respect of recipients who become UK citizens, it might to that extent address what the 1998 report described as the "sense of unfair and unwarranted discrimination that is currently felt about" the education allowance policy (paragraph 30 above).

94. From this analysis the Tribunal concludes as follows. The payment of the education allowance, without restriction, to a recipient who becomes a UK citizen is the feature of the allowance that is not reasonably related to the policy of recruiting and retaining expatriate staff. Further, or in the

alternative, this feature gives the recipients a benefit that is not proportionate to the disadvantages flowing from expatriate status. Accordingly, the Tribunal holds that, by denying the allowance to the Appellant, the Respondent discriminated against him unjustifiably on grounds of nationality and in breach of international administrative law.

Tribunal's conclusion on remedy

95. The Respondent submitted that if the Tribunal found that either allowance was unlawfully discriminatory then sections 4.04(d) and 9.03(a) of the GAP would apply. These sections provide as follows:

> **The Tribunal shall not uphold an appeal by a staff member if it is established that the administrative decision complained of was required by, or in the case of a failure or refusal to act was prohibited by, a decision of the Board of Directors or the Board of Governors. A written statement signed by the Secretary General shall be conclusive evidence of the existence of a Board decision. In the case of doubt on the part of the Tribunal about the meaning and intent of the particular Board decision, the Tribunal shall rely on an expert opinion provided by the General Counsel (4.04(d)).**
>
> **If the Tribunal concludes that it cannot uphold any part or all of the appeal because this would be inconsistent with a decision of the Board of Directors or of the Board of Governors, but considers that the decision of the Board of Directors or the Board of Governors is or may be in breach of international administrative law, the Tribunal may request that its view and the reasons for it be brought to the attention of the Board of Directors. The President of the Bank shall comply with any such request (9.03(a)).**

96. The Respondent relied upon a statement from the Secretary General dated 10 October 2003 that was stated to be made pursuant to section 4.04(d) of the GAP. It listed the series of decisions made by the Board of Directors that had approved the payment of the education and accommodation allowances to expatriates, thereby effectively requiring the denial of them to the Appellant. The adoption on 3 April 2003 by the Respondent of the new edition of the Staff Handbook

continuing the Appellant's non-entitlement to the education allowance, which is the administrative decision complained of by the Appellant, was thus required by the decisions of the Board of Directors specified in the Secretary General's statement.

97. The Appellant submitted that a wide range of remedial orders was available to the Tribunal because the Secretary General's statement was not effective for the purposes of section 4.04(d) of the GAP. The statement did not, according to the Appellant, set out with sufficient particularity the decision or decisions that required continued discrimination against the Appellant.

98. After examining the Secretary General's statement, the Tribunal is persuaded by the Respondent's submission and it agrees with that submission that the Secretary General's statement is effective for the purposes of GAP section 4.04(d). The statement comprehensively specifies the decisions made by the Board of Directors that required the continued denial of the education allowance to the Appellant in April 2003. Since there is no doubt about that matter, there is no need to trouble General Counsel for an expert opinion.

99. It follows that the appeal cannot be upheld. However, for the reasons already explained, the Tribunal has formed the view that the denial of the education allowance to the Appellant is contrary to international administrative law. By the same token, the decisions of the Board of Directors requiring that denial are also contrary to international administrative law. A request will therefore be made to the President of the EBRD to bring the Tribunal's view and the reasons for it to the attention of the Board of Directors.

Professor Roy Lewis
President, Administrative Tribunal