

## **Recommendation in case OI/13/2014/JF on the European External Action Service's non-recognition of a third country court ruling: payment of compensation Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]**

Recommendation

**Case** OI/13/2014/JF - **Opened on** 16/09/2014 - **Recommendation on** 23/09/2016 - **Decision on** 19/06/2017 - **Institution concerned** European External Action Service |

*The complaint concerns the failure of the European External Action Service (EEAS) to waive its diplomatic immunity in relation to a staff dispute.*

*A local Court in Guinea-Bissau decided that the former EU security reform support mission in Guinea-Bissau should pay the complainant, who had worked for the mission, compensation for wrongful dismissal. However, after appeal, the mission was found to have diplomatic immunity. The Court's decision was therefore not enforced. The complainant then turned to the Ombudsman for help.*

*According to the EEAS, it waives immunity from court proceedings when asked by the competent authorities.*

*The Ombudsman finds that the mission had failed to set in motion the procedure for waiving immunity. The Ombudsman considers that using diplomatic immunity, without good reason, to avoid implementing a judgment, risks damaging the reputation of the EU.*

*The Ombudsman recommends that the EEAS pay the complainant fair compensation equivalent, at least, to sixteen months of salary.*

### **The background**

1. The complainant worked for the (no longer existing) EU Mission in Support of the Security Sector Reform in Guinea-Bissau (the 'Mission'). When the Mission decided not to renew her contract in 2010, she went to the Regional Court of Bissau (the 'Court'), seeking compensation for wrongful dismissal.
2. The Court ruled, on 10 January 2011, that the Mission should pay the complainant an



amount of FCFA 23 216 373 (approximately EUR 35 000) in compensation.

3. The European External Action Service (EEAS) then appealed the Court's decision. The Appeal Court found that the Mission enjoyed immunity and that the Court's decision could therefore not be enforced [2] .

4. In June 2014, the complainant turned to the European Ombudsman regarding the matter.

5. The Ombudsman opened an inquiry [3] into the following allegation and claim:

1) The EEAS failed to comply with the Court's ruling of 10 January 2011.

2) The EEAS should comply with that ruling [4] .

## **Allegation of failure to comply with the Court's ruling**

The Ombudsman's solution proposal

6. Based on her preliminary assessment of the case, in July 2015 the Ombudsman made a proposal to the EEAS for a solution to the case. The solution proposed was that the EEAS should pay the complainant compensation equivalent to sixteen months of salary. When proposing this solution, the Ombudsman took into account the arguments and opinions put forward by the parties.

7. The Court's ruling in favour of the complainant was based on the fact that the Mission had not made any observations to the Court, despite having been summoned to do so. The Court thus considered the Mission to have accepted the complainant's pleas.

8. The EEAS argued that the Mission had not received any summons from the Court. However, the complainant submitted evidence to the Ombudsman showing that someone at the Mission had acknowledged receipt of a summons about the Court proceedings long before the Court delivered its judgment.

9. The EEAS had informed the complainant that employment related claims were to be resolved directly between the employer and the employee, namely " *through the legal means available under the legislation of the country in question* ". It had assured her that " *the EU respects fully the outcomes of legal proceedings of the competent judicial authorities of Guinea-Bissau on the matter* ". By taking the matter to Court in Guinea-Bissau, the complainant had thus merely followed the procedure that the EEAS considered to be appropriate.

10. It appeared, therefore, that the only reason for the Court's ruling of 10 January 2011 not being enforced was that the Appeal Court had found that the Mission enjoyed immunity. There was nothing to suggest that the Appeal Court had questioned the Court's ruling on the substance.



11. The Ombudsman considered that, whereas the Mission's immunity was clearly established by the Appeal Court, the fact that the complainant had obtained a judgment in her favour on the substantive issue could not be ignored.

12. The Ombudsman also considered that using immunity as an argument for not implementing a judgment risked the EU being perceived as disrespectful of decisions by the judicial authorities of sovereign States where these decisions are not in the EU's favour.

13. Before the complainant brought the matter to court, the Mission had offered her a three-month salary compensation. The Court awarded the complainant compensation that included salaries for a period when the Mission no longer existed, in a total of twenty months. Although the immunity of the Mission was clearly a legally valid argument for the Court's decision not being enforced, such an argument did not put the EU in a good light regarding the handling of the substantive issue. The Ombudsman therefore proposed that the EEAS pay the complainant compensation for the period up to the end of the Mission, in total sixteen months of salary.

14. The EEAS replied that neither the EEAS, nor the Mission, called the jurisdiction of the Court into question, or used immunity to escape that jurisdiction. According to the applicable rules, the Court had jurisdiction to deal with disputes between the Mission and the members of its local staff [5] . The Mission acknowledged that jurisdiction by appealing the Court's decision of 10 January 2011.

15. However, the applicable rules also provided that the Mission enjoyed immunity from legal proceedings [6] . The EEAS said that it waives immunity from jurisdiction whenever it is expressly requested to do so through proper official channels. According to the EEAS, while " *it is widely accepted that the immunity from jurisdiction is procedural in character and does not affect any underlying substantive liability, it is nevertheless of utmost importance to respect procedural safeguards in order to protect the functioning and the independence of the Mission.* " In the EEAS's view, in such circumstances, " *the validity of the first instance judgment cannot be recognized.* "

16. The EEAS stated that the Appeal Court had subsequently found that the Mission also enjoyed immunity from enforcement of the judgment. According to the EEAS, a " *waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.* " [7]

17. However, the EEAS stated in reply to the Ombudsman's proposal, it was willing to offer the complainant an *ex gratia* payment of six months of salary to settle the case.

18. The complainant was disappointed with the EEAS's reply. She argued that immunity could have been waived only in extreme cases, involving a crime or some other serious misbehaviour. She doubted that the EEAS would have waived the Mission's immunity in a case of " *illegal*



*dismissal* ". In the complainant's view, the EEAS could prove its argument that it does respect the Court's jurisdiction only by accepting the Court's decision of 10 January 2011. She could thus not accept the EEAS's offer in reply to the Ombudsman's proposal to pay her six months of salary. She expected the EEAS to abide fully by the Court's ruling.

The Ombudsman's assessment after the proposal for a solution

**19.** The Mission personnel enjoyed immunity from the civil and administrative jurisdiction of Guinea-Bissau regarding all acts performed by them in the exercise of their official functions [8] .

**20.** In the present case, the Head of Mission clearly exercised his official functions when he decided not to renew the complainant's employment contract. He therefore enjoyed immunity from jurisdiction of the local courts and from enforcement of their decisions on this issue [9] .

**21.** However, the EEAS stated, in its reply to the Ombudsman's solution proposal, that "[i]n line with its established practice, the EEAS waives the immunity from jurisdiction as a general rule whenever requested properly through official channels. " [10] This practice would be in line with the information that the EEAS gave to the complainant, namely that " any dispute between the [Mission] and a member of local staff shall be referred to the court having jurisdiction under local law " .

**22.** The Ombudsman has been provided with evidence showing that the Mission received a summons to the court proceedings. Having been informed about the court proceedings, the Mission was obliged to inform the Court whether the act in question was committed by Mission personnel in the exercise of their official functions [11] . This would have allowed the authorities of Guinea-Bissau to request a waiver if such was the case. In this case, the Ombudsman understands that the EEAS would have waived its immunity had the Court asked the Guinea-Bissau Ministry of Foreign Affairs to request such a waiver. According to the EEAS, such a request would have been accepted. However, the Mission never responded to the summons and the authorities of Guinea-Bissau did not request a waiver. However, this failure of the Guinea-Bissau authorities to request a waiver would not prevent the EEAS from taking the initiative in waiving the Mission's immunity.

**23.** The EEAS stated, in its response to the Ombudsman's solution proposal, that "[i]t is ... of utmost importance to respect procedural safeguards in order to protect the functioning and the independence of the Mission ." In the present case, the Mission itself failed to respect the procedural safeguards which would have allowed the immunity issue to be dealt with. In the Ombudsman's view, it was maladministration on the part of the Mission to refuse to implement the Court's judgment simply because it had not been requested to waive its immunity. It was, or ought to have been, clear to the Mission that the absence of a request for a waiver was the result of a possible misunderstanding which, in turn, was a consequence of the Mission not having responded to the Court's summons. It remained open to the EEAS to take the initiative in waiving the immunity but it declined to do so. This maladministration is compounded in light of the reputational risks this entailed for the European Union, as highlighted in paragraph 12 above.



**24.** In light of the above the Ombudsman finds that, by relying on the absence of a request from the Guinea-Bissau authorities to waive its immunity, and by its own failure to take the initiative in this regard, the EEAS committed maladministration. She therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

**25.** The Ombudsman proposed her solution to the EEAS in the knowledge that, in strict legal terms, the Mission's immunity had not been waived. Acceptance of the Ombudsman's proposal would not have required a formal waiver of immunity and offered a fair and pragmatic resolution of the case. The Ombudsman is disappointed that the EEAS has not taken the opportunity offered by her proposal to revise its position on this issue. The Ombudsman nevertheless notes that the EEAS is willing to settle the case and invites it to carefully reconsider that position when replying to her recommendation.

**26.** Finally, the Ombudsman commends the EEAS for its general practice of waiving immunity from jurisdiction, although this was regrettably not done in the present case. Although not explicitly stated by the EEAS, the Ombudsman trusts that its practice is also to waive immunity from *execution*, given that, without such a waiver, a waiver of immunity from jurisdiction would be rather meaningless. The Ombudsman invites the EEAS to explicitly clarify its practice in this regard in its reply to her recommendation.

### **The recommendation**

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the EEAS:

**The EEAS should pay the complainant compensation equivalent, at least, to sixteen months of salary.**

The EEAS and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the EEAS shall send a detailed response by 31 December 2016.

### **Suggestion for improvement**

**The EEAS should clarify whether its practice to waive immunity also includes a practice to waive immunity from *execution* of decisions and judgments.**

Strasbourg, 23/09/2016,

Emily O'Reilly

European Ombudsman



## Annex

A. Article 6 'Privileges and immunities of EU SSR Guinea-Bissau personnel granted by the Host State' of SOMA provides that

*" 3. EU SSR Guinea-Bissau personnel shall enjoy immunity from the criminal jurisdiction of the Host State under all circumstances. The immunity from criminal jurisdiction of EU SSR Guinea-Bissau personnel may be waived by the Sending State or EU institution concerned, as the case may be. Such waiver must always be express.*

*4. EU SSR Guinea-Bissau personnel shall enjoy immunity from the civil and administrative jurisdiction of the Host State in respect of spoken or written utterances and all acts performed by them in the exercise of their official functions. If any civil proceeding is instituted against EU SSR Guinea-Bissau personnel before any Host State court, the Head of Mission and the competent authority of the Sending State or EU institution shall be notified immediately. Prior to initiation of the proceeding before the court, the Head of Mission and the competent authority of the Sending State or EU institution shall certify to the court whether the act in question was committed by EU SSR Guinea-Bissau personnel in the exercise of their official functions. If the act was committed in the exercise of official functions, the proceeding shall not be initiated... If the act was not committed in the exercise of official functions, the proceeding may continue. The certification by the Head of Mission and the competent authority of the Sending State or EU institution shall be binding upon the jurisdiction of the Host State, which may not contest it.*

*(...)*

*6. No measures of execution may be taken in respect of EU SSR Guinea-Bissau personnel, except in the case where a civil proceeding not related to their official functions is instituted against them... In civil proceedings EU SSR Guinea-Bissau personnel shall not be subject to any restrictions on their personal liberty or to any other measures of constraint ."*

The SOMA are available here:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:219:0066:0071:EN:PDF>

B. According to Article 31(1) of the Vienna Convention on Diplomatic Relations of 1961: "[a] diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction" , except in some specific cases. Article 32 of the Convention clarifies that "1.The immunity from jurisdiction of diplomatic agents... may be waived by the sending State. (...) 4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary. "



The Vienna Convention is available here:

[http://legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf) [Link]

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] The Mission was conducted under the EU Common Security and Defence Policy (the 'CSDP'). The CSDP is " *put into effect* " by the High Representative of the Union for Foreign Affairs and Security Policy, assisted by the EEAS.

[3] The Ombudsman opened this inquiry on her own initiative as the complainant appeared initially to be neither a citizen of, nor a resident in, the European Union. Later, the complainant clarified that she is a citizen of the EU.

[4] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's solution proposal available at: <http://www.ombudsman.europa.eu/cases/solution.faces/en/71329/html.bookmark>

[5] The EEAS referred to Article 23 of the Framework Rules laying down the Specific Conditions of Employment of Local Staff with the European Commission Delegation in Bissau, according to which: "[a] *ny dispute between the [Mission] and a member of local staff shall be referred to the court having jurisdiction under local law.* "

[6] The EEAS referred to Article 5(3) of the Agreement between the European Union and the Republic of Guinea-Bissau on the Status of the European Union Mission in support of Security Sector Reform in the Republic of Guinea-Bissau (SOMA): " *EU SSR Guinea-Bissau, its property and assets, wherever located and by whomever held, shall enjoy immunity from every form of legal process.* " According to the EEAS, the said immunity covered " *the EU Mission in the Host State, its components, forces, units, headquarters and personnel (Article 1.3.(a)), including its Head of Mission who, in his official capacity, signed the employment contract with the complainant.* "

[7] According to the EEAS, this is provided in Article 32 of the Vienna Convention on Diplomatic Relations of 1961, " *signed and ratified by Guinea-Bissau on 11 Aug 1993 without reservation.* "

[8] According to Article 6 'Privileges and immunities of EU SSR Guinea-Bissau personnel granted by the Host State' of SOMA (see point A of the annex).

[9] Article 6(4) and (6) of SOMA (see point A of the annex).

[10] The rules specific to the Mission did not appear to have explicitly provided for such a



possibility. However, the Ombudsman notes the EEAS's references to the Vienna Convention on Diplomatic Relations of 1961 (see point B of the annex). SOMA, however, does not appear to provide for any possibility of a waiver in civil or administrative court cases where the Mission acts in the exercise of its official function (Article 6(4) and (6) of SOMA - see point A of the annex). The Ombudsman understands SOMA to have been a *lex specialis* in respect of the Status of the Mission in Guinea-Bissau and the Vienna Convention to be a *lex generalis* in respect of diplomatic relations in general.

[11] Article 6(4) of SOMA (see point A of the annex).

the European Commission's approach to work experience for the purpose of internal competitions and for the maximum period of fixed-term contracts