

LEGAL OPINION

CONSIDERING THE ACTIONS OF THE PRESIDENT,
THE ADMINISTRATIVE COUNCIL AND
MEMBER STATES
OF THE
EUROPEAN PATENT OFFICE

Specialists In Public International Law

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1. INTRODUCTION

- 1.1. We are instructed by the Staff Union of the European Patent Office ('EPO' or 'Office') to produce an opinion in respect of the rights of staff members and potential remedies regarding amendments to the laws of the Office by its President, Benoît Battistelli and the response of the oversight bodies of the Office, namely, the Administrative Council and the Member States.
- 1.2. This Opinion aims to provide a consideration of the legal framework and structure for challenging alleged breaches of the rights of Staff Members of the EPO. Annex 1 of this Opinion deals with specific examples and provides analysis of where breaches may have occurred. The annexed document should be read in conjunction with this Opinion.

2. BACKGROUND AND CONTEXT

- 2.1 The EPO is currently in a state of considerable social unrest with allegations that the President has acted *ultra vires* and in a capricious and arbitrary manner. Furthermore, it has been suggested that the bodies with responsibility for oversight of the Office and the actions of the President have failed properly to discharge their duties and obligations.
- 2.2 The European Patent Organisation ('EPOrg' or 'Organisation') is an international organisation of which the European Patent Office is one of two organs, the other being the Administrative Council. As such, the Organisation, its President and staff members enjoy a number of privileges and immunities from legal suit by virtue of the European Patent Convention (5th October 1973, as amended; the 'Convention' or 'EPC') and the annexed Protocol on Privileges and Immunities of the European Patent Organisation (the 'Protocol on Privileges and Immunities' or 'PPI'), which in turn incorporates the Vienna Convention on Diplomatic Relations of 18 April 1961 ('Vienna Convention').
- 2.3 The EPO, like other international organisations which enjoy functional immunity from legal suit, must provide an alternative internal legal system in order to fill the



lacuna left by the application of immunities. This is done, in the case of the EPO, through its internal laws as collected in the Codex and International Administrative Law. In the case of the EPO, the ultimate tribunal in which Staff Members may seek redress is the International Labour Organisation Administrative Tribunal ('ILOAT'). Regrettably, this Tribunal is well known for considerable delays in hearing complaints, a disregard for normative legal standards and predisposition in favour of the institutions which chose to subscribe to it.

- 2.4 Having regard to the demonstrably autocratic conduct that the President has exhibited and the apparent failure by the Administrative Council and the Member States of the EPOrg to check such behaviour, the first job of this opinion must be to start at the source of the EPO's legitimacy, for ultimately, the Member States giveth and the Member States taketh away.

3 THE LAW: TREATIES AND CONVENTIONS

- 3.1 The authority for the existence of the EPO is derived from treaties between contracting States. Absent such treaties, the EPO has no legal personality. The relevant constituent treaty is the Convention on the Grant of European Patents 1973 (as amended) ('EPC'). The relevant provisions of the EPC are reproduced and considered below and they include those relating to the functions, powers and duties of the President and the Administrative Council, the Privileges and Immunities of the EPOrg, the Office and the President as well as provisions and circumstances for waiver of the same through intervention by the Administrative Council and the Member States.

Function, powers and structure

- 3.2 Part 1, Chapter 1 of the EPC contains General Provisions. Article 4 of the Convention sets out the hierarchy and structure of the Organisation:

1. *A European Patent Organisation, hereinafter referred to as the Organisation, is established by this convention. It shall have administrative and financial autonomy.*



2. *The organs of the Organisation shall be:*
 - a. *The European Patent Office;*
 - b. *The Administrative Council.*
3. *The task of the Organisation shall be to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council.*

It is clear and unequivocal then, that the Office is subject to supervision by the Administrative Council.

3.3 The legal personality of the Organisation exists only by virtue of the agreement of the Member States as codified in the EPC at Part 1, Chapter 2, Article 5 and which also states that *'The President of the European Patent Office shall represent the Organisation'* that being a function which is subject to supervision and not a power, *per se* (EPO G 0005/88).

3.4 Article 10, EPC contains provisions in respect of management, which subjects the President of the Office to the authority of the Administrative Council and then sets out his functions and powers:

1. *The European Patent Office shall be managed by the President, who shall be responsible for its activities to the Administrative Council.*
2. *To this end, the President shall have in particular the following functions and powers:*
 - a. *he shall take all necessary steps to ensure the functioning of the European Patent Office, including the adoption of internal administrative instructions and information to the public;*
 - b. *unless this Convention provides otherwise, he shall prescribe which acts are to be performed at the European Patent Office in Munich and its branch at The Hague respectively;*
 - c. *he may submit to the Administrative Council any proposal for amending this Convention, for general regulations, or for decisions which come within the competence of the Administrative Council;*
 - d. *he shall prepare and implement the budget and any amending or supplementary budget;*
 - e. *he shall submit a management report to the Administrative Council each year;*
 - f. *he shall exercise supervisory authority over the staff;*
 - g. *subject to Article 11, he shall appoint the employees and decide on their promotion;*
 - h. *he shall exercise disciplinary authority over the employees other than those referred to in Article 11, and may propose disciplinary action to the*



Administrative Council with regard to employees referred to in Article 11, paragraphs 2 and 3;

i. he may delegate his functions and powers.

3. The President shall be assisted by a number of Vice-Presidents. If the President is absent or indisposed, one of the Vice-Presidents shall take his place in accordance with the procedures laid down by the Administrative Council.

3.5 Once again it is clear that the President is accountable for his actions to the Administrative Council.

3.6 Furthermore, Article 11 of the EPC deals with the appointment and discipline of senior employees and not only provides authority for, but also mandates – through the use of the imperative ‘shall’ – the exercise, by the Administrative Council, of disciplinary authority over the President, Vice-President and Chairmen of the Boards of Appeal:

- 1. The President of the European Patent Office shall be appointed by the Administrative Council.*
- 2. The Vice-Presidents shall be appointed by the Administrative Council after the President of the European Patent Office has been consulted.*
- 3. The members, including the Chairmen, of the Boards of Appeal and of the Enlarged Board of Appeal shall be appointed by the Administrative Council on a proposal from the President of the European Patent Office. They may be re-appointed by the Administrative Council after the President of the European Patent Office has been consulted.*
- 4. The Administrative Council shall exercise disciplinary authority over the employees referred to in paragraphs 1 to 3.*
- 5. The Administrative Council, after consulting the President of the European Patent Office, may also appoint as members of the Enlarged Board of Appeal legally qualified members of the national courts or quasi-judicial authorities of the Contracting States, who may continue their judicial activities at the national level. They shall be appointed for a term of three years and may be re-appointed.*

3.7 It is submitted that a straightforward reading of the ‘black letter law’ as contained in Articles 10 and 11 makes it clear that the Administrative Council not only has authority over the President, but also that it *shall* (and not ‘may’) exercise



disciplinary authority over, *inter alia*, the President. That is a function of and an obligation on, the Administrative Council: a failure to do so would surely amount to an abrogation of the responsibilities of the Administrative Council and indeed the Member States. If those bodies that are charged with the responsibility for oversight of the EPO and the proper application of the EPC are absent or remiss, then it is certainly arguable that the terms of the EPC and consequently, the Privileges and Immunities that were granted pursuant to the EPC, are no longer being met and complied with. Immunities are granted on the basis of representations concerning the system that will be put in their stead; it cannot be the case that, immunities, once granted, will continue to exist in perpetuity regardless of whether the terms on which they were granted are complied with. The reality is that in the case of international organisations, immunities are granted as part of a compact between signatories and the terms should be respected.

Privileges and Immunities

- 3.8 Article 8 of the EPC deals with the Privileges and Immunities of the EPOrg in the following terms:

The Protocol on Privileges and Immunities annexed to this Convention shall define the conditions under which the Organisation, the members of the Administrative Council, the employees of the European Patent Office, and such other persons specified in that Protocol as take part in the work of the Organisation, shall enjoy, in each Contracting State, the privileges and immunities necessary for the performance of their duties.

- 3.9 The mechanisms for giving effect to the Privileges and Immunities are codified in the PPI, the relevant parts of which are dealt with below. Article 13 concerns the immunity of the President of the Office:

1. *Subject to the provisions of Article 6, the President of the European Patent Office shall enjoy the privileges and immunities accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations of 18 April 1961.*
2. *However, immunity from jurisdiction shall not apply in the case of a motor traffic offence committed by the President of the European Patent Office or damage caused by a motor vehicle belonging to or driven by him.*



Article 6 of the Protocol referred to relates to the application of taxes and so is not reproduced for the purposes of this Opinion.

3.10 Before turning to the text of the Vienna Convention, it is important to note the articles of the PPI which follow, and **qualify**, the privileges and immunities that are set out in Article 13, most notably, Articles 19, 20 and 25 of the Protocol. Article 19, which deals with the purpose of the immunities and specifically limits their scope, states (with emphasis added):

1. *The privileges and immunities provided for in this Protocol are not designed to give to employees of the European Patent Office or experts performing functions for or on behalf of the Organisation personal advantage. They are provided solely to ensure, in all circumstances, the unimpeded functioning of the Organisation and the complete independence of the persons to whom they are accorded.*
2. *The President of the European Patent Office has the duty to waive immunity where he considers that such immunity prevents the normal course of justice and that it is possible to dispense with such immunity without prejudicing the interests of the Organisation. The Administrative Council may waive immunity of the President for the same reasons.*

A number of important points emerge from Article 19 of the Protocol. The first is that the purpose of privileges and immunities certainly is not personal advantage; rather their **sole** purpose is the unimpeded function of the Organisation. As such, privileges and immunities only relate to the performance by an individual of official functions: indeed, they are just that – a privilege and not an entitlement. This is a point which appears to have been forgotten by the President in his conduct and the Administrative Council and Member States are in danger of similar ignorance if they fail properly to discharge their supervisory duties. Article 19(2) also gives clear guidance as to the way in which such privileges and immunities are to be applied and the ethos that should be adopted by those charged with administering them. The Protocol creates, not just a discretion, but a positive **duty** on the President to waive such immunity from legal suit where it prevents the normal course of justice (where the interests of the Organisation are not prejudiced) and crucially, **the Administrative Council is under exactly the same duty in respect of the President.**



3.11 Furthermore, Article 20 also envisages that the privileges and immunities of the EPO will not be absolute; rather it states that:

1. *The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice, to ensure the observance of police regulations and regulations concerning public health, labour inspection or other similar national legislation, and to prevent any abuse of the privileges, immunities and facilities provided for in this Protocol.*
2. *The procedure of co-operation mentioned in paragraph 1 may be laid down in the complementary agreements referred to in Article 25.*

3.12 Article 25 states:

The Organisation may, on a decision of the Administrative Council, conclude with one or more Contracting States complementary agreements to give effect to the provisions of this Protocol as regards such State or States, and other arrangements to ensure the efficient functioning of the Organisation and the safeguarding of its interests.

It is abundantly clear from the provisions of the Protocol on Privileges and Immunities that they are not there to give the President or any other staff member of the EPO *carte blanche* to behave as he or she sees fit and they are a clear reminder that the EPO does not operate in splendid isolation. On the contrary, it exists by virtue of the consent of its constituent Member States and its offices are accommodated at the pleasure of its host countries as part of an agreement of cooperation set out in the EPC (Articles 6 and 7). In order to enjoy and maintain such privileges and immunities, the EPO and those responsible for its oversight and administration must fulfill their side of the agreement: the EPC, once agreed does not *necessarily* exist in perpetuity; rather the cooperation envisaged in it should continue to be maintained.

3.13 Having regard to the express and unequivocal provisions above and the guidance concerning interpretation, one might quite reasonably expect that, in the appropriate circumstances, the Administrative Council would have no reluctance in waiving immunities of the EPO in accordance with its duties under the EPC. However, before considering this point further it is necessary to consider the Vienna Convention, the effect of which is incorporated by reference.



The Vienna Convention

- 3.14 The sentiments expressed above in respect of interpretation are reiterated in the Introduction to the Vienna Convention, which is incorporated, by reference, into the EPC Protocol on Privileges and Immunities. It states (*inter alia*):

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

and further, that:

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention

This unequivocal statement makes a number of things clear about the way in which the paragraphs which follow it should be read and interpreted. Again, the purpose of diplomatic immunity is not to give those on whom it is bestowed *carte blanche* to do as they please. On the contrary, the purpose is to ensure the proper performance of the functions of the organisation to which the immunity applies. Secondly, it is not absolute, but instead it works in conjunction with other laws such that the rules of customary international law continue to apply to matters not expressly regulated by the convention. As such, the extent of diplomatic immunity is confined to the performance of the official functions of the individual or organisation asserting such immunity.

- 3.15 The immunity itself is set out later at Article 31 of the Vienna Convention, which states:

1. *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 the case of:*

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;



(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. *A diplomatic agent is not obliged to give evidence as a witness.*
3. *No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.*
4. *The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.*

This provision does indeed create immunity from civil and administrative jurisdiction in the host state (with three exceptions which are not relevant for the purposes of this opinion). The immunity does *not* exempt the diplomatic agent in question from the jurisdiction of the sending State. The question in respect of the President of the EPO is whether he can be said to have a 'sending State' at all, for unlike traditional diplomatic relations, he is not sent as the representative of a State, but rather of a multilateral institution constituted at the will of many. The answer, then, would seem to be one of three options: first, there is no such sending State, but then this would appear to be contrary to the essence of the express provision of the Protocol which does provide for waiver of the Privileges and Immunities. Secondly, the 'sending state', for the purposes of interpretation, is the EPOrg itself, which would seem to be supported by Article 19(2) of the Protocol which expressly provides for waiver. Or thirdly, the national State of the President which, in this case, is France, which also seems unsatisfactory, for the nationality of the President is merely incidental and he is not exercising his functions on behalf of the French Republic.

- 3.16 Article 32 of the Vienna Convention, which is not excluded by the Protocol also sets out provisions for waiver of diplomatic immunity by the sending State:



1. *The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 [which is not relevant for this opinion] may be waived by the sending State.*
2. *Waiver must always be express.*
3. *The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.*
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.*

3.17 The Vienna Convention is only relevant *because* the EPC incorporates it by reference. As such, it cannot be the case that it was the intention of the draftsman that another convention which is referred to as a point of reference would have the effect of contradicting or trumping the very document which refers to it. As such, the only logical way in which to interpret references to ‘sending State’ in the Vienna Convention would seem to be in such a way that they will be consistent with the explicit provisions concerning waiver contained in the EPC. With this in mind, the EPOrg appears to be tantamount to the sending State referred to in the Convention and it clearly has the authority to waive immunity by virtue of the EPC. This means that it is all the more important that the role of the Administrative Council of performing a supervisory function over senior members of the EPO is taken seriously because, unlike diplomatic representatives of States proper, such individuals might otherwise be able to evade their responsibilities and abuse their privileges under the immunities granted to them; and if they are able to do this, then the immunities of the Organisation itself might be imperiled by reason of breach of - for want of a better phrase – the ‘terms and conditions’ of the EPC.

Observations in respect of the European Patent Convention

3.18 All too often, privileges and immunities are applied by courts blindly, without considering whether the conditions precedent to their grant continue to be satisfied. The Protocol on Privileges and Immunities and the Vienna Convention, whether read together or separately, make it clear that any immunities from legal



suit enjoyed by the staff or President of the EPO are not absolute; rather they are functional and are designed only to further the interests and mission of the Organisation. It is contended that where staff or the President of the EPO act contrary to this objective or outside of their powers, then they may no longer be said to be acting within their official functions and consequently, should be prevented from asserting and benefiting from the privileges and immunities that would otherwise apply as part of the normal functioning of the Office.

- 3.19 Having regard to the Protocol on Privileges and Immunities, the Administrative Council and consequently, the Member States which agreed to adopt those provisions in furtherance of the Organisation's functions, have a duty incumbent upon them to waive the immunity of the EPO or its President where the proper administration of justice requires it (and it does not prejudice the interests of the Organisation).
- 3.20 Perhaps the most clear-cut example of a situation which would warrant the waiver of immunities is where a staff member or official assaulted someone. Take an absurd and far-fetched example, where there is evidence that the President of the EPO physically assaulted a staff member. In those circumstances, the Administrative Council would be faced with a serious allegation against a senior official over whom they have disciplinary authority. In this example, no argument can be made that such actions were undertaken in performance of official functions. The Administrative Council would surely be duty-bound to waive immunities in furtherance of its obligation of cooperation *to facilitate the proper administration of justice* and *to prevent any abuse of the privileges, immunities and facilities provided for in* the Protocol on Immunities. Yet this palpably absurd and frankly offensive situation, when it materialised in reality¹, was met with a refusal by the Administrative Council – without reasons – to waive the immunities of the President. An argument can clearly be made in these circumstances that the Administrative Council and the Member States of the Organisation were remiss and/or that they erred in law in failing properly to exercise their discretion and duty of supervision. Whilst this unfortunate position arose in the past, it is demonstrative of the need for members of the Administrative Council to take

¹ Appeal by *In re. Rombach-Le Guldec*, ILOAT 1581, attempting to have the immunities of President Braendli lifted.



their duties and responsibilities seriously. Attitudes to privileges and immunities have moved on and if such a predicament were to arise today, it is highly likely that the EPOrg would – quite rightly – find its immunities imperiled.

- 3.21 Indeed, the current situation at the EPO gives clear cause for concern. It is extraordinary that the Vice President of an organisation – which is itself merely a product of treaty – would pronounce on national television, in respect of a case in which judgment remains extant, that the senior officials of that organisation have such little regard for the laws of their host nation that they will simply ignore the finding of the appellate court of that country.
- 3.22 There are very clear and justified reasons for concern that the proper functioning of the EPO is being impeded by the conduct of its senior officials. The Administrative Council has the theoretical legal tools to remedy the failings of officials of the Office and indeed, a duty to do so would also seem to be a condition of the EPO maintaining its privileges and immunities. However, it should also be noted that the Administrative Council must be given the practical capacity to discharge its obligations, for a theoretical ability absent the means of enforcing the same is meaningless. To this end, the Administrative Council must be afforded sufficient resources in its secretariat to give effect to its legal and supervisory rights and responsibilities.

4 THE LAW: HUMAN RIGHTS CONSIDERATIONS

- 4.1 The Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights ('ECHR')) emanates from the Council of Europe ('CoE') and provides access to a remedy in the European Court of Human Rights ('ECtHR'). Ratification of the ECHR was a condition precedent of membership of the CoE.
- 4.2 The ECHR sets out a number of rights, the most relevant of which are as follows:



Article 6: the right to a fair trial

- 1 *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

In addition to which there are further rights which, whilst they relate to criminal offences, the principles may be applied in analogous cases. These concern the presumption of innocence, the right to be informed of the charge against him, adequate time and facilities for preparation of his defence, legal assistance – which shall be free where the interests of justice so require – and the right to examine witnesses.

Article 8: the right to respect for private and family life

- 1 *Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2 *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 10: freedom of expression

- 1 *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
- 2 *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*



Article 11: freedom assembly and association

- 1 *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
- 2 *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

Article 14: Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 17: Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

- 4.3 It is not hard to see that many of the circumstances that have arisen at the EPO amount to violations of the rights contained in the ECHR. To list but a few: fair trial provisions are fundamentally absent at the EPO, since the President sits as a judge in his own cause; there is a lack of equality of arms, delays, an absence of due process and a tribunal that is itself beholden for its funding to the very institutions it is being invited to find against. The provisions in respect of sick leave (and the effective 'house arrest' of staff members) appear to contravene the right to a private and family life. The arbitrary treatment and abuses of the system in respect of staff representatives appear to be an attack on all of the rights listed above.
- 4.4 Many of the Member States of the EPO are signatories to the European Convention on Human Rights (ECHR). Whilst the EPO itself is not directly



bound by the ECHR, it seems perverse that citizens of countries which are signatories and who would ordinarily benefit from such protections in domestic jurisdictions should be actively prevented from accessing comparable rights and norms simply because they have agreed to serve at the EPO.

4.5 Diplomatic immunity emerged as a means of securing safe passage for the representatives of states so that, even in times of hostility, lines of communications might remain open. Yet the application of these same privileges and immunities in circumstances where no such issues are at play, but where the agents are instead concerned with coffee or olive oil production² or indeed patents, seems at best to be anachronistic and at worst, an affront to basic legal standards and norms. However, there appears to be a shift in attitudes towards the application of immunities in a number of the Member States of the EPO. The Dutch courts have lifted the immunities of Office; final judgment is current being awaited. The Court of Appeal of England and Wales considered the issue of the assertion of diplomatic immunity in an employment case in 2015, in the joined cases of *Janah v Libya; Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33³. In those cases, the Court found that certain provisions of the State Immunity Act 1978 breached Articles 6 and 14 of the ECHR and held that the Charter of Fundamental Rights of the European Union requires those provisions to be disapplied insofar as they bar employment law claims that are within the material scope of the EU law. This is significant because this is an example of a Member State of the EPO concluding that absolute diplomatic immunities are no longer sustainable; rather they are to be balanced with other rights and laws.

4.6 Patents are a means of protecting intellectual property and are capable of possessing value: indeed this is one of the primary motivations for seeking the grant of a patent. The EPO is currently pursuing the European Patent with Unitary Effect which can be relied upon within signatory states. However, the protection and peaceful enjoyment of property is also enshrined within the ECHR (Article 1 of The First Protocol). But what of the situation where there is tension

² Both the International Coffee Organisation based in London and the International Olive Oil Council based in Madrid enjoy immunity from legal suit.

³ *Janah v Libya; Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33



between the two? Will the EPO simply assert immunity from the ECHR in that situation too? It would seem fanciful for the EPO to be promoting on the one hand a unitary patent as a means of protecting property in Member States, whilst simultaneously denying the protections afforded to property under the ECHR.

- 4.7 It is misleading to suggest that domestic laws are unknown to the EPO; rather, the Organisation engages directly with national jurisdictions in respect of patent applications as evidence by, *inter alia*, the publication of a booklet called *National law relating to the EPC* as well as the recognition of domestic patents.

Domestic Remedies

- 4.8 If staff members of the EPO found themselves without a remedy, the position would likely be very different if they were in their home States. Not only do those in many national jurisdictions enjoy a plethora of rights pursuant to the ECHR, they also enjoy access to independent employment tribunals, the ability to seek the protection and punishment of the criminal justice system against aggressors, a civil remedy for wrongs, for example, through actions in negligence and, of course, judicial review of decisions of public bodies which act unlawfully or which fail to act where they should.
- 4.9 National Governments are represented at the EPO by delegates from their national intellectual property offices. During missions to the EPO, representatives of those national offices enjoy the privileges and immunities of the Organisation. However, unlike the President, they *are* present at the behest of their domestic governments and as such, it would seem that they do remain subject to the laws of their sending State. With this in mind it might well be possible to challenge a failure by national delegations to discharge their supervisory functions in the domestic courts of the sending State.



The Human Rights Mission Statement of the European Union

4.10 In 2004, European Union foreign minister adopted *Guidelines on Human Rights Defenders*⁴ (the ‘Guidelines’) which set out the EU’s role and aspirations for cooperation with human rights defenders and propose practical means of assisting at-risk activists. The European Union has made it clear that the promotion of human rights is a priority:

‘Support to human rights defenders is one of the major priorities of the EU’s external human rights policy. Human rights defenders are our natural and indispensable allies in the promotion of human rights and democratisation in their respective countries.’

Annex 1 to the *Guidelines* contains the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, which states, *inter alia*:

The General Assembly,

Reaffirming the importance of the observance of the purposes and principles of the Charter of the United Nations for the promotion and protection of all human rights and fundamental freedoms for all persons in all countries of the world,

...

Stressing that all members of the international community shall fulfil, jointly and separately, their solemn obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinction of any kind, including distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and reaffirming the particular importance of achieving international cooperation to fulfil this obligation according to the Charter,

...

Reiterating that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and should be promoted and implemented in a fair and equitable manner, without prejudice to the implementation of each of those rights and freedoms,

Stressing that the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State

After which the specific Article rights are outlined.

⁴ Available at: http://eeas.europa.eu/human_rights/guidelines/defenders/docs/16332-re02_08_en.pdf



- 4.11 Regrettably, it would appear, that this quite proper concern for human rights and the rule of law expressed in the EU's foreign policy and by its Member States has yet to reach staff members serving at the EPO. It is hard to see how a lack of action and an unwillingness to protect the rights of staff members on the part of the Member States of the EPO can be compatible with these clearly stated policy objectives and it would seem to give rise to a quite justifiable claim of hypocrisy: how can Member States of the EU pursue these objectives for others, whilst simultaneously neglecting to protect the rights of, and promoting rule of law protections for, their own citizens serving in international organisations abroad?

5 THE LAW: INTERNAL JURISDICTION OF THE EPO

- 5.1 The maintenance of privileges and immunities by the EPO, like other international organisations, is such that the internal laws, rules and procedures of the organisation take on far greater significance than might otherwise be the case in institutions in which staff members have recourse to national mechanisms of redress and normative standards of justice.
- 5.2 Within international administrative law, causes of action are typically characterised as flowing from conduct which is: 1) *ultra vires*, that is to say, that the decision-maker acted beyond or indeed, outside of his powers; 2) a *détournement de pouvoir* whereby the individual exercising discretion did so with an irregular motive or purpose; or 3) in breach of the procedural regularity, *per se*.
- 5.3 Whether or not officials of the EPO have acting *ultra vires* or with *détournement de pouvoir* is a matter to be determined on the facts of a particular case, although it would seem appropriate to note at this juncture that much of the conduct complained of by the staff of the EPO would certainly seem to fall within these actionable causes. Procedural irregularity, on the other hand, may give rise to a remedy without the need to demonstrate that the decision-maker acted beyond his powers or with some improper purpose.



- 5.4 Amerasinghe is a former judge, an eminent lawyer and international administrative law academic; his book *The Law of the International Civil Service*⁵ remains a leading practitioner text on the subject. As he points out: *International administrative law tribunals have not hesitated to emphasize the need for fair procedure to be followed in taking discretionary administrative decisions*⁶. It is a point that was made by the World Bank Administrative Tribunal in the case of *Salle*⁶ which concerned the non-confirmation of a probationary appointment:

The Tribunal deems it necessary to emphasize the importance of the requirement sometimes subsumed under the phrase 'due process of law'. The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that procedural guarantees ensuring the staff member of fair treatment be respected.'

- 5.5 The EPO enjoys functional immunity from legal suit; as a consequence, in the normal course of affairs, its staff members have no recourse to national courts⁷. For this reason, procedural regularity takes on even greater significance in international organisations. Adherence by the Organisation to its Regulations and the checks and balances that should be applied, is fundamental to protecting the rights and interests of its staff members.
- 5.6 A consideration of the conduct of the President, the Administrative Council and the Member States of the EPO gives significant cause for concern. It would appear that there have been significant breaches of the internal law of the EPO which might well be contrary to the ECHR. The specific instances of breach are considered in depth at Annex 1 to this Opinion.
- 5.7 The situation at the EPO and the apparent disregard by senior officials for procedural regularity and due process is of concern not only for staff members, but also for the Administrative Council and Member States, for such conduct clearly *'prevents the normal course of justice'*. Furthermore, the impact that this conduct

⁵ Amerasinghe, C.F., *The Law of the International Civil Service* (1994) OUP 2nd Ed. p366

⁶ WBAT [1983, Part 1], Decisions No.10 at p23

⁷ The importance of consultations, engaging with staff and providing access to a proper remedy have been demonstrated by the lifting of the immunities of the EPO by the Dutch Courts.



has had on the morale and levels of discord amongst staff is contrary to the interests of the Organisation. As such, it is certainly arguable that permitting the situation to continue without remedy would itself imperil the immunities of Organisation, first, because such conduct may be contrary to the EPC and secondly, because of linked human rights violations.

6 CONCLUSION

6.1 Having considered the constituent treaties, conventions and laws of the EPOrg, it seems clear that the Administrative Council not only has a *right* to exercise supervisory jurisdiction over senior officials of the EPO, but a *duty* to do so. It would also seem that a compelling case can be made out to challenge the immunities of the Organisation where the terms of the EPC are not complied with or where the Administrative Council is negligent in respect of its responsibilities. Furthermore, challenging Member States in domestic courts would seem to be an avenue worth exploring further.

6.2 In light of the above, it would seem that Member States, by virtue of their representation on the Administrative Council, have a number of responsibilities at various different levels:

1. To the EPOrg, in discharging its supervisory functions;
2. To the signatories of the EPC (and in particular, the host States), in fulfilling their obligations under that Convention and in remaining compliant with the conditions pursuant to which the immunities of the Organisation were granted;
3. to *all* staff members of the EPO, in fulfilling their obligations on the Administrative Council in accordance with the EPC; and
4. Specifically to the staff members of the EPO, in ensuring that, their actions are compliant with their domestic legal obligations under legislation which gives effect to the ECHR.



- 6.3 This opinion has considered a number of different areas of responsibility and liability. It may be pragmatic to undertake further work which would look in considerably more detail at the mechanisms and avenues for pursuing Member States in the domestic courts in respect of potential domestic and ECHR remedies.
- 6.4 Finally, readers are invited to consider Annex 1 to this Opinion which provides in-depth analysis of specific breaches and violations at the EPO.

If we can assist further or if you require clarification in respect of any of the points above, please do not hesitate to contact us.

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