

**DECISION OF THE PANEL OF ADJUDICATORS OF THE OSCE WITH  
REGARD TO THE EXTERNAL APPEAL BY ██████████**  
(CASE No: OSCE PoA 44/2019)

*Proceedings*

1. The Chairperson of the Panel of Adjudicators (PoA) of the OSCE received on 14 October 2019 a letter dated 10 October 2019 from the Chairperson of the Permanent Council of the OSCE transmitting an external appeal by ██████████ (Applicant) which had been forwarded to him on 3 October 2019.
2. The Chairperson of the Panel, through the Executive Secretary of the Panel, informed the Secretary General of the OSCE (Respondent) and the Applicant on 18 October 2019 of the constitution of the Panel and asked them to forward any further communication to the Panel as per Article 5 of the Rules of Procedure of the Panel to reach the Panel no later than 18 November 2019. The Respondent forwarded his reply on 18 November 2019 which was transmitted to the Applicant, advising ██████ that ██████ has a right to file a rebuttal which ██████ did not.
3. In accordance with Article VI of the Terms of Reference of the Panel, the Chairperson of the Panel invited the Panel to meet at the Hofburg premises at Vienna on 27 and 28 April 2020 to examine the appeal. Travel restrictions in relation to a viral pandemic prevented the Panel from meeting in person. Following consultations with the parties, the Panel held deliberations via video-conference on 6 and 7 July 2020. The Panel was composed of its Chairperson, Mr. Thomas Laker, and its members, Ms. Anna Csorba and Ms. Catherine Quidenus.
4. After examining all the documents submitted to it, the Panel noted that the Applicant's relief claimed is for the full amount of national taxes incurred and paid to the government of ██████████ on the Applicant's OSCE income of 2016, while serving as an international civil servant.

5. The Respondent, pursuant to his reply, acknowledges that the OSCE's Staff Regulations and Staff Rules (SRSR) reflect the principle of fiscal immunity of international servants. However, according to his view, the OSCE differs from other international organizations. Therefore, the Respondent requests to dismiss the application.

*Summary of facts*

6. The Applicant, [REDACTED], is a former official who worked for the OSCE on a [REDACTED] between February 2015 and July 2016. Pursuant to [REDACTED] statement, [REDACTED] taxes [REDACTED] for the income earned from the OSCE in 2016.
7. On 8 March 2018, the Applicant submitted a request to the OSCE Secretary General to refund the income tax [REDACTED] for 2016.
8. By Note Verbale of 13 July 2018, the Secretary General sought reimbursement from [REDACTED] in order to be in a position to grant the Applicant's claim. [REDACTED] declined this request by Note Verbale dated 5 September 2018.
9. By letter dated 19 November 2018, the Respondent rejected the Applicant's request of 8 March 2018.
10. By email dated 9 December 2018, the Applicant submitted a request for internal review which was rejected, based on a report of an Internal Review Board of 7 June 2019, by letter dated 8 July 2018.
11. The Applicant filed [REDACTED] request for external review by email dated 25 August 2019.

*Contentions of parties*

12. The Applicant's major contentions are:

- The primary effect of the local staff income tax leveled is unequal treatment and the inequality that it produced with regard to ■■■ net pay;
- The principle of equal treatment of staff and its subset principle of equal pay for equal work is established in international law and enshrined in the OSCE's Staff Rules and Regulations, specifically, Staff Regulation 5.05 and applicable Rules. In an official OSCE document presented by the Secretariat's Legal Services at an OSCE Chairmanship Conference on Local Staff Income Tax (OSCE document SEC/GAL/151/14 dated 2 September 2014), it was argued that international civil servants cannot be deprived of their fundamental right to be treated on an equal basis and be paid equally for equal work;
- Furthermore, the Applicant claims that the organizations cannot invoke individual State positions on not granting taxation exemptions to their nationals as a reason for refusing to ensure the equal treatment of the staff member, irrespective of whether the organization will be reimbursed by the taxing country or not.

13. The Respondent concedes that the Applicant's submissions are correct and in line with the official position taken by the OSCE Secretariat in respect of the principle of tax exemption of OSCE salaries and emoluments and the duty of taxing States to reimbursement of the taxes collected. The Respondent emphasizes that taxation of OSCE salaries is a contentious issue in the OSCE, dating back at least to 1994. The Respondent clarifies that all decisions in the OSCE, pursuant to its Rules of Procedure, are taken by consensus. Since there is no voting, contentious issues do not move forward. The Respondent's major contentions are:

- The status of OSCE officials as international civil servants is not a concept that is universally accepted by all participating States on the basis of OSCE's unique legal

personality; an informal Working Group meets three times a year in order to consider the legal personality of the OSCE; this is the appropriate channel through which the questions should be ultimately determined, rather than through applications for external review;

- The jurisprudence on the questions is not entirely settled;
- The method of resolving national taxation remains under active discussion in the OSCE, but similarly remains contentious;
- The contested decision not to grant refund is fully compliant with Staff Regulation 5.05.

### *Considerations*

14. As there are no concerns with respect to the admissibility of the application (see Rule 10.02.2 (d) of the SRSR), the Panel may directly turn to its merits.
15. Pursuant to Regulation 5.05 of the SRSR, in the event an OSCE official is subject to national income taxation with respect to the net salaries and emoluments paid to him/her by the OSCE, the Secretary General of the OSCE is authorized to refund him/her the amount of taxes paid to the extent that such amounts have been reimbursed to the OSCE by the State concerned. It follows from a plain reading of this provision that such refund is not possible where reimbursement by the State concerned has not taken place (see Panel's decision of 24 November 2017, OSCE PoA 2/2017, para. 29).
16. The Panel notes that, according to the uncontested submissions of the Respondent, the OSCE's request for reimbursement of the income taxes paid by the Applicant to ██████ has been declined by Note Verbale of ██████ dated 5 September 2018. Therefore, an indispensable prerequisite for refunding the Applicant, i.e. the reimbursement to the OSCE by the State concerned, is obviously not fulfilled. It follows from the mere application of Regulation 5.05 of the SRSR that the Applicant's claim is unfounded.

*The principle of fiscal immunity of international civil servants*

17. However, pursuant to established jurisprudence of international administrative tribunals, the exemption from national taxation on the income is a fundamental element of the concept of international civil service. In this respect, a provision like Regulation 5.05 of the SRSR may raise concerns, since it requires reimbursement by the concerned State as a precondition for granting *de facto* tax exemption through refunding the taxes paid, thus calling for an agreement between the organization and the State concerned.
18. These concerns are reflected, e.g., in Judgment 2256 (2003) of the Administrative Tribunal of the International Labor Organization (ILOAT) with respect to a provision similar to Regulation 5.05 of the SRSR. According to this judgment, “it would be similarly strange if the existence of an agreement could be invoked by an international organization to deprive some staff members and not others of their tax exempt status. Such an agreement is meant to set the terms of a member State’s commitment to refund an organization for tax reimbursements. It must, however, conform with international law and cannot be used to undermine the fundamental principles of tax exemption [...]. The Staff Regulations must be in conformity with the requirements of the law and where they are not, they are simply unenforceable.” (see paras. 16 and 17 of said decision).
19. The Panel takes note that the established jurisprudence on this issue concerns international organizations such as the World Bank, the Organization for Economic Cooperation and Development, or the Organisation for the Prohibition of Chemical Weapons, which are in a different legal situation than the OSCE, given that their legal personality, privileges and immunities are based on international agreements. With respect to those organizations, the principles of international administrative law are unquestionably applicable.
20. The Panel could only neglect and/or set aside Regulation 5.05 of the SRSR as being contrary to international law if the principle of tax exemption for international civil servants was undoubtedly applicable also with regard to the OSCE.

21. The issue of OSCE's legal personality has existed since its foundation as 'Conference on Security and CO-operation in Europe' in 1975 and has continued to exist after its renaming in 1994. Particularly since 2000, legal experts in various configurations have examined various approaches to establish the legal status and privileges and immunities of the OSCE under international law (see the comprehensive summary by Tichy, H. (2019), *The Role of the Participating States in Reforming the Legal Framework of the OSCE: Past Developments, Status Quo and Future Ambitions*, in M. Steinbrück Platise, C. Moser, & A. Peters (Eds.), *The Legal Framework of the OSCE* (pp. 82-94), Cambridge University Press). An informal 'Working Group on Strengthening the Legal Framework of the OSCE' (IWG) was established in 2009, with number of reports to the OSCE's Ministerial Council. Pursuant to the report dated 7 December 2018 - MC.GAL/10/18 – (IWG Report 2018), various participating States granted legal status, privileges and immunities through national legislation or bilateral agreements or arrangements with the OSCE; further, the OSCE is currently operating under a variety of legal measures, resulting in a "fragmentation of the legal framework of the OSCE" (see IWG Report 2018, para. 4).
22. Without going into detail, the Panel takes note that international organizations normally derive their international legal personality as well as privileges and immunities from treaties. It is further noted that – regardless of existing drafts – neither a constituent treaty nor an agreement on the legal status, privileges and immunities exists for the OSCE. In addition, the Panel has to take into account that only less than ten - out of 57 - participating States have formally recognized the legal capacity of the OSCE and granted it privileges and immunities (see IWG Report 2018, paras. 22 and 27).
23. The Panel takes note that the issue of the legal framework of the OSCE is unsolved, regardless of various and long-lasting efforts. As the IWG Report 2018 concludes, "options for strengthening the legal framework of the OSCE remained tabled in 2018 without perceptible progress towards consensus".
24. In such situation, it is not for the Panel to overrule provisions of the SRSR as long as the applicability of principles of international law cannot be based upon respective clarification by the consensus of OSCE participating States.

*The principle of equal pay for equal work*

25. As a general principle of law, the principle of equal pay for equal work requires that staff members of the same status, rank and category receive the same net salary.
26. The Panel assumes that, from the outset, the Applicant received the same amount of money as any other contracted staff member at [REDACTED] level from the OSCE. However, the application of [REDACTED] home country's [REDACTED] tax policy resulted in a lower net income as compared to the net income of staff members from countries that do not tax their citizens.
27. Further, the Panel notes that the OSCE has duly tried to implement the reimbursement mechanism as provided for in Staff Regulation 5.05 of the SRSR by approaching [REDACTED] [REDACTED] in an appropriate manner. As [REDACTED] refused to reimburse the taxes received from the Applicant to the OSCE, according to the binding internal law of the OSCE, the OSCE was prevented from balancing the Applicant's loss.
28. It follows from the above that the inequality of the net income does not result from any action or omission from the OSCE's side. National taxation exceeds the OSCE's sphere of influence and can therefore not be attributed to it. Further, the inapplicability of the principle of tax exemption for international civil servants cannot be by-passed through recourse to the principle of equal pay for equal work. The Panel notes that this principle has, in any case, only limited impact with regard to an organization such as the OSCE, with different types of personnel - seconded and contracted.

*The duty of care*

29. As a general principle of civil service law, the duty of care entails an open catalogue of obligations with regard to protecting staff. These obligations include the duties to offer fair labour contracts and to make adequate information about the specific situation in the country of destination available to staff (see, e.g., the list suggested in IWG Report 2018, para. 33). In the Panel's view, it is also part of these duties to inform staff at the earliest opportunity about the individual financial circumstances of their appointment, including their respective home countries' policy on income taxes and/or tax exemption.

30. In the present case, the Panel did not find any indication whether such information was or was not available to the Applicant. For the future, the Panel expects the OSCE's administration to fulfill said obligation of information at the adequate time, i.e. on or before sending the respective offer of appointment.

31. In light of the above, the application is rejected.

Done on 7 July 2020



Thomas Laker



Anna Csorba



Catherine Quidenus