

Kluwer Patent Blog

Landgericht München: Patrick Corcoran is Innocent and Acquitted of all Charges

Thorsten Bausch (Hoffmann Eitle) · Wednesday, June 20th, 2018

Background

The story about Patrick Corcoran has been covered several times on this blog, e.g. [here](#), [here](#) and [here](#) and other blogs, e.g. [here](#) and [here](#). There is even a [Wikipedia site](#) about it. In a nutshell, the story is about a (previous) EPO Board of Appeal member who was suspended and banned from access to the EPO premises by the President in 2014 due to the suspicion that he had distributed defamatory material about the EPO upper management. His temporary suspension was extended by the Administrative Council until the end of his 5 year-appointment, which in my view was a blatant violation of Art. 23(1) EPC. Mr. Corcoran was not re-appointed and his requests for review were rejected. In December 2017, however, the ILOAT [held](#) that the proceedings initiated against Mr. Corcoran were unlawful, set aside the two impugned decisions by the AC, ordered that Mr. Corcoran shall be immediately reinstated in his former post, that the EPO shall immediately allow him access to the EPO premises and resources, return to him any EPO property it requested him to hand over pursuant to decision CA/D 12/14, and to immediately unblock his User ID. Moreover, the EPO was ordered to pay the complainant 10,000 euros in compensation for moral injury and costs in the amount of 5,000 euros.

The EPO did not initially comply with this order, which caused an [outcry](#). Finally, he was at least allowed access to the BoA premises in Haar, but then his tenure as BoA member ended and he was demoted to an examiner's position. According to [fospatents](#), the following happened then:

In a letter addressed to the heads of delegations of the administrative council, the EPO's Central Staff Committee said that the office had informed Corcoran he would be "permanently transferred in February 2018 to a post of senior expert in classification expressly created for him in The Hague".

The committee argued that "transferring [Corcoran] to a country in which he had never lived is a further burden for him and his family".

The committee also argued that the office "did not fulfil its duty of care by assessing medically whether the employee was fit for a transfer. For

medical or personal reasons, the employee may have to refuse to be transferred and in such case the President may decide to terminate his service”.

I have repeatedly complained about this unlawful and harassing proceeding against a Board of Appeal member, who should be treated like an independent judge and should enjoy the protection by Art 23 EPC:

(1) The members of the Enlarged Board of Appeal and of the Boards of Appeal shall be appointed for a term of five years and may not be removed from office during this term, except if there are serious grounds for such removal and if the Administrative Council, **on a proposal from the Enlarged Board of Appeal**, takes a decision to this effect.

However, there never was such a proposal from the Enlarged Board of Appeal. On the contrary, the Enlarged Board of Appeal refused to make such a proposal no less than three times, see [Decision Art 23 1-15](#) and here in [Decision Art 23 1-16](#), which is also available in a German translation [here](#). Note that in the second case, the AC withdrew the request in the oral proceedings, so there is no decision, but the Art 23 1-16 decision refers to the failed second attempt. In the first of these decisions, the EBA held, inter alia, this:

“(…) the fact that a board member can exceptionally be removed from office only on a proposal from the Enlarged Board is intended to make sure that unsubstantiated or groundless, made-up allegations cannot be used as a pretext for getting rid of an irksome judge.

The Enlarged Board must satisfy itself, in adversarial proceedings conducted in proper judicial form, that the allegations made are indeed true, and so serious as to require that judge’s removal from office. Only on the basis of proceedings meeting that general yardstick for justice can the Council take a decision that is so far reaching, both personally and institutionally. These proceedings thus embody the legislative intent codified in Article 23(1) EPC.”

In the second decision, the EBA noted

that the amendment to Article 95(3) ServRegs was decided upon by the AC in its December 2015 meeting, during the course of this series of proceedings. With this amendment it cannot be excluded that the suspension of the Respondent will continue to the end of his present five year term. The Enlarged Board further notes that this is possible because the period of suspension has been raised from 4 to 24 months specifically for board members, and it can now be extended by the AC in “exceptional

cases". A limit to this extension is not given, and no guidance as to what may constitute exceptional circumstances is provided.

This amendment of Article 95(3) ServRegs therefore gives the possibility, *de facto*, to the AC to remove a member of the Boards of Appeal from office without following the procedure in Article 23(1) EPC.

Despite these cautionary words, Mr. Corcoran was kept away and thus "removed" from his office during his term by the Administrative Council and the EPO President. Sophistic jurists may want to allege that a "temporary suspension" for two and a half years is not a "removal", but it is - and alleging anything else is, in my humble opinion, just evil legal sophistry. The whole purpose of Art. 23 EPC is to protect the independence of the BoA members and their ability to make decisions. It is this very function which has been severely affected by the Administrative Council's measures.

Intermediate Result

The proceedings initiated against Mr. Corcoran were unlawful (ILOAT) and the Administrative Council's decision to extend his temporary suspension up to the end of his tenure constituted a violation of Art. 23 EPC (EBA). Mr. Corcoran must therefore be reinstated as a Board of Appeal member for at least the time he was prevented from exercising this function.

Breaking News

All of the above decisions of the ILO and the EBA went in favour of Mr. Corcoran for procedural reasons only. This made me curious whether there is anything to the accusations raised against Mr. Corcoran on the merits, or whether - using the EBA's words - "unsubstantiated or groundless, made-up allegations were used as a pretext for getting rid of an irksome judge". It took me several months and a request to the Regional Court of Munich (Landgericht München) to get closer to the bottom of this issue. Finally I received an anonymized copy of a decision [24 Qs 18/17](#) in criminal proceedings between the EPO President (private plaintiff 1) and his VP4 (EPO Vice-President), Mr. Željko Topić (private plaintiff 2) against Mr. Corcoran (defendant). An English translation is provided [here](#).

To put it succinctly, Mr. Corcoran was acquitted of all charges both by the Local Court (Amtsgericht München) and on appeal by the Regional Court of Munich (Landgericht München). The decision is final and I encourage readers to read it thoroughly. Not only has the procedure instigated against Mr. Corcoran been unlawful, Mr. Corcoran is also innocent on the merits!

Comment

Reading the Landgericht's decision, my first impression was that the President's and VP4's criminal action failed absolutely spectacularly, both for formal reasons and on the merits. It is particularly worth noting that the three judges of the Landgericht, who could have taken the same easy way out as the Amtsgericht and the ILOAT decisions by just deciding the appeal based on formalities, did not stop there but

actually considered the merits of the case as well.

In doing so, the Landgericht thoroughly destroyed the complaint, designating plaintiffs' evidence as „assumptions“ or „suspicions“ far away from the high probability or near certainty necessary for entering a judgment against the defendant, and held that there is no basis for the accusations (a) that Mr. Corcoran wrote a certain allegedly defamatory email about Mr. Topić, (b) that he sent this email out, (c) that it was received by any of the alleged addressees, and (d) that the email was even defamatory to the Plaintiffs. I would call this decision a first class acquittal.

Patrick Corcoran is therefore innocent and, in my view, has a right to be treated as such by the Administrative Council. In my personal opinion, the AC therefore owes him a BIG apology, full restoration of his reputation and full restoration of his position as a Board of Appeal member.

I will say no more than this today, but I would emphasize that this is the absolute minimum that I would expect from an Administrative Council that must have an elementary interest in taking care that justice be done and seen to be done to a Board of Appeal member. If the AC does not turn around now and does not reverse its decisions against Mr. Corcoran, this would be a sign that judicial independence of the Boards of Appeal is in serious jeopardy or even non-existent. It would then become plainly evident that the European Patent Organisation does not comply with the [EU Charter of Fundamental Rights](#) and the constitutions of its member states.

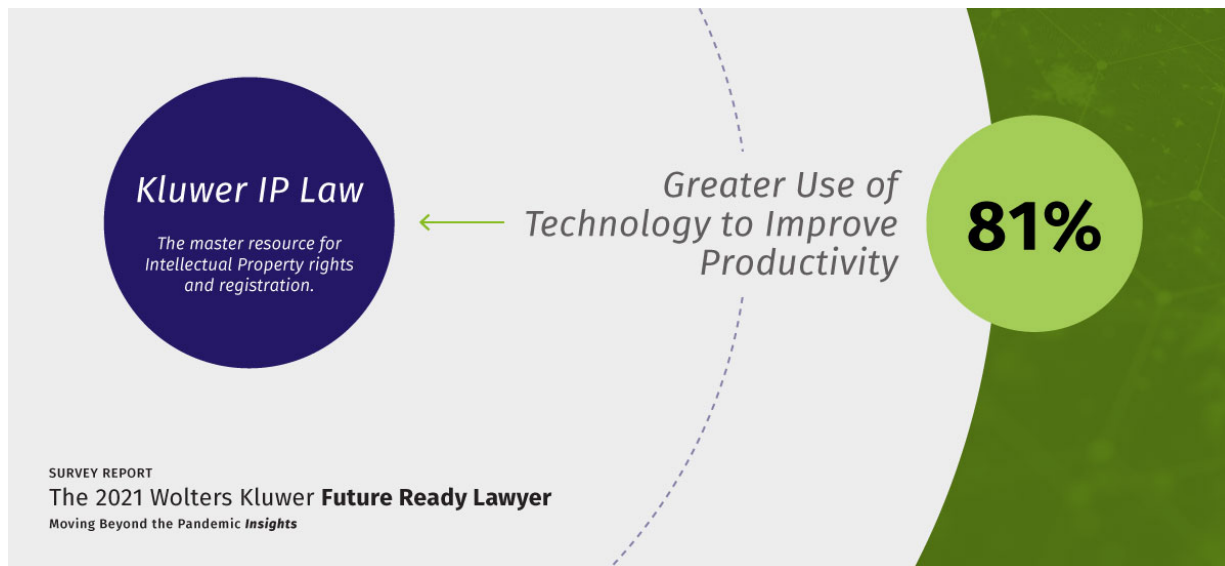
Dear Mr. Chairman and Members of the Administrative Council, you have a high responsibility for what is going on at the EPO. Rest assured that both the public and the [Federal Constitutional Court](#) in Karlsruhe will be closely watching you.

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