
ADMINISTRATIVE TRIBUNAL

Judgement No. 436

Case No. 457: WIEDL

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, President; Mr. Ahmed Osman;

Mr. Jerome Ackerman;

Whereas, on 23 September 1987 and 29 December 1987, Walter Wiedl, a former staff member of the United Nations, filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 16 February 1988, the Applicant, after making the necessary corrections, again filed an application, the pleas of which read as follows:

- "1. On 26 June 1980 I was convicted by the District Court of Jerusalem, court case 208/79, of 'Trade and Supply of a dangerous drug under Section 499(1) of Israel Penal Law 5737-1977 and Section 13 of the Dangerous Drug Ordinance (New Version) 5733-1973 and possession of a dangerous drug under Section 7 of that Ordinance'. This verdict was not legally binding.
2. In spite of the fact that the verdict had not become legally effective the Secretary-General decided on 22 July 1980 to summarily dismiss me from my service in accordance with staff regulation 10.2 effective that day for serious misconduct (...).
3. Pursuant to a bilateral legal assistance agreement between Israel and Austria, the case had to be made available to the Austrian legal authorities for further action. All documents and evidence related to my

conviction were transmitted to Austria.
On 24 September 1984 I had to appear before the
Landesgericht Salzburg, sitting as a Court of Assessors.
I was pronounced NOT GUILTY. Court case
Nr. 21aVr2668/83Hv28/84 refers (...).

4. Based on this acquittal I filed on 20 November 1984 an appeal against my summary dismissal with the Joint Appeals Board, United Nations Headquarters New York (...). My appeal was eventually transferred to the Joint Appeals Board, United Nations Office Vienna.
5. On 19 March 1987 the Representative of the Secretary-General, Mrs. Diana Boernstein, disregarded in her response both the conviction of the District Court of Jerusalem as well as the acquittal pronounced by the Landesgericht Salzburg and asserted that my 'unsatisfactory conduct history' was the actual reason for my summary dismissal (...).
6. The Joint Appeals Board, United Nations Office Vienna revoked the assertion of the Respondent but also neglected the acquittal pronounced by the Landesgericht Salzburg. The body accepted the conviction handed down by the District Court of Jerusalem and decided on 5 June 1987 not to recommend my appeal to the Secretary-General (...).
7. On 24 July 1987 the Assistant Secretary-General, Mr. Kofi A. Annan, informed me that the Secretary-General maintained the contested decision (...).
8. Since the conviction handed down by the District Court of Jerusalem as the alleged reason for my summary dismissal was vitiated and the constructed assertion of the Representative of the Secretary-General that my 'unsatisfactory conduct history' as the actual ground for my dismissal was revoked by the Joint Appeals Board, United Nations Office Vienna, remains the legally binding acquittal pronounced by the Landesgericht Salzburg as the last competent court decision.

I, therefore, respectfully request as a permanent staff member of the United Nations Secretariat:

- (a) Recognition of the acquittal pronounced by the Landesgericht Salzburg, Court of Assessors, as an independent court of a United Nations Member State,

as the final verdict.

- (b) The rectification of the Secretary-General's decision dated 22 July 1980 to summarily dismiss me from my service with the United Nations and cancellation of the consequences which accrued in conjunction with this decision.
- (c) Full rehabilitation with all consequences - since I am INNOCENT."

Whereas the Respondent filed his answer on 19 July 1988;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 26 June 1961. He served on a series of successive fixed-term appointments as a Field Service Security Officer until 1 February 1967, when he was granted a probationary appointment. On 1 February 1968, he was granted a permanent appointment. During the course of his employment with the UN he was assigned to different peace-keeping missions. At the time of the events that gave rise to the present proceedings, the Applicant was serving as a Field Service Security Officer with the United Nations Disengagement Observer Force (UNDOF) in Damascus.

On 20 May 1979, the Applicant was taken into custody by the Israeli police on narcotics charges, after having been apprehended near Gaza with 63.5 kilos of pure opium packed in cartons in the trunk of his car. Three accomplices were arrested at the same time in East Jerusalem. On learning of his arrest, the Assistant Secretary-General for Personnel Services approved the Applicant's suspension with full pay in accordance with staff rule 110.4, effective 21 May 1979, pending completion of the investigation.

The Applicant was arraigned on 22 May 1979 and subsequently tried before the Jerusalem District Court. On 23 June 1980, he was convicted of possession, trade in and supply of a dangerous drug in violation of Israeli law. On 27 June 1980, the Applicant was

sentenced to two and a half years imprisonment with remission for the period spent in custody awaiting trial.

On 22 July 1980, the Director, Division of Personnel Administration, Office of Personnel Services (OPS), informed the Applicant that the Secretary-General had decided to summarily dismiss him for serious misconduct, pursuant to staff regulation 10.2, effective 22 July 1980. The Applicant was subsequently granted a pardon by the President of Israel and on 18 August 1980, he was deported to Austria.

On 7 October 1980, the Applicant wrote to the Director of Personnel Administration, OPS, asking for the grounds on which the Secretary-General had decided to dismiss him. In a reply dated 5 November 1980, the Director of the Division for Personnel Administration, OPS, informed the Applicant that the decision to dismiss him was based on his "conviction for possessing narcotics and conspiring to traffic in the drug". At the request of the Applicant, who asserted that the decision to summarily dismiss him had been founded on an inaccurate reading of the judgement of the District Court, the dismissal was further reviewed, and on 27 November 1981, the Assistant Secretary-General for Personnel Services stated that the decision was fully justified.

On 14 July 1981, the Supreme Court of Israel rejected the Applicant's appeal of his conviction.

On 24 September 1984, the Applicant appeared before the Landesgericht Salzburg als Schöffengericht, an Austrian County or Provincial Court, which considered his case pursuant to provisions of the Austrian Criminal Code which require prosecution in Austria for certain offences (including offences against the Austrian Narcotic Drugs Law 1951), such prosecution being irrespective of action already taken in accordance with the laws at the locus delicti. The Landesgericht Salzburg acquitted the Applicant of the charges against him on the following grounds (certified translation

from the original German supplied by the Applicant):

"Based on the inadequate corroborating legal documents provided by the District Court of Jerusalem which were used to prove the irrefutable guilt of the accused and in consideration of the demonstrated evidence, in a case of doubt a verdict of NOT GUILTY in accordance with para. 259, section 3 [of the Code of Criminal Procedure]."

On 20 November 1984, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 5 June 1987. Its considerations, conclusions and recommendations read as follows:

"Considerations

15. The Board notes that the reason for the summary dismissal of the Appellant by the Secretary-General was the undisputed fact that he was found to be in possession of opium, an illicit drug, that he was convicted by an Israeli court, and that the conviction was sustained by the Israeli Supreme Court. The Board disregards the other alleged misdeeds of the Appellant which the Respondent states to be additional factors demonstrating the Appellant's record of misconduct (...). Even if these alleged misdeeds could be established, it is clear from the fact that the Appellant was kept in the service of the Organization for so long demonstrates that these acts were not considered to be of such a nature as to justify dismissal. Until the Appellant was found by the Israeli authorities to be in possession of opium, nothing in his record seems to have been considered by the Secretary-General as sufficient ground for dismissal. In any case, it would not seem just at this stage to advance additional grounds which were not conveyed to the Appellant at the time of dismissal and against which he had no opportunity to defend himself. In addition, the Board notes that in the almost 20 years of service the Appellant had satisfactory performance evaluation reports.
16. The Board does not consider that the decision of the Salzburg Landesgericht which was based on the insufficiency of the documentation obtained from the

Jerusalem Court vitiated the grounds for the summary dismissal of the Appellant. In any case, no valid reason has been advanced which could have caused the Secretary-General to disregard the decision of the District Court of Jerusalem.

17. Staff regulation 10.2 provides that the Secretary-General may impose disciplinary measures on a staff member whose conduct is unsatisfactory and may summarily dismiss a staff member for serious misconduct. The Board believes that the conviction of the Appellant of possession of a large quantity of opium constitutes serious misconduct within the meaning of staff regulation 10.2.

Conclusions and Recommendations

18. For the above reasons, the Board concludes the decision of the Secretary-General to summarily dismiss the Appellant was a valid exercise of his authority under staff regulation 10.2.
19. In view of the above conclusion the Board makes no recommendation in favour of the present appeal."

On 24 July 1987, the Assistant Secretary-General for the Office of Human Resources Management¹ informed the Applicant that the Secretary-General had decided to maintain the contested decision.

On 16 February 1988, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Landesgericht Salzburg als Schöffengericht acquitted the Applicant.
2. The decision to summarily dismiss the Applicant for

¹ Successor of OPS.

serious misconduct was taken on the basis of the Applicant's history of unsatisfactory conduct and not as a result of the Applicant's conviction by the District Court of Jerusalem.

Whereas the Respondent's principal contentions are:

1. The decision to summarily dismiss the Applicant for serious misconduct was a valid exercise of the Secretary-General's discretion under staff regulation 10.2.

2. The Applicant has provided no new information which alters the basic premise on which his summary dismissal for serious misconduct was based.

The Tribunal, having deliberated from 19 October 1988 to 9 November 1988, now pronounces the following judgement:

I. The central issue before the Tribunal is whether, and if so to what extent, the judgement of the Austrian Court (Landesgericht Salzburg als Schöffengericht) is binding on the Secretary-General in the exercise of his discretionary power in summarily dismissing the Applicant, a former staff member of the UN. This power is given to the Secretary-General by staff regulation 10.2, which reads:

"The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.

He may summarily dismiss a member of the staff for serious misconduct".

The Tribunal has consistently taken the view that the Secretary-General has broad discretion under this regulation with regard to disciplinary matters, and this includes determinations of what constitutes serious misconduct, as well as the appropriate discipline. His discretion must, of course, be exercised without prejudice or other extraneous considerations and according to due

process.

II. The Applicant does not seriously question the Secretary-General's good faith, and to emphasize this the Respondent points out how, prior to final separation, the Applicant was allowed all the financial benefits when under suspension and when the case was before the Court in Israel. On this aspect the JAB report states:

"It appears that at all stages of the trial, United Nations officials from UNTSO [United Nations Truce Supervision Organization], UNDOF and Headquarters followed his case and kept in touch with the Israeli authorities. UN officials attended the public court hearings and did everything possible to expedite the hearing of his appeal by making representations to the Israeli Foreign Ministry. The Appellant was given access to UN officials who offered assistance. After his arrest, UN officials, including a legal officer, interviewed the Appellant in order to ascertain his version of the incident. However, the Appellant chose not to make any comment or avail himself of the assistance offered and preferred to rely on the prominent Israeli lawyer he had retained, who apparently had advised him not to make any statement to the UN officials. After his conviction, the Appellant was again visited in prison by UN officials."

III. The Tribunal also notes that the Secretary-General's decision to dismiss the Applicant was on the recommendation of officials who had dealt with the case at all stages and was neither capricious nor in violation of due process. In view of this, it would appear to the Tribunal that prima facie the Secretary-General was properly exercising his powers under staff regulation 10.2. Moreover, irrespective of the conclusion of any court, if the Secretary-General were satisfied that the Applicant had in his possession and transported any illegal drug, there is not the slightest question that this would constitute serious misconduct.

However, the Applicant claims that after his acquittal by the

Austrian Court, he was entitled to reinstatement (with all its consequences) as his dismissal was based essentially on the findings of an Israeli Court which had found him guilty of carrying narcotics.

IV. The Tribunal notes that the case against the Applicant was decided by a court in Israel, culminating in the conviction of the Applicant and a sentence of two and one-half years of imprisonment. Before the Applicant had served his full term of imprisonment, he was repatriated to Austria. According to the Applicants's statement, he "wanted to be sent away from Israel because he felt he was in danger for[sic] his life." He had appealed to the High Court of Israel, and was pardoned by the President of Israel. He finally returned to Austria on 18 August 1980. In Austria, the Applicant was charged with committing an offence against the Austrian narcotics law. The Landesgericht Salzburg acquitted him on the grounds of "inadequate corroborating legal documents provided by the District Court of Jerusalem". Meanwhile, the High Court in Israel had confirmed the judgement of the lower court which had convicted and sentenced the Applicant.

V. The Representative of the Secretary-General before the JAB and the Applicant asserted that the evidence on which the Applicant was convicted by the Israeli Court was made available to the Austrian Court by virtue of a "legal assistance" treaty between Austria and Israel. The Applicant did not furnish either any evidence of the content of the legal assistance treaty between Austria and Israel, or proof that the treaty empowered a Court in Austria to nullify criminal convictions by courts in any other nation. Thus, while the Landesgericht in Austria was not satisfied with the adequacy of material sent by the Court in Israel, it did not impugn the judgement of that court, and it did not evaluate the

merits of the case. The Tribunal is not aware of precisely what was forwarded by the Israeli Court or of the reasons for its proving inadequate, but a perusal of the judgement by the Israeli Court shows why that court was satisfied beyond any reasonable doubt that the Applicant was guilty. Evidently, the Landesgericht was not sitting as an appellate Court, but in any event the judgement of the Austrian Court could not be binding on the Secretary-General without his consent, nor did the Landesgericht comment on the confirmation by the Israeli High Court of its subordinate Court's judgement.

VI. The Tribunal is aware that, one of the principles of international law is that " ... A nation has the right to proscribe any conduct taking place within its borders as criminal whether committed by a citizen, resident alien or nonresident alien."² Hence, since due process was accorded to the Applicant, the Secretary-General was entitled to take into consideration, if he wished, the action of the Israeli courts, but, as indicated above, irrespective of what the Austrian Court or the Israeli Court decided, it would not have prevented the Respondent from taking action under staff regulation 10.2 if he considered such action justified in the light of all the facts available to him. If, in coming to his present decision, i.e., to dismiss the Applicant, he took into account, among other factors, evidence available in the Israeli Court, he was entitled to do so. He could take action, even in the absence of a court proceeding, if he was convinced, in good faith and after due process, that summary dismissal of the Applicant was called for.

VII. In this particular instance, the Secretary-General certainly took into account the evidence before the Israeli Court, and he

² Hall, George and Force, Criminal Law and Procedure, 3rd edition, p. 908, (1976).

refused to reverse his decision, despite what the Austrian Court subsequently decided; this too he had the discretion to do.

VIII. In view of the above considerations, the application is rejected.

(Signatures)

Samar SEN
President

Ahmed OSMAN
Member

Jerome ACKERMAN
Member

New York, 9 November 1988

R. Maria VICIEN-MILBURN
Executive Secretary