



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 819

Case No. 853: MOAWAD

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Mikuin Leliel Balanda, Vice-President,
presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;
Whereas, on 13 April 1995, Hasan Moawad, a staff member of
the United Nations, filed an application containing, inter alia, the
following pleas:

- "1. ... I request the immediate reimbursement of the amount
[of my staff assessment which counts as part of my
salary] that has been illegally kept in the budget of
the Organization.
2. I also request that the Administrative Tribunal revoke
the Administration's decision that I be terminated by
the 1st of May [1995] ...
3. [and instead, either]

(A) to downgrade me to the General Service category ...
[which is] permitted to sign the waiver of immunities
and privileges ...

(B) ... enable me to resign voluntarily by ruling that
I be given the staff assessment and other tax-related
amounts as well as an adequate compensation for agreed
termination ...
4. I also request an additional ... compensation [payment]
for unemployment, to be paid as of the date of my
separation, 1 May 1995."

Whereas the Respondent filed his answer on 24 September 1996;
Whereas, on 4 July 1997, the Tribunal requested the Respondent to provide it with answers to certain questions, which he did, on 11 July 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 29 August 1984, on a three-month, fixed-term appointment, as an Interpreter-Trainee at the P-1, step I level. His fixed-term appointment was extended successively until 1 November 1985, when the Applicant was promoted to the P-2 level and given a two-year fixed-term appointment. With effect from 1 November 1987, the Applicant was promoted to the P-3 level, and his functional title changed to Interpreter. The Applicant's appointment was converted to a probationary appointment on 1 March 1988, and to a permanent one on 1 December 1988. The Applicant separated from service on 1 May 1995.

On 18 May 1992, the Applicant verbally informed his Personnel Officer in the Office of Human Resources Management (OHRM) that he had signed a waiver of privileges and immunities as a UN official under the Convention on the Privileges and Immunities of the United Nations (hereinafter the Convention) in connexion with his acquiring permanent resident status in the United States of America, as of 13 May 1992. He requested that OHRM take the necessary steps to authorize his reimbursement for any income taxes due on his UN salary and emoluments, based on his changed immigration status.

A Personnel Officer informed the Applicant that, as a Professional category staff member, his acquisition of permanent resident status violated the established policy of the United Nations. He was requested by OHRM to take the necessary steps to relinquish that status.

On 19 May 1992, the Applicant wrote to his Personnel Officer, OHRM, informing her of the reasons why he felt he could not comply

with the request, namely: (i) he was unaware of the UN's policy on the matter; (ii) he had exercised his "natural and fundamental human right to immigrate"; (iii) there were other cases of Professional category staff members having acquired permanent resident status while serving in the Secretariat; and (iv) he had strong personal and family motives to apply for permanent resident status.

In a reply dated 22 June 1992, the Acting Chief, Staff Administration and Monitoring Service, OHRM, informed the Applicant that, in light of the UN's policy, as embodied in staff rule 104.4(c) and administrative instruction ST/AI/294, and in view of the fact that the Applicant did not meet any of the grounds for an exception thereto, he should decide, within one month, whether he wished to relinquish his newly acquired permanent resident status, or to resign. OHRM gave the Applicant until 30 June 1992 to make his decision.

The Applicant did not inform OHRM of his decision within the specified time period. Subsequently, meetings took place between OHRM and the Applicant on 7 December 1992, and again, on 26 October 1993. At the latter meeting, the Applicant was informed that if he did not comply with OHRM's request that he either relinquish his permanent resident status or resign, the matter would be referred to the Joint Disciplinary Committee (JDC). This was done on 15 February 1994.

The JDC Panel adopted its report on 3 March 1995. The conclusions and recommendations of the majority read, in part, as follows:

"V. Conclusions

"13. The majority of the Panel observed that the Convention on the Privileges and Immunities of the UN and the UN Staff Regulations make it clear that the privileges and immunity of UN officials are [the] prerogative of the Organization which it has been granted to enable it to carry out its functions. It is reserved for the Secretary-General to determine when they should be claimed and when they should be

waived. Since the Privileges and Immunities are not perquisites of staff members, they cannot waive them except if authorized to do so by the Secretary-General. This was established in Article V of the Convention on Privileges and Immunities of the United Nations, 1946 and in the staff regulation 1.8, staff rule 104.4 (c) and in the administrative instruction ST/AI/294.

14. The majority of the Panel noted that such waivers were, under United States Immigration law, a pre-requisite for the acquisition of permanent residence status. So far as the United Nations is concerned, such waivers may be executed only with the permission of the Secretary-General.

15. The majority of the Panel took note of the explanations given by the Representative of the Secretary-General, namely, that UN policy, developed in accordance with General Assembly directives, [was] to grant permission only to locally recruited staff in the General Service category. Internationally recruited staff are not permitted to execute the waiver, unless there are exceptional and compelling circumstances. Such circumstances have been recognized only in cases of statelessness.

...

17. From a careful reading of the records before it and after examining the staff member's testimony given at the hearing, the majority of the Panel concluded that the staff member acquired the status of a US permanent resident, without the prior authorization of the Secretary-General, in violation of staff rule 104.4 (c) and ST/AI/294.

18. The majority of the Panel however, noted that the staff member refused to answer the Panel's question, namely, whether he signed the waiver of the Privileges and Immunities granted to the United Nations by the United States under the Convention on Privileges and Immunities. However, the majority of the Panel noted the staff member's contention that he should be reimbursed for the tax paid by him to the US authorities. This implies an admission that he had paid US taxes, which could have resulted only from his having signed a waiver of his privileges and immunity.

...

20. The majority of the Panel considered the staff member's arguments for his need for a US residency, reasons that had to do with his family situation. The majority of the Panel,

however, found that no exceptional and compelling circumstances had been demonstrated by the staff member to exist in this case.

...

22. The majority of the Panel concluded that the staff member was not innocent of intentional wrongdoing. The majority of the Panel found that the staff member failed to comply with repeated written instructions, either to resign or to relinquish the US permanent resident status he had acquired without the prior authorization of the Secretary-General.

23. The majority of the Panel noted however, that the staff member was a member of the Language Services staff where criteria of geographical distribution did not apply. If the purpose of staff rule 104.4(c) and administrative instruction ST/AI/294 was not to allow the balance of geographical distribution to be changed by the unauthorized action of the staff members, the Organization might wish to reconsider whether this rule should not be made inapplicable to staff members of the Language Services.

VI. Recommendations

24. The majority of the Panel was disturbed by the staff member's unwillingness to recognize the implications of his refusal to comply with the instructions given to him, either [to] resign or [to] relinquish his permanent resident status. The majority of the Panel considers that such refusal constitutes misconduct under the Staff Rules.

25. In the light of the above considerations, the majority of the Panel agreed that a written censure by the Secretary-General was appropriate.

26. The majority of the Panel finds it necessary to indicate that the above-mentioned disciplinary measure is not in-lieu of the staff member's obligation to relinquish his improperly acquired permanent resident status. The majority of the Panel expects that the staff member will do so within one month from the day of the Secretary-General's decision on this case. Should the staff member fail to do so, the majority of the Panel recommends his separation from service."

A dissenting opinion by one member of the JDC Panel on 3 March 1993, recommended that:

"...

... the Secretary-General grant the exception of the staff member since he has demonstrated that exceptions are made.

...

... Because this area of change of national status, geographical distribution and tax exemption is not consistent and needs review - I strongly dissent from the recommendation of the majority. It does not reflect equality of treatment. The minority recommends that no decisions with career implications should be implemented until any subsequent appeals are exhausted."

On 28 March 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC's report to the Applicant and informed him as follows:

"The Secretary-General has examined your case in the light of the Committee's report, including the dissenting opinion. He has noted the following findings, conclusions and recommendations of the majority:

- Although you refused to answer the Panel's question whether you signed the waiver of the Privileges and Immunities granted to the UN by the US under the Convention on Privileges and Immunities, your request that you be reimbursed for the tax you paid to the US authorities implies that you had paid US taxes, which could have resulted only from your having signed a waiver.
- That the Privileges and Immunities are not perquisites of staff members, who cannot waive them except if authorized to do so by the Secretary-General; that waivers were, under US Immigration Law, a prerequisite for the acquisition of permanent resident status. So far as the UN is concerned, such waivers may be executed only with the permission of the Secretary-General.
- Having considered your contention that a decision to terminate a staff member's service or forcing him to

surrender his resident status or his newly acquired citizenship would constitute a violation of the right to work and the right to immigrate, as contained in the Universal Declaration of Human Rights, aware that internationally recruited staff are not permitted to execute the waiver, unless there are exceptional and compelling circumstances, notably statelessness, and relying on Judgement No. [326] (Fischman), found your arguments, having to do with your family, did not demonstrate that exceptional and compelling circumstances existed.

- Found that you were not innocent of intentional wrongdoing and that, as charged as at the date of the JDC report, you had not complied with the instruction.

- Considers that refusal to comply with the instructions given to you constitutes misconduct and recommends written censure, provided that you relinquish your improperly acquired permanent resident status within one month. Should you not comply, the majority further recommends separation from service.

The Secretary-General has concluded that your conduct constituted misconduct. He has decided to accept the majority recommendation to impose the disciplinary measure of written censure, provided that you comply with the instructions within one month from the date of receipt of this letter. If by 1 May 1995 you have not either relinquished your permanent resident status, or resigned, the Secretary-General has further decided that you be separated from service with effect on that date of 1 May 1995.

This letter constitutes the written censure and will become a part of your official status file.

..."

On 13 April 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Administration wrongfully denied the Applicant reimbursement of income taxes on his US salary and emoluments and wrongfully terminated him, disregarding his fundamental right to

immigrate, his exceptional circumstances and the fact that other exceptions had been made.

Whereas the Respondent's principal contention is:

The decision to separate the Applicant from service, based on his repeated refusal to comply with the Respondent's instruction that he either relinquish his permanent resident status or resign, was a valid exercise of the Respondent's discretionary authority.

The Tribunal, having deliberated from 9 to 25 July 1997, now pronounces the following judgement:

I. The Applicant requests the Tribunal to decide that the Secretary-General may not force him to choose between permanent resident status in the U.S.A. and his UN status as an internationally recruited staff member. Accordingly, the Secretary-General must reimburse him for the taxes he paid as a permanent resident of the U.S.A.

II. This case fits squarely within the precedent previously established by this Tribunal in Judgement No. 326, Fischman (1984). In that case, an Argentinian staff member requested the Secretary-General's authorization to sign a waiver of privileges and immunities, as required by staff rule 104.4(c) and Section C of administrative instruction ST/AI/294 of 16 August 1982, under Article V of the Convention on the Privileges and Immunities of the United Nations (the Convention)¹. The applicant argued that the Universal Declaration of Human Rights forbade the Respondent from preventing him from changing his nationality. In upholding the

¹ Adopted by the General Assembly of the United Nations on 13 February 1946.

Respondent's decision denying the applicant's request, the Tribunal held that UN employment does not preclude a change in a staff member's nationality. The Secretary-General may exercise discretion in allowing a waiver of privileges and immunities, but in any case, a staff member wishing to change nationality may "at any time resign from his post and release himself thereby from all constraints of the service." (Cf. Fischman, para. IV).

III. In this case, the Applicant did not request that the Secretary-General authorize his signing of the waiver of privileges and immunities when he applied for permanent resident status, as the applicable Staff Rules and Administrative Instructions require. Instead, the Applicant acquired permanent resident status without the Secretary-General's prior authorization and then sought reimbursement of his tax payments. As the Joint Disciplinary Committee (JDC) found, Article V of the Convention establishes that privileges and immunities are the prerogative of the Organization. Consequently, the Applicant does not have the power to waive those privileges and immunities without the Secretary-General's authorization.

IV. The Tribunal does not accept the Applicant's argument that his conduct was justified by his ignorance of the applicable Staff Rules and Administrative Instructions forbidding international recruits from holding permanent resident status. At best, the Applicant was entitled to the opportunity to correct his error, an opportunity the Secretary-General repeatedly provided and one he declined to take.

V. The Applicant argues that similarly situated staff members have not been forced to choose between permanent resident status and their status as internationally recruited staff members and that there is a policy of selective enforcement of the residency rules.

If correct, such a policy or selective enforcement would concern the Tribunal. However, from evidence provided to the Tribunal by the Respondent at its request, the Tribunal is satisfied that there has not been selective enforcement and that no such policy exists.

VI. Accordingly, the Tribunal rejects the Applicant's pleas in respect of his requests relating to the maintenance of his status as a permanent resident of the U.S.A. while at the same time continuing to serve as a UN staff member.

The Tribunal therefore rejects the application in its entirety.

(Signatures)

Mikuin Leliel BALANDA
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary