
ADMINISTRATIVE TRIBUNAL

Judgement No.437

Case No. 447: AHMED

AGAINST: The Secretary-General
of the United Nations

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

Whereas, at the request of Saadat Ahmed, a staff member of the United Nations Conference on Trade and Development (hereinafter referred to as UNCTAD), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit in which to file an application until 30 November 1987;

Whereas, on 28 October 1987, the Applicant filed an application, the pleas of which read as follows:

"II. PLEAS

(a) Preliminary measures

(i) Documents Records

- Evidence showing nomination of Mr. D. Soyosa as a candidate of Sri Lanka (to be produced by the respondent).
- Evidence showing withdrawal of Mr. D. Soyosa's nomination by the Government of Sri Lanka (to be produced by the respondent).
- Evidence showing the replacement of Mr. D. Soyosa by Mr. Krandawala.
- Evidence showing any internal selection procedures established within the UNCTAD Secretariat to scrutinize different candidates and to finalize a choice.

(ii) Witness

-Mr. Victor Busuttil, Chief, Personnel and
Administration Service, UNCTAD Administration.

(b) The Decision contested

- (i) The decision of the Secretary-General of the United Nations appointing Mr. Krandawala as Registrar of the Code of Conduct for Liner Conferences.
- (ii) The decision not to circulate the vacancy within the United Nations system or advertise it.
- (iii) The decision of the United Nations Administration not to seek the approval of the General Assembly of the United Nations.
- (iv) The decision not to refer the case to the Contracting Parties to the Convention on a Code of Conduct for Liner Conferences to seek their guidance at any stage during the selection process which lasted 2 years or more.
- (v) The recommendations of the Joint Appeals Board which did not realize the magnitude of injustice done to the applicant and consequently accorded a totally insignificant compensation. The Joint Appeals Board's final recommendations, though favourable to the applicant, did not provide adequate relief since they were based on an erroneous conclusion that the applicant's rights were not infringed.

(c) The obligation involved

Regulation 4.2 of the United Nations Staff Regulations:
Infringement of the obligations imposed by 4.2
Recruitment was guided by considerations other than
securing the 'highest standards of efficiency,
competence and integrity'. Infringement of staff
rules 4.3, 4.4, read with Charter of the United Nations,
Article 101(3).

(d) The amount of compensation

- (i) Specific performance through giving the post of Registrar to the applicant.
- (ii) The compensation recommended by the Joint Appeals Board (\$US 2,000) being totally inadequate, the Tribunal is requested to accord compensation commensurate to the

injury suffered, i.e., at least, an amount equivalent to 2 years salary is requested.
(iii) Any other relief as may be deemed suitable by the Tribunal keeping in view the peculiar nature of the entire selection process."

Whereas the Respondent filed his answer on 21 April 1988;

Whereas, on 10 May 1988, the Applicant requested the Respondent to produce certain documents required for the preparation of his rebuttal and, on 21 June 1988, the Respondent commented thereon;

Whereas, on 4 August 1988, the President of the Tribunal rules that the Applicant should request such documents in his written observations on the Respondent's answer;

Whereas, on 23 September and 10 October 1988, the President of the Tribunal rules that no oral proceedings would be held in the case;

Whereas the Applicant filed written observations on 19 September 1988;

Whereas, on 4 October 1988, the Applicant filed additional documents;

Whereas, on 14 October 1988, the Tribunal submitted a question in writing to the Respondent;

Whereas, on 20 October 1988, the Respondent replied in writing to the question put to him by the Tribunal;

Whereas, on 28 October 1988, the Tribunal submitted further questions in writing to the Respondent, who replied in writing on 2 November 1988;

Whereas the facts in the case are as follows:

Saadat Ahmed, a national of Pakistan, was recruited by UNCTAD on 1 June 1977 as an Economic Affairs Officer at the P-3 level. He initially served on a series of fixed-term appointments, and after being promoted to the P-4 level on 1 April 1983, he was granted a probationary appointment on 1 August 1983 and a permanent appointment on 1 April 1984.

In 1973, the United Nations convened a Conference to reform the existing international liner conference system. On 6 April 1974, the Conference adopted the new Convention on a Code of Conduct for Liner Conferences. Article 46 of the Convention read as follows:

"Six months before the entry into force of the ... Convention, the Secretary-General of the United Nations shall, subject to the approval of the General Assembly of the United Nations, and taking into account the views expressed by the Contracting Parties, appoint a Registrar ..." [Emphasis added].

The Convention entered into force on 6 October 1983.

In May 1983, when entry into force of the Convention became imminent, UNCTAD commenced the selection procedure for a candidate to fill the post of Registrar. On 10 October 1983, a Recruitment Officer at UNCTAD transmitted to the Special Assistant to the Director, Shipping Division, a list of 10 candidates who had applied for the post. The Applicant's name was not included in this list.

On 13 October 1983, the Secretary-General of UNCTAD convened a meeting of the Contracting Parties to the Convention, for the purpose of obtaining their views on the appointment of the Registrar. At the consultations, it was decided that the Registrar should be a national of a developing country which was a party to the Convention.

On 19 October 1983, the Applicant wrote to the Secretary-General of UNCTAD to express his interest in the post of Registrar and to submit his application therefor.

In a letter dated 20 October 1983, the Secretary-General of UNCTAD conveyed to the Secretary-General of the United Nations the outcome of the consultations among the Contracting Parties. He explained to him that UNCTAD had received applications from 10 candidates for the post of Registrar, only four of whom were nationals of Member States parties to the Convention. He attached a tabulation with the full list of the candidates and an evaluation of their qualifications and experience. Although the Applicant was one

of the four candidates who were nationals of Member States parties to the Convention, the Secretary-General of UNCTAD did not select him for the post. He recommended instead Mr. David Soyosa, a national of Sri Lanka, as "the strongest candidate for the post".

The formal procedure to appoint the Registrar did not commence until early 1985. The Appointment and Promotion Board at Headquarters postponed consideration of Mr. Soyosa's appointment pending receipt of an explanation from the UNCTAD secretariat concerning the waiver of a vacancy announcement among Member States parties to the Convention, as well as the reason for not recommending for the appointment the Applicant who was the only internal (staff member) candidate.

In two cables, dated 18 March 1985 and 28 April 1985, UNCTAD replied that the matter was "still under discussion" and that Headquarters would be informed as soon as a decision was taken. Finally, on 10 June 1985, the Chief, Administrative Service of UNCTAD informed the Director, Division of Recruitment, Office of Personnel Services, that the Deputy Secretary-General in charge of UNCTAD now wished "to recommend, for recruitment ..." another candidate (Mr. Piyasiri Karandawala), a national of Sri Lanka, who had been serving with UNCTAD at the L-5 level as a Special Adviser on Shipping. Mr. Karandawala had not applied for the post in 1983, nor had his name been included in the list of four candidates originally transmitted in the letter of 19 October 1983 from the Secretary-General of UNCTAD to the Secretary-General of the United Nations.

In a cable dated 2 July 1985, a Personnel Officer at UNCTAD expressed its concern to the Office of Personnel Services at Headquarters about the prospects of further delays with regard to the appointment of the Registrar. He also transmitted a comparative evaluation of the Applicant's and Mr. Karandawala's qualifications for the post of Registrar.

On 18 July 1985, the Applicant himself wrote to the Secretary of the Appointment and Promotion Board to submit personally to the

Board information concerning his qualifications and experience that would be relevant to the post of Registrar.

In a cable dated 24 July 1985, UNCTAD confirmed that Mr. Soyosa's candidacy had been withdrawn.

On 8 August 1985, the Assistant Secretary-General for Personnel Services, Office of Personnel Services,¹ recommended to the Appointment and Promotion Board the appointment of Mr. Karandawala as Registrar. The Board agreed with that recommendation, which was subsequently accepted by the Secretary-General.

On 13 October 1985, the Applicant submitted to the Geneva Joint Appeals Board a request for an injunction to restrain UNCTAD from appointing the Registrar. On 23 October 1985, he requested the Secretary-General of the United Nations to review the administrative decision to appoint Mr. Karandawala as Registrar. On 6 November 1985, the Geneva Joint Appeals Board ruled that the Applicant's request for an "injunction" was irreceivable. Having received no reply from the Secretary-General of the United Nations to his request of 23 October 1985, the Applicant lodged an appeal with the Geneva Joint Appeals Board on 27 February 1986. The Board adopted its report on 22 May 1987. Its conclusions and recommendations read as follows:

"IV. CONCLUSIONS

31. The Board believes, as stated in the ... Ahmed memorandum of 6 November 1985, that Appellant cannot invoke article 46 of the Convention to justify his claims. And the Board is not in a position to judge whether such procedural irregularities would constitute a violation of the international treaty; under international law, it is only the State parties to the Convention which can formulate claims under the treaty.
32. As for [the] Appellant's rights under the terms of his appointment, the Board failed to find them infringed.

¹ Former name of the Office of Human Resources Management.

33. Nevertheless, from the above observations on the case, the Board concludes that [the] Appellant has legitimate grounds for complaining that, in consequence of acts of omission or commission by the UNCTAD Administration and the APB [Appointment and Promotion Board], he was placed in the context of promotion appointment procedures characterized by irregularities, deficiencies and shortcomings.
34. Specifically, the UNCTAD Administration failed to abide by the procedures specially designed for the recruitment in question, by including [the] Appellant's candidature without the Contracting Parties' knowledge, by evading questions posed by the Appointment and Promotion Board concerning [the] Appellant's candidature,² and, furthermore, by putting forward a replacement candidate without informing the Contracting Parties.
35. The Board also concludes that Appellant's request for specific performance, i.e., that Respondent make arrangements leading to Appellant's appointment to the post of the Registrar, should be rejected. The totality of the record shows that even if the procedural irregularities discussed above had not occurred, an especially qualified person other than [the] Appellant would have been selected. The Board, therefore, cannot recommend that the appointment already made be rescinded (which, in any event, would be of extremely doubtful feasibility) nor can it accept the argument that [the] Appellant's candidature would have prevailed inasmuch as the qualifications of other candidates considered, including, in particular, the appointee, appear to justify the selection which, however dysfunctionally, was made.

V. RECOMMENDATIONS

36. For the reasons outlined above, the Board finds that the defective handling of the case by the UNCTAD resulted in the Appellant's experiencing an unwarranted ordeal of the type which justifies the payment of a compensation which the Board recommends should be set at \$2,000.--. The Board further recommends that [the] Respondent be invited to devote henceforth special attention to the opportunities which may arise for the legitimate advancement of [the] Appellant's career in accordance with the rules."

² The Board wishes to note in this regard, that the UNCTAD formulated, for the consideration of the APB, evaluations of [the] Appellant's candidature and related observations which in the opinion of the Board, could be leniently described as misleading and disingenuous.

On 23 September 1987, the Assistant Secretary-General for Human Resources Management informed the Applicant of the following:

"While not agreeing with the Board's position concerning payment of compensation to you, [the Secretary-General] has decided that you be paid, in settlement of the case, \$US 2,000, the amount recommended by the Board as compensation.

With regard to the second recommendation made by the Board in paragraph 36 of the report, the matter is being referred to in the Career Development and Placement Unit for appropriate attention."

On 23 October 1987, the Applicant filed with the Tribunal the application referred to above;

On 10 May 1988, the Applicant sent the cheque for \$US 2,000 which he had received to the Executive Secretary of the Tribunal.

Whereas the Applicant's principal contentions are:

1. The irregular procedures adopted by the UNCTAD secretariat for the selection of the Registrar led to the Applicant's exclusion from the selection process.
2. The Respondent never fulfilled his obligation to obtain approval of the selected candidate by the General Assembly.
3. The Respondent misrepresented facts and made false statements in order to support the candidacy favoured by UNCTAD.
4. The Respondent was prejudiced against the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant's procedural pleas should be rejected.
2. The Tribunal is not competent to decide whether the Respondent correctly interpreted the provisions of the Convention on a Code of Conduct for Liner Conferences with regard to the appointment of the Registrar.
3. The Applicant has failed to show that the Respondent's interpretation of the Convention has caused him any harm.

4. The Respondent's decision not to appoint the Applicant as Registrar was a permissible exercise of his discretionary authority.

5. There was no evidence that the exercise of the Secretary-General's discretion not to appoint the Applicant as Registrar was vitiated by prejudice.

The Tribunal, having deliberated from 14 October to 10 November 1988, now pronounces the following judgement:

I. The Applicant is requesting the Tribunal to rescind the decision by the Secretary-General of the United Nations to appoint Mr. Karandawala as Registrar for the Convention on a Code of Conduct for Liner Conferences of 6 April 1974 (hereinafter referred to as the Convention), which entered into force on 6 October 1983. The appointment was formalized through an offer made by the Secretary-General on 4 October 1985 and accepted by Mr. Karandawala on 10 October, and a personnel action form of 20 November 1985, with an effective date of 1 November.

The Applicant further requests the Tribunal to rule that the Secretary-General should appoint him as Registrar. Failing that, he is claiming compensation in an amount equivalent to at least two years' salary.

II. As preliminary measures, the Applicant requests the Tribunal to order the submission of various records and documents, and to hear a witness: Mr. Victor Busuttil, Chief, Personnel and Administration Service, United Nations Conference on Trade and Development (UNCTAD).

III. The Tribunal invited the Respondent to submit written statements and additional documents. The Respondent has duly answered the questions put by the Tribunal, which considers that there is enough material in the file to enable it to make a ruling.

It therefore rejects the Applicant's pleas regarding the submission of evidence and the hearing of a witness.

IV. As to the merits, the Applicant sets forth the following arguments to support his requests:

(1) The post of Registrar for the Convention was not announced in a vacancy notice or advertised within the United Nations system;

(2) The appointment of the Registrar was not submitted to the United Nations General Assembly for approval;

(3) The appointment was made without "taking into account the views expressed by the Contracting Parties" to the Convention;

(4) The appointment was made in violation of United Nations staff regulations 4.3 and 4.4.

V. To support his argument regarding the failure to circulate a vacancy announcement, the Applicant relies on a previous decision of the Tribunal (Judgement No. 362, Williamson (1986)). That precedent may not be invoked here. The present case does not involve a vacancy within the United Nations Secretariat, but appointment to a post established by a specific international Convention. The circumstances and conditions pertaining to that post when it was established tend to show that the rules governing vacancies do not apply.

The post of Registrar is under the regular administrative management of the United Nations Secretariat. The last sentence of paragraph 1 of article 46 of the Convention reads as follows: "Administrative services for the Registrar and his assistants shall be provided by the United Nations Office at Geneva."

Nevertheless, the establishment of the new post was no secret to the parties concerned. The Applicant himself was aware of it, and there were several applications submitted between 1983 and 1985.

VI. There was no provision in article 46, paragraph 1, of the Convention for any special measure to advertise the establishment of the post of Registrar. The Tribunal considers that the publicity to be given to the establishment of international civil service posts was adequate in this case.

VII. The Applicant proceeds to set forth two arguments regarding the violation of article 46, paragraph 1, of the Convention.

VIII. There is a question as to whether the Applicant, as a private individual, may invoke the violation of an international treaty. The treaty is addressed to the High Contracting Parties, and upon acceptance by the General Assembly, to the United Nations.

Under the Vienna Convention on the Law of Treaties, only the parties to a treaty are bound by its provisions; they are bound in relation to one another (article 26 of the Vienna Convention). An international treaty does not create either obligations or rights for a third State without the consent of that State (article 34 of the Vienna Convention). The Tribunal does not believe that in order to render its judgement, it needs to consider whether the treaty creates rights and obligations that may be invoked by individuals.

IX. On the one hand, the Convention cannot be regarded as part of the Applicant's contract and of the terms of his appointment which, in his application before the Tribunal, he may allege have not been observed. Article 2, paragraph 1, of the Statute of the Tribunal defines the terms "contracts" and "terms of appointment". The reference is exclusively to the Staff Rules and Regulations, including the staff pension regulations. The Convention has not been included in those provisions.

X. On the other hand, contrary to the Applicant's contention, the Tribunal can find no violation of article 46 of the Convention.

XI. In the first place, article 46, paragraph 1, does not require the General Assembly to approve the Secretary-General's appointment of the Registrar. The scope of the General Assembly's intervention is defined in the travaux préparatoires.

XII. The relevant text dealing with the institutional machinery of the Convention underwent the following amendments during the deliberations of the Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences (cf. TD/CODE/10 (vol. II), annex XVIII).

XIII. Initially, draft article 24 (which was renumbered 25 and later became article 46 of the Convention) provided that "the Secretary-General shall appoint, six months before the entry into force of the Convention, a Registrar ..." (TD CODE/10, annex XVIII).

That text was amended to include the words: "... subject to the approval of the United Nations General Assembly, and taking into account the views expressed by the Contracting Parties ..."

(TD/CODE/10, annex XV). Except for the change in paragraph number, that version was not amended (Emphasis added).

XIV. The requirement of General Assembly approval was in response to the concerns of certain delegations, that of the United States in particular.

The United States representative had requested:

"... that confirmation should be sought from the Secretary-General as to whether the United Nations Secretariat could undertake the functions enumerated in the article [then article 24] and that an assurance to that effect should be given to the Conference before it came to a decision on the matter"
(United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, vol. I, Reports and other documents, Geneva, 1975, p. 34, para. 52).

The representative of the Group of 77 expressed the view that such an assurance was unnecessary (ibid., para. 53). For his part, the Director-in-charge of the Conference stated:

"That the UNCTAD secretariat had informed United Nations Headquarters of the proposals on institutional arrangements, and that it would inform the Conference of the reply, if any, before the Conference ended." (ibid., para. 55)

XV. When the question was taken up again, the United States representative referred to his delegation's previous remarks:

"The Director-in-charge of the Conference, in reply, assured the Conference that the senior officials concerned at United Nations Headquarters had been kept fully informed by cable of the discussions on the subject. He said it was now for the Conference to decide whether it wished to adopt this article in the knowledge that, if it did so, the matter would be submitted to the General Assembly by the Secretary-General of the United Nations, together with his observations on the administrative and financial implications" (ibid., p. 72).

XVI. Thus, the requirement of General Assembly approval relates to the institutional machinery established by the Convention, not to the appointment of the Registrar. The Assembly did indeed agree to the institutional machinery. It voted the United Nations budget appropriations for the appointment of a Registrar (resolution 38/236/A of 20 December 1983, part IV, which in section 15, dealing with UNCTAD, includes appropriations relating to the Convention).

XVII. The General Assembly was therefore not required to approve the appointment of the Registrar. Even if the Applicant's argument that the General Assembly failed to give its approval were accepted, his plea would have no basis in law.

XVIII. Assuming that the Applicant is justified in arguing that account was not taken of "the views expressed by the Contracting Parties" to the Convention, that argument fails on the facts. The Contracting Parties were convened to a meeting on 13 October 1983 to

obtain their views. With respect to the actual appointment of the Registrar, it seems to the Tribunal that while there was no legal requirement to consult the High Contracting Parties thereon, it would have been desirable to do so.

XIX. Lastly, the Applicant contends that the decision to appoint the Registrar was in violation of United Nations staff regulations 4.3 and 4.4. As the Tribunal has already noted, article 46 of the Convention makes no reference to the United Nations Staff Rules.

XX. Nevertheless, in appointing the Registrar for the Convention, the Secretary-General of the United Nations must apply the general principles governing the appointment of any international civil servant. Article 101 of the Charter of the United Nations reflects those general principles.

The Tribunal finds that the Secretary-General did not act contrary to those principles in appointing the Registrar for the Convention.

XXI. As to the request for damages, the Applicant contests the amount of US\$2,000 awarded to him by the Secretary-General on the recommendation of the Joint Appeals Board. He considers that amount totally inadequate for the injury suffered by him, which he assesses, at least, at the equivalent of two years' salary.

XXII. Though not endorsing the Board's words of reproach against the UNCTAD administration, the Tribunal finds that the Applicant's application for the post of Registrar for the Convention was not considered with due seriousness. The hesitation and procrastination on the part of the UNCTAD administration created an unwarranted ordeal for the Applicant, causing him mental suffering. However, the Applicant, like any other candidate, did not have a right to the post of Registrar. Accordingly, the Tribunal considers that the

Secretary-General's award of US\$2,000 in damages constitutes adequate reparation for the injury suffered by the Applicant.

XXIII. For the foregoing reasons, the Tribunal decides:
All the Applicant's pleas are rejected.

(Signatures)

Samar SEN
President

Roger PINTO
Vice-President

Ahmed OSMAN
Member

New York, 10 November 1988

Executive Secretary