
ADMINISTRATIVE TRIBUNAL

Judgement No. 455

Case No. 488: DENIG

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, First Vice-President, presiding;
Mr. Jerome Ackerman, Second Vice-President; Mr. Samar Sen;

Whereas, on 8 August 1988 and 22 October 1988, George T. Cosgrave Denig, a former consultant of the Office of the High Commissioner for Refugees, hereinafter referred to as UNHCR, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 5 December 1988;

Whereas the pleas of the application read as follows:

"I, George Thomas Denig-Cosgrave, hereby request the United Nations Administrative Tribunal:

1. As a preliminary measure:

-To declare itself competent under article 2 of its Statute to decide on the present appeal;

-To declare the present appeal receivable;

2. On the merits:

-To rescind the UNHCR's refusal to give effect to the appointment of September 17, 1985, decision which was implicitly confirmed by the Secretary-General of the United Nations who took no action on the letter of my attorney of September 16, 1986.

- To declare valid the appointment of September 17, 1985 which I accepted and that my employment took effect as from March 15, 1985[sic].
- To direct the UNHCR to compensate me for one year (US\$47,295) as the UNHCR did not let me fulfil the contract until it expired on March 15, 1987, plus interest at 8% as from that date.
- To declare that the UNHCR shall pay me the difference between the salary received as a consultant and the compensation I was entitled to while performing the duties of head of the Hargeisa Sub-Office (US\$6,733) during the period from September 17, 1985 until January 31, 1986, plus interest at 8 % as from that date.
- To declare that the UNHCR shall pay my statement of expenses submitted on February 5, 1986.
- To declare that the UNHCR shall pay me US\$5,000 as moral reparation."

Whereas the Respondent filed his answer on 26 June 1989;

Whereas, on 20 September 1989, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and, on 21 September 1989, he provided answers thereto;

Whereas, on 18 October 1989, the Tribunal put questions to the Respondent and, on 25 October 1989, he provided answers thereto;

Whereas the facts in the case are as follows:

The Applicant, a national of the United States of America, was employed by UNHCR as a consultant, to perform the services of Field Adviser, at the UNHCR Sub-Office in Hargeisa, Somalia, for a duration of three months running from 8 May 1985 to 7 August 1985, at the pay rate of US\$2,500 per month.

On 17 September 1985, the High Commissioner for Refugees offered the Applicant a one year Project Personnel, Intermediate-Term Appointment at the L.3, step VIII level, as Field Officer in the UNHCR Sub-Office in Hargeisa, Somalia. The offer stated that

the appointment was "subject to medical and U.S. Clearances and satisfactory reference checks" and "should take effect as soon as possible." The U.S. clearance requirement was based on Executive Order 10422, issued in 1953 by the President of the United States, which required that U.S. nationals seeking U.N. employment obtain a U.S. security clearance. Through an informal understanding, this requirement was concurred in by the Secretary-General. In a handwritten note dated 1 November 1985, the Applicant stated: "I accept the terms of this offer after having read the Staff Rules and Regulations ...".

The Applicant appears to have been designated by the UNHCR Administration to act as Head of the Hargeisa Sub-Office, a post at the P-4 level. In a cable dated 23 September 1985, the UNHCR Branch Office Representative, referring to the technically incorrect arrangement whereby a consultant (the Applicant) and not a staff member was occupying the Head of Sub-Office post, informed the Administration that the Applicant would prefer Headquarters to consider his candidacy for that post, and not for the post in the same office to which the offer of employment corresponded. He also suggested possible ways and means to employ the Applicant, pending his reassignment to head the Sub-Office, at the P-4 level, function which he was fulfilling as a consultant. In a reply dated 24 September 1985, the Chief, Recruitment Unit, informed the Branch Office Representative that the Head of Sub-Office post was "NOT PRESENTLY VACANT" and suggested that the Applicant should accept the offer made to him at the L.3 level. Then, he could apply for the other post when it became vacant.

An exchange of correspondence ensued between the UNHCR Branch Office Representative and the Head, Personnel Services at Headquarters. The Branch Office Representative was anxious to regularize the administrative situation at the Sub-Office and was concerned that if the Applicant's contractual status was not settled expeditiously, the Applicant would eventually leave, and then the North-West Region of Somalia, where refugee problems were extremely

serious, would be left unattended by UNHCR professional staff.

In a cable dated 13 November 1985, the UNHCR Branch Office Representative confirmed that the Applicant accepted the offer of employment at the L.3 level, that all papers concerning the appointment were being mailed and that the medical exam had been completed. He also noted that the forms concerning the Applicant's U.S. security clearance had been forwarded to the U.S. authorities a month earlier, and confirmed that the Applicant was officially applying for the Head of Sub-Office post.

In a reply dated 14 November 1985, the Deputy Head, Personnel Services, stated:

"HAVE TAKEN NOTE DENIG'S ACCEPTANCE L.3 FIELD OFFICER POST HARGEISA. UNTIL US CLEARANCE RECEIVED WILL EXTEND CONSULTANCY CONTRACT. INITIAL EXTENSION BEING PROCESSED UNTIL 7 DECEMBER [1985] ... POST HEAD SO[SUB-OFFICE] HARGEISA WILL BE ADVERTISED INTERNALLY AND EXTERNALLY AND HAVE TAKEN NOTE THAT DENIG IS CANDIDATE FOR THIS POST."

The Applicant's consultant's contract was subsequently extended first, retroactively, until 7 November 1985, then until 7 December 1985. In a cable dated 3 January 1986, the Chief, Recruitment Unit, informed the Branch Office Representative that the UNHCR Administration had not received the Applicant's U.S. security clearance and that in order to "SPEED UP RECRUITMENT" as a Field Officer, UNHCR would be grateful if the Applicant "HIMSELF COULD INQUIRE ON [THE] MATTER WITH [THE] US AUTHORITIES". In a further cable dated 15 January 1986, the Chief, Recruitment Unit, informed the Branch Office Representative that the Applicant's contract was being retroactively extended from 1 January to 28 February 1986 pending receipt of the U.S. security clearance.

On 23 January 1986, the Applicant notified the UNHCR Branch Office Representative that he was "ending [his] consultant's contract with UNHCR as of 31 January 1986." He stated that "after many months as Acting Head of the Hargeisa Sub-Office, repeated requests to the B.O.[Branch Office] for assistance in securing the

'L' post offered by HQ [Headquarters] and on the recommendation of HQ ...", he was leaving for the United States of America in order to obtain his security clearance. In addition, he noted that he could not absorb any further "the financial hardships and living conditions" resulting from his low paying consultant's contract.

An exchange of cables ensued between Headquarters and the UNHCR Branch Office Representative concerning the modalities of the Applicant's departure from Somalia, his contractual status and the precarious staffing situation at the Hargeisa office.

The Applicant left Mogadishu on 29 January 1986, unable to sign his consultant's contract for January and February since the documents had not arrived at Mogadishu. The Applicant travelled to Geneva, and met with the Head, Personnel Services, to discuss his employment situation. According to a note for the file prepared by the Head, Personnel Services, the Applicant stated "that he was willing to return to Hargeisa immediately, but on the condition that he be paid at the L.4/P-4, step VIII level", although he was aware that the P-4 post of Head of the Sub-Office, whose functions he had been discharging, had been filled by a serving staff member. The Applicant "was not now willing to return to Hargeisa for the L.3, step VIII appointment he had been offered and which he had accepted previously." The Head, Personnel Services, asserts that when told that the UNHCR Administration "could not agree to compensating him at the L.4 level" the Applicant "said that in the circumstances, his employment with UNHCR was ended." The Applicant contests this account of the meeting.

The Applicant then travelled to the United States of America and in a letter dated 1 March 1986, he informed the Deputy High Commissioner that he had obtained "the required security clearance" and "taken all medical exams". He also stated that he was willing to return to Somalia if UNHCR required staff to cover the North-West Region and that he sought employment at the P-4 or P-5 level.

On 4 May 1986, the Applicant wrote to the Chief, Recruitment Unit, stating that since UNHCR's conditions concerning medical

examination, U.S. clearances and reference checks had been fulfilled, a valid contract at the L.3, step VIII level had been concluded between him and the UNHCR as of 15 March 1986, the date of receipt of his U.S. security clearance. In a reply dated 12 May 1986, the Chief, Recruitment Section, referring to the Applicant's "abrupt departure from Hargeisa" as a "clear sign of [the Applicant's] unilateral decision not to remain with UNHCR" and to the numerous occasions on which the Applicant had "made it abundantly clear ... that [he was] not prepared to work for UNHCR in any capacity under a certain level", stated: "I regret, therefore, to confirm that the offer which once was made to you is de facto cancelled and cannot, therefore, be implemented ...".

An exchange of correspondence ensued between the Applicant's counsel and the Administration, and on 18 December 1986, the Applicant filed a statement of appeal with the Geneva Joint Appeals Board.

On 30 May 1988, the Presiding Officer of the Joint Appeals Board informed the Applicant that "after consultations with the Office of Legal Affairs and an examination of relevant issues, the Board decided that it ha[d] no competence and jurisdiction to consider [his] appeal." In a letter dated 21 July 1988, the Deputy to the Under-Secretary-General and Director, General Legal Division of the Office of Legal Affairs, informed the Applicant that he could file an application directly with the Administrative Tribunal, alleging that he was the holder of a valid contract of employment with the United Nations.

On 5 December 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent should have compensated the Applicant at the level corresponding to his duties when the Applicant acted as Head of the Sub-Office in Hargeisa.

2. When the Applicant obtained the U.S. security clearance,

the Respondent should have given effect to the offer of appointment dated 17 September 1985.

3. The note for the file from the Head, Personnel Services, is self-serving and untruthful.

Whereas the Respondent's principal contentions are:

1. The Applicant never received a valid appointment since, prior to the Applicant's having fulfilled all the conditions set for his appointment, the Respondent had withdrawn the offer.

2. The Respondent was not legally precluded from revoking his conditional offer of appointment before all of its conditions were fulfilled.

3. The Applicant did not receive any other offer of appointment from the Respondent.

The Tribunal, having deliberated from 17 to 31 October 1989, now pronounces the following judgement:

I. As indicated above, the Applicant contends that (a) as of 15 March 1986, he had a binding contract for one year until 15 March 1987, at the L.3, step VIII level which he was wrongly not permitted to perform by the Administration; (b) he is entitled to \$6,733.00 in additional compensation with respect to the period from 17 September 1985 until 31 January 1986 because he performed the duties of Head of the Hargeisa Sub-Office during that period - not the consultant duties for which he was being paid; and (c) he is entitled to reimbursement of certain expenses for which he submitted a statement on 5 February 1986, and to moral reparations in the sum of \$5,000.00. In addition, the Applicant challenges the refusal of the Administration to give any effect to the Applicant's acceptance of the 17 September 1985 offer of a one-year appointment at the L.3, step VIII level for service at the Hargeisa Sub-Office in Somalia.

II. The Respondent's principal defense to the Applicant's claim

is that the contract offer to the Applicant for a one-year interim appointment on 17 September 1985 was revoked or withdrawn by the Respondent before its acceptance through fulfillment by the Applicant of one condition precedent, i.e., receipt by the Applicant of a U.S. security clearance. In the Respondent's view, since this was the only contract offered to the Applicant besides the consultancy agreement he held at the time, the new contract could not have come into existence until 15 March 1986. That was when the Applicant obtained the security clearance. But the Respondent contends that his offer was revoked or withdrawn because the Applicant decided at the end of January 1986 to leave Somalia, and was willing to return only on the basis of a different contract for a higher level post than that offered to him on 17 September 1985. Accordingly, the Respondent maintains that his 17 September 1985 offer never ripened into a contract, and that the Applicant's employment prior to his departure from U.N. service was pursuant to extensions of an earlier consultancy agreement.

III. The Tribunal finds no valid basis for the Applicant's contention that, as of 15 March 1986, he had a one-year contract until 15 March 1987, for which he was entitled to be paid even though he did no work for the Organization in that period. Although it may be that the Applicant felt that he had justification for leaving Somalia in January 1986 because of expiration of the consultancy contract extension, and the delay by the Administration in implementing the 17 September 1985 offer for lack of U.S. security clearance, this did not entitle him to a paid vacation until 15 March 1987. Nor did it entitle him to a new contract for appointment at a higher level than that provided in the 17 September 1985 offer as the price for his return to U.N. service in Somalia. The Tribunal finds that this was sought by the Applicant during his meeting in Geneva on 5 February 1986, with Mr. Conway, the Head, Personnel Services of UNHCR. The Tribunal also finds that Mr. Conway's response to the Applicant's requests, among other

things, led the Applicant to leave the service of the U.N. on 5 February 1986. The Applicant made clear at that time and by his subsequent conduct that he had left the employ of the U.N. Consequently, the Tribunal rejects the Applicant's claim for compensation with respect to the period from 15 March 1986 to 15 March 1987.

IV. The Applicant has not raised the question whether the security clearance condition stated in the offer of appointment is contrary to the U.N. Charter or the Staff Regulations and Rules. Consequently, the Tribunal does not consider it necessary to address itself to any such question.

V. The Tribunal's finding that the Applicant's claim with respect to the one-year period from 15 March 1986 to 15 March 1987 is unfounded does not mean that the Respondent's contentions have persuaded the Tribunal that the Applicant's position is wholly without merit. Contrary to what the Respondent says, the Tribunal does not consider that the requirement for a U.S. security clearance should have been regarded as a condition that had to be met before the contract contemplated by the 17 September 1985 proposal could come into effect.

VI. It appears from the record that, by or before 17 September 1985, the Applicant, though serving under a consultancy contract, was discharging the duties and responsibilities of the Head of the Hargeisa Sub-Office (who had left and had not been replaced), and that he continued to do so until the end of January 1986. The post actually being encumbered by the Applicant during that period was acknowledged by the Administration to have been at a higher level than the L.3, step VIII position provided for in the 17 September 1985 offer. In view of this situation, which the Administration permitted to continue, the Respondent can hardly assert that it would be reasonable now to construe the requirement for a U.S.

security clearance as so vital to the formation of the contract contemplated, that it must be regarded as a condition that had to be met before any valid contract could be entered into. If that were the case, the Applicant should have been limited by the Administration to the significantly different and lesser duties and responsibilities of a consultant. The Tribunal concludes that in this case the requirement for a security clearance must be deemed a condition which could be satisfied by the Applicant after he began performing the contract, and that the offer of 17 September 1985 was accepted by the Applicant's performance of duties either identical to, or at a higher level than those he was to perform in the L.3, step VIII post.

VII. When the Applicant's security clearance was received in March 1986, it should have been considered effective as of 17 September 1985. The Applicant's signed acceptance on 1 November 1985 should be regarded as confirming the fact that the offer was already accepted by performance. Accordingly, the contract was in effect before the offer was revoked or withdrawn.

VIII. On an alternative ground, the Tribunal likewise finds the contract to have been in existence on 17 September 1985. On 21 September 1984, almost a year earlier, the U.S. Court of Appeals for the First Circuit rendered a decision in Ozonoff v. Berzah, which is reported at 744 F.2d 244 (Federal Reporter, Second Series).

The Court ruled, on the basis of earlier decisions of the Supreme Court of the United States, that Executive Order 10422 prescribing security clearance for U.S. citizens seeking appointment in the U.N. system was unconstitutional because of its vagueness and its infringement on freedom of speech. It does not appear that any further judicial review was sought in the Ozonoff case. Although the Tribunal understands that as a technical legal matter, the U.S. Government might have and apparently did, temporarily, decline to abide by the Ozonoff decision in jurisdictions not governed by the

U.S. Court of Appeals for the First Circuit, in the absence of either a further appeal or a conflicting decision by another Court, the Tribunal does not believe that the Ozonoff decision could properly be ignored insofar as the Applicant's position was concerned. This is especially so since, in what appears to have been the only other case directly challenging the validity of Executive Order 10422, a U.S. District Court for the Eastern District of Pennsylvania in April 1986, in Hinton v. Devine, 633 F. Supp. 1023 (E.D. Pa. 1986), (U.S. Federal Supplement), followed the rationale of the Ozonoff decision, and also declared Executive Order 10422 to be unconstitutional. The U.S. Government then decided not to pursue the matter further and on 2 June 1986 informed the U.N. that observance of Executive Order 10422 was suspended.

IX. The record does not indicate that either the Applicant, the Chief, Recruitment Unit, or anyone else involved in the 17 September 1985 offer to the Applicant was aware that Executive Order 10422, had been declared unconstitutional the previous year. U.N. officials at Headquarters were, however, informed of this in 1984. Since the Executive Order was the only basis for inclusion in the 17 September 1985 offer to the Applicant of the security clearance requirement, the Tribunal is satisfied that its presence in the 17 September 1985 offer was based on the implicit mutual belief by the immediate parties that the validity of the Executive Order was not open to question. While such a mistake of law may sometimes be ground for total rescission of a contract, that result is not called for under the circumstances of this case.

X. Given the course of events here, the Tribunal concludes that the date of the Ozonoff decision established the invalidity of the security clearance programme under Executive Order 10422, thus eliminating any reason for including the security clearance requirement in the 17 September 1985 offer. The Tribunal finds that, because of the extraneous nature of the security clearance

provision as regards the subject matter of the contract, the parties would have simply omitted that provision from the contract if failure to take account of the Ozonoff decision had not occurred. In consequence the requirement is to be regarded as irrelevant.

XI. Had the Applicant elected to remain in Somalia until the expiration of the one-year term of the 17 September 1985 contract, i.e., 16 September 1986, he would have been entitled to all of the contract's emoluments regardless of whether he eventually obtained a U.S. security clearance. However, the Applicant left Somalia at the end of January 1986, because he was then under the impression that his only entitlement was under the consultancy contract he had received to that date, which he regarded as inadequate. His meeting in Geneva with Mr. Conway on 5 February 1986, was a further discouragement. As acknowledged by Administration officials, the Applicant had been placed at a financial disadvantage by the continued delay and uncertainty with regard to implementation of the terms of his 17 September 1985 contract provisions due to absence of the U.S. security clearance. Yet the Applicant had throughout been performing at the L.3 or higher level.

XII. In these circumstances, the Applicant's decision to leave Somalia at the end of January 1986 in an effort to correct the unfortunate situation into which he had been placed should not, in the Tribunal's view, deprive him of relief. However, having left his post in Somalia, even if for understandable reasons, the Tribunal is also unable to conclude that the Applicant should be paid for services not performed to the end of the one-year term of the 17 September 1985 contract. In short, responsibility for his premature departure and non-return rests both on the Administration and the Applicant in varying degrees.

XIII. For the reasons set forth above, the Tribunal determines that the 17 September 1985 offer became a binding contract on that date

and that the Applicant should receive the difference between the salary and all allowanceshe would have received as an L.3, step VIII staff member with respect to the period from 17 September 1985 until his separation from service on 5 February1986 as a result of his discussion with Mr. Conway in Geneva, and the amountshe received as a consultant with respect to that period. Moreover, the circumstances of his separation should be without prejudice to the possibility of his being re-employed by the Organization in the future. In addition, as compensation for the injury sustained by the Applicant due to the mishandling of the Applicant's situation by the Administration, leading, among other things, to the Applicant's departure from Somalia, the Applicant is awarded the sum of US\$3,000.

XIV. For the foregoing reasons, the Tribunal orders that a copy of this judgement be placed in the Applicant's personnel file and orders the Respondent to pay the Applicant:

(i) The difference between the salary and all allowances the Applicant would have received as an L.3, step VIII staff member from 17 September 1985 until 5 February 1986, and the amounts he received as a consultant with respect to that period;

(ii) In accordance with the applicable Staff Rules, any outstanding claims for expenses related to his employment under the consultancy contract; and

(iii) The sum of US\$3,000.

XV. Except as set forth above, the application is rejected.

(Signatures)

Roger PINTO
First Vice-President

Jerome ACKERMAN

Second Vice-President

Samar SEN
Member

New York, 31 October 1989

R. Maria VICIEN-MILBURN
Executive Secretary

DECLARATION BY MR. ROGER PINTO

[ORIGINAL FRENCH]

I agree with the reasons and the holding of the judgement. The Tribunal has not examined the question of the validity of the condition stated in the offer of appointment. If it had examined this question, I would have concluded that such condition is unquestionably, contrary to the Charter of the United Nations and the Staff Regulations and Rules of the United Nations.

(Signature)

Roger PINTO
First Vice-President

New York, 31 October 1989