



Administrative Tribunal

Distr.
LIMITED

AT/DEC/1075
26 July 2002

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1075

Case No. 1131: EL-ZOHAIRY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Omer Yousif Bireedo;
Ms. Brigitte Stern;

Whereas, on 17 September 1999, Nabil El-Zohairy, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 30 March 2000, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"II: PLEAS

- 8 - The Applicant respectfully requests the distinguished Tribunal to judge as follows:
 - (a) That the claim submitted by the Applicant in 1983 ... to establish the child ... as his dependent is a legitimate and legal request according to Rule 103.24 and Rule 103.15 of the Staff Rules and Regulations of the United Nations, and as has been confirmed by the judgement of the New Jersey Family Court of 10 December 1991 ...

- (b) That the Administration's decision dated 23 August 1996 ... to reject the above-mentioned request is not based on legal grounds, and has to be rescinded;
- (c) That the Administration has taken certain decisions in which it implicitly recognized the child ... as the daughter of the Applicant, including when it forced the Applicant ... to pay amounts exceeding what the New York Family Court has established in its decision of 13 December 1994 ... for payment of the arrears;
- (d) That the Administration bears the consequences of, and responsibility for the legal opinion of 13 April 1984 of the Office of Legal Affairs ... which opinion adversely affected the rights of the Applicant ...; and therefore that the actions subsequently taken by the Administration in this case are illegal, arbitrary and in violation of the basic rights of the Applicant;
- (e) That the delaying tactics by the Administration and its protracted and continuous delays in responding within the prescribed time limits have caused considerable injury and damage to the Applicant ...;
- ...
- (g) that the Applicant should be granted the following compensations:
 - (i) Dependency benefits retroactively from 1983 in accordance to the relevant Staff Rules;
 - (ii) Medical expenses borne by the Applicant since 1983, to be estimated by the Distinguished Tribunal;
 - (iii) Compensation to be estimated by the ... Tribunal for all other benefits and entitlements as per the Staff Rules which the Applicant was unable to enjoy, including, but not limited to, home leave, and education grant;
 - (iv) Expenses related to the case which lasted for two years ...;
 - (v) A compensation equivalent to 24-month salary ... for the damage done to him ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2000 and periodically thereafter until 30 November 2001;

Whereas the Respondent filed his Answer on 9 November 2001;

Whereas the Applicant filed Written Observations on 17 May 2002;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a probationary appointment as an Associate Translator at the P-2 level with the Translation Division, Department of Conference Services (DCS), on 1 August 1975. Effective 1 August 1977, his appointment was converted to permanent. On 1 February 1995, the Applicant was transferred to the Economic and Social Commission for Western Asia (ESCWA), Amman, and on 4 November 1997 to ESCWA, Beirut, as Chief, Conference Services Section, at the P-5 level.

On 22 December 1983, the Applicant wrote to the Acting Chief, Allowances and Benefits Unit (the Acting Chief), requesting dependency benefits for Arleen Hennessey (the Child), a minor who had been placed in the custody of the Applicant and his wife. In his letter the Applicant states that the couple did not apply for legal adoption since the Applicant is an Egyptian national and Egyptian religious and civil law do not provide for legal adoption.

By memorandum dated 3 April 1984, a Senior Legal Officer, Office of Legal Affairs (OLA) informed the Acting Chief that the Child could not be regarded as the Applicant's dependent child for purposes of dependency benefits under staff rule 103.24 (b) and administrative instruction ST/AI/278/Rev.1 of 25 May 1982. He explained that the Child's parents had agreed, apparently as a temporary measure, to place her in the legal custody of the Applicant and his wife and thus the Child resided with him, but had not been adopted. Furthermore, since the Child was born in the United States and the parents were domiciled in the United States, and since the parties submitted to the jurisdiction of a New Jersey court, where adoption is possible, the prohibition of adoption under Egyptian law was not relevant.

In April 1984, the Applicant's request for dependency benefits for the child was denied.

On 24 January 1986, the Applicant's spouse legally adopted the Child.

In 1989 the Applicant's spouse filed for divorce and, on 10 December 1991, the Superior Court of New Jersey issued a final judgement of divorce, annexed to which was a property settlement agreement. Included in the agreement were provisions for the Applicant's obligations for support and maintenance of the Child.

On 15 January 1992, the Applicant once again applied for dependency benefits for the Child, as of 1 October 1991. The record does not contain a reply to this letter. Referring to his

prior requests from 1984 and 1992, the Applicant made another request for dependency benefits for the Child on 12 July 1994.

On 21 March 1995, the Applicant's former wife sent a letter to the Secretary-General requesting assistance in her efforts to recover child support payment owed to her by the Applicant and on 24 April 1995, the Westchester County Office of Child Support Enforcement (WCOCE) served the United Nations with an Income Execution Order to compel the Applicant to make his child support payments. On 8 June 1995, OLA informed the Westchester County Office that the United Nations is immune from legal process and that the Applicant would be informed of his obligation to settle the matter.

In a letter dated 28 August 1995, the Assistant Secretary-General, Office of Human Resources Management (OHRM) instructed the Applicant to provide documentary evidence, demonstrating that he was complying with his child support obligations. On 27 September 1995, following an exchange of correspondence on the matter, the Applicant consented to a 50 per cent deduction from his salary until his obligations were met.

By memorandum dated 5 July 1996, OHRM requested the Chief, Rules and Regulations Unit, OHRM, to review the Applicant's request for dependency benefits for the Child, retroactive to 1983. In her reply dated 17 July 1996, the Chief, Rules and Regulations Unit, OHRM, reiterated OLA's decision of 1984, adding that had the Applicant wished to challenge that decision, he should have done so within the two months time limit. Since he did not, the matter could not be re-opened. Moreover, the Applicant did not make another claim for dependency benefits for the Child until 15 January 1992, and in accordance with staff rule 103.15 (b) he cannot receive retroactive benefits for her for any period prior to 15 January 1991.

On 23 August 1996, the Officer-in-Charge, OHRM, informed the Applicant that his request for retroactive benefits for the Child had been denied and that dependency allowances would be paid as of 10 December 1991, the date of the Applicant's divorce.

On 25 October 1995, the Applicant requested the Secretary-General to review the administrative decision not to accord him dependency benefits for the Child, retroactive to 1983.

On 16 February 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 5 May 1999. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations of the Panel

...

44. The Panel was of the view that exceptional circumstances existed in this case which warranted a waiver of the time-limits ...

...

Conclusions

46. The Panel found that the Appellant was entitled to retroactive dependency benefits from 12 October 1983 (date when the Custodial Order was granted) to 10 December 1991 because during this period, he met all the requirements set forth in ST/AI/278/Rev.1.

47. Furthermore, the Panel concluded that the Administration's endorsement of the Income Execution Order filed by the WCOCE on 24 [April] 1995, and its efforts to pressure the Appellant to pay child support constituted an indication that the Administration recognized the child as the Appellant's dependent.

48. The Panel found that the Administration's decision to make deductions from the Appellant's salary in order to pay outstanding child support to his former wife was proper and reasonable.

Recommendations

49. In light of the foregoing, the Panel unanimously recommends that the Appellant be granted retroactive dependency benefits (including all related allowances) for the child starting from 12 October 1983, when the Custodial Order was granted.

50. The Panel unanimously recommends that the Appellant be reimbursed the child's medical expenses which he incurred due to the lack of medical insurance.

51. The Panel also found that the Appellant should be given compensation ... in the amount of US\$ 50,000. The Panel considers this amount to constitute adequate compensation for the injury sustained by the Appellant, and that it should be construed as a full and final settlement of all the Appellant's claims for damages.

52. The Panel makes no other recommendation in support of the appeal."

On 24 January 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General first observes that the Board erred when it decided to waive the time-limits in respect of your appeal which is not against the 1984 decision which denied you dependency benefits (you never appealed that decision) but against the 1996 decision to grant you such benefits as of 10 December 1991. ... In accordance with Staff Rule 103.15(b) on retroactivity of payments, you cannot receive such benefits for Arleen for any period prior to 15 January 1991. The JAB has no authority to waive the time limits in this Rule. As you finally met your child support obligations voluntarily and through deductions, the Secretary-General has decided that your entitlement to dependency benefits should be recognized as of 15 January 1991. In light of the above, the Secretary-General finds no justification for the recommendation to compensate you in the amount of \$50,000. As regards the Board's recommendation for reimbursement of medical expenses, the Secretary-General cannot accept this unsubstantiated recommendation which is not supported by any findings of facts concerning, e.g., the exact amounts in question, the period within which they occurred, and the reason that they were incurred considering that, pursuant to the divorce judgement, you should have borne the cost of obtaining medical insurance for Arleen as of 1991 and you only did so in mid-1996. ..."

On 30 March 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. In keeping with the provisions of ST/AI/278/Rev.1, particularly as concerns the impossibility of adoption, the Child should have been regarded as the Applicant's dependent since 1983.
2. The parental right consecrated in the divorce agreement existed prior to divorce, i.e. during marriage
3. The Applicant was misled by the opinion of OLA and the Administration's actions subsequent to this opinion violated his rights.
4. Even if the Applicant did not challenge the Administration's decision in 1984, this could not compromise his right, which is not subject to any statute of limitation.

5. The Respondent should not have made any deductions from the Applicant's salary. However, in so doing, the Administration recognized the Child as the Applicant's dependent.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim is time-barred; the Applicant has cited no extraordinary circumstances that would warrant a waiver of the time limits.
2. The Applicant was not entitled to dependency benefits in respect of the Child in 1983. The decision based on the 1984 OLA opinion was properly taken.
3. The decision to deduct money from the Applicant's salary in order to fulfill his child support obligations was properly taken.

The Tribunal, having deliberated from 25 June to 26 July 2002, now pronounces the following Judgement:

I. In deciding this case, the Tribunal finds it necessary to point out the following facts and dates, which it considers to be pertinent to this Judgement:

1983 - New Jersey court awarded the Applicant's wife legal custody of the Child. Subsequently, the Applicant applied for dependency benefits, explaining that his religion and national law prevent him from legally filing for adoption. In support of his claim, the Applicant submitted a letter from the Egyptian Consulate in New York, confirming the prohibition of adoption under Egyptian law.

1984 - OLA issued its opinion, concluding that the Child could not be regarded as the Applicant's child for the purpose of receiving dependency benefits. OLA's opinion was based on the following argumentations:

- a) Even though adoption was possible in New Jersey, the Child had not been adopted by the Applicant, but simply placed under his custody;
- b) The Child's parents had only consented to the staff member's wife acting as a guardian of the Child, *apparently as a temporary measure*, because they could not provide adequate care for her; and,

c) The staff-member's personal law (Egyptian law) is not relevant to the case.

Based on this legal opinion, the Respondent denied the Applicant dependency benefits.

The Applicant did not appeal this decision.

1986 - the Child was legally adopted by the Applicant's wife, as decreed by the Superior Court of New Jersey.

1991 - the Applicant and his wife divorced and the Court issued an order for child support in respect of the Child, as part of the divorce agreement.

1992 - the Applicant submitted a new request for dependency benefits in respect of the Child, as of October 1991. Once again, the Administration rejected his request.

1994 - the Applicant renewed his request for dependency benefits, retroactive to 1983.

1996 - the Administration acceded to grant the Applicant dependency benefits as of the date of his divorce, i.e. 10 December 1991.

II. The Applicant requested administrative review of the decision granting him dependency benefits only from the date of his divorce, and subsequently lodged an appeal with the JAB.

The JAB unanimously concluded that the Applicant was entitled to dependency benefits as of 12 October 1983, the date of the custodial order. Furthermore, the JAB also recommended that the Child's medical expenses, paid by the Applicant, be reimbursed and that the Applicant be paid US \$50,000 as compensation for the injuries he sustained.

III. Since the legal opinion issued by OLA in 1983 served as the basis for the Administration's denial of dependency benefits to the Applicant, the Tribunal first examined this legal opinion carefully. Having done so, the Tribunal is satisfied that the opinion is grossly erroneous.

The first reason invoked in OLA's opinion was that even though adoption was possible in New Jersey, the Child had not been adopted by the Applicant, but simply placed in his custody. However, the applicable law in determining the Organization's obligation to pay dependency benefits was not the New Jersey law, but the laws of the United Nations. The obligations of the Organization towards its staff members are established primarily in the Charter of the United

Nations, the Staff Regulations and Rules, General Assembly resolutions and the directives issued by the Secretary-General. In this particular case, it was staff rule 103.24 (b):

"A 'dependent child' shall be:

- (i) A staff member's natural or legally adopted child; or
- (ii) A staff member's stepchild, if residing with the staff member ..."

Moreover, ST/AI/ 278/Rev.1 stipulates that:

"A dependent child shall be any of the following ... for whom the staff member provides main and continuing support ... :

... If legal adoption of the child is not possible because there is no statutory provision for adoption or any prescribed court procedure for formal recognition of customary or *de facto* adoption in the staff member's home country or country of permanent residence, then a child in respect of whom the following conditions are met:

- (i) The child resides with the staff member;
- (ii) The staff member can be regarded as having established a parental relationship with the child ..."

The Applicant met these requirements. Legal adoption was not possible under the law of the Applicant's home country (Egyptian law), as established by the affidavit of the Egyptian Consul; the Child resided with the Applicant, who provided continuous support for her and had established a parental relationship with her. The impossibility of the Applicant's adoption of the Child, in conformity with ST/AI/278 Rev.1, was clear. His national and religious laws do not contemplate the possibility of adoption and in New Jersey, if the Court was to apply the Applicant's personal law, i.e. Egyptian law, it could not grant adoption. The fact that the Applicant was a temporary resident of New Jersey (on a G-4 visa) does not alter his personal inability to adopt.

The requirement of a parental relationship with the child - a requisite that was not even considered in OLA's legal opinion - should be considered to have been established almost automatically, since the Child was a baby when placed in the care of the Applicant and his wife, she resided with them and the Applicant provided for her needs and maintenance. At the latest, once the adoption was granted to the Applicant's wife, it was possible for the Administration to

have established the existence of that parental relationship, as of the time the Child moved in with the Applicant and his wife.

IV. Another issue raised in OLA's legal opinion was that the birth parents of the Child had not given her up for adoption, but only for legal guardianship. However, all the circumstances point towards the provisional character of this custody and the intention of all concerned that it should be transformed as soon as possible to an adoption, which it did by a 1986 court order. Considering that the adoption procedure is typically quite a lengthy process, and that three years after the custodial order was granted the Child's legal adoption was completed, it is clear that the legal custodianship was only an interim measure, enabling the Applicant and his wife to legally keep the Child with them, pending the final adoption.

The text of ST/AI/278/Rev.1 is very clear. The Organization, in determining entitlement to dependency benefits, considers that a child is a dependent if there is a legal adoption. Where legal adoption is not possible - and clearly it was not possible in the present case - the United Nations considers a child as a dependent of the staff member if certain *de facto* circumstances exist. First, then, a legal situation, second, if that is impossible, a factual situation. It is a wise law, its primary consideration being that when a parental relationship between the child and the staff member is established, and the staff member consequently pays for the maintenance of the child, he is entitled to receive dependency benefits.

V. In the succession of facts referred to above by the Tribunal, the decision taken by the Organization in 1996, when it finally decided to pay the Applicant the requested benefits, retroactive to 10 December 1991, the date of his divorce, is crucial to the case. The Administration invoked staff rule 103.15, which refers to retroactive payments:

"A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment *unless the staff member has made written claim:*

...

(ii)... within one year following the date on which the staff member would have been entitled to the initial payment." (Emphasis added)

The Applicant complied with the requirements as stipulated above when he claimed the benefit in writing, within the prescribed time frame of one year from his initial entitlement, i.e. within a year of obtaining custody of the Child. Therefore the Tribunal finds that this retroactivity clause is not applicable in this case.

This notwithstanding, even were the rule above to apply, the Applicant should have received the dependency benefits retroactive to 15 January 1991, one year prior to filing his renewed request, and not as of the date of his divorce (10 December 1991). The Tribunal finds it baffling that the Administration decided to grant the benefits as of the date of the Applicant's divorce.

VI. The Tribunal notes that the New Jersey Court issued the order for child support beginning on the date of separation of the parents, when the Child went to live with her adoptive mother and the Applicant was to pay his contribution to the Child's maintenance. Yet this does not mean that prior to that the Child was not a dependant of the Applicant. Indeed, the Applicant continuously provided for the Child, who resided with him and his wife, as he contributed to the expenses of the household in the manner agreed between husband and wife. The Administration was not in the same position as the Court and could have selected, for example, 1986 as the starting point for granting dependency benefits, when without the shadow of a doubt the Child became the Applicant's step-child.

The Tribunal cannot but manifest its perplexity for the choice of date for commencement of the dependency benefits.

VII. The Tribunal wishes to reiterate its earlier statement that the obligations of the United Nations regarding the concept of dependency are independent of domestic law. The Administration should have applied the laws of the Organization regarding the Child's dependency. The divorce decree of the New Jersey Court should not have influenced the Administration's decision.

VIII. The Tribunal finds that the Administration's decision to finally grant the Applicant the dependency benefits, though belated, is a correct acknowledgment that the Applicant was entitled to these benefits, *in accordance with the laws of the United Nations*. The Applicant should have been paid the dependency benefits in respect of the Child as of the date when she was placed in the legal custody of the Applicant and his wife, when in accordance with staff rule 103.24 and ST/AI/278/Rev.1, the Child became the Applicant's dependent.

IX. The Respondent contends that the Applicant's claim is time-barred and that the JAB erred in waiving the time limits. The Tribunal finds that the JAB was correct when determining that exceptional circumstances existed in this case, warranting the waiver of the time limits.

The Applicant initially took the right step in requesting dependency benefits for the Child. The legal opinion issued by OLA in 1983, no doubt discouraged the Applicant from pursuing his rights. He assumed that this was a correct legal opinion, and concluded that his possibility to receive the dependency benefits for the Child was effectively barred. However, the analysis in this Judgement demonstrates that the said legal opinion was grossly erroneous, resulting in substantial injury to the Applicant. In Judgement No. 454, *McReynolds* (1989), paragraph XXII, the Tribunal stated, *inter alia*:

"The Tribunal must reiterate that the error made by the Administration, which was perpetuated ... was particularly serious. It is understandable that the Applicant, who had received a forceful response from the Administration ... was completely discouraged and decided to take no further action."

Furthermore, it is not surprising that the Applicant decided to renew his request for dependency benefits at the beginning of 1992, following the child support order, which was a part of his divorce agreement. Likewise, it is no wonder that pursuant to the Administration's deductions from his salary, made in order to ensure the Applicant's compliance with his obligations arising from said agreement, the Applicant yet again renewed his request for dependency benefits; for it would seem quite inconceivable for the same Organization to make these deductions on the one hand, but not to recognize as the Applicant's child the same child for whom these payments were made. In *McReynolds* the Tribunal stated: "The Tribunal considers that the persistent error on

the part of the Administration as to ... the time-limit ... implies the Respondent's liability to the Applicant". The Tribunal finds that the Respondent's error in denying the Applicant the dependency benefits, combined with the renewed requests made by the Applicant, constitute exceptional circumstances.

As for the Tribunal's time limits, the Tribunal considers that article 7.5 of its Statute is applicable here, since the case would not have come before it had the Administration proceeded with a minimum of common sense.

X. The Tribunal notes that the Administration took steps to compel the Applicant to fulfil his child support obligations, arising from the New Jersey Court order. While the Tribunal commends the Administration for ensuring that the Applicant fulfil his obligations towards that end, it notes that the measures taken by the Administration, in particular its insistence on deducting 50 per cent of the Applicant's monthly salary, and threatening with "disciplinary measures ... for unsatisfactory conduct, including summary dismissal" if he were not to agree to these deductions, were rather extreme. This is especially so when considering that the Court order expressly states that "such deduction ... does not exceed forty percent of the debtor's disposable [income]" and that "[this] execution is not to be used as grounds to discharge, lay off, or discipline the debtor-employee". Even though the Court order does not bind the Organization whatsoever, the principles contained in it could have guided the Administration in determining the appropriate measures to be taken. In the Tribunal's view, this issue could, and indeed should, have been handled better. The Tribunal finds that the Applicant was treated unjustly, warranting compensation.

The Tribunal also wishes to express its concern regarding the Administration's failure to notify the Applicant as to its exchange of correspondence with the Westchester County Office of Child Support Enforcement regarding his case. In the view of the Tribunal this constitutes a violation of the Applicant's rights.

XI. Finally, the Tribunal notes that the Administration's refusal to recognize the Child as the Applicant's dependent resulted in her non-eligibility for participation in the Organization's

medical scheme. The Applicant incurred significant medical expenses due to the lack of medical insurance, for which he should be compensated.

XII. In view of the foregoing, the Tribunal orders that:

1. The Applicant be granted retroactive dependency benefits in respect of the Child, including all related allowances, from the date the custodial order was granted, i.e. from 12 October 1983;

2. Upon production of sufficient evidence, the Applicant be reimbursed for the Child's medical expenses, and

3. The Applicant be paid six months of his net base salary at the rate in effect on the date of this Judgement in compensation for having been deprived of his entitlements for an extended period of time, having suffered undue financial burden as a result and for the moral damages he sustained.

XIII. All other pleas are rejected.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Omer Yousif BIREEDO
Member

Brigitte STERN
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary