

Judgement No. 149

(Original: English)

Case No. 150:
Mirza

Against: The Secretary General of the
International Civil Aviation
Organization

Termination of the fixed-term appointment of an OPAS officer recruited by ICAO and rejected by the recipient Government.

Question of the legality of the termination of the contract.—Absence in the contract of any reference to the grounds on which the Organization may terminate it.—The existence of a cause an essential requirement of due process for the termination of a fixed-term appointment before the expiry of the term.—Examination by the Tribunal of the grounds on which the appointment could be prematurely terminated.—Clause in the contract to the effect that any relevant matter for which no provision is made in the contract shall be settled according to the administrative practices of the Organization.—Conclusion that the Staff Rules relating to termination are applicable to the present case.—The letter setting out the terms of the appointment states that the conditions of service will be those applicable under the ICAO Field Service Staff Rules.—Conclusion of the Tribunal that in the absence of a specific provision in the contract regarding premature termination, the relevant provisions of the rules are applicable to the present case even though the Applicant does not have the status of an ICAO staff member.—Field Service Staff Rule 9.4.—The Respondent has not invoked authority under this rule nor has he contended that the termination of the appointment was in the interest of the Organization.—Conclusion that the termination of the contract was not in accordance with the administrative practices envisaged under the Field Service Staff Rules and consequently not in accordance with the terms of the contract.—The Respondent has not exercised all the care required in the circumstances of the case before entering into the contract.—Assurances were given to the Applicant that the necessary approval of the recipient Government had been properly secured and that the Applicant's employment for the full term of the contract was ensured.—Award to the Applicant of compensation equivalent to what would have been his net base salary for the whole period of the unfulfilled term, less the amount of the terminal indemnity already paid.

Claim for further compensation.—Claim rejected, as the contract did not carry any expectancy of renewal.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton;
Mr. Zenon Rossides;

Whereas, on 3 May 1971, Babar Mirza, a former OPAS (Operational Assistance) expert recruited by the International Civil Aviation Organization, hereinafter called ICAO, filed an application in which he requested that:

“The decision of the Secretary General dated 27 January 1971 be rescinded;

“He be awarded for the prejudice suffered, an indemnity equivalent to his base salary for the period of the contract remaining as from the date of termination, less the sums already paid following the termination, as recommended by the Advisory Joint Appeals Board;

"In addition, the Applicant requests that he be offered any employment with ICAO in whatever field or territory that would be commensurate with his experience, education and seniority. Should this not be possible, the Applicant requests that the Tribunal may consider payment of a further year's base salary to him as his assignment with ICAO was expected to continue for at least two to three years.";

Whereas the Respondent filed his answer on 9 June 1971;

Whereas, on 19 July 1971, the Applicant filed written observations in which he requested oral proceedings and production of three documents, namely, (1) a letter of 5 November 1969 from Mr. Eruwayo of the Government of Nigeria, (2) a letter of 12 January 1970 from the Resident Representative of the United Nations Development Programme (UNDP) in Nigeria to the Government of Nigeria, and (3) a letter of 20 February 1970 from the Government of Nigeria to the Resident Representative of UNDP in Nigeria;

Whereas, on 12 August 1971, the Executive Secretary of the Tribunal informed the parties that the President had decided that no oral proceedings would be held in the case;

Whereas, on 24 August 1971, the Respondent informed the Executive Secretary that the above-mentioned documents were not available with ICAO;

Whereas the facts in the case are as follows:

The Applicant having expressed interest in entering the service of ICAO, the Director of the Technical Assistance Bureau informed him, by a letter dated 9 December 1969, that his name had been included in a list of candidates considered suitably qualified for a post of Senior Operations Officer in Lagos, Nigeria, under the OPAS Agreement between ICAO and the Government of Nigeria; the letter specified that selection for the post would be made by the host Government. From a cable sent to ICAO on 5 November 1969 by the Resident Representative of UNDP in Nigeria, it appears that the list referred to by the Director of the Technical Assistance Bureau also contained two other candidates who later proved to be unavailable for employment, that all three candidates were acceptable to the Government, and that the Government had expressed a third preference for the Applicant.

On 22 December 1969, the Director of the Technical Assistance Bureau addressed to the Applicant a further letter reading in part:

"1. Further to our letter of 9 December 1969 . . . , we are pleased to inform you that, further to the necessary approvals, including:

"(1) formal approval of your nomination by the Government of Nigeria;

"(2) the endorsement of your selection by the Personnel Selection Committee at this Headquarters; and

"(3) the receipt of a satisfactory medical examination report;

we shall be pleased to offer you an appointment as Senior Operations Expert (OPAS) in Lagos, Nigeria.

"2. We would, therefore, be grateful if you will consider the following information and advise us as to your sustained interest, together with an indication of the earliest date you would be available. The duration of this assignment will be for an initial period of one year, renewable thereafter by mutual consent.

"3. The OPAS Agreement between the Organization and the Government of Nigeria provides that the Organization will recruit experts to occupy particular posts within the national Civil Service of the country. The Government undertakes to provide the recruited expert with salary, allowances and general conditions of service appropriate to a member of its Civil Service. The Organization undertakes to supplement these governmental conditions to ensure that the expert receives salary, allowances and conditions as if an ICAO expert. The expert, in performing his duties, is directly responsible to the Government.

" . . .

"7. All these conditions of service will be those applicable under the ICAO Field Service Staff Rules and which are outlined in the résumé of the conditions of service at Attachment I except that, as you will not be an ICAO Staff member, you will not be entitled to participation in the United Nations Joint Staff Pension Fund, nor will you be issued a United Nations Laissez- Passer."

On 29 December 1969, the Applicant informed the Director of the Technical Assistance Bureau that he was making arrangements for the medical examination and that he would be ready to leave for Nigeria within two weeks after receiving ICAO's final acceptance. The contract between ICAO and the Applicant was signed on 26 and 31 January 1970 and was concluded for a period of one year. With regard to termination, the contract provided in its article IV that it might be terminated by either party upon one month of written notice and that, should the Organization so terminate the contract, it should pay to the Officer an indemnity equal to one week's salary for each month of uncompleted service. In its article VII the contract provided that while the Officer did not have the status of an official or a staff member of the Organization, any relevant matter for which no provision was made in the contract should be settled according to the administrative practices of the Organization. The Applicant arrived at Lagos on 15 February 1970. Between 20 and 28 February 1970, an exchange of letters took place between the Nigerian Government and the Resident Representative of UNDP (or his deputy). While the Government took objection to the Applicant assuming duty and asked that arrangements be made for his return, the Resident Representative expressed embarrassment at this turn of events, stating *inter alia*:

"On the basis of Government approval given in November 1969 we wrote you on 12 January confirming that Mr. Mirza was expected to arrive in Lagos by mid-February 1970. It was not until 20 February, five days after the arrival of the expert, that we received the Government letter expressing reservations concerning the qualifications and experience of Mr. Mirza, whose candidature and curriculum vitae was submitted in full to the Government as early as 8 October 1969."

On 28 February 1970, the Resident Representative sent to the Director of the Technical Assistance Bureau the following cable:

"Regret inform you that despite our efforts Government not repeat not prepared accept Mirza for Operations Officer OPAS post appreciate immediate authorization return travel Mirza . . ."

On 2 March 1970, the Director replied as follows:

" . . . Unable understand present situation Stop appreciate urgent explanation unexpected withdrawal Government acceptance Stop Mirza to remain Lagos pending instructions".

The explanation requested by the Director of the Technical Assistance Bureau was cabled on the following day by the Resident Representative in a cable reading in part:

“... Government official position firmly maintained despite our personal and official representations key official now responsible Civil Aviation insists Mirza unable fill this important post due lack recent professional aviation experience. . . . Recommend urgent action avoid further unnecessary embarrassment Mirza”.

On 4 March 1970, ICAO headquarters cabled to the Resident Representative that in view of the attitude of the Government there was no alternative but to withdraw the Applicant and terminate his contract effective on the date of his repatriation. On 5 March 1970 the Applicant was given notice of termination and, on 7 March 1970, he left Lagos for repatriation to Toronto via Montreal. On 11 March 1970 the Director of the Technical Assistance Bureau sent him the following letter:

“In confirmation of the advice conveyed to you by the UNDP Resident Representative, Lagos, and your discussions in this office on 11 March 1970, it is advised with regret that your services are terminated with effect from the close of business 11 March 1970.

“In accordance with the ICAO Technical Assistance Field Service Staff Rules the following payments and adjustments will be made in association with your termination:

“(a) Notice: Notice of termination was conveyed to you by the UNDP Resident Representative on 5 March 1970. In terms of Field Service Staff Rule 9.6 you are entitled to one month's notice. You will, therefore, be paid salary and allowances to the date of your termination, 11 March 1970, and for the period from 12 March to 6 April 1970, in lieu of notice.

“(b) Terminal Indemnity: In terms of Field Service Staff Rule 9.7 you are eligible for one week's base salary, exclusive of allowances, in respect of each uncompleted month of contracted service. You are, therefore, eligible for ten weeks' base salary as terminal indemnity.

“... ”

“We do most sincerely apologize for the unfortunate experience you endured. Nothing in the situation should be interpreted as a reflection on your personal or professional competence. Certainly, you may be assured that your name will be retained on our roster of persons interested in Technical Assistance assignments and your candidature will be considered against other posts, appropriate to your qualifications and experience, which may occur in our Programme from time to time.”

On 16 May 1970 the Applicant requested the Secretary General to reconsider the circumstances leading to the unexpected termination of his appointment. On 9 June 1970 the Secretary General informed the Applicant that, as a special measure, he had determined that the short period in excess of 10 months' unexpired service be regarded as a completed month, and that as a consequence he had authorized one week's base salary as additional terminal indemnity. On the same day the Applicant lodged an appeal with the Advisory Joint Appeals Board, which handed down its Opinion (Opinion No. 39) on 4 December 1970. The Board's recommendation read as follows:

“Recommendation

“12. Striking the balance of equities in the case and noting that one of the contracting parties, namely the Appellant, relying on the sanctity of the contract between ICAO and himself, had irreversibly altered his position to his detriment, it appears that the only authority which is in a position to rectify or at least ameliorate the situation is ICAO, the Appellant having no recourse against the Government involved.

“12.1 Therefore, considering that in the normal circumstances the contract of employment between the Appellant and ICAO would have subsisted until its exhaustion by elapse of the time for which it was made, and believing that in the interests of justice and observance of good administrative practices it is incumbent on the Organization to endeavour to relieve the Appellant of the financial consequences of the premature termination of his contract of employment:

“The Board *recommends* that the Secretary General take all possible measures to ensure that the Appellant obtain compensation equivalent to his base salary under the contract of employment for the whole period of the unfulfilled term, less the amount of indemnity already received.”

On 27 January 1971 the Secretary General's final decision was communicated to the Applicant, as follows:

“The Opinion of the Advisory Joint Appeals Board . . . brings out the fact that the Appellant, without any fault or omission on his part, found his contract terminated before it had run its expected, normal course. While I accept this, his claim for further indemnities than those already granted under his contract of employment can be met only if any of the conditions specified in paragraph 3 (a) of GSI [General Secretariat Instruction] 1.4.7 had been established. Such not being the case the Appeal fails.”

On 3 May 1971 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. ICAO and UNDP never obtained the formal approval of the Applicant's appointment by the Government of Nigeria; at the same time it was represented to the Applicant that the Government had recorded its formal agreement and that the Applicant was entitled to a supplementary contract and all results or consequences following therefrom.

2. The Respondent never attempted to obtain from the Government of Nigeria any compensation for the loss of appointment by the Applicant; he failed in particular to initiate a claim for compensation against the Government under article V of the OPAS Agreement.

3. The Respondent is therefore responsible for the loss of employment by the Applicant primarily as a result of its administrative action.

4. It was both legally and morally incorrect to use the termination clause as an “escape” clause for getting out of an impasse as the Applicant was not at all at fault; the termination clause can only be justifiably applied in cases where the service of the employee had not been satisfactory, or the post had been abolished.

5. The Applicant was denied the opportunity of fulfilling his contract of employment, which contract he had accepted in good faith; therefore the decision to terminate the contract is irregular.

6. The Applicant had a reasonable expectancy of employment for at least one whole year under the contract; in fact, the appointment was of an intermediate type and could reasonably be expected to continue for at least two to three years.

Whereas the Respondent's principal contentions are:

1. The Respondent, prior to offering an appointment to the Applicant, followed the normal practice in so far as concerns eliciting the Government's approval of candidates; he was entitled to rely on the list of persons approved by the Government; neither he nor UNDP had any reason to believe that approval would be withdrawn by the Government; he cannot be held accountable if, without previous warning and in spite of the Government's having been given lengthy advance notice of the Applicant's pending appointment, the Government withdrew its approval at the last minute.

2. The contract was terminated in accordance with its terms and all indemnities to which the Applicant was entitled were paid.

3. The Respondent gave every possible consideration to the reassignment of the Applicant to an alternative post.

4. The Applicant's contract did not carry any expectancy of renewal and in any event, since the Applicant has no entitlement to employment with ICAO, his non-employment by ICAO could not give rise to the payment of an indemnity.

The Tribunal, having deliberated from 21 September 1971 to 6 October 1971, now pronounces the following judgement:

I. The Applicant's OPAS contract was for the fixed term of one year beginning 31 January 1970. The question before the Tribunal is whether the Respondent was justified in terminating it as from 11 March 1970.

Article IV of the contract provides *inter alia* that the contract is concluded for one year, that it may be terminated by either party upon one month of written notice and that should the Organization so terminate the contract, it shall pay to the Officer an indemnity equal to one week's salary for each month of uncompleted service under the contract. Though the contract stipulates that no indemnity shall be due if its termination is based on the misconduct of the Officer or on the "non-observance by the Officer of the obligations incumbent upon him", the contract itself does not specify the grounds on which the Organization may terminate it.

The Tribunal regards as an essential requirement of due process that a fixed-term appointment may be terminated before the expiry of the term for cause, but not arbitrarily by giving a month's notice. The Tribunal will therefore proceed to examine the grounds on which the appointment could be prematurely terminated.

II. Article VII, paragraph 3 of the contract provides as follows:

"While the Officer does not have the status of an official or a staff member of the Organization, any relevant matter for which no provision is made in this Contract shall be settled according to the administrative practices of the Organization."

Since the administrative practices of the Organization are based on the staff rules, the Tribunal holds that the staff rules relating to termination are relevant to the determination of the case.

Further, in paragraph 7 of the letter of 22 December 1969 setting out the terms of the appointment it is stated that "all these conditions of service will be those applicable under the ICAO Field Service Staff Rules and which are outlined in the résumé of the conditions of service at Attachment I except that, as you will not be an ICAO Staff member, you will not be entitled to participation in the United Nations Joint Staff Pension Fund, nor will you be issued a United Nations Laissez-Passer." Attachment I specifically mentions that "it does not replace the detailed Technical Assistance Field Service Staff Rules applicable to Technical Assistance Project Personnel. (A copy of the Field Service Staff Rules will be supplied on appointment)."

From the foregoing the Tribunal concludes that in the absence of a specific provision in the contract regarding premature termination, the relevant provisions of the ICAO Field Service Staff Rules are applicable to the present case even though the Applicant does not have the status of a staff member.

III. Rule 9.4 of the Field Service Staff Rules reads as follows:

"The appointment of a staff member may be terminated by the Secretary-General prior to its expiration by the application against the staff member of the disciplinary measures of termination of appointment or of summary dismissal as provided in Part VII of these Rules, or if, in the opinion of the Secretary General:

"(a) The performance by the staff member of his duties and responsibilities is unsatisfactory, or

"(b) The staff member is, for reasons of health, incapacitated for further service, or

"(c) The necessities of the service require abolition of the post or reduction of the staff, or

"(d) The termination of the staff member's appointment would be in the interest of the Organization."

The termination of the Applicant's contract by the Respondent did not fall within any of the above categories; in particular, it cannot be said that the necessities of the service required abolition of the post or reduction of the staff, nor was the termination in any real sense "in the interest of the Organization". The Respondent rests his case on article IV of the contract which authorizes termination of the contract on one month's written notice and payment of indemnity. He has not invoked authority under Rule 9.4 of the Field Service Staff Rules, nor has he contended that in his opinion the termination of the Applicant's appointment was in the interest of the Organization.

The Tribunal holds that the termination of the Applicant's contract by the Respondent was not in accordance with the administrative practices envisaged under the Field Service Staff Rules and consequently not in accordance with the terms of the contract.

IV. The Tribunal also notes that the Respondent has not exercised all the care required in the circumstances of the case before entering into the contract. From the cable dated 5 November 1969, it is seen that the Government of Nigeria accepted the candidates proposed under the OPAS Agreement in order of preference and placed the Applicant third in the list. The Respondent informed the

Resident Representative of UNDP by cable dated 16 December 1969 that the first two candidates were not available and that he was proceeding to recruit the Applicant. No approval of this proposal was given by the Government as can be seen from a letter dated 28 February 1970 from the Deputy Resident Representative of UNDP to the Permanent Secretary of the Federal Ministry of Economic Development and Reconstruction of Nigeria, which reads as follows:

“On the basis of Government approval given in November 1969 we wrote you on 12 January confirming that Mr. Mirza was expected to arrive in Lagos by mid-February 1970. It was not until 20 February, five days after the arrival of the expert, that we received the Government letter expressing reservations concerning the qualifications and experience of Mr. Mirza, whose candidature and curriculum vitae was submitted in full to the Government as early as 8 October 1969.”

The Respondent was alive to the importance of securing the approval of the Government of Nigeria. In his letter dated 22 December 1969, he mentioned that the offer of appointment was subject to formal approval of the Applicant's nomination by the Government of Nigeria and added:

“You should not make any financial or other commitments until you are informed that all appointment formalities mentioned previously have been satisfactorily completed.”

Nevertheless, in a letter dated 27 January 1970 sending the contract to the Applicant the Respondent wrote:

“We look forward to your association with our Programme.”

In a certificate accompanying that letter the Respondent stated:

“Since the Government of Nigeria is pressing for the arrival of this expert, as early as possible, the prompt issuance of the necessary entry permit to Mr. Mirza will be appreciated.”

In the view of the Tribunal, the above letter and the accompanying certificate constituted an assurance that the necessary approval of the Government had been properly secured and that the Applicant's employment for the full term of the contract was assured. Thus the Respondent, by his conduct, led the Applicant to alter his situation to his prejudice and resign from an existing employment.

V. In view of the fact that the Applicant was unable to find other employment during what would have been the term of his contract and that the Respondent was unable to provide such employment, the Tribunal determines that the Respondent shall pay to the Applicant compensation equivalent to what would have been his net base salary under the contract for the whole period of the unfulfilled term, less the amount of the terminal indemnity already paid.

VI. The Applicant claims compensation beyond the one year of the contract. The contract specifically provided in article IV:

“2. This Contract does not carry any expectancy of renewal or of conversion to any type of appointment in the Secretariat of the Organization.”

The fact that Attachment I to the letter of 22 December 1969 read in part:

“Most appointments are initially for a period of one year. Many contracts, however, are renewed after the initial appointment and the duration of service with the Organization may be over two years.”

conferred no assurance in this respect and in any event could not affect the precise wording of the contract itself. The Applicant's claim for further compensation is therefore rejected.

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON
Member

Zenon ROSSIDES
Member

Jean HARDY
Executive Secretary

New York, 6 October 1971

Judgement No. 150

(Original: French)

Case No. 151:
Irani

Against: The Secretary-General
of the United Nations

Non-renewal of the fixed-term contract of an OPEX officer.

Argument by the Respondent that the Applicant was an OPEX officer, not a staff member of the United Nations Secretariat and therefore outside the jurisdiction of the Tribunal.—Establishment of the juridical status of the Applicant as an OPEX officer by a combination of three agreements.—The parties had been concerned to provide for the settlement of any disputes that might arise between them.—Successive versions of the clause relating to the settlement of disputes in the contract between the United Nations and the Applicant.—Although the final text leaves a wide margin of discretion to the Organization, the latter undertook to provide for the intervention of an independent, decision-making authority.—Part played in the case by the Joint Appeals Board.—The final decision was taken by the Secretary-General, a party to the dispute, not by the Joint Appeals Board.—Principle according to which any decision taken by the Secretary-General on the advice of the Board can be appealed to the Tribunal, which is competent to take a decision binding on the parties.—Consideration of the question whether the legal relationship between the Applicant and the Respondent falls outside the Tribunal's competence.—Situation of OPEX officers.—Importance of the contractual link with the United Nations.—Analogies between the contractual law between the Organization and an OPEX officer and the law applicable to staff members of the Secretariat.—Applicability of the body of rules governing the international civil service in solving juridical problems relating to disputes that may arise concerning the contract between the Organization and an OPEX officer.—The approach taken by the Tribunal in its Judgements Nos. 96 and 106 should be applied to the present case.—Advisory opinion of the International Court of Justice.—Judgements Nos. 11 and 122 of the ILO Administrative Tribunal.—All staff members of international organizations have the right to resort to an impartial decision-making body.—The United Nations has recognized this principle for the benefit of OPEX officers.—The Joint Appeals Board was limited in this case to its advisory role.—In the absence of any other provisions established by the Respondent for settlement of the dispute, unless the Tribunal was competent in the present case, the Applicant would not have the safeguard of some appeals procedure.—Reference to Judgement No. 149.—Competence of the Tribunal.