Judgement No. 177

(Original: English)

Case No. 144:
Fasla

Against: **The Secretary-General of the United Nations**

Confirmation of Judgement No. 158 following an advisory opinion of the International Court of Justice.—Application submitted in accordance with paragraph XV of the Judgement.—Request for revision of the Judgement.

Confirmation of the Judgement.—Date from which the period of two months fixed in paragraph XV of the Judgement must be reckoned.

Application submitted in accordance with paragraph XV of the Judgement.—Differences of opinion between the Applicant and the Respondent as to which claims have to be satisfied.—Applicant's request that the Tribunal decide on the merits.—Article 7, paragraph 1, of the Statute of the Tribunal.—Application not receivable, because it is in effect a new application which does not comply with the requirements of that article.

Request for revision.—Considerations on which it is based.—Oral proceedings unnecessary.—Question of the receivability of the request.—Since revision proceedings can be instituted only against a final judgement, the one-year time-limit runs from the date of the judgement confirming the original judgement.—Since the request was submitted at a time when the Tribunal had not yet taken any action following the advisory opinion but when, in view of the terms of that opinion, it was clear that the Tribunal would confine itself to confirming its judgement, it is not barred by time.—Purpose of article 12 of the Statute of the Tribunal.—New facts allegedly discovered by the Applicant.—Applicant blames his counsel for the way in which he conducted the case.—Role of counsel.—The Applicant knew at the time of two reports not produced to the Tribunal.—Matters explained to the Applicant by his counsel.—Impossibility of equating discovery of a new fact with the Applicant's present conviction that his case should have been presented differently.—Question, unrelated to the revision proceedings, concerning a certificate of service.—The Tribunal notes the Respondent's statement that he is prepared to issue to the Applicant an appropriate certificate of service.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Mutuale-Tahikantshe;

Whereas, by a letter dated 28 June 1972, the Secretary-General of the United Nations informed the International Court of Justice that the Committee on Applications for Review of Administrative Tribunal Judgements, set up by General Assembly resolution 957 (X), had, pursuant to article 11 of the Statute of the Tribunal, decided on 20 June 1972 that there was a substantial basis for the application made to that Committee for review of Judgement No. 158;

Whereas the Committee had requested "an advisory opinion of the International Court of Justice on the following questions:

"1. Has the Tribunal failed to exercise jurisdiction vested in it, as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgement (A/AC.86/R.59)?

"2. Has the Tribunal committed a fundamental error in procedure which has

occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements (A/AC.86/R.59)?";

Whereas, on 12 July 1973, the International Court of Justice gave an advisory opinion the operative part of which reads:

"*The Court decides,*

"by 10 votes to 3,

"to comply with the request for an advisory opinion;

"*The Court is of opinion,*

"with regard to Question I,

"by 9 votes to 4,

"that the Administrative Tribunal has not failed to exercise the jurisdiction vested in it as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements;

"with regard to Question II,

"by 10 votes to 3,

"that the Administrative Tribunal has not committed a fundamental error in procedure which has occasioned a failure of justice as contended in the applicant's application to the Committee on Applications for Review of Administrative Tribunal Judgements.";

Whereas paragraph 100 of the Court's advisory opinion reads:

"100. After having stated its conclusions on the questions referred to it, the Court wishes to reaffirm the opinion which it expressed in paragraph 73 above, namely that Mr. Fasla is entitled, in accordance with paragraph XV of the Administrative Tribunal's Judgement, to a payment in the amount of any losses suffered as a result of his precipitate recall from Yemen, and that the period of two months fixed in this connection by the Administrative Tribunal, having been suspended for the duration of the review proceedings, is to be calculated from the date when the Judgement becomes final in accordance with paragraph 3 of article 11 of the Statute of the Tribunal.";

Whereas article 11, paragraph 3 of the Statute of the Tribunal provides in part:

". . . In any case in which a request has been made for an advisory opinion, the Secretary-General shall either give effect to the opinion of the Court or request the Tribunal to convene specially in order that it shall confirm its original judgement, or give a new judgement, in conformity with the opinion of the Court. If not requested to convene specially the Tribunal shall at its next session confirm its judgement or bring it into conformity with the opinion of the Court.";

Whereas, on 26 July 1973, the Tribunal was informed that:

"In view of the negative answer given by the Court to the two questions, the Secretary-General considers that he need not take any action pursuant to Article 11 (3) of the Statute of the Tribunal in order to give effect to the Opinion of the Court or to request the Tribunal to convene specially.";

Whereas it is necessary for the Tribunal to confirm its Judgement No. 158 under article 11, paragraph 3, of its Statute;

Whereas the Applicant, on the basis of paragraph XV of Judgement No. 158, submitted to the United Nations Development Programme (UNDP), by a letter dated 17 June 1972, a list of items of loss amounting to $13,458; whereas he received from UNDP a cheque of $2,990; whereas, not satisfied with the explanations given to him by the Respondent, he submitted to the Tribunal on 15 September 1973 an application for the award of the balance of his claims, increased by 18 per cent to take account of

the devaluation of the United States dollar, and for the payment of interest at 6 per cent on such award from June 1972 until that date; whereas the Respondent submitted his observations on 26 September 1973 and the Applicant his comments on 2 October 1973;

Whereas, on 29 August 1973, the Applicant filed an application for revision of Judgement No. 158 under article 12 of the Statute of the Tribunal; whereas the Respondent submitted his answer on 19 September 1973 and the Applicant submitted observations on the Respondent's answer on 27 September 1973.

The Tribunal, having deliberated from 4 to 12 October 1973, now pronounces the following judgement:

A

I. The Tribunal confirms its Judgement No. 158 (Fasla against the Secretary-General of the United Nations). Consequently, Judgement No. 158 becomes final as of 12 October 1973.

II. The period of two months fixed in paragraph XV of Judgement No. 158 must be reckoned from 12 October 1973.

B

I. The application submitted to the Tribunal on 15 September 1973 seeks a decision on the amount of compensation due to the Applicant in accordance with paragraph XV of Judgement No. 158, as differences of opinion arose between the Applicant and the Respondent as to which claims have to be satisfied and how some of them have to be evaluated.

II. In his comments dated 2 October 1973, the Applicant requests the Tribunal to decide on the settlement of his claims on their merit.

III. Under article 7, paragraph 1 of the Statute of the Tribunal,

> "An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

IV. Although the Applicant's claims are based on a provision of Judgement No. 158, his application deals in substance with questions which had neither been discussed by the parties nor considered by the Tribunal when the Judgement was rendered. What is in effect before the Tribunal is a new application which does not comply with the requirements of article 7, paragraph 1 of the Statute. The Tribunal therefore decides that the application is not receivable.

C

I. The application dated 29 August 1973 for revision of Judgement No. 158 is based mainly on the following considerations:

> "By ignorance, trusting my counsel, who was chosen from the list of the UN counsels, and who has prepared my statements to the UN Administrative Tribunal, I have been misled, being ignorant of the UN Administrative Tribunal procedure and being not a lawyer.
>
> "When reading the Opinion of ICJ, I have just discovered some facts of such a nature to be decisive factors, which facts were, when the judgement was given, unknown to the Tribunal and to me.
>
> "It is a fact, when I have requested my counsel to present an evidence to the Tribunal or to request a decision from the Tribunal, my counsel misled me with arguments that I, only now, realize as illegal, improper or inexact.

"My counsel informed me on the phone and, at time, in writing of the following points, among many:

"(1) the Tribunal has always been reluctant to interfere in any decision taken by the Secretary-General and specially in view that I was under fixed term contract.

"(2) being a holder of a fixed term contract, I could not ask for a rescission of a decision of recall, or a renewal of a contract on the grounds of illegality and improper motivations. The Tribunal has never rescinded any decision for a fixed term contract or ordered the renewal of a fixed term appointment, even if a prejudice has been proven to the satisfaction of the Tribunal.

"(3) the Tribunal does not as a rule hold an oral Hearing, when I insisted on an oral Hearing, that would have enabled the Tribunal to assess the entire situation.

"(4) my sudden recall from Yemen may be considered injust but not illegal, as I was under fixed term contract.

"(5) I should let him present the case in a certain way as I do not understand the legal approach of a procedure and that there was no need to present all evidences in detail, (He will do so during the procedure, in writing) that I had asked him to include in the statement, as it is either implied in what has been said in the statement or that the Tribunal would automatically, on its own account, requests supplementary information.

"(6) no advanced information should be given to the respondent, and that he will submit an addendum during the Hearing of the case by the Tribunal."

II. The Applicant also alleges that his counsel did not submit to the Tribunal certain documents which he had given to him, including the Applicant's own report on the situation in Yemen, and that the Tribunal was thus not apprised "of highly relevant informations".

III. The application for revision contains a request for oral proceedings. The President of the Tribunal ruled that a decision on that matter would be taken by the Tribunal. The Tribunal did not deem oral proceedings to be necessary and decided to use the written statements of the parties for the consideration of the case.

IV. The Tribunal must consider whether the application for revision is receivable and, first of all, whether it was made within one year of the date of the judgement. The Respondent contends that factual issues are not submitted to the International Court of Justice for review and that the time-limit of one year should be reckoned from the date of the judgement, namely 28 April 1972. He argues that, since article 12 of the Statute refers to the date of the judgement and not to the date on which a judgement becomes final pursuant to article 11, paragraph 3, the application is barred by time.

The Tribunal notes that when a request has been made for an advisory opinion, the Tribunal may be called upon to confirm its original judgement or to give a new judgement in conformity with the opinion of the Court. In the present case, since the Tribunal is confirming its judgement, it is on the date of that decision that the judgement becomes final. The revision proceedings can be instituted only against a final judgement. The time-limit for applying for revision cannot therefore be reckoned from the date of a judgement whose effect remains uncertain until the Tribunal has taken any action in accordance with the advisory opinion. The Tribunal accordingly decides that the time-limit of one year runs from the date of the judgement confirming the original judgement.

V. Since the application for revision was submitted at a time when the Tribunal had not yet taken any action following the advisory opinion but when, in view of the

terms of the advisory opinion, it was clear that the Tribunal would confine itself to confirming its judgement, the Tribunal holds that the application is not barred by time.

VI. Article 12 of the Statute of the Tribunal provides that an application for revision may be made "on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence".

This provision makes it possible to challenge a judgement which was given on the basis of erroneous or incomplete facts, provided that the facts invoked by the party claiming revision were unknown to the Tribunal and to that party when the judgement was given and that these facts are of such a nature as to be decisive factors.

VII. The Applicant contends that, while reading the advisory opinion of the Court, he "discovered" facts which were, when Judgement No. 158 was given, unknown to the Tribunal and to him. He refers to the passages of the advisory opinion where the Court points out that the Applicant had not requested the Tribunal to rescind the decisions to recall him from Yemen and not to renew his fixed-term contract.

The Applicant further asserts that he "discovered" that his counsel had not conducted the case in the Applicant's best interests. The Applicant blames the counsel for certain positions he took with regard to procedure and for pointing out the difficulties to which certain claims might give rise. He produces several letters from his counsel, all of which relate to the conduct of the case and indicate that there were differences of opinion between them about the course to be followed. But these differences stem from the obligations of a counsel to present the case at the legal level.

The Tribunal notes that any appeal involves various options on the pleas to be made and on the arguments to be presented. It is for the counsel to make this choice in consultation with the Applicant. The Tribunal cannot consider that a fact unknown to the Tribunal and to the Applicant has been discovered when, after the event, the Applicant believes that another course should have been followed in the presentation of his case.

VIII. The Applicant also argues that he did not discover until after the judgement that his counsel had not used the evidence which he had supplied him in order to dispute the content of the report submitted by Mr. Satrap on the situation in Yemen. He relies chiefly on his own report of 17 January 1969 to the Director of the Bureau of Administrative Management and Budget of UNDP, which was not produced to the Tribunal prior to its Judgement No. 158.

The Tribunal notes that this report could not have been unknown to the Applicant since the Applicant was its author. The Tribunal also notes that the Applicant discussed with his counsel how to proceed before the Tribunal with regard to the Satrap report. The Tribunal's lack of knowledge of the Applicant's own report is not a sufficient basis for an application for revision. The same applies to a UNESCO report which was not produced to the Tribunal but of which the Applicant knew at the time of the case.

The Tribunal finds that, here again, what is at issue is the choice of legal submissions presented on behalf of the Applicant. The Tribunal notes that his counsel explained to him at length and clearly the reasons which guided the counsel's choice of the course he intended to follow. The Applicant cannot therefore claim that advantage was taken of his good faith. On the contrary, it would appear that he was satisfied with his counsel since he maintained him throughout the proceedings before the Tribunal in full knowledge of the arguments that the counsel was submitting. The Tribunal cannot find that the Applicant's present conviction that his case should have been presented differently constitutes the discovery of a new fact under the terms of article 12 of the Statute.

IX. Consequently, the Tribunal considers that the conditions laid down by article 12 of its Statute for an application for revision are not fulfilled in this case and that for that reason the application must be rejected.

X. The Applicant raises in his application for revision a question concerning a certificate of service which he had not raised previously in his pleas to the Tribunal. As this question is unrelated to the revision proceedings, the Tribunal confines itself to taking note of the Respondent's statement, in his answer dated 19 September 1973, that he is prepared to issue to the Applicant an appropriate certificate of service under Staff Rule 109.11.

XI. For the reasons stated in paragraphs VI and IX above, the Tribunal rejects the application for revision.

(Signatures):

R. VENKATARAMAN
President

MUTUALE-TSHIKANTSHE
Member

Suzanne BASTID
Vice-President

Jean HARDY
Executive Secretary

New York, 12 October 1973

Judgement No. 178

(Original: French)

Case No. 175:
Surina

Against: **The Secretary-General of the United Nations**

Non-renewal of the fixed-term appointment of a technical co-operation associate expert.

Clause in the letter of appointment stating that the appointment does not carry any expectation of renewal or of conversion to any other type of appointment.—No legal foundation for the Applicant's claim that according to United Nations practice his appointment should have been extended.—Conclusion of the Tribunal that the Applicant had no legal expectation that his contract would be renewed.

The Applicant had been given reason to believe that his contract might in fact be extended.—Contract extended by one month.—For about one month, the Applicant could have expected that his contract would be renewed.—The expectation thus created extended after the expiration of the initial period of appointment.—Creation in the Applicant of a state of mind approaching a legal expectation.—Compensation to which the Applicant would have been entitled if his appointment had in fact been extended for one year as the assisted Government had originally requested and if he had been terminated at the end of one month.—Right of the Applicant to equivalent compensation because of the behaviour of the Respondent.—Award to the Applicant of an indemnity equal to his net base salary for a total of 55 days.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Zenon Rossides; Sir Roger Stevens;