

Judgement No. 321

(Original: English)

Case No. 320:
Cunio (date of birth)

Against: **The Secretary-General of
the International Civil
Aviation Organization**

Request by a staff member of ICAO for rescinding the decision refusing a change in her official record to show a different birth date.—Request for preliminary or provisional measures: suspension of the Applicant's separation on retirement pending completion of the appeal and production of documents.

Conclusion of the Advisory Joint Appeals Board that the organization can decide to accept a change of birth date only if it is based on documents from the competent authorities of the country of birth.—Recommendation that the organization assist in obtaining such documentation and that pending receipt of the documentation the appeal be rejected.

Question of the rectification of the Applicant's birth date.—The Tribunal notes that normally, where a birth certificate cannot be obtained, other evidence may be admissible.—Egyptian legislation relating to birth records.—Finding of the Tribunal that the Applicant used the same birth date on her applications for employment, on documents pertaining to her participation in the Staff Pension Fund and throughout 23 years of employment with FAO and ICAO.—Finding of the Tribunal that her negligence was such that she is not entitled to reinstatement or compensation on account of a different birth date.—Relevance of the general rule found in Judgement No. 459 of the ILO Administrative Tribunal (In re Zreikat) that the date of birth warranted by a staff member in his application for employment settles in principle the date of his retirement.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Mr. Herbert Reis; Mr. Roger Pinto;

Whereas, on 18 October 1983, Miss Renée Cunio, a staff member of the International Civil Aviation Organization, hereinafter called ICAO, filed an application which 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 16 December 1983;

Whereas the pleas of the application read as follows:

“(a) *Preliminary or Provisional Measures*

“The Applicant respectfully requests the Tribunal, as a matter of urgency, to order the suspension of the separation (retirement) of Applicant from ICAO on 31 October 1983 (see Annex 8) arising from the decision of 6 July 1983 (see Annex 7), pending completion of the appeal proceedings and the determination by the Tribunal on the merits of the case.

“In addition, the Applicant respectfully requests the Tribunal to order the production by ICAO of all documents, memoranda, notes and files concerning or tangential to the issues and actions appealed to, including but not limited to:

- “(i) Applicant’s personal and confidential files;
- “(ii) Copies of ICAO Service Code and ICAO Staff Rules and Personnel Instructions (previously known as ICAO Secretariat Instructions.—G.S.I.)

“(b) *Decision Contended and Rescission Requested*

“The Applicant respectfully requests the Tribunal to rescind under the terms of paragraph 1, Article 9 of its Statute the decision of the Secretary General dated 6 July 1983 (see Annex 7) to accept the conclusion and recommendations in Opinion No. 74 (see Annex 6) rendered by the Advisory Joint Appeals Board (AJAB) and to reject accordingly Appeal No. 74 (see Annex 2)

“(c) *The obligations invoked* are that

- “(i) The sworn affidavit from Applicant’s mother, attesting to her date of birth to be 11 October 1926 (and not 11 October 1923), which was accepted by the competent Canadian authorities for a corresponding correction of that *State’s official records*, be accepted by ICAO as constituting proof of birth by secondary evidence (which is proper in accordance with the basic principles of law where primary evidence is unavailable or unobtainable);
- “(ii) ICAO’s rejection on 7 July 1982 of that sworn affidavit which it had acquiesced to by its action, having requested and received that evidence some six months earlier, is illogical and unjust, and would seem to be related to the appeal proceedings which the Applicant initiated in June 1982 (UNAT Case No. 302);
- “(iii) The Applicant’s submission of documentary information, namely, the proof of birth by secondary evidence, complies with the requirement in paragraph B.3, Annex I to the Administrative Rules of the United Nations Joint Staff Pension Fund (UNJSPF);
- “(iv) The requirements in paragraphs B.2 and B.3 of Annex I to the Administrative Rules of the UN Joint Staff Pension Fund (UNJSPF) be accordingly complied with by ICAO;
- “(v) ICAO’s decision to maintain 11 October 1923 as the Applicant’s date of birth for personnel records and UNJSPF purposes is based upon information which was incorrect. *Your Applicant, in fact, was born on 11 October 1926, and not 11 October 1923. Hence her retirement date as 31 October 1983, while denying the Applicant three years of service, is not in accordance with the terms of Article 28 of the Regulations and Rules of the UNJSPF respecting mandatory age for retirement benefits.*”;

Whereas the Respondent filed his answer on 16 February 1984;

Whereas the Applicant requested oral proceedings on 19 April 1984;

Whereas the Applicant filed written observations on 23 April 1984;

Whereas the Tribunal decided on 2 May 1984 that no oral proceeding would be held in the case;

Whereas the facts in the case are as follows:

On 15 October 1957 the Applicant, an Egyptian national at birth, completed and signed an application for employment with ICAO in which she indicated 11 October 1923 as her date of birth, substantiating her declaration with the presentation of her Egyptian passport. On 5 May 1958 she entered the service of ICAO. On 28 May 1958, in her Participant's Declaration to the Joint Staff Pension Fund, she also indicated 11 October 1923 as her date of birth. On 4 October 1974 the Applicant requested the Chief of the Personnel Branch to "update" her "Personal History" on file with the Branch so that it would, *inter alia*, show her newly acquired Canadian citizenship and indicate 12 October 1926 as her date of birth. On 18 September 1975 she again gave that date in an application for a vacant post. On 30 July 1976 a personnel officer discussed the change in birthdate with the Applicant and recorded the discussion in a note for the file which read in part:

"Today I discussed the change with Miss Cunio who informed me that, when she left Egypt, she had no birth certificate or relevant papers. A different date showed on her Egyptian passport because she was required to be older than she really was to leave Egypt. When she became a Canadian citizen, the Canadian Government accepted her birthdate as 12 October 1926, presumably on a sworn statement. As per A/C/SA [Acting Chief, Staff Administration Section], this does not appear adequate for our requirements. . . ."

On 16 October 1981 the Applicant addressed the following memorandum to the Chief of the Personnel Branch:

"I would appreciate it if the year of birth in my personnel records could be corrected in accordance with the data appearing in the enclosed photocopy of Certificate of Canadian Citizenship No. 3132748, which I have now received from the Secretary of State, Government of Canada, in amendment of Certificate No. 809828 previously issued.

". . ."

The Applicant's birthdate is shown as 11 October 1923 in certificate No. 809828 and as 11 October 1926 in certificate No. 3132748. On 7 July 1982 the Chief of the Personnel Branch replied:

"I refer to your request dated 16 October 1981 for a change of your birth date in the Organization's personnel records to read 11 October 1926. I note that you submitted in support of your request a photocopy of Certificate of Canadian Citizenship No. 3132748 issued by the Secretary of State, Government of Canada, and later, on 13 January 1982, a solemn declaration signed by your mother before Miss Douesnard in her capacity as Commissioner for Oaths.

"I regret to inform you that I cannot accede to your request on the basis of the evidence submitted and, in order to clarify once and for all the question of your correct date of birth, I would request you to submit to the Organization a birth certificate or other similar document issued by the competent authorities of the Government of Egypt, attesting that your date of birth is 11 October 1926. Should you for any reason encounter difficulties in securing that evidence by 11 September 1982, the Organization will be happy to assist you by seeking to obtain it through appropriate official channels."

On 10 September 1982 the Applicant sent to the Chief of the Personnel Branch a certificate, dated 19 August 1982, issued by the Rabbinate of Alexandria, Egypt, stating that "it follows from the declaration of witnesses registered in its

Registry of Acts of Public Notoriety, Tome 74, No. 292, that Renée Counio, daughter of Abraham and Fortunée Counio", was born in Alexandria on 11 October 1926. On 17 September 1982 the Chief of the Personnel Branch wrote to the Great Rabbinate of Alexandria asking for clarification regarding this certificate. He apparently received no reply. On 28 October 1982 he advised the Applicant that the certificate had not at that time been accepted as an authoritative proof of her date of birth, and continued:

"Clarification of certain aspects of this certificate is required, and enquiries have been made to the Great Rabbinate.

"It is noted that this document is not issued by the Egyptian authorities, and its value under Egyptian law is unknown to me at this time. It is also noted that the signatures on the certificate are certified by the Consulate General of France in Alexandria, and not by the Egyptian authorities. The role of the government of France in certifying the birth of a former Egyptian citizen is unclear.

"Please keep the original of this certificate available for inspection at some future date.

"In the meantime, and in the absence of any documentation from the appropriate Egyptian authorities, the International Civil Aviation Organization continues to consider that your date of birth is 11 October 1923, as entered into our records by you when you joined the ICAO staff.

"I therefore must take this opportunity to inform you even now that your services to ICAO will end on 31 October 1983, unless you exercise the option of retiring on your birthdate, in which case they will end on 11 October 1983.

"Please make your future plans with your retirement in October 1983 in view. If before that date the certificate delivered by the Great Rabbinate of Alexandria is clarified to ICAO's satisfaction, or if some other documentary evidence from the authorities of the government of Egypt become available to ICAO, ICAO will reconsider the question of the year of your birth."

On 10 February 1983 the Chief of the Personnel Branch confirmed to the Applicant "the Organization's final decision" that she would retire in October 1983. On 10 March 1983 the Applicant asked the Secretary-General to review that decision and to have her personnel records in ICAO corrected so that her date of birth therein be shown as 11 October 1926. On 24 March 1983 the Secretary-General replied that he could see no grounds to alter the personnel records of the Organization, adding, however, that should the Organization receive, before the end of October 1983, the required evidence, or a satisfactory clarification requested from the Great Rabbinate, the question of the Applicant's year of birth would be reviewed. On 8 April 1983 the Applicant lodged an appeal with the Advisory Joint Appeals Board. On 4 May 1983 the Secretary-General instructed the representative of ICAO in Cairo to ask ICAO's lawyer in Cairo to obtain the information which the Chief of the Personnel Branch had requested from the Great Rabbinate of Alexandria on 17 September 1982. On 27 May 1983 the lawyer provided the information, from which it appeared that the Act of Public Notoriety in question had been established on 30 July 1982 on the basis of a declaration by two witnesses who had based their testimony on the Applicant's certificate of Canadian citizenship No. 3132748. On 30 June 1983 the Advisory Joint Appeals Board issued its report. The Board's conclusion and recommendations read as follows:

“Conclusion

“31. The Board concludes that the Organization can decide that it will only accept a change of birth date based on documentation from the competent authorities of the Appellant’s country of birth. Accordingly, the information provided by Canada is not relevant and until such time that the Appellant provides such documentation, the birth date of her application form is binding for ICAO official purposes.

“Recommendations

“32. Considering the Administration’s willingness to assist and the short time remaining until the Appellant’s retirement in October 1983, the Board recommends that the Administration assist the Appellant in obtaining documentation from competent authorities in Egypt, should the Appellant so request.

“33. The Board further recommends that pending receipt, before 31 October 1983, of documentation from competent authorities in Egypt, the appeal be rejected.”

On 6 July 1983 the Secretary-General accepted the conclusion reached by the Board in paragraph 31 of its report and noted the recommendations of the Board in paragraphs 32 and 33 of the report; he added that the offer made to the Applicant on 7 July 1982 had never been revoked and that the Organization would be prepared to render any reasonable assistance in the matter if the Applicant specifically so requested and issued appropriate power of attorney for the Organization so to act; on the basis of the evidence then available, the appeal was rejected. On 9 September 1983 the Applicant signed a power of attorney authorizing ICAO to take any necessary steps on her behalf to obtain from the appropriate authorities of Egypt an official certificate of her birth. On 14 September 1983 the Chief of the Personnel Branch asked the representative of ICAO in Cairo to request ICAO’s lawyer in Cairo to resume his attempts to obtain from official Egyptian records some proof of the year of the Applicant’s birth in Alexandria. On 26 November 1983 ICAO was informed that the attempts had been unsuccessful. In the meantime the Applicant had, on 18 October 1983, filed with the Tribunal the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The conclusion and recommendations of the Advisory Joint Appeals Board were based on findings derived from a presentation of the case containing inaccuracies.

2. In every country governed by the rule of law, secondary evidence is always accepted where primary evidence is unavailable.

3. The change of date of birth was acquiesced to by the Organization’s action.

4. The Board’s conclusion, while going beyond the requirement in the last sentence of Administrative Rule B.2 of the United Nations Joint Staff Pension Fund, does not appear to be based upon any such requirement in ICAO Staff Regulations and Rules.

Whereas the Respondent’s principal contentions are:

1. The Applicant failed to prove to the full satisfaction of the Organization that her correct date of birth was 11 October 1926.

2. The Applicant did not demonstrate that she acted in good faith from the time she requested the Organization to correct her birthdate; she has supplied ICAO and the Tribunal with conflicting information.

3. The Act of Public Notoriety relied on by the Applicant is not a certificate of birth and it was established only on 30 July 1982; in fact, this evidence was knowingly contrived by the Applicant.

The Tribunal, having deliberated from 2 May to 14 May 1984, now pronounces the following judgement:

I. Sixteen years after she had told the employing organization that she had been born in 1923, the Applicant eventually presented to ICAO two pieces of documentation in support of her contention that she had in fact been born in 1926. These were, first, a 1981 revised certificate of Canadian citizenship, and, second, a 1982 certificate issued by the Great Rabbinate of Alexandria. Normally, where a birth certificate issued by the government of the State of birth does not exist or cannot be obtained, documentation of the character presented by the Applicant would have been sufficient for the employing organization to revise its records as to the correct date of birth.

II. In fact, ICAO employed Egyptian counsel in an attempt to obtain more definitive data. The Egyptian attorney produced information concerning the basis of the issuance of the certificate by the Great Rabbinate of Alexandria which tended to cast doubt on the value of that certificate since it had been issued only in 1982 and on the basis of declarations made at that time by two private persons. The Cairo attorney also reported to ICAO that, although he had inquired of the Civil Department of the Egyptian Government at Alexandria, he had been unable to find a record of the Applicant's birth in its archives. The correspondence with ICAO contains no statement by him, nor does it reflect any inquiry by ICAO, whether, at the period of the 1920s during which the Applicant was born, the appropriate authority under Egyptian law for the registration of births was the administration of the religious body to which the parents belonged. While the registration of births is generally now carried out by secular authorities, at earlier periods organized religious communities were often used for that purpose. The Tribunal considers that ICAO might well have followed its commendable initial effort to secure authoritative advice from Egyptian counsel by soliciting additional explanations concerning the situation under Egyptian law in the 1920s. ICAO also made no inquiry as to the reasons why the Cairo attorney had been unable to find a record of the date of birth in the governmental archives, that is, whether there had been no such archives for the period because these had been maintained by the religious communities, or, on the contrary, whether there existed governmental archives but these had been destroyed or were missing or were silent as to the Applicant's birth. If, under local law, responsibility for the maintenance of birth records was at the time invested in the various religious communities, then the certificate ultimately given by the Great Rabbinate of Alexandria, although issued as recently as 1982, would be entitled to substantial weight.

III. The Tribunal is aware, however, that a régime of secularized birth registration existed in Egypt under Law No. 23 of 1912 on births and deaths. In accordance with article 20 of that law, such a régime was not mandatory only in the case of the birth of children of foreign nationality the registration of which could be replaced by filing within 15 days a certificate of birth issued by the civil or religious authority competent "d'après le statut personnel de l'enfant". The Applicant, however, was an Egyptian national.

IV. The Tribunal has considered ordering the Respondent to make further inquiries in Egypt. It refrains from doing so on the ground that, even if the Great Rabbinate of Alexandria had been the authority to register the Appli-

cant's birth, by virtue of her own conduct the Applicant would not be entitled to reinstatement or to damages on account of the retirement forced upon her by the Respondent in October 1983. The Tribunal takes note of the fact that the Applicant told ICAO, when applying for employment in 1957, that she had been born in 1923. She continued to cite 1923 when filing her Participant's Declaration with the Joint Staff Pension Fund in 1958. On obtaining employment with FAO in Rome in 1951, she had likewise used as the year of her birth the year 1923 given in her Egyptian passport. For the sixteen years of ICAO employment from 1958 to 1974, as well as for the twenty-three years from her 1951 FAO employment until 1974, the Applicant either volunteered or made no objection to 1923 as the year of birth to be carried on the records of the employing organization. The Applicant sought for the first time only in 1974 to characterize the 1923 date as erroneous and to try to establish 1926 as the actual year of birth. Thus, the conduct of the Applicant has been, at the least, so negligent as to require a finding by the Tribunal of a lack of entitlement on her part to reinstatement or compensation for lack of due diligence by the Respondent. Too many years passed before the Applicant, who had attested to the accuracy of the statements made by her in applications for employment with United Nations agencies and to the Joint Staff Pension Fund, attempted to take corrective action.

V. The Tribunal has also considered the possible relevance of Judgement No. 459, *In re Zreikat* (1981), cited by both parties, in which the ILO Administrative Tribunal held that the date of birth warranted by a staff member in his application for employment settles in principle the date on which he is due to retire. That is certainly the general rule.

VI. Accordingly, and considering the failure of the Applicant to produce convincing proof that she was born in 1926, the Tribunal rejects the Applicant's request that the Respondent be ordered to rescind the retirement it compelled in October 1983 or to pay damages for the losses suffered by the Applicant by reason of premature retirement. All other pleas of the Applicant likewise fail.

(Signatures)

Endre USTOR

President

Herbert REIS

Member

Geneva, 14 May 1984

Roger PINTO

Member

Jean HARDY

Executive Secretary

Judgement No. 322

(Original: French)

Case No. 314:
Hecquet

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

Request by a former staff member of the United Nations Centre for Human Settlements (Habitat) to rescind the decision to dismiss him for misconduct as disciplinary measure under staff rule 110.3 (b); request for reinstatement or compensation.