Judgement No. 326

(Original: English)

Case No. 303:
Fischman

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

Request by a staff member of the United Nations to rescind the decision refusing the Applicant's request to be authorized to sign a waiver of privileges and immunities in order to be able to acquire permanent resident status in the United States.

Direct submission of the application to the Tribunal under article 7.1 of its statute.

Applicant's contention that the contested decision violated his right to change his nationality and to move freely from country to country, embodied in articles 13 and 15 of the Universal Declaration of Human Rights.—The Tribunal finds that it must uphold the principles embodied in the Universal Declaration of Human Rights and in the related International Covenants.—Consideration of the relationship between the general principles embodied in these instruments and the conditions of service governing the Applicant's employment contract.—The Tribunal notes that the conditions of employment in the United Nations do not a priori *exclude any change in the nationality during the period of service but leave it to the discretion of the Secretary-General within the framework of policy laid down by the General Assembly.—Conclusion that this policy is not contrary to any international instrument on human rights, since any staff member may resign at any time and thus release himself from all constraints of the service.—Continued relevance of the views expressed in 1953 by the Fifth Committee, whereby staff members who elect to break their ties with their country no longer fulfil the conditions governing employment in the United Nations.—Finding of the Tribunal that the Applicant was adequately informed at the time of his recruitment and during 14 years of service of the policy regarding change of nationality by staff members in the Professional category.*

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President; Mr. Luis M. de Posadas Montero;

Whereas, on 16 December 1982, Emilio Norberto Fischman, a staff member of the United Nations, filed an application in which he requested the Tribunal:

"A. To order the Secretary-General to rescind his decision of 12 November 1981 refusing the Applicant the right to sign a waiver of privileges and immunities in order to acquire permanent resident status in the United States;

"and

"B. To award to the Applicant reasonable costs incurred in submitting this application, viz. typing and duplicating costs.";

Whereas the Respondent filed his answer on 22 June 1983;

Whereas the facts in the case are as follows:

The Applicant, a national of Argentina, entered the service of the United Nations on 4 May 1967 as a Translator under a probationary appointment which was converted to a permanent appointment on 1 May 1969. On 22 June

1981 he requested permission to acquire permanent resident status in the United States by a memorandum addressed to the Office of Personnel Services which read:

"In accordance with paragraph 11 (*c*) of ST/AFS/SER.A/214 of 26 June 1953, entitled 'Visa status of non-U.S. staff members serving in the United States', I hereby notify the Office of Personnel Services of my intention to apply for permanent residence status in the United States, request permission to do so, and request the Secretary-General's authorization to sign the waiver of personal immunity and privileges.

"On the basis of that authorization being granted, I am ready to forego the entitlements listed in paragraphs 9 (*a*), (*b*), (*c*), (*d*) and (*e*) of ST/AFS/SER.A/214, namely: (*a*) home leave; (*b*) non-resident's allowance; (*c*) education grant; (*d*) repatriation grant and (*e*) return transportation. In this connection I'd like to point out that I have not exercised entitlement (*a*) for seven years now, and I have never exercised entitlements (*b*), (*c*), (*d*) or (*e*).

"The reasons for this request are that having lived in the United States for more than fourteen years with very few and short absences I have seen all ties with my country of origin become gradually dissolved and have formed many and strong attachments to people, institutions and places in the U.S. In fact, intellectually and emotionally for a long time I have considered the U.S. to be my own country, and I want now the legal situation to reflect that fact. My wife is a U.S. citizen.

". . ."

On 10 September 1981 the Chief of Staff Services replied:

". . .

"The Organization has adopted a strict policy regarding the change of visa status from the G-4 International Organization to permanent resident of the United States. This policy, as evolved over the past twenty-four years, is based on General Assembly Directives (GAOR, 8th Session, A151 (pp. 44-45)). The question of change of visa status was discussed at length during the eighth session of the General Assembly. As a consequence of that discussion, the Fifth Committee adopted a report (A/2615) which included the following paragraph:

"'63. In the ensuing discussion, a number of delegations specifically endorsed the view expressed by the Advisory Committee in its report that a decision to remain in permanent residence status in no way represented an interest of the United Nations and that, on the contrary, to the extent (if any) that it might weaken existing ties with the countries of nationality it was an undesirable decision . . .'

"'70. The view was widely shared that international officials should be true representatives of the cultures and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations . . .'

"Consequently, permission to change visa status is granted only to locally-recruited staff in the General Service category. Internationally recruited staff are not permitted to change their visa status unless there are exceptional and compelling reasons. Such circumstances have, as a matter of policy, been restricted to cases of statelessness. Your request to change

your visa status to permanent resident of the United States is therefore denied."

In a letter to the Secretary-General dated 5 October 1981 the Applicant requested a review of that administrative decision on the following grounds:

"1. Article 15 (2) of the Universal Declaration of Human Rights (General Assembly resolution 217 A (III) of 10 December 1948) states: 'No one shall be . . . denied the right to change his nationality'. Since a change in visa status is a prerequisite to a change in nationality, preventing me from changing my visa status in effect prevents me from eventually changing my nationality, thereby violating the Universal Declaration of Human Rights.

"2. The first sentence of paragraph 70 of A/2615 makes it clear that the paragraph refers to staff members subject to geographical distribution: '70. Several delegations expressed the hope that the Secretary-General would submit definite proposals in due course for dealing with the problem that had arisen *with regard to the application of the principle of geographical distribution.* The view was widely shared . . .' [emphasis added]. Since I am a translator in the Department of Conference Services, my post is not subject to geographical distribution.

"3. Changing my visa status would in no way change the culture or personality I represent, which are the result of all my education and experience, or reduce my usefulness to the Organization as a translator, which I have demonstrated in more than fourteen years of faithful service.

"4. My own perusal of the Staff Rules and Regulations, as well as consultation on the subject with my Personnel Officer, have made it clear to me that nothing in those Rules and Regulations forbids a change in visa status."

On 12 November 1981 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to maintain the decision; he stated:

". . . the Secretary-General has little if any leeway to depart from the explicit guidance given almost three decades ago by the General Assembly. He can and has only done so in exceptional circumstances involving stateless staff members. It should not be forgotten that, if the General Assembly—as you pointed out—considered geographic distribution as an important factor in the determination of this policy, equally as important was the financial element implied, in the case of the United States, in a change of visa status and nationality, since this would cause the reimbursement of United States income taxes to the staff member concerned.

"The policy, which was first embodied in ST/AFS/SER.A/238, dated 19 Jan. 1954 and herewith attached, has been consistently followed. It applies not only to professional staff members who are not authorised to change their G-4 permanent resident visas, but also to candidate holders of permanent visas who are not recruited, except for short term appointment, unless they have them changed to G-4 visas. This applies also to all Language Service Staff."

On 16 November 1981 the Applicant lodged an appeal with the Joint Appeals Board. On 27 August 1982, however, the Respondent agreed to direct submission of the case to the Tribunal and on 16 December 1982 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's refusal to authorize the Applicant to sign a waiver of privileges and immunities in order to apply for permanent resident status in the United States was illegal:

(*a*) The Respondent's action was not consistent with his responsibilities under the Charter provisions dealing with human rights and under the Universal Declaration of Human Rights, articles 15 (2) and 13 of which, together with article 14 (1), imply, as a common standard, an individual right to move freely from country to country and to change nationality. Both the General Assembly and the Staff Rules envisage situations in which staff members might wish to exercise their right to change nationality or residence status. Only in the case of permanent residence in the United States is an impediment placed in the way—the requirement that the Secretary-General give permission to sign the waiver of rights, privileges, exemptions and immunities—and the impediment is placed not be the General Assembly, not by the U.S. Government, but by the Respondent by means of an Administrative Instruction. The General Assembly did not authorize the Secretary-General to curtail the freedom of staff members in a manner inconsistent with its own definition of individual human rights;

(*b*) The Respondent's action was not consistent with current legal norms. The burden is now generally on the employer to abolish practices that discriminate.

2. The action of the Respondent in refusing authorization to the Applicant to waive privileges and immunities was inequitable since it deprived him, without warning, of an option he had every right to expect.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision to deny the Applicant authorization to waive privileges and immunities was a valid exercise of the Secretary-General's discretion, taken in accordance with long-standing practice developed under the Charter, the General Convention on Privileges and Immunities and the Staff Regulations of the United Nations, in light of guidance from the General Assembly and the Administrative Tribunal.

2. In the discharge of his responsibility for the executive management of the Organization, which includes, most importantly, his duty to safeguard the substantial interests of the United Nations, the Respondent is obligated to weigh the personal interest of individual staff members against the larger interests of the Organization and it is the duty of the staff member to submit the problem to the Secretary-General who has the right of decision.

The Tribunal, having deliberated from 3 to 17 May 1984, now pronounces the following judgement:

I. The Applicant heavily relies on the Universal Declaration of Human Rights which in article 15 proclaims *inter alia* that "no one shall be . . . denied the right to change his nationality". He also refers to article 13 according to which "Everyone has the right to freedom of movement . . . within the borders of each State" and "the right to leave any country, including his own . . .".

In the Applicant's interpretation the Respondent impedes him in the exercise of these rights although he should, as the chief administrative officer of the Organization, support the Applicant's aims and act consistently with his responsibilities under the Charter, one of the purposes of which is "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language and religion". Hence the Respondent's refusal to comply with the Applicant's request is, according to the

Applicant, illegal and in violation of his fundamental rights, the more so as in the last hundred years and particularly in the last two decades the world has witnessed a progressive penetration of human rights principles into the generally recognized ("current") norms of labour law so that "conditions of service must now be adapted in order to preserve rights". Furthermore the attitude of the Respondent, the Applicant argues, is inequitable as at the time of his entering into service he was not warned of the implications of his G-4 visa status and so was deprived of a right which he had every reason to expect.

II. The Tribunal must uphold the principles embodied in the Universal Declaration of Human Rights and in the related International Covenants. It cannot, however, accept the argument of the Applicant in the present case.

III. The essence of the Applicant's complaint is that he has been prevented by the Respondent from taking the steps necessary to change his Argentine nationality to that of the United States and that this denial violates his fundamental right. The Applicant believes that his fundamental right must prevail over the particular conditions of his employment contract. The Tribunal cannot share this view.

IV. The conditions of employment in the United Nations do not *a priori* exclude any change in nationality during the period of service. The Staff Regulations and Rules leave it to the discretion of the Secretary-General, within the framework of such policy as may be laid down by the General Assembly, to act in a way which makes a change in nationality during the time of the service possible or not. This is by no means contrary to any principle of any international instrument on human rights since every staff member may at any time resign from his post and release himself thereby from all constraints of the service. The Tribunal consequently finds that the Applicant's allegation concerning the infringement of his rights under the Universal Declaration of Human Rights is unfounded and that he "confused general human rights with particular conditions of service which govern his employment contract" (Judgement No. 66: Khavkine).

V. In the situation described above the Applicant's reference to "current legal norms", i.e. the fact that the labour laws governing relations outside the United Nations have changed progressively in favour of employees, is hardly relevant. In matters of nationality or change of nationality of staff members the staff regulations and practices of the Organization have not been substantially modified in the last thirty years. The view which according to a report of the Fifth Committee (document A/2615, paragraph 70) was "widely shared" in 1953, namely that "international officials should be true representatives of the culture and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations", must continue to provide an essential guidance in this matter.

VI. The complaint of the Applicant that at the time of his recruitment he was not adequately warned of the implications of his G-4 visa status is refuted by the correspondence he attached to his application. The Vice-Consul of the United States in his letter dated 29 March 1967 informed him as follows:

> "This visa is temporary and covers the duration of your employment with the United Nations as a translator. Such employment is not regarded as meeting one of the requirements for the issue of an immigrant visa, in which case the immigrant's contract of employment has to be approved by the United States Department of Labor."

VII. Similarly the Tribunal finds no merit in the Applicant's allegation that the rules in force at the time of the contested decision (1981) gave no indication of the restrictiveness of the policy regarding the waiver of privileges and immunities, a prerequisite for obtaining permanent residence in the United States which in turn is needed for applying for United States nationality. At that time the Applicant had been in service for 14 years and must have known Information Circular ST/AFS/SER.A/238 of 19 January 1954 with stated *inter alia* that

> "The decision of a staff member to remain on or acquire permanent residence status in . . . [the] country [of their duty station] in no way represents an interest of the United Nations. On the contrary, this decision may adversely affect the interests of the United Nations in the case of internationally recruited staff members in the Professional category . . .".

VIII. For the foregoing reasons, the application is rejected.

(Signatures)

Endre USTOR
President

Luis M. de POSADAS MONTERO
Member

Samar SEN
Vice-President

Jean HARDY
Executive Secretary

Geneva, 17 May 1984

Judgement No. 327

(Original: English)

Case No. 319: Ridler

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

Request by a former staff member of UNCTAD to find that the conditions of employment imposed on him by the Respondent impaired his ability to perform his duties in accordance with his contract of employment, that he had a reasonable expectancy of renewal of contract and that the procedural delays in the consideration of his appeal caused him injury; request for appropriate compensation.

Conclusion of the Joint Appeals Board that the Applicant did not establish that the changes in the scope of his official duties resulted from improper or extraneous motivations and that no expectancy of renewal could be inferred from the Respondent's acts.—Recommendation to pay to the Applicant $US 2,500 on the ground of the Respondent's negligence in his dealings with the Applicant.

Question of the existence of a legal expectancy of renewal of the Applicant's fixed-term appointment.—Consideration of the circumstances of the case.—Circumstances of the Applicant's move from the International Monetary Fund to UNCTAD.—Alleged existence of "verbal assurances".—Finding of the Tribunal that no expectancy was created.—Application of staff rules 104.12 (b) and 109.7 (a).—Applicant's complaint of injury caused by successive changes in his responsibilities and the absence of a meaningful job description.—Application of staff regulation 1.2.—Finding of the Tribunal that there were many serious instances of poor administration but that the Applicant failed to prove that the treatment of which he complained was prompted by improper or extraneous motivation.