United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1098

Case No. 1175: CHERIF

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas at the request of Lamine Cherif, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 December 2000, and once thereafter until 31 May 2001;

Whereas, on 28 February 2001, the Applicant filed an Application containing pleas which read, in part, as follows:

"**II: PLEAS**

A. PRELIMINARY OR PROVISIONAL MEASURES REQUESTED

The Tribunal is respectfully requested to order the production of the following additional documents:

…

B. DECISIONS CONTESTED

(a) Decision to suspend the Applicant's dependency allowance for his two children as of July 1995 …

(b) Decision to pay to Anna Stern [attorney of ex-wife] escrow account the total amount of the Applicant's final pay, that is $29,768.29 …

C. OBLIGATIONS INVOKED AND RELIEFS REQUESTED

The Tribunal is requested:

(a) To order that the decision by the Secretary-General dated 19 May 2000 … be rescinded;

(b) To find and rule that the inordinate delay [by the Joint Appeals Board (JAB)] in considering and concluding the Applicant's cases (…) amounts to a denial of justice, and consequently to award the Applicant compensation in the amount of one year of salary for the material, professional and moral damage … sustained … and the distress caused to him …;

(c) To reinstate the Applicant's dependency allowance for his two children from July 1995 to May 1996, with appropriate compound interest …;

(d) To find that the Administration's decision communicated to the Applicant on 6 November 1996 (…) is deemed to be null and void … and order it to pay the Applicant the total amounts of his final entitlements … plus compound interest …;

(e) To award the Applicant … compensation to be fixed at a one year full P-4 X salary at the time of payment of the compensation … for the … damage sustained as a result of the Respondent's decision to file adverse material in the Applicant's personnel file without notifying him;

(f) To award the Applicant … compensation to be fixed at a two year full P-4 X salary at the time of payment … for … damage sustained as a result of the deliverance … of [the note of 17 January 1995] to the Applicant's ex-wife;

(g) To order the Respondent to pay substantial compensation … for the dilatory and inconsiderate manner in which the Administration handled his case hitherto;

(h) To order the Administration to cease and desist from harassing the Applicant and to write a formal letter of apology …"

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 August 2001 and periodically thereafter until 15 April 2002;

Whereas the Respondent filed his Answer on 15 April 2002;

Whereas the Applicant filed Written Observations on 29 August 2002;

Whereas on 12 November 2002, the Tribunal requested the Respondent to provide it with a document dated 3 September 1996, and, on 13 November, the Respondent submitted to the Tribunal the document requested;

Whereas on 22 November 2002, the Tribunal requested the Respondent to provide it with a document dated 10 August 1995, from The Legal Counsel to the Assistant Secretary-General, Office of Human Resources Management (OHRM), and, on 27 November, the Respondent submitted to the Tribunal the document requested;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations on 29 October 1981, as an Associate Translator (P-2) with the Translation Services, Administration and Conference Services, Economic Commission for Africa, on a probationary appointment. He was promoted to the P-3 level, and his appointment was converted to permanent on 1 October 1983. Effective 23 November 1986, the Applicant was transferred to the Translation Division of the Department of Conference Services at Headquarters, and on 1 October 1987, he was promoted to the P-4 level. The Applicant separated from service on 15 May 1996.

On 23 November 1993, the Family Court of the State of New York, County of New York, (Family Court) ordered the Applicant to pay ongoing child support for his two sons in the amount of $1,125 semi-monthly and "retroactive support … fixed at $26,301 … payable at $250 semi-monthly", commencing 30 November 1993.

Effective 21 January 1994, the Applicant was assigned to the United Nations Environmental Programme (UNEP), Nairobi. Shortly thereafter, the Organization received documentation from the Family Court according to which the Applicant was in arrears with regard to child support payments. On 2 February 1994, the Applicant was provided with a copy of the said documentation and requested to confirm settlement in full as soon as possible.

On 10 May 1994, the Family Court issued a second order by which the Court reconfirmed that the Applicant was obligated to pay $1,125 semi-monthly to his former spouse. Furthermore, according to the Order, the Applicant's total arrears were set at $27,737.

On 5 July 1994, the Assistant Secretary-General, OHRM, informed the Applicant that the Organization had been advised of the Applicant's ongoing failure to pay child support and that this was a serious matter particularly since he was in receipt of a "child's allowance" for the children in question from the United Nations. He was asked to provide "proof in writing that [he was] repaying the money owed and providing ongoing child support by 31 July 1994". By November 1994, the Applicant's child support arrears amounted to some $20,387.

On 20 December 1994, in an effort to help the staff member's spouse so that her two children could continue their studies, OHRM contacted the Office of Programme Planning, Budget and Finance, requesting that the cheques for the 1994-95 advance education grants authorized should be made payable and sent directly to the children's school and that, with regard to the 1993-94 education grant settlement, a second cheque should be issued in favour of the Applicant's spouse.

On 17 January 1995, OHRM provided the Applicant's spouse with a "to whom it may concern" note indicating that the Applicant was on assignment to UNEP, Nairobi, and providing information on the Applicant's daily subsistence allowance (DSA).

On 29 March 1995, the Applicant and his spouse divorced. The Applicant's spouse was awarded custody of the "parties' infant issues", and child support was to be paid by the Applicant. With effect from that date, the Applicant was no longer entitled to a dependency allowance with respect to his spouse.

On 12 May 1995, the Applicant was found "guilty of contempt [of court] for failure to pay child support … in the amount of $1,125.00 semi-monthly". On 14 June 1995, the Organization was informed of this order.

Following the Applicant's return from UNEP, Nairobi, to New York, with effect from 1 July 1995, the Administration discontinued paying the Applicant a dependency allowance with respect to his children. Such allowance was as of that date paid to the Applicant's former spouse as she had entered the service of United Nations Population Fund (UNFPA).

On 24 August 1995, the Assistant Secretary-General, OHRM, informed the Applicant that the Organization "will not tolerate that its privileges and immunities be misused by staff as a means to avoid compliance with court orders, in particular court orders obligating such members to pay child support".

On 23 October 1995, the Applicant informed the Assistant Secretary-General, OHRM, that he agreed to a deduction of fifty per cent of his salary and allowances to be paid over for the support of his children until he met his support obligations.

On 3 November 1995, the Applicant requested OHRM to reinstate payment of dependency allowance with respect to his two children.

On 4 December 1995, the Assistant Secretary-General, OHRM, informed the Applicant that, in the light of the fact that he was complying with his obligations, he had decided not to pursue disciplinary action against him, but that any recurrence of his failure to comply with his financial obligations and the laws of the Host Country would necessarily lead to the adoption of stern measures. A copy of this letter would be placed in his Official Status file.

On 22 February 1996, the Applicant requested administrative review of the decision to include documents in his Official Status file that had not been shown to him before filing, and on 15 April, he lodged an appeal with the JAB against this decision.

On 18 June 1996, the Family Court "ordered that judgment be entered in the amount of $34,266.56 together with costs and disbursements," payable by the Applicant to his former spouse. In accordance with that order, the Applicant's arrears for the time period of 12 May 1995 through 22 March 1996 were set at $34,266.56. On 16 July 1996, OHRM submitted this Order to the Office of Legal Affairs (OLA), and inquired whether it constituted a valid basis on which to pay over to the Applicant's former spouse his terminal salary and emoluments, including repatriation grant, up to the amount ordered, under the provisions of administrative instruction ST/AI/399 of 14 December 1994. In its reply of 8 August 1996, OLA, advised OHRM that, pursuant to paragraph 11 of ST/AI/399, deductions from the Applicant's final

payments could be made for the purposes of paying his judicially established child support arrears.

On 24 September 1996, the Applicant was informed that OHRM was not in a position to reinstate his entitlement to dependency allowance as his former spouse had been in receipt of dependency allowance from (UNFPA) since 1 July 1995. On 3 October 1996, the Applicant submitted a request for administrative review of that decision, and on 17 December, he lodged an appeal with the JAB.

On 6 November 1996, the Applicant received a copy of his final pay statement. The statement indicated, inter alia, that, after the deduction of $10,652 to liquidate an outstanding loan, the balance of the amount due him, i.e., $29,768.29, had been "paid to Anna Stern (attorney of ex-wife) escrow account as per court order".

By memorandum of 8 November 1996, the Applicant requested administrative review of the decision of 6 November, and on 16 January 1997, he lodged an appeal with the JAB.

On 22 January 1997, OHRM requested the Personnel Records Unit, OHRM, to remove a number of documents from the Applicant's Official Status file. On 7 February 1997, the Respondent informed the JAB of the removal of the documents and requested that this case be closed, as his appeal was now without object. On 23 April 1997, the Applicant requested the JAB not to close his case and to consider that he be paid compensation for the damages incurred as a result of the documents filed in his Official Status file.

On 14 March 2000, following its consideration of all three cases, the JAB issued its report, which, in relevant part, read as follows:

> "***Considerations***
>
> [Placement of document in the Applicant's Official Status file]
>
> 30. … [T]he fact that adverse material was placed on, and remained for some time on, Appellant's file in violation of ST/AI/292 is acknowledged by Respondent. The Panel would have had the soundest of foundations for recommending that the Appellant be indemnified for material damage, had he been able to demonstrate that he had suffered such damage as a consequence of the adverse material on his file. After a thorough review of all the material submitted by Appellant and Counsel, however, the Panel was unable to find convincing evidence to that effect.

…

[Dependency allowance]

32. … [The] Appellant's former spouse became a staff member of UNFPA and was granted dependency allowance for the two children on 1 July 1995. …

33. The Panel considered it self-evident that where both parents of the same child, or children, are staff members, only one can receive the allowance. … The Panel concluded that [the] Respondent was correct in contending that the denial of his request for reinstatement of dependency allowance was proper.

[Withholding of final payments]

34. [The] Respondent cites ST/AI/399 of 14 December 1994, Financial and other Obligations of Staff Members, and Staff Rule 103.18(b)(iii) as its authority for withholding the sum of $29,768.29 from Appellant's final payments and depositing that sum in an escrow account held by the attorney of his former spouse.

…

36. In the light of these texts, the Panel considered that the [A]dministration was justified in considering the Decision and Findings of Fact of the Family Court … which set [the] Appellant's total arrears at $36,806.98, as 'a final judgment by a court of competent jurisdiction'. The Panel concluded that the Organization had sufficient grounds for withholding $29,768.29 from [the] Appellant's final payment.

Recommendations

37. The Panel makes no recommendation with respect to these appeals."

On 19 May 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the Board's findings and conclusions and had accordingly decided to take no further action on his appeals.

On 28 February 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. On several occasions, documents were issued without informing the Applicant, denying him the opportunity to protect his interests.

2. The placing of adverse material in the Applicant's Official Status file caused him to suffer considerable material, professional and moral damage which could in no way be compensated by the late removal of these documents from the said file.

3. The Administration violated his right to due process when it failed to inform him of the decision to change his status in respect of dependency allowance and payment of his salary at the dependency rate.

4. The decision to pay the Applicant's terminal payments to his former spouse was tainted with arbitrariness and devoid of any legal basis as it transgressed the terms specified in the court order that the Administration claimed to enforce.

Whereas the Respondent's principal contentions are:

1. The decision not to pay the Applicant any dependency allowance from 1 July 1995 in respect of his children was properly taken.

2. The Applicant did not suffer any damage as a result of the filing of four documents in his Official Status file and he is not entitled to any financial compensation in this respect.

3. The Respondent's decision to withhold a portion of the Applicant's final pay for purposes of paying judicially established child support arrears was a valid exercise of the Secretary-General's discretion.

4. The Administration did not display a pattern of personal animosity or discrimination in its dealings with the Applicant.

The Tribunal, having deliberated from 11 to 26 November 2002, now pronounces the following Judgement:

I. In this case, the Tribunal is faced with a number of issues. It will address them within a chronological narrative of the principal events.

II. From 1990, the time of the Applicant's separation from his wife, until 1993, when the first Order of the Family Court was entered, the Applicant's contribution to the support of his wife and two children was more or less dependent on his goodwill. The Family Court's Order of

23 November 1993 fixed the amount of $26,301 as "retroactive support", which indicates that the Applicant's prior payments were short by that amount.

From 23 November 1993 until early 1995, the Tribunal considers that the attitude of the Administration towards the Applicant was correct. He continued to receive dependency allowance for his wife and children notwithstanding the fact that his payments were somewhat erratic and his arrears were not entirely cleared. The Applicant had made some progress in this regard however as, by 15 January 1995, he had reduced his arrears from more than $38,000 to approximately $20,000.

III. On 17 January 1995, the Administration first intervened to the detriment of the Applicant by issuing a "to whom it may concern" note, certifying that the Applicant was receiving DSA while assigned to Nairobi, but failing to clarify that DSA is not technically salary but rather is intended to compensate staff members for expenses incurred whilst on a temporary assignment away from their duty station. The Tribunal considers that the way in which the note was phrased ("[i]n addition to his salary, [the Applicant] received a daily subsistence allowance") and the fact that the Applicant was not informed of the note in accordance with the provisions of paragraph 9 of ST/AI/399, are sure indications that the Administration was exceeding the limits of impartiality expected of it: the Administrative Instruction directs the Organization to cooperate with domestic authorities in providing such information but it makes no provision for making it available to private individuals. Thereafter, the Applicant's ex-wife presented this letter on DSA to the Family Court as evidence of his increased salary, and, apparently, the Court took it into account when it fixed the amount of child support the Applicant was obligated to pay. From this point onwards, it is clear that the attitude of the Administration towards the Applicant took a decisive turn for the worse and that it began to favour his wife to his disadvantage.

IV. It is appropriate to note that, in general, the Administration is well advised to be zealous in protecting the good name of the Organization and in preventing staff members from abusing its immunity. The provisions of paragraph 1 of ST/AI/399 give the Organization a clear mandate:

> "The purpose of the present instruction is to remind staff members of their obligations under staff regulations 1.1, 1.4 and 1.8 to regulate their conduct at all times in a manner befitting their status as international civil servants, and also to set out, in broad terms, the Organization's policies for responding to cases of personal indebtedness."

Staff members must obey the laws of the host country and the fact that the Convention on the Privileges and Immunities of the United Nations prevents their salary from being attached must be compensated in some cases by the action of the Organization itself, as stipulated in paragraph 4 of ST/AI/399, "to prevent the occurrence of any abuse in connection with the privileges and immunities of the Organization".

That said, the Tribunal must emphasize that there is a great distinction between such appropriate action by the Organization and punishing a staff member by utilizing unauthorized means. In the present case, insofar as "spouse and child support" is concerned, paragraph 9 of the said Administrative Instruction enables the Organization to provide personal information on staff members in order to "cooperate with the appropriate authorities", not to any interested party, and with due notification to the staff member concerned "that the information has been provided and the nature of the information". This was not done in the present case. The fact that OHRM produced a "to whom it may concern" note is hardly indicative of the fulfillment of these requirements. The Applicant contends that the note in question induced the Family Court to fix a higher level of support payments. Whether or not that is the case, the Tribunal finds that it is obvious that the issuance of that note by the Administration was a violation of the provisions of ST/AI/399 and an act of hostility towards the Applicant.

V. Another important stage in the narrative of the case is the contempt of court Order which was communicated to the Organization on 14 June 1995, and the appointment of the Applicant's wife as a staff member of UNFPA. Only a few days after she joined UNFPA, the dependency allowance, which had been paid to the Applicant for his two children, was shifted in her favour. Nonetheless, the Applicant was still obligated to make child support payments calculated on the basis that he received the allowance. Moreover, the Administration failed to respond to his repeated requests for confirmation that the children's mother was now in receipt of the dependency allowance. This is, of course, another violation of the Applicant's rights.

VI. The Tribunal notes that the Family Court Order of 23 November 1993 fixes the pro rata share of the Applicant's obligations at 54 per cent, amounting to $450 semi-monthly for basic support, $464 semi-monthly in childcare expenses, $97 for tuition and transportation, and various other expenses for a total of $1,143 semi-monthly. It also fixed the total of his retroactive support at $26,301, payable at $250 semi-monthly. However, on 10 May 1994 a subsequent Order determined that the Applicant's pro rata share as the non-custodial parent was 100 per cent, raising the amount of his basic support obligation to $1,125 semi-monthly, and set his arrears at $27,737, to be repaid at $250 semi-monthly. On 23 November 1994, the Applicant's spouse submitted an affidavit to hold the Applicant in contempt of court, as, since 23 November 1993, he had failed to pay $17,631. She submitted, at the same time, "proof" that the Applicant was making $50,000 more annually, "by virtue of his reassignment on mission to [UNEP, Nairobi]", and complained of the Applicant's refusal to take appropriate steps to obtain the United Nations education grant for the two children's tuition.

VII. In view of the contempt of court Order, OHRM, in consultation with OLA, obtained the agreement of the Applicant that 50 per cent of his salary would be deducted in order to meet his child support obligations. Shortly thereafter, on 3 November 1995, the Applicant requested the reinstatement of a dependency allowance with regard to his children, invoking staff rule 103.24(c)(i). This request, even when reiterated, was ignored. The Tribunal fails to see why this dependency allowance was not reinstated, as he was providing main and continuous support for the children, from the moment he agreed to have 50 per cent of his salary deducted, especially as he was still obligated to pay 100 per cent of the children's support. The Tribunal is satisfied that the dependency allowance in question should have been reinstated as from the date the first 50 per cent deduction was made.

VIII. In the meantime, certain documents that, in the opinion of the Applicant, were material adverse to him were placed in his personnel file without his being notified. The Tribunal is satisfied that such documents constituted adverse material under the wide definition contained in paragraph 2 of administrative instruction ST/AI/292 of 15 July 1982 on the filing of adverse material in personnel records, which provides that

> "[a]dverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member".

It further provides that

> "[a]s a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon. It shall be handled and filed in accordance with the [appropriate] procedures …"

Not only was the Applicant never officially notified of the existence of the material in question, but his petition of 22 February 1996 to remove same was not complied with until 7 February 1997, i.e., a full year later. The Applicant maintains that some of these documents, e.g., the memorandum from OHRM of 11 July 1995, damaged him considerably, being instrumental in his removal from the African translator's Training Program at ECA, after preparing for months for that assignment. The Tribunal finds that the mere fact that these documents were placed in his personnel file without him having been properly notified caused the Applicant damage and violated his rights, for which he should be compensated.

IX. Ultimately, the Applicant resigned his position with the Organization on 15 May 1996. On 18 June of the same year, the Family Court fixed his arrears until 22 March 1996 at $34,266.56. OHRM submitted this Order to OLA and inquired whether it constituted a valid basis on which to pay the Applicant's terminal salary and emoluments, including repatriation grant, up to the amount of the arrears, over to his former wife, under the provisions of ST/AI/399, and obtained a positive response. Paragraph 12 of ST/AI/399 establishes clearly that, in cases like the one *sub judice*, the Organization

> "shall have the right, in its discretion, to withhold payments commensurate with the amount in question until such dispute or conflicting claims have been resolved by written agreement between the interested parties or the issuance of a final judgement by a court of competent jurisdiction".

The Tribunal finds that the Administration acted precipitately in deducting the amount fixed by the Court because it was obvious that that might not be the final sum. In fact, by June 1996, the

Applicant had made payments totaling $5,550 and, as a consequence, his arrears were reduced to $28,716.56. The Administration thus seems to have paid the Applicant's ex-wife a sum that was higher than the Applicant's arrears. Moreover, it failed to recognize a new arrangement that was entered into, as reflected in the subsequent court Order of 8 October 1996, by which the Applicant was allowed to clear his arrears at a semi-monthly rate of $300. The Applicant transmitted a copy of this Order to the Administration on 1 November 1996. Accordingly, the Tribunal finds that the Applicant is correct in contending that the Administration failed to act on the information provided and chose to substitute its own authority for that of the domestic courts, and finds that this justifies an award of compensation.

X. In conclusion, the Tribunal finds that the Administration's hostile attitude resulted in a lack of respect for the Applicant's due process rights and damaged his image within the Organization, warranting compensation. The Tribunal determines that such compensation should be in the amount of six months net base salary.

XI. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation equivalent to the dependency allowance to which he was entitled from the time the first 50 per cent salary deduction was made, following his consent on 23 October 1995, until his resignation, on 15 May 1996;

2. Orders the Respondent also to pay the Applicant compensation in the amount of six months' net base salary at the rate in effect on the date of his separation from service; and,

3. Rejects all other pleas.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Spyridon FLOGAITIS
Member

Brigitte STERN
Member

New York, 26 November 2002

Maritza STRUYVENBERG
Executive Secretary