United Nations AT/DEC/1201

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1201

Case No. 1185: BERG

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern Vice-President, presiding; Ms. Jacqueline R. Scott; Mr. Dayendra Sena Wijewardane**;**

Whereas, on 28 July 2003, Njal Berg, a staff member of the United Nations, filed an Application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 1090, rendered by the Tribunal on 25 November 2002;

Whereas in his Application the Applicant requested the Tribunal, inter alia:

> "9. … [T]he Applicant most respectfully requests the Administrative Tribunal *to order*:
>
> (a) that the **written** censure dated 11 July 2000 be withdrawn.
>
> (b) that all and any demotions recommended by the [Joint Disciplinary Committee (JDC)] or the Tribunal be revoked and that the Applicant be reinstated to FS-4 level retrospectfully from the date of the original demotion.
>
> (c) that the Applicant be awarded as costs the sum of $10,000 in legal fees plus $1,000 in expenses.
>
> 10. Further and in the alternative, to order that the Applicant be paid the sum of two years' net base pay in compensation."

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 19 November 2003;

Whereas the Respondent filed his Answer on 28 October 2003;

Whereas the Applicant filed Written Observations on 18 February 2004;

Whereas the facts in the case were set forth in Judgement No. 1090.

Whereas the Applicant's principal contentions are:

1. The Applicant has submitted new facts of such a nature as to be a decisive factor, which facts were unknown to the Tribunal and to the Applicant when Judgement No. 1090 was rendered.

2. The findings of the JDC were incorrect, both as to the interpretation of the facts and of the law. The disciplinary process violated the Applicant’s rights of due process and resulted in a disproportionate penalty.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 1090 was rendered.

2. The Applicant’s request for the award of costs is without merit.

The Tribunal, having deliberated from 26 October to 24 November 2004, now pronounces the following Judgement:

I. The Applicant seeks the revision of Judgment No. 1090, which was rendered by the Tribunal on 25 November 2002 and which was the final step in the proceedings that arose out of an accident which took place on 8 November 1998, when the Applicant lost control of his private car whilst driving it in the United Nations Protected Area (UNPA) in Nicosia, Cyprus.

The allegation against the Applicant was one of misconduct in driving dangerously at high speed under the influence of alcohol and refusing to stop his vehicle when requested to do so by the United Nations Military Police (UNMP). The Applicant denied these allegations and the case was brought before an *ad hoc* JDC which, having considered the evidence, found that the Applicant did not meet the standards of conduct expected of international civil servants. The *ad hoc* JDC consequently recommended that disciplinary measures be imposed on the Applicant,

which recommendation the Secretary-General accepted. In his original Application before the Tribunal, the Applicant challenged the findings of the *ad hoc* JDC as well as the disproportionate penalty imposed. In its Judgement, the Tribunal determined that although disciplinary measures were justified, the measures imposed had been disproportionate.

II. The Applicant now seeks to introduce a supplementary statement by a witness who had already made a statement to the UNMP, stating that the initial statement had not given "a particularly full account of [his] observations". Additionally, the Applicant seeks to introduce as evidence a survey of the traffic in the UNPA, conducted some six months after the Judgment in this case was rendered and more than five years after the incident in question took place. According to the Applicant, this survey demonstrates the wide-spread use of the UNPA by civilian vehicles and had this evidence been available to the Tribunal when it deliberated his case, the conclusions reached would have been different.

III. Article 12 of the Tribunal's Statute provides that the Applicant may apply to the Tribunal

> "for a revision of a judgment 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 …"

The Tribunal has repeatedly held that these provisions in the Statute limit the scope of an application for revision and do not enable a party to reopen issues which have been adjudicated. (See, for example, Judgement No. 1055, *Al-Jassani* (2002).)

The Applicant had the opportunity to produce any and all evidence in support of his case during the proceedings before the *ad hoc* JDC, or at the latest, to present it to the Tribunal when his original case was considered. It is very clear to the Tribunal that the present Application for revision does not in any way subscribe to the requirements of the Statute. What the Applicant is seeking to do in this instance is to obtain another opportunity to supplement evidence in support of his case on issues which had already been decided by the *ad hoc* JDC and the Tribunal. There was no limitation imposed on the actions which the Applicant might have undertaken to strengthen his case, provided that he did so at the appropriate juncture, *i.e.*, present it to the *ad hoc* JDC. In fact, in this request for revision, the Applicant indicates that he and his legal advisors considered that the evidence presented, on at least one issue, had

sufficiently placed the weight of evidence in the Applicant's favour. Only when Judgement No. 1090 was issued did they realize that this was not so, thus prompting this attempt to re-open the same issue with the present request. This is not what article 12 provides for.

Furthermore, if what the Applicant is claiming to advance as a "discovery of new facts" was assumed to be so, which it is not, it would be quite unrealistic to characterize these facts as being "of such a nature as to be a decisive factor". In the Tribunal's view, what the Applicant is seeking is "another bite at the cherry", another chance to litigate the same issues which have been settled in the previous litigation. The jurisprudence of the Tribunal is clear that he cannot do this, as stated in Judgement No. 503, *Noble* (1991):

> "This request seeks to relitigate factual issues involved in the proceeding which led to that judgement and which could and should have been raised by the Applicant in that proceeding ... It is plainly frivolous for the Applicant to attempt to relitigate factual issues in the guise of seeking an interpretation of a Tribunal judgement."

This principle also applies when the case at hand is one for a revision of judgement.

IV. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Jacqueline R. **Scott**
Member

Dayendra Sena **Wijewardane**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary