



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1367

Case No. 1445

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Mr. Julio Barboza; Ms.  
Brigitte Stern;

Whereas, on 4 November 2005, a staff member of the United Nations, filed an Application  
requesting the Tribunal, inter alia:

“9. ... *to order*

- (a) that the [United Nations] accepts the United States of America where [he], [his] spouse and children permanently live as the place of home for the purpose of home leave and allow [him] to exercise [his] home leave entitlements at the same place;
- (b) that the [United Nations] compensate [him] for the financial and emotional burden [he] and [his] family suffered ... due to the fact that [he] was denied home leave to the place where [his] permanent residence is, and where [his] personal and family ties are.”

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 10 April 2006 and once thereafter until 10 May;

Whereas the Respondent filed his Answer on 24 April 2006;

Whereas the Applicant filed Written Observations on 31 May 2006;

Whereas the statement of facts, including the employment record, contained in the report of the  
Joint Appeals Board (JAB) reads as follows:

***“Employment History***

The [Applicant] entered the services of the United Nations Centre for Human Settlement (UNCHS) in September 1996 as [an] Environmental Planning and Management Process Expert on an appointment of limited duration [(ALD)] for six months at the L-3 Level. In March 1997, his contract was extended for three months.

In June 1997, his [ALD] was converted to an intermediate-term appointment. In the following years, he received further extensions ranging from three months to one year [and his functional title changed periodically].

...

In June 2002, his intermediate-term appointment was converted to a fixed-term appointment under the 100 Series when he was appointed to the post of Human Settlements Officer (Training) at the P-3 level for a period of two years. [Thereafter], his fixed-term contract was renewed ...

***Facts of the Case***

The [Applicant] appeals ... a decision of [the United Nations Office at Nairobi (UNON)] not to recognize the United States of America as his home country under the applicable Staff [Regulations and Rules].

On 19 January 1999, the [Applicant] wrote to UNON requesting his permanent home address in the United States of America ... be recognized as his home address for home leave purposes. Together with his application, he submitted extensive documentation, inter alia, [U.S. ‘Green Cards’] for his family members, evidence of home ownership, school enrollment etc. in order to demonstrate that he had severed relations with his original home country of nationality (Ethiopia) and had permanently established his home and family in the United States of America.

On 8 February 1999, he was notified ... that he [did] not meet the conditions stipulated in staff rule 205.2 [(c)] (iii) (a) for exercising home leave outside the country of his nationality.

On 15 February 1999, he responded asking for reconsideration of his case in ... light of the spirit of the aforementioned rule. In the following years, he repeatedly addressed UNON on the matter ...

On 22 July 2003, the [Applicant] wrote to [the Office of Human Resources Management (OHRM)] at ... Headquarters requesting consideration of [UNON’s] decision ... The reply received on 31 July ... was a confirmation of the earlier rejection by UNON on the basis of staff rule 205.2 [(c)] (iii) (a).

On 12 September 2003, the [Applicant] submitted a request for administrative review [of this decision].”

On 9 December 2003, the Applicant lodged an appeal with the JAB in Nairobi. The JAB adopted its report on 23 June 2005. Its considerations and recommendation read as follows:

***“Considerations:***

This case is governed by staff rule 205.2 (c) (iii) (a) in conjunction with ST/AI/367 [of 15 October 1990, entitled “Home leave - Change of place of home leave and change of country of home leave”].

Those rules provide three conditions under which a change of the country of home leave can be granted to a staff member, namely,

- ‘a). that the staff member has maintained normal residency in the other country, for a prolonged period preceding his or her appointment;
- b). that the staff member continues to have close family and personal ties in that country; and,
- c). thirdly, that staff member taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3.’

It is not contentious in this case that the Appellant does not fulfill the first requirement, i.e. he [had] not maintained his normal residence in the United States for a prolonged period preceding his appointment.

The Appellant has argued that not to acknowledge the change in his circumstances after joining the [Organization] by not recognizing the U.S. as his new home country violates the spirit of the rules regarding home leave.

After consideration, the Panel came to the conclusion that the Appellant’s case is without merit.

...

... [T]he panel does not accept the Appellant’s argument that the spirit of the entire rule 205.2 could be compromised by the sub-rule 205.2 [(c)] (iii) (a). The main reason home leave is granted is not to preserve family ties, although this certainly will be one of the side effects of taking home leave for most staff members. The main purpose for the granting of home leave is the desire of the United Nations to ensure that its staff members preserve their cultural ties to their home countries. This is considered desirable in an organization which is based so strongly on mobility and multi-cultural exchange.

Having thus agreed that staff rule 205.2 [(c)] (iii) (a) does not contravene higher ranking law and is compatible with the spirit of the entire rule 205.2, the JAB concluded that there is no room for interpretation above and beyond the wording of that rule. The JAB would exceed its mandate, if it were to ignore the clear and unambiguous wording of that rule, by recommending that a change in the normal residence *after* taking up employment could be considered equal to a change prior to taking up employment with the [Organization]. ...

It follows that UNON when denying the Appellant’s request for change of his home leave country, acted in accordance with the applicable [Regulations and Rules] and that consequently the present appeal must be rejected.

***Recommendation***

In the light of the foregoing considerations and conclusions, the Panel recommends to the Secretary-General to reject the present Appeal.”

On 14 September 2005, 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 JAB’s findings and

conclusions and had decided to accept its unanimous recommendation and to take no further action on his appeal.

On 4 November 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contention is:

The Administration denied him the exercise of his home leave entitlement to the country where his family permanently resides and which it considers its domicile.

Whereas the Respondent's principal contentions are:

1. The Applicant does not meet one of the requirements of staff rule 205.2 (c) (iii) (a) and, thus, the Respondent is not able to consider authorizing a country, other than the Applicant's country of nationality, for the purposes of travel by the Applicant and his eligible family members on home leave.

2. The Applicant has not been denied any of his rights in relation to his entitlement to home leave and is not entitled to any compensation for financial, emotional or other damage allegedly suffered by him and his family members.

The Tribunal, having deliberated from 1 to 21 November 2007, now pronounces the following Judgement:

I. On 19 January 1999, the Applicant, an Ethiopian national who was serving under a 200 Series intermediate-term appointment, formally requested that his address in the U.S. be recognized for home leave purposes. In support of his request, he provided his family members' U.S. "Green Cards" as well as evidence of home ownership and school enrollment. On 8 February, however, he was advised that he did not meet the conditions stipulated in staff rule 205.2 (c) (iii) (a) for exercising home leave outside the country of his nationality. After years of ongoing correspondence with the Administration, on 12 September 2003, the Applicant requested administrative review of the decision not to permit this requested change of home leave location and, on 9 December, he lodged an appeal with the JAB in Nairobi. In its report dated 23 June 2005, the JAB concluded that his case was without merit as he had failed to establish that he had maintained his normal residence in the U.S. for a prolonged period prior to his appointment, as required by the Staff Rules. On 14 September, the Applicant was advised that the Secretary-General had accepted the JAB's findings and conclusions in his case. It is this decision which the Applicant now appeals to the Tribunal.

II. The Applicant argues that, since his appointment to the United Nations as an Ethiopian national, he has established a new domicile for himself and his family. The U.S. has become the gravitational centre of life for him as well as his entire family: it is where he owns a home; where his wife looks after his children; where his children go to school; and, where he does his community work. As a result of these

changes that have taken place in their lives, the Applicant contends that his country of nationality, Ethiopia, is no longer a relevant point of reference for his family and all his ties are with the U.S., their country of permanent residence. He claims that he should be allowed to spend his hard-earned and valuable leave in the U.S., despite the fact that his country of nationality remains Ethiopia. He asks that the U.S. be recognized for his home leave purposes.

III. The Tribunal has some sympathy with the predicament in which the Applicant finds himself but the clear wording of staff rule 205.2, as it currently stands, is, regrettably from his point of view, an impediment. Staff rule 205.2 (c) (iii) provides that:

“The Secretary-General may authorize:

- a. A country other than the country of nationality as the home country, for the purposes of this rule, in exceptional and compelling circumstances. An individual requesting such authorization will be required to satisfy the Secretary-General that he or she maintained normal residence in such other country for a prolonged period preceding his or her appointment, that the individual continues to have close family and personal ties in that country and that his or her taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3”.

The staff rule provides in no unmistakable terms that the country of home leave shall be the country of nationality unless “exceptional and compelling circumstances” can be established. The Applicant may well have encountered such circumstances, but the staff rule also places an additional condition on the Secretary-General’s authority to change his “home country”, as he is required to show, *inter alia*, “that he ... maintained normal residence in such other country for a prolonged period preceding his ... appointment”.

Staff rule 205.2 (c) (iii) is elaborated upon by ST/AI/367, paragraphs 6 and 7 of which read as follows:

- “6. In accordance with [the staff rules], the country of home leave shall be the country of the staff member’s nationality. However, in exceptional and compelling circumstances, the Secretary-General may authorize a country other than the country of nationality as the home leave country, as detailed below.
7. For a permanent change in the country of home leave to be authorized, the conditions set out in [the staff rules] must be met, i.e., the staff member must satisfy the Secretary-General:
  - (a) That he or she maintained normal residence in such other country for a prolonged period preceding his or her appointment;
  - (b) That the staff member continues to have close family and personal ties in that country;
  - (c) That the staff member’s taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3.

When such a change is authorized, the Organization shall bear the travel and transportation expenses to the newly designated home country.”

The Tribunal recalls the language of staff regulation 5.3, which provides: “Eligible staff members shall be granted home leave once in every two years. ... A staff member whose home country is either the country of his or her official duty station or the country of his or her normal residence while in United Nations service shall not be eligible for home leave.” The Tribunal finds that the language of the staff regulation does not alter the above-referenced interpretation of the staff rules.

IV. The Applicant simply does not meet the requirements of the above-quoted rules and is, indeed, fully aware of that. There is no dispute that he was not a resident of the U.S. prior to his appointment, an essential condition for a change of his home leave location.

In Judgement No. 509, *Hamadeh-Banerjee* (1991), the Tribunal held that

“the Applicant’s arguments, rather than resting on a plausible reading of any of the applicable rules, appear to be premised on the notion that her personal situation somehow entitled her to an exception from the applicable rules at the time of the events in question. The granting of exceptions is within the discretion of the Respondent, not the Tribunal. Only where there is evidence - not present here - that the Respondent’s discretion was improperly exercised on the basis of unlawful or extraneous factors or was based on some material mistake of fact or law will the Tribunal review the matter.”

Similarly, in the instant case, the Applicant cannot persuade the Tribunal in his favour as the Tribunal is not in a position to determine that he was entitled to an exception from the rules.

The Tribunal recalls its Judgement No. 1109, *Wollstein* (2003), in which a staff member was permitted to change her designated home leave destination from Germany to Chile as an exception under staff rule 105.3 (d) (iii) (the equivalent provision in the 100 Series Staff Rules to the afore-mentioned staff rule 205.2 (c) (iii)). It takes note, however, of the fact that the circumstances of the case were quite different as the Applicant *Wollstein* had never lived in Germany, her country of nationality, but had resided in Chile since infancy.

V. The Applicant argues that the “spirit” of the staff rule is in his favour and that permitting him to change his home leave country would still accommodate “its substantive purpose”. The Tribunal cannot agree. The JAB rejected a similar claim, finding that

“[t]he main reason home leave is granted is not to preserve family ties, although this certainly will be one of the side effects of taking home leave for most staff members. The main purpose for the granting of home leave is the desire of the United Nations to ensure that its staff members preserve their cultural ties to their home countries. This is considered desirable in an organization which is based so strongly on mobility and multi-cultural exchange.”

The Tribunal concurs, noting that the Organization has historically referred to “home leave”, not “family leave”. While the Applicant’s current family home may be located in the U.S., his “home” under the confines of the internal rules remains Ethiopia. That he wishes to visit his family in the U.S. is not relevant to the Organization in its determination of his “home” country. The Tribunal observes that if the intent of the rule was only to permit staff members to visit their immediate families, then many staff members would never be able to exercise such leave, as their families reside with them at their duty station. It is clear that the purpose of home leave is to enable staff members to maintain ongoing links with their country of nationality.

VI. In *Hamadeh-Banerjee (ibid.)*, the Tribunal held that

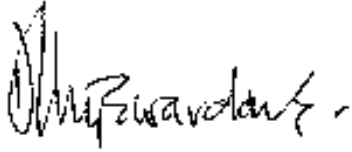
“Most of [the Applicant’s contentions] are fundamentally flawed by [her] failure to recognize ... that the Tribunal’s function is to determine whether the Staff Rules and related Instructions have been applied in accordance with their terms and whether the reasonable discretion which the Secretary-General has in applying or allowing exceptions to the Rules has been exercised in a lawful manner or was tainted by some impropriety or error of fact. The Tribunal’s consistent jurisprudence that it is not empowered to ignore the Staff Rules or to create exceptions to them is plainly applicable here.”

In the instant case, the Applicant may aspire to one of two possibilities: either the Respondent must agree to create an exception in his favour or the Staff Rules must be amended. It is not for the Tribunal to determine whether an exception ought to be made or whether the relevant rules require amendment. The Tribunal agrees with the conclusion of the JAB that it “would exceed its mandate, if it were to ignore the clear and unambiguous wording of [the] rule, by recommending that a change in the normal residence *after* taking up employment could be considered equal to a change prior to taking up employment”, as such an initiative would mean that the JAB “would no longer interpret the application of the Staff [Regulations and Rules] but would actually change them, a mandate it does not have” and finds, likewise, that the Tribunal’s mandate does not extend to such action. As it held in Judgement No. 1145, *Tabari* (2003),

“Unlike a Staff Association or a Staff Union, neither a JAB nor the Tribunal is a vehicle available to a staff member to be used to lobby management or to seek to persuade management to effect what the staff member would perceive to be improvements in his working conditions or the terms of his employment, unless that staff member seeks to establish that the matter of which he complains arises from the non-observance of the terms of his appointment or that it arises from the infringement or denial of some employment right. Both the JAB and the Tribunal are parts of the justice system whose primary objective is to right employment wrongs and to provide remedies to staff members who establish that they have been wronged in relation to a condition of employment or been denied an employment right.”

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

*(Signatures)*



Dayendra Sena **Wijewardane**  
Vice-President

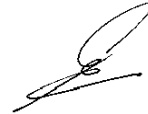


Julio **Barboza**  
Member



Brigitte **Stern**  
Member

New York, 21 November 2007



Maritza **Struyvenberg**  
Executive Secretary