

SEVENTY-FOURTH SESSION

***In re* DIALLO (No. 2)**

(Application for review)

Judgment 1209

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1116 filed by Mr. Cheick Diallo on 11 August 1991 and corrected on 5 September, the reply of 14 January 1992 from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the complainant's rejoinder of 22 May and UNESCO's surrejoinder of 29 June 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 12, paragraph 1, of the Rules of Court;

Having examined the written submissions and dismissed the complainant's application for hearings;

CONSIDERATIONS:

1. The complainant's fixed-term appointment with UNESCO expired on 31 August 1988. By a letter of 12 June 1990 the Director-General notified acceptance of a recommendation by the Appeals Board against extending his appointment beyond that date. He lodged a complaint with the Tribunal, Judgment 1116 of 3 July 1991 dismissed it, and he is applying for review of that judgment.

2. As the Tribunal has often said - for example in Judgments 442 (in re de Villegas No. 4) and 1178 (in re Leonor No. 2) - neither its Statute nor the Rules of Court provide for review of its rulings. Although it will nevertheless entertain an application for review, only on exceptional grounds will it do so because it will thereby be derogating from the *res judicata* rule.

Some pleas in favour of review are admissible and some are not. Those that are not include a mistake of law, a wrong appraisal of the evidence that involves exercise of judgment, and failure to admit evidence. Other pleas in favour of review may be allowed if they are such as to affect the Tribunal's ruling. They include an omission to take account of particular facts; a material error, i.e. a mistaken finding of fact that involves no exercise of judgment; and the discovery of a "new" fact, i.e. one the complainant learned of too late to cite in the earlier proceedings.

The complainant puts forward each of those three pleas in support of his application and they are taken up below.

3. First, he submits that Judgment 1116 overlooked an essential fact on which the whole proceedings had been based. He cites "key" items of evidence appended to his original complaint and to his rejoinder. UNESCO's explanation was that it had abolished his post because of financial stringency. In his submission those items show its explanation to be false because it went on recruiting and promoting staff even after he had gone.

Judgment 1116 took up the issue he raises. It recorded his submission that

"... financial stringency and redundancy were not the true reasons for abolishing post UPP-750 and terminating his appointment: what was at work was a subjective factor, a desire to get rid of someone there was no sound reason to dismiss. In other words, there was abuse of authority."

The Tribunal dismissed his argument as "unconvincing" and said that on the evidence before it the Organization could not be held liable. In coming to that view it read and appraised all the evidence before it. Its conclusion was that the complainant had been dismissed because of financial stringency. The inevitable implication was that it

rejected the complainant's contention to the contrary and discarded as immaterial the items he cited as evidence of, among other things, recruitment and promotions after his own dismissal.

In any event abolishing his temporary post, UPP-750, for financial reasons did not mean there might be no later recruitment or promotions to other posts for reasons the DirectorGeneral alone was free to determine at his discretion in the Organization's interests.

Since on all the evidence before it the Tribunal came to a different view it was not bound to comment on each of the items the complainant had produced in support of his own contention. To require it to do so would be to question the way in which it reached its conclusion, that is to say its appraisal of the facts and evidence.

The complainant's plea is tantamount to alleging a mistake, not of fact, but of reasoning, and that affords no admissible grounds for review.

4. Secondly, the complainant challenges the finding that he turned down offers of several posts and calls upon UNESCO to adduce written evidence to show he did so.

But such offers need not have been made in writing, the issue was one for the Tribunal to resolve on the evidence, and the objection to its finding on the point is therefore not admissible.

5. Thirdly, the complainant objects to the statement in Judgment 1116 under 8 that the Mediation Committee did not question the financial reasons for abolishing his post in its first report of 12 July 1988 to the Director-General.

The plea cannot be sustained. The text of that report shows that it had nothing to do with the complainant's own case. In any event he is challenging the construction the Tribunal put on the Mediation Committee's findings and again the plea is not admissible.

6. Nor is the contention that Judgment 1116 disregarded the rules of law about due process and the hearing of the parties, their witnesses and representatives and the provisions of "Article 14.1 of the Universal Declaration of Human Rights" about the right to fair trial before a competent, independent and impartial tribunal.

The complainant is here objecting to the rejection of his application for oral proceedings and the hearing of witnesses, and he says it also ran counter to Article 12(1) of the Rules of Court.

To allege breach of Article 12(1) of the Rules of Court and of Article 14.1 of the International Covenant on Civil and Political Rights (not the Universal Declaration of Human Rights) is to plead failure to admit evidence or a mistake of law. In either case the plea is inadmissible.

7. The complainant alleges disregard of irrefutable evidence which he adduced in the original proceedings and which he says is corroborated by further evidence he appends to his present application. He presses the point in his rejoinder:

"The force of the complainant's argument is borne out by highly cogent evidence in Appendices 2, paragraph 1 b, and 5, paragraphs 6 and 15, to the application, which disclose new facts warranting review".

Appendix 1 to the application is circular 1769 of 7 February 1991; Appendix 2 is a letter of 31 January 1989 from the complainant bearing a handwritten note by the DirectorGeneral; and Appendix 5 is the Mediation Committee's report of 12 July 1988 mentioned in 5 above.

All those items are prior to Judgment 1116 and they amount to new facts only if the complainant discovered them after the publication of the judgment or was unable to cite them in the original proceedings. He does not even say, let alone prove, that he has met either condition.

The items appended to his rejoinder, which he says amount to "a new feature of the case", were subsequent to the judgment but are not new facts. They give further examples of recruitment, promotion and reclassification of posts. Some of them are dated 1992. Even though they could not be disclosed in the original proceedings they are immaterial: for the reasons stated in 3 above what happened in 1992 is no more relevant to the ruling on the original case than what happened in 1991.

8. There is no need to entertain the complainant's pleas that the impugned decision of 12 June 1990 shows mistakes of fact and law, procedural flaws, personal prejudice and abuse of authority. They are a fond attempt to resuscitate arguments which he put forward in support of his original complaint and which Judgment 1116 dismissed. They offend against res judicata.

9. The conclusion is that none of the pleas for review can succeed. The various claims to compensation and costs are therefore dismissed. So too is the claim to an apology from the Organization, a form of redress the Tribunal may not grant anyway.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot
A.B. Gardner