

C. (No. 2) and N. (No. 2)

v.

ICC

124th Session

Judgment No. 3859

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr B. L. M. C. (his second) and Mr D. D. N. N. (his second) against the International Criminal Court (ICC) on 5 March 2015, the ICC's reply of 29 June, the complainants' rejoinder of 7 October 2015 and the ICC's surrejoinder of 18 January 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

Considering that the facts of the case may be summed up as follows:

The complainants challenge the decision adopted by the ICC Assembly of States Parties (hereinafter "the Assembly") on 17 December 2014, reaffirming its earlier decision that the amended Pension Scheme Regulations apply to them.

Facts relevant to these complaints are to be found in Judgment 3359, delivered in public on 9 July 2014, concerning the complainants' first complaints. It may be recalled that the Assembly elected the complainants as replacement judges during its sixth session in 2007. At that same session, the Assembly adopted amendments to the Pension Scheme Regulations for Judges and decided, on 14 December 2007, that the amended Regulations would apply to judges elected at the sixth session.

In 2010 the Judges' Pensions Committee requested that the Assembly review the amendments to the Pension Scheme Regulations and expressed the view that the complainants' pensions should be governed by the original Pension Scheme Regulations. These requests were submitted to the Assembly by the Presidency in a memorandum of 5 October 2010. At its ninth session in December 2010, the Assembly decided not to reopen the issue of the amendments to the Judges' Pension Scheme Regulations, but it agreed to refer the question of which Regulations should govern the complainants' pensions to the Committee on Budget and Finance (CBF). In the event, the CBF declined to give an opinion on this specific question. Thereafter, as the matter was not placed on the agenda of the Assembly's tenth session, the complainants inferred that the ICC had abandoned its reconsideration of the decision to apply the amended Pension Scheme Regulations to them. They therefore brought the matter before the Tribunal, which held in Judgment 3359 that they were entitled to have the Assembly complete its reconsideration of its 14 December 2007 decision. To that end, the Tribunal ordered the ICC to take the necessary steps to resubmit the Presidency's 5 October 2010 memorandum to the Assembly.

Following the delivery of Judgment 3359, the 5 October 2010 memorandum and some additional documents were submitted to the Secretariat of the Assembly. At its thirteenth session, on 17 December 2014, the Assembly adopted a decision in which it reaffirmed its decision of 14 December 2007, that judges elected at the sixth session would hold office subject to the amended Pension Scheme Regulations.

The complainants impugn before the Tribunal the Assembly's decision of 17 December 2014. They ask the Tribunal to set aside the impugned decision and to draw all legal consequences. In particular, they ask the Tribunal to order the ICC to pay them the difference between the pension actually paid to each of them and that which would have resulted from the original Pension Scheme Regulations, until the date of the judgment to be delivered in the present case and, as from that date, the full pension resulting from the original Pension Scheme Regulations, plus compound interest at the rate of 10 per cent per annum until the date of payment of such amounts. Alternatively, Mr C. claims

a lump sum payment of 515,460 euros and Mr N. a lump sum payment of 337,032 euros. They also claim costs.

The ICC asks the Tribunal to dismiss the complaints.

CONSIDERATIONS

1. The complainants, two retired judges of the ICC, impugn the 17 December 2014 decision of the ICC Assembly of States Parties. As the complaints raise common legal issues and are based on the same facts, they are joined.

2. The impugned decision stems from the execution of Judgment 3359. In that judgment, the Tribunal held that the ICC's duty to act in good faith towards the complainants required it to complete its reconsideration of the question of which Pension Scheme Regulations applied to the complainants. To that end, it remitted the case to the ICC and, at point 1 of its decision, ordered it to "take such steps as are necessary to resubmit the Presidency's 5 October 2010 memorandum to the Assembly of States Parties for the purpose" – as stated in consideration 30 of the judgment – of completing "its reconsideration of its December 2007 decision".

3. On 17 December 2014, at its thirteenth session, "following the thorough reconsideration of the matter", the Assembly decided "to reaffirm its decision from its sixth session that judges elected at that session would hold office subject to the Pension Scheme Regulations for Judges, adopted by resolution ICC-ASP/6/Res.6". This is the impugned decision.

4. The complainants challenge the lawfulness of the decision of 17 December 2014 on the grounds that the Assembly did not provide reasons for it, as required by the case law. In Judgment 3359, the Tribunal listed several issues that could be taken into account by the Assembly during the reconsideration process. Although the impugned decision does not address these issues, which is regrettable, it cannot be

said that the impugned decision does not provide any reasons. The stated reason for the decision of 17 December 2014 is that the Assembly decided at its sixth session “that the judges elected during th[at] session would hold office subject to the terms and conditions of office to be adopted during the sixth session”.

5. The complainants further contend that the amended Pension Scheme Regulations could not have applied to them, as they were not adopted until after the commencement of their respective terms of office.

6. As noted above, in Judgment 3359 the Tribunal asked the Assembly to complete its reconsideration of its earlier decision. In the circumstances where the Assembly had agreed to undertake a reconsideration of whether the amended Pension Scheme Regulations applied to the complainants, before taking the decision to “reaffirm” its earlier decision, it was incumbent on the Assembly to examine the lawfulness of its earlier decision.

7. As a starting point for the analysis, it must first be determined when the amended Pension Scheme Regulations came into force. The original Pension Scheme Regulations came into force at the Assembly’s third session, which was held from 6 to 10 September 2004. According to the Official Records of the proceedings of the third session, the Assembly adopted, by consensus, Resolution ICC-ASP/3/Res.3 on Strengthening the International Criminal Court and the Assembly of States Parties. That Resolution adopted the “Conditions of service and compensation of judges” annexed to the Resolution. The Annex entitled “Conditions of service and compensation of judges of the International Criminal Court” (Conditions of Service) in relevant part states:

“The present draft conditions of service and compensation of judges embody the fundamental conditions of service of judges of the [ICC], in accordance with articles 35 and 49 of the Rome Statute [...] adopted by the [Assembly] during its first session in September 2002 and revised and reissued in Part III.A of document ICC-ASP/2/10 adopted by the Assembly during its second session in September 2003.”

8. There are two appendices to the Conditions of Service: Appendix 1, “Travel and subsistence regulations for judges of the International Criminal Court”; and Appendix 2, “Pension scheme regulations for judges of the International Criminal Court”.

9. As to the entry into force of the Conditions of Service, including the Pension Scheme Regulations, Article XII.1 states:

“The conditions of service and compensation of judges of the International Criminal Court embodying the fundamental conditions of service of judges as set forth in this document, including its appendices, shall enter into force upon the adoption of this document by the Assembly.”

10. The sixth session of the Assembly was held from 30 November to 14 December 2007. The Official Record of the proceedings of the sixth session, under the heading “Commencement of terms of office of judges”, at paragraphs 32 and 33, reads in pertinent part:

“At the 2nd meeting, on 30 November 2007, the Assembly, on the recommendation of the Bureau, decided that the term of office of the judges elected to fill judicial vacancies shall run from the date of the election for the remainder of the term of their predecessors. [...]

At the same meeting, the Assembly decided, on the recommendation of the Bureau, that the judges elected during this session of the Assembly will hold office subject to the terms and conditions of office to be adopted during the sixth session.”

11. The Official Record of proceedings for the same sixth session of the Assembly held on 14 December, at paragraph 19, states:

“The Assembly endorsed the recommendation of the Committee contained in paragraph 100 of its report that the pension scheme for judges be amended, and accordingly adopted the draft amendments to the Pension Scheme Regulations for judges as contained in the report of the Court on the pension scheme for judges, with entry into force as of the sixth session of the Assembly. In accordance with the decision of the Assembly at its second plenary meeting, these amendments thus apply to the judges elected at the sixth session.”

12. The recitals of the Resolution itself amending the original Pension Scheme Regulations read:

“Decides to amend articles I, III, and IV of the pension scheme regulations for judges of the International Criminal Court by replacing them with the following texts:”

Articles I, III and IV are then set out.

13. Based on the above chronology it is abundantly clear that the original Pension Scheme Regulations continued to be in force up to the time of the adoption of the amendments on 14 December 2007. Regulation 9, sub-regulation 2, of the Regulations of the Court adopted on 26 May 2004 states:

“The term of office of a judge elected to replace a judge whose term of office has not expired shall commence on the date of his or her election and shall continue for the remainder of the term of his or her predecessor.”

14. It is equally clear that at the time the complainants were elected the original Pension Scheme Regulations applied to them. Further, the Assembly’s decision that the judges elected at the sixth session would “hold office subject to the terms and conditions of office to be adopted at the sixth session”, could not render inoperative the application of the Pension Scheme Regulations that by operation of law applied to the complainants upon their respective elections as judges.

15. If the position was not as clear as just discussed (in considerations 13 and 14), then Article 49 of the Rome Statute of the ICC would have come into play in determining the operation of the original Pension Scheme Regulations, favouring a result that did not diminish the rights of judges at the time their terms of office commenced.

16. It is also observed that Article 45 of the Rome Statute has no bearing on the question as to whether the original or amended Pension Scheme Regulations apply to the complainants. Article 45 requires that “[b]efore taking up their respective duties under [the] Statute, the judges [...] shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously”.

This provision is only directed at the performance of the judicial function and requires the taking of a solemn oath before any judicial duties can be undertaken. It is irrelevant in relation to the application of the conditions of service and compensation of the judges.

17. As the impugned decision is grounded on an unlawful decision it will be set aside, as will the 14 December 2007 decision insofar as it provided that the amended Pension Scheme Regulations applied to the complainants. In the circumstances, a consideration of the complainants' remaining pleas is unnecessary.

18. The ICC will be ordered to pay the complainants an amount equal to the difference between the pensions the complainants were paid and the pensions they would have been paid under the original Pension Scheme Regulations as of their respective dates of election within thirty days of the date of the delivery in public of this judgment, together with interest thereon at the rate of 5 per cent per annum. The complainants are also entitled to costs in the total amount of 7,000 euros.

DECISION

For the above reasons,

1. The Assembly's 17 December 2014 decision is set aside, as is the Assembly's 14 December 2007 decision insofar as it provided that the amended Pension Scheme Regulations for judges applied to the complainants.
2. The ICC shall pay the complainants an amount equal to the difference between the pensions the complainants were paid and the pensions they would have been paid under the original Pension Scheme Regulations as of their respective dates of election within thirty days of the date of the delivery in public of this judgment, together with interest thereon at the rate of 5 per cent per annum.

3. The ICC shall pay the complainants costs in the total amount of 7,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 May 2017, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 June 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ