

NINETY-FIFTH SESSION

Judgment No. 2222

The Administrative Tribunal,

Considering the complaint filed by Mr G. M. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 3 May 2002 and corrected on 9 July, the Organization's reply of 22 October 2002, the complainant's rejoinder of 17 March 2003 and UNESCO's surrejoinder of 5 May 2003;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a Burundian national born in 1941, joined UNESCO in Paris in 1979 as Chief of the Legal Affairs Division. At the material time, he was Director of the Section of relations with Member States of Africa and the Least Developed Countries, at grade D.1, within the Bureau for External Relations. He retired on 30 November 2001.

By a fax received at UNESCO on 8 January 1999, the Prosecutor's Office of the court of first instance in Nanterre (France), acting "in response to information originating from the administration of UNESCO", requested the Director-General to waive the complainant's diplomatic immunity, in order to investigate "suspected ill treatment" inflicted on two young girls, including one minor, who were the nieces of the complainant's spouse. They had been living with the couple until 4 January, when they were taken in by two French associations which had initiated proceedings against him. In a fax dated 6 January addressed to the Prosecutor's Office in Nanterre, the two associations had stated that the Director-General had been "informed of this matter" and had replied that he was prepared to waive the complainant's diplomatic immunity if the French courts wished to bring charges against him. On 13 and 20 January 1999 the complainant was informed of this request by the Director of the Office of International Standards and Legal Affairs. He indicated that he did not intend to avail himself of his immunity. On 21 January he wrote to the Director-General citing irregularities in the request for the waiving of his immunity, which had not followed the usual diplomatic channels. He claimed the right to state his case and the benefit of the presumption of innocence, while requesting the Director-General to allow him access to the relevant documents and to grant him an interview. By a fax dated 25 January the lawyer representing the two associations informed the Director-General that if he did not reply to the request of the Prosecutor's Office, the associations would notify the press of the matter on the following day. On 27 January the Director-General gave the Prosecutor's Office his consent to waiving the diplomatic immunity of the complainant and his spouse, adding, however, that the measure was exceptional and would be restricted to the planned investigation. He also indicated that in future any request of that kind should be submitted to him through the usual diplomatic channels.

On the same day the associations' lawyer was informed of that decision, as was the complainant, who was told by the Director of the Executive Office of the Director-General that UNESCO's Welfare Assistant could provide him with all available information concerning the facts at issue. On 9 February the complainant's counsel asked the Director-General to insist that the Welfare Assistant should let him have the complete file, and especially the "information originating from the administration of UNESCO" mentioned in the letter from the Prosecutor's Office. By a fax dated 25 February, the Prosecutor's Office in Nanterre informed the Director-General that it had been a mistake to indicate that the information originated from UNESCO, because it had in fact originated entirely from the two associations.

On that same day the complainant sent a protest to the Director-General, in which he said that he was not challenging "the decision to waive [his] diplomatic immunity in itself", but "the circumstances in which the decision was taken", in the wake of a "calumnious denunciation". He requested compensation for the injury he had suffered and the restoration of the immunity of which he had been deprived. By a note dated 12 April the complainant notified the Appeals Board of his intent to appeal and then lodged a "detailed appeal" on 11 November 1999. In a report dated 13 July 2001, the Appeals Board found that the Organization had failed in its obligation to provide the complainant with all the information he required prior to waiving his diplomatic immunity and that the Director-General (in office until November 1999) had been wrong in agreeing to a request to waive the complainant's immunity which had not been transmitted through diplomatic channels. The Board accordingly recommended that the complainant be paid a sum of 50,000 French francs in damages "for the prejudice and mental sufferings". By a letter dated 16 January 2002, which constitutes the impugned decision, the Director-General rejected the appeal. On 5 February 2001 the investigating judge issued an order dismissing the charges against the complainant for lack of sufficient evidence, while his spouse was referred for trial before the criminal court. The diplomatic immunity of the complainant was restored.

B. The complainant submits that the Director-General through his statements and dealings with outsiders, and other members of the Secretariat, by providing outsiders with "information" concerning his private life, encouraged those outsiders to initiate proceedings against him. This constitutes a violation of UNESCO's Constitution and of its Staff Regulations, especially the provisions relating to the duty of discretion and reserve and to the independence of international civil servants. The Administration also violated the principle of adversarial proceedings and the complainant's rights of defence by withholding from him the accusations made against him, failing to conduct an inquiry and refusing him access to the relevant documents. The complainant alleges that there is good reason to believe that the Director-General had indeed given assurances to the French associations that the complainant's diplomatic immunity would be waived. As the Appeals Board noted, the Director-General should have denied the statements contained in the fax of 6 January 1999 before granting the requested waiver. By not doing so, he implicitly admitted the truth of the accusations.

The complainant asserts that the Director-General's decision was a grave affront to his dignity and reputation and jeopardised his career prospects. The press campaign unleashed against him might have been avoided - or at any rate attenuated - if UNESCO had insisted on the observance of international law and diplomatic practice. He also argues that the decision, in February 1999, to relieve him of his responsibility for coordinating UNESCO's relations with the Member States of Africa - leaving him only responsibility for the least developed countries - was a breach of the promises made to him by the Director-General and was prejudicial to him. In his view, the impugned decision amounts to abuse of power and bias, which caused him serious material and moral injury.

He requests that the impugned decision be set aside and that he be granted compensation for material and moral injury, as well as legal costs.

C. In its reply the defendant asserts that the complaint is irreceivable *ratione materiae*. Citing the Tribunal's Judgments 70 and 1543, it contends that the Director-General's discretion to decide the waiving of immunity is a matter involving relations between the Organization and a Member State and therefore does not lie within the power of review by the Tribunal. The complaint is therefore clearly irreceivable and should be summarily dismissed, in accordance with the procedure of Article 7 of the Tribunal's Rules.

UNESCO's reply on the merits is therefore subsidiary. It recalls that the privileges and immunities granted to international civil servants apply to the exercise of their duties in the interest of the Organization and are not for their personal benefit. The Director-General should agree to waive an official's immunity where such immunity is liable to impede the course of justice. Any other response, particularly in a case of suspected ill treatment of children, might imperil the prestige of the Organization as well as the probity and dignity of a member of its staff, perhaps suspected unjustly.

In reply to the complainant's allegations the defendant maintains: that the Director-General did not receive instructions from the French authorities, that he had not signified his consent prior to receiving the request to waive a staff member's diplomatic immunity, and that the accusation that the Organization denounced the complainant to the judicial authorities of the host country is unfounded. On the contrary, the Director-General had waived the complainant's immunity only partially, in order to protect him, and the complainant was not adversely affected as a result, since his fixed-term appointment as a Director had been renewed until the age for retirement. Moreover, he had been duly informed of the suspicions levelled against him, since the Director of the Office of International

Standards and Legal Affairs had received him twice and since the Director-General had arranged for the Welfare Assistant to give him the relevant documents. UNESCO argues that its duty to protect its staff does not extend to an official against whom proceedings are in progress before the regular authorities.

The defendant maintains that there is *de jure* no established procedure which must of necessity be followed in requesting the waiving of an official's diplomatic immunity. It was for the Director-General to accept or reject the way in which the request was communicated, but there is no right that the official concerned can assert in this regard. The allegation of abuse of power and bias is therefore unfounded. Lastly, UNESCO points out that a claim for compensation for moral or material injury can succeed only if evidence is provided of an unlawful act, actual injury and a causal link between act and injury. In the case in hand, no unlawful act had taken place.

D. In his rejoinder the complainant points out that, as from February 1999, he was only Director of a unit rather than a section, which amounted to being downgraded. The decision to relieve him of responsibility for coordination with Africa was generally perceived as a disguised sanction and therefore caused him injury.

With regard to the Tribunal's competence, the complainant reiterates that he is not challenging the decision to waive his immunity in itself, but rather the violation of his contractual and statutory rights. The complaint is therefore perfectly receivable.

With regard to the merits, the complainant maintains that the Organization violated his right to obtain access to the documents of the case by refusing to provide him with the file concerning the information originating from the Administration of UNESCO, even after the Welfare Assistant had acknowledged that such a file existed. In view of the "obligation of fairness, transparency and openness which the Organization owes its employees", it should have conducted an objective, impartial inquiry prior to waiving the complainant's immunity and should have informed him of the exchanges between the Director-General and the French associations concerning him. According to him, the Director-General violated the principle of the independence of the international civil service by precipitately giving in to the blackmail of the associations' lawyer. By not going through diplomatic channels, the Director-General violated an essential rule of procedure. The complainant asks why, if there is no compulsory legal rule in that respect, the Director-General felt obliged to make it clear that he was acceding "exceptionally" to the request and that the judicial authorities were invited in future to go through the usual diplomatic channels. The complainant accuses the Director-General of having caused an affront to his dignity and reputation and considers that he has shown proof of illicit acts, injury and a causal link between them. He adds that the Director-General's failure to keep his promises, a reduction in his duties and the Organization's violations of his rights all added to the injury he suffered.

E. In its surrejoinder UNESCO maintains that the change made in the complainant's responsibilities in February 1999 was no more than the consequence of a reorganisation of services which had begun in 1996, and that it had had no adverse effects on his career.

It reiterates that the complaint is irreceivable and claims that, in waiving the complainant's diplomatic immunity, the Director-General infringed neither the complainant's contractual rights nor the Staff Regulations.

On the merits, it points out that the indication to the effect that the information had originated from UNESCO was a mistake which has been acknowledged by the Prosecutor's Office in Nanterre. Regarding the allegation that the Director-General had stated that he would be prepared to waive the complainant's diplomatic immunity, the defendant maintains that, on the one hand, according to case law, acts which have no effect on an official's position - such as a mere declaration of intent - cannot be appealed against and that, on the other hand, that question is not at issue since the complainant has always made it clear that he is not challenging the decision to waive his diplomatic immunity. Furthermore, that decision was not taken under pressure; the fact that it was communicated to the Prosecutor's Office at the same time as the letter from the associations' lawyer was received was a mere coincidence. Lastly, the fact that the Prosecutor's Office did not submit its request through diplomatic channels in no way invalidated the Director-General's decision: since privileges and immunities are granted solely in the interest of the Organization, it was for the executive head of the Secretariat to appraise the situation in the light of that interest.

CONSIDERATIONS

1. In his complaint the complainant asks the Tribunal to set aside the decision of 16 January 2002 dismissing his internal appeal, and to award him compensation for all the injury he suffered as a result of the circumstances in which the Director-General's decision to waive his diplomatic immunity was taken.

2. The complainant contends that the defendant acted in violation of Article VI, paragraph 5, of UNESCO's Constitution, Articles 1.1, 1.3 and 1.5 of the Staff Regulations, the principle of adversarial proceedings, the obligation to inform, and the rights of defence and that it has injured his dignity and his reputation.

He adds that the Director-General's decision is flawed by blatant abuse of power and bias and that it has caused him very serious material and moral injury.

Receivability

3. Referring to the Tribunal's case law, in particular Judgments 70 and 1543, the defendant submits that the Tribunal's competence, *ratione materiae*, does not extend to disputes regarding the Director-General's discretion to waive diplomatic immunity.

It is worth noting that the complainant does not in fact, as he has made clear in his protest addressed to the Director-General and confirmed in his submissions before the Tribunal, challenge the decision to waive his diplomatic immunity in itself. He rather challenges the circumstances in which that decision was taken, which in his view, violated his contractual rights or those arising from the general principles of law which should be observed by international organisations.

Since the case law referred to by the defendant does not apply, the Tribunal is of the view that only a consideration of the merits of the case may show whether the complainant's allegations are well founded.

The merits

4. With regard to the violation of the provisions of UNESCO's Constitution and those of its Staff Regulations, the complainant contends that the Director-General and other members of the Secretariat acted contrary to their constitutional and statutory obligations by providing persons outside the Organization with "information" concerning his private life and by encouraging them to initiate criminal proceedings against him, causing him very serious injury.

Contrary to the complainant's allegations, however, which he might have based on indications derived from the information he had been given, none of the evidence produced proves beyond doubt that the Director-General through "his statements and dealings with outsiders encouraged the latter to initiate criminal proceedings against the complainant". The document submitted by the complainant in support of his allegations, which was the fax of 6 January 1999, did not originate from the Director-General and merely reported statements attributed to him which were in the event subsequently challenged by the Director of his Executive Office. The fact that those statements were not denied cannot be held as proof that they were really made by the Director-General.

With regard to the "information" which allegedly led to the decision by the Prosecutor's Office in Nanterre to bring charges against the complainant, it emerges from the fax dated 25 February 1999, addressed to the Director-General of UNESCO by the Deputy Prosecutor, that the "information" in question "originated entirely" from the two French associations.

The Tribunal has no grounds for doubting that statement by a French judge.

5. On the other hand, without examining other pleas directed against the decision to waive the complainant's diplomatic immunity in itself, which lies beyond the Tribunal's jurisdiction, the Tribunal considers the pleas regarding the breach of the obligation to inform and the failure to comply with the applicable provisions in waiving the complainant's immunity to be well founded.

It has not been denied that the decisive factor behind the request for the complainant's diplomatic immunity to be waived was the mention of "information" attributed to UNESCO - even though the Prosecutor's Office in Nanterre subsequently acknowledged its mistake - and that this fact was not brought to the complainant's knowledge. That might have given him a chance to identify his accusers and, if need be, armed with that knowledge, to explain to his hierarchical superiors the reasons for the serious charges brought against him, before the decision was taken

to waive his diplomatic immunity, in circumstances in which the Director-General could appropriately have done so.

By virtue of the right to information recognised by the Tribunal's case law, particularly Judgment 1756, the Organization, which held information that was so important to the complainant, had an obligation to bring it to his knowledge.

6. It may be concluded from the above that the Organization violated the complainant's right to be informed and injured his dignity and reputation.

The decision of 16 January 2002 dismissing the complainant's appeal shall therefore be set aside.

7. The complainant claims compensation for material and moral injury.

The Tribunal considers that the complainant did not suffer any material damage directly as a result of the violations committed by the Organization. The complainant has not submitted proof of his allegation that the Director-General withdrew a large part of his responsibilities as a penalty for the accusations made against him. Furthermore, the complainant retained the position of director and his fixed-term contract was extended until the statutory retirement age.

On the other hand, the moral injury suffered by the complainant is undeniable, in view of the circumstances in which his diplomatic immunity was waived.

The Tribunal considers that this damage may be compensated by an award of 5,000 euros.

8. As his complaint succeeds in part, the complainant is entitled to 3,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organization shall pay the complainant the sum of 5,000 euros in compensation for moral injury.
3. It shall also pay him 3,000 euros in costs.
4. All other claims are dismissed.

DISSENTING OPINION BY JUDGE RONDÓN DE SANSÓ

Regretfully I cannot agree with the majority opinion in this matter.

The complainant asks the Tribunal to set aside the Director-General's decision of 16 January 2002 rejecting his appeal, against the recommendation of the Appeals Board, and to award him compensation for all the alleged injury he suffered and payment of costs.

On the one hand, by waiving the complainant's diplomatic immunity, the Director-General of UNESCO did not commit an unlawful act. Firstly, as the defendant pointed out, it was for the Director-General to decide whether or not to accede to the requested waiver in the light of the terms of the Headquarters Agreement between France and UNESCO. Secondly, as the defendant also pointed out, according to Articles 21 and 24 of the Headquarters Agreement, privileges and immunities are granted to officials in the interests of the Organization and not for the personal benefit of the individuals themselves, and the Director-General should agree to waive the immunity granted in any case in which he considers that such immunity would impede the course of justice. Thirdly, like the defendant I consider that the privileges and immunities granted to international civil servants apply to the exercise of their duties and do not extend to all aspects of their private lives. Lastly, while it is true that the decisive

element in the request to waive the complainant's diplomatic immunity had been the reference to "information" originating from the Administration of UNESCO, it is no less true that the Deputy Prosecutor of the court of first instance in Nanterre had recognised that he had made a mistake and that "the information originated entirely" from the two French associations. There is no evidence that UNESCO's Administration informed on the complainant to the French judicial authorities. I therefore consider that the Director-General of UNESCO breached neither his duty to inform the complainant nor the rules of procedure concerning the waiving of diplomatic immunity.

Furthermore, the complainant has not proved the injury caused by the Director-General of UNESCO. I consider that in the circumstances the Tribunal should have applied the case law in consideration 8 of Judgment 1551, whereby "a claim to damages cannot succeed unless the claimant proves the unlawful act and the consequent injury".

In my opinion, the Tribunal should therefore have dismissed the complaint.

In witness of this judgment, adopted on 20 May 2003, Mr Jean-François Egli, Presiding Judge for this case, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Jean-François Egli

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet