

TWELFTH ORDINARY SESSION

In re JURADO

Judgment No. 70

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Labour Organisation drawn up by Mr. Cesáreo Jurado on 10 December 1963, the reply of the Organisation dated 27 January 1964, the additional statement of the complainant dated 20 March 1964, the reply of the Organisation to that statement dated 9 April 1964, the third statement of the complainant dated 14 August 1964, and the reply of the Organisation to this third statement dated 25 August 1964;

Considering article II, paragraph 1, of the Statute of the Tribunal, articles 1.2, 1.7, 7.5, 7.6 and 7.7 of the Staff Regulations of the International Labour Office, article 40 of the Constitution of the International Labour Organisation and article 21 of the Agreement of 11 March 1946 between the Swiss Federal Council and the International Labour Organisation concerning the Legal Status of the International Labour Organisation in Switzerland;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed;

Considering that the material facts of the case are as follows:

A. After holding various temporary appointments between 1955 and 1960 in the International Labour Office, the European Office of the United Nations and the World Health Organization as a shorthand-typist and then as a translator, the complainant, who is of Spanish nationality, was appointed a permanent Member of Division in the Editorial and Translation Division of the ILO on 30 June 1960, and, as such, was granted full immunity from jurisdiction in Switzerland as regards both his official and private activities. On 13 October 1956 Mr. Jurado had married, in Geneva, a Swiss national, who kept her Swiss nationality but acquired also, by her marriage, Spanish nationality.

B. By a letter dated 21 September 1960, the Counsellor of State in charge of the Department of Justice and Police of the Republic and Canton of Geneva asked, on the request of Mrs. Jurado's lawyer, for the waiving of the complainant's immunity from jurisdiction in connection with divorce proceedings instituted by Mrs. Jurado. By a letter dated 6 October 1960, the waiving of Mr. Jurado's immunity was notified to the Genevese authorities after the complainant had been informed, on 4 October, of their request and the effect which would be given to it. The proceedings before the Swiss legal authorities then followed their normal course. The custody of the child of the marriage, which was still very young, was given provisionally to Mrs. Jurado and the right of the complainant to visit it was fixed by the Court of First Instance, which, on 5 November 1962, ruled on the substance of the matter in favour of a divorce against the complainant and gave the custody of, and parental authority over, the child to the mother. Following an appeal by the complainant, the Court of Justice of Geneva reversed the first judgment on 14 May 1963 and dismissed the action for divorce, attributing to Mrs. Jurado responsibility for the breaking up of the marriage. Mrs. Jurado's appeals were dismissed by the Federal Court on 20 September 1963, and the ruling of the Court of Justice was upheld.

C. After various unsuccessful attempts to obtain the custody of his child, which continued to live with its mother, the complainant submitted, on 12 October 1963, two requests to the Director-General of the ILO asking him, first, to be good enough to lay the matter before the competent Swiss authorities through the intermediary of the Federal Political Department, or by any other means, in order that the complainant's son might be restored to him, and secondly to grant him leave with salary in order to enable him to look for his child. Following these requests, the Legal Adviser of the International Labour Office, after reviewing and discussing the situation with the complainant, indicated to him that the Director-General did not consider himself able to offer more than his good offices, as a result of which many steps had been taken and followed up with a view to achieving a reasonable arrangement between the parties which would enable the complainant to see his child. The tenor of these discussions was

confirmed in a letter from the Chief of Personnel to the complainant dated 5 November 1963.

D. By a letter of 4 November 1963, the complainant informed the Director-General that, in view of the failure of new approaches to the Genevese and federal authorities, he was preferring a penal charge with the Public Prosecutor of Geneva for the abduction of the child, while on 6 November 1963 the Department of Justice and Police again requested the waiving of the complainant's immunity in connection with a new divorce action instituted against him by his wife and based on new facts. On 7 November 1963 the waiving of the complainant's immunity, which he should have asked for before instituting penal proceedings, was authorised by the Director-General in connection with these proceedings, and his immunity was also waived in connection with the new divorce proceedings, as requested by the Department of Justice and Police, after the complainant had been advised that this action would be taken.

E. Meanwhile, by various communications, the complainant had repeated his request of 12 October 1963 indicating that what he wanted was not the Director-General's good offices, but his intervention with the Swiss authorities with a view to impressing on them the principle of respect of his diplomatic immunity which, in his view, had been impeached by the application to his case of Swiss law, whereas he should only have been subject to Spanish law, under which he would have been given the custody of, and parental authority over, his child. The refusal to grant him "diplomatic protection" by such an intervention was made worse by the waiving of his immunity in connection with a divorce action that was contrary to Spanish law. On 13 November 1963 the Chief of Personnel informed the complainant that the Director-General did not consider that the purpose of the immunities granted by the Swiss Confederation to the International Labour Organisation was affected by the facts stated by the complainant. The Director-General could not give diplomatic protection to officials in respect of their private affairs, since only the national authorities had the power to do so, and he would only intervene if he considered that the free functioning of the ILO, and the complete independence of its officials was not assured. In the Director-General's view this was not so in the present case, but he remained ready to use his good offices again.

The complainant's additional statements, in which the original grounds for his complaint are explained at greater length, also relate to the civil and penal proceedings in progress, both in Switzerland and elsewhere, in connection with the disagreement between Mr. and Mrs. Jurado and the custody of their child, which continues to live with its mother.

F. The complainant prays that the Tribunal should -

- (1) find that the ILO Administration has offended his religious convictions and infringed article 1.2 of the Staff Regulations;
- (2) find that the waiving of the complainant's immunity the first time was illegal and infringed article 1.7 of the Staff Regulations;
- (3) find that the decision of the ILO Administration dated 7 November 1963, and confirmed on 13 November, waiving the complainant's diplomatic immunity and refusing him diplomatic protection is contrary to article 1.7 of the Staff Regulations and is tainted with illegality and arbitrary action;
- (4) find that the ILO Administration has infringed articles 7.5 and 7.6 of the Staff Regulations;
- (5) order the Director-General of the ILO to pay the complainant compensation in an amount to be fixed *ex aequo et bono* for damages and prejudice suffered;
- (6) order the Director-General of the ILO to take the necessary measures for the diplomatic protection of the complainant so as to enable him to recover his child and obtain the custody of it;
- (7) fix the sum of 10,000 Swiss francs as being-payable to the complainant for every day's delay in recovering his son, starting from the date of the judgment;
- (8) subsidiarily, in the event that the Director-General does not wish to reverse his decision, order him to pay the complainant compensation of 5 million Swiss francs for the loss of his child, not reimbursable in any circumstances;
- (9) fix an amount of compensation *ex aequo et bono* to be paid to the complainant for his work in connection with

the preparation and drafting of the present complaint;

(10) order the Director-General to pay the expenditure incurred by the complainant since 12 October 1963 in connection with the recovery of his child and the present complaint;

(11) order the Director-General to pay all the costs.

G. The Organisation prays that the Tribunal is not competent to hear Mr. Jurado's complaints; subsidiarily, that the complaints are not receivable; and, very subsidiarily, that the complaints be dismissed.

(1) While the complainant claims that the waiving of his immunity obliges him to appear in a divorce suit contrary to his religious convictions, whereas article 1.2 of the Staff Regulations recognises an official's right to his religious convictions, the waiving of immunity does not infringe this right and the source of his objection is in the divorce action instituted by Mrs. Jurado in accordance with Swiss law, which is an aspect of the problem that is not within the competence of the Director-General and falls outside the competence of the Tribunal.

(2) Article 1.7 of the Staff Regulations does not establish any subjective rights of officials in respect of the privileges and immunities conferred upon the Organisation with a view to ensuring the free functioning of the ILO and the complete independence of its agents, and consequently the complaint does not come within the competence of the Tribunal. In addition, the Director-General's decision is based on his own view of his obligations towards the Swiss Confederation under the 1946 Agreement, any infringement of which is not amenable to the jurisdiction of the Tribunal, and if the Tribunal were nonetheless to deem itself competent, its authority would then be limited to the question of an abuse or exceeding of powers.

(3) No text refers to the diplomatic protection of officials by the Director-General, no official has a subjective right to such protection, but, even if there were such protection, it would, in any case, fall outside the competence of the Tribunal.

(4) While, under article 7.5 of the Staff Regulations, officials are entitled to take their leave, the Director-General, by inviting the complainant to use up his annual leave before requesting special leave with salary in order to look for his child, far from infringing this right, confined himself to reminding the complainant of its existence, and, seeing that no decision was taken based on article 7.5 of the Staff Regulations, the Tribunal is not competent to hear this complaint. Moreover, special leave with salary, provided for in article 7.7 of the Staff Regulations, is granted at the discretion of the Director-General, and the refusal to grant such leave falls outside the competence of the Tribunal except where there has been an abuse or exceeding of powers, which is not alleged by the complainant.

(5) While under article 7.6 of the Staff Regulations officials are entitled to take their home leave accompanied by the members of their family, this right has not been infringed in view of the fact that the complainant's family cannot, or will not, accompany him, which is a matter beyond the Director-General's control, and that the complainant has consequently not exercised this right. In confining himself to reminding the complainant of the existence of his rights, the Director-General has not applied article 7.6 in any way that comes within the competence of the Tribunal.

(6) The Tribunal's incompetence to hear the financial claims of the complainant derives from its incompetence to hear his principal claims.

(7) To the extent to which the complainant would base his claims on the waiving of his immunity the first time, on 6 October 1960, appeal against this decision was time-barred and, consequently, all subsequent claims proceeding therefrom are also not receivable.

(8) Supposing the Tribunal to be competent and the complainant's claims to be receivable, they are not well-founded.

IN LAW

I. As regards the competence of the Tribunal:

According to article II, paragraph 1, of the Statute of the Administrative Tribunal, the Tribunal shall be competent

to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case. Consequently, in so far as Mr. Jurado submits that, in the decisions impugned of 6 October 1960 and of 7 and 13 November 1963 waiving, in connection with divorce proceedings, his immunity from jurisdiction, and in the decision of 5 November 1963 relating to his leave, the Director-General has infringed various provisions of the Staff Regulations, and in so far as he prays, on account of these infringements, for the quashing of these decisions and for the Organisation to be ordered to pay him compensation, the Administrative Tribunal is competent to hear his complaint.

However, the Tribunal is not competent to give a ruling in respect of Mr. Jurado's submission that the Director-General should be ordered to take measures for his "diplomatic protection" (point (6) of his submissions).

II. As regards the legality of the decisions impugned:

Without there being any need to examine the receivability of the complaint in so far as the time limit for its submission is concerned:

1. On the alleged infringement of article 1.2 of the Staff Regulations:

While article 1.2 provides, inter alia, that officials "are not expected to abandon their national sentiments or their political or religious convictions", a decision of clearly-defined and limited scope in which the Director-General confines himself to waiving, in a specific case, an official's immunity from jurisdiction cannot be considered as offending, in any way, the religious convictions of the person concerned. The above allegation is therefore unfounded.

2. On the alleged infringement of article 1.7 of the Staff Regulations inasmuch as the decisions impugned disregard Mr. Jurado's right to immunity from jurisdiction:

Under article 40 of the Constitution of the International Labour Organisation the latter shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

According to article 21, paragraph 2, of the Agreement between the Swiss Federal Council and the International Labour Organisation concerning the Legal Status of the International Labour Organisation in Switzerland, the Director of the International Labour Office has the right and duty to waive the immunity of any official in any case in which he considers that immunity would impede the course of justice and can be waived without prejudice to the interests of the International Labour Organisation.

Article 1.7 of the Staff Regulations provides that -

The privileges and immunities attaching to the International Labour Organisation by virtue of article 40 of the Constitution, and the arrangements made with governments by virtue thereof, are conferred in the interests of the Organisation. These privileges and immunities furnish no excuse to the officials who enjoy them for non-performance of their private obligations or for failure to observe laws and police regulations. In any case where these privileges and immunities arise, the official concerned shall immediately report to the Director-General, who will decide whether they shall be waived. It is clear from these provisions that the privileges and immunities of officials of the International Labour Organisation are granted solely in the interests of the Organisation.

Consequently, not only have officials no right to the maintenance thereof, but, moreover, the Director-General is obliged to waive an official's immunity if such immunity impedes the normal course of justice and if waiving it does not prejudice the interests of the Organisation.

The Director-General's power to decide in any case submitted to him whether or not these two conditions apply, is, in view of its specific character which necessarily involves relations between the Organisation and a third party, completely beyond the control of the Administrative Tribunal.

The above-mentioned submission cannot therefore be accepted.

3. On the alleged infringement of article 1.7 of the Staff Regulations inasmuch as the decisions impugned disregard Mr. Jurado's right to "diplomatic protection":

No provision of the relevant international agreements or of the Staff Regulations mentions the right of ILO officials to "diplomatic protection".

While by virtue of a general principle concerning the rights of the international civil service (Cf. International Court of Justice: Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports, 1949, p. 174) it is the duty of the ILO to protect and assist its officials in the performance of their functions or in connection therewith, the case of Mr. Jurado, against whom divorce proceedings were in progress before the regular Swiss legal authorities, was not one where such protection could or should be provided.

While, in fact, the competent authorities of the Organisation took measures to advise Mr. Jurado and to facilitate his action, and intervened on his behalf, they acted purely voluntarily, without being legally obliged to do so; and the complainant has no right to complain of the effective assistance which was unsparingly given to him.

4. On the alleged infringement of articles 7.5 and 7.6 of the Staff Regulations:

The letter of 5 November 1963, which is confined to recalling Mr. Jurado's rights in respect of leave, even if it is admitted that it constitutes a decision, does not, in any case, involve any infringement of the regulations concerned.

III. As regards the financial claims:

On the one hand, it results from the foregoing that the decisions impugned are not tainted by illegality; consequently, the claims in question, in so far as they relate to these decisions, are unfounded.

On the other hand, compensation for the preparation and drafting of the complaint and the subsequent statements could not, in any case, be granted.

The other financial claims: relating to matters which are totally extraneous to the Organisation, must also be dismissed.

DECISION:

The complaint is dismissed.

In witness of this judgment, delivered in public sitting in Geneva on 11 September 1964 by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as well as myself, Lemoine, Registrar of the Tribunal.

Signed:

M. Letourneur
André Grisel
H. Armbruster
Jacques Lemoine